

# ● PRAYAS

Initiatives in Health, Energy,  
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9<sup>th</sup> October 2012

To,  
The Secretary,  
MERC, Mumbai.

**Subject:** Prayas submission in the matter of Petition filed by Adani Power Maharashtra Ltd. for adjudication of dispute u/s 86 of the Electricity Act, 2003.

**Ref:** Hearing dated 22<sup>nd</sup> August 2012 in Case No. 68 of 2012

Dear Sir,

With reference to the above mentioned matter, a hearing was undertaken on 22<sup>nd</sup> August 2012 for which we were present and have submitted our comments. The commission has directed the petitioner to submit data regarding all its sources of fuel procurement and details of all its fuel related contracts. Similarly the respondent was also directed to share chronology wise details of its correspondence with the petitioner in respect of present matter. However, subsequent to the last hearing no additional data has been shared by either party. We request the commission to kindly again direct both parties to share all their additional submissions with us. Based on the discussion during this hearing dated 22<sup>nd</sup> August, our preliminary submission is summarized below. We request the commission to take the same on record and allow us to make further submissions based on information shared by other parties in the subsequent proceedings.

1. **Brief facts of the matter:** The petitioner is setting up generating stations in Tiroda and has signed PPA on 8<sup>th</sup> Sept 2008 for capacity of 1320 MW comprising of units 2 and 3 with MSEDCL under the case-1, stage-1 bidding round of MSEDCL. The petitioner chose to quote fixed tariff in spite of the flexibility under the bidding framework to quote escalable parameters for fuel cost, transportation and handling. On account of the low tariff quoted by the petitioner, it emerged as the L1, thereby winning the bid. Subsequent to this process, the petitioner has filed the present case before MERC claiming termination of the said PPA under clause 3.3.3 on grounds of claimed force majeure. The petitioner is claiming its inability to source fuel from the coal blocks which were promised to it, as a force majeure event. However, in the same petition, the petitioner is also making a simultaneous prayer to consider revised fuel cost for generation.
2. The Competitive Bidding Guidelines define case-1 as a type of bidding, "Where the location, technology, or fuel is not specified by the procurer". As recorded by the petitioner on affidavit, (ref. page no 13 of the petition, paragraph no 13) information regarding fuel arrangements as submitted by petitioner in the bid document states:  
*Fuel: Lohara (West) and Lohara (Extn.) coal blocks have been allocated to the Project, which will meet the **part of coal requirement** of the project. The **balance coal requirement** of the projects shall be met from **coal supply by CIL or its subsidiary and Imported Coal**.*

3. As is evident from the points mentioned above, from the beginning of the bidding process, the bidder was fully aware that arranging the fuel is solely his responsibility and that the procurer is not obliged to assist in any manner in this regard. Further, in the qualifying process the bidder made it clear that it had plans to source fuel from all possible sources i.e. captive block, linkage from Coal India Ltd. and imported coal, thereby not indicating any absolute reliance on the blocks supposed to be allocated to it. More importantly, the bidding process gave the bidder complete flexibility to quote escalable charges for fuel cost, fuel handling and fuel transportation. However, in spite of this flexibility the bidder choose to quote fixed fuel charge and managed to emerge as the lowest bidder (L-1) in the process and thereby won the contract. Therefore, as far as the PPA is concerned there is no connection between the source of the fuel and the PPA agreed tariff, as the bidder is given the flexibility to procure fuel at any cost and from any location at any point of time. Hence, cancelation or otherwise of the said coal blocks do not have any material impact on the PPA terms and conditions.
4. After winning the bid and signing the PPA, the petitioner now claims to have terminated the contract by issuing a notice under section 3.3.3 of the PPA to MSEDCL on 16<sup>th</sup> February 2011. Clause 3.3.3 of the PPA states: *"In case of inability of the seller to fulfill the conditions specified in Article 3.1.2 **due to any Force Majeure event**, the time period for fulfillment of the Condition Subsequent as mentioned in Article 3.1.2, shall be extended for the period of such Force Majeure event, subject to a maximum extension period of ten (10) Months, continuous or non-continuous in aggregate. Thereafter, this Agreement may be terminated by either the procurer or the Seller by giving a notice of at least seven (7) days in writing to the other Party."* (**emphasis added**)
5. The clause 12.3 of the PPA defines Force Majeure event as: *"A 'Force Majeure' means any event or circumstance or combination of events and circumstances including those stated below that **wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with prudent practices:**"* (**emphasis added**)
6. Further, section 12.4 of the PPA defines Force Majeure Exclusions. This clause states: *"**Force Majeure shall not include** (i) any event or circumstance which is within the reasonable control of the Parties and (ii) the following conditions, except to the extent that they are consequences of an event of Force Majeure:  
a. **Unavailability, late delivery, or changes in cost of** the plant, machinery, equipment, materials, spare parts, **Fuel or consumables for the Project;"***
7. As shown above, a Force Majeure event implies inability of the affected party to perform its obligations as per the contract on account of events beyond its reasonable control. As shown before, the petitioner chose to quote fixed fuel cost in spite of having flexibility to include escalable parameters and while acknowledging possibility of procurement from all possible sources such as captive block, linkage and imports. Further and more importantly, the petitioner is not claiming any inability to perform, as it is simultaneously seeking tariff revision which clearly implies that sourcing fuel for generation is not the problem. Thus, purported high cost of fuel is the only difficulty for petitioner in complying with the PPA terms, which has been explicitly excluded under the force majeure definition, as the bidder had the discretion to pass on such costs at the time of bidding. In fact therefore, there is no relief for variation in fuel cost under the article 12 of the PPA which deals with relief measures in case of a Force Majeure event. This fact itself proves that there is no force majeure event as claimed by petitioner.

8. Therefore, harmonious reading of the bidding guidelines (which give the bidder complete flexibility in choosing the fuel location and source and passing through such costs), along with clauses of the PPA article 12, makes it clear that unavailability of captive coal block cannot be construed as a Force Majeure event. The commission has itself upheld this interpretation of the PPA in its order dated November 16, 2011 in Case No. 9 of 2011 by ruling that: *“Thus, Article 12.4 Force Majeure Exclusions, **specifically excludes the unavailability or changes in cost of Fuel from Force Majeure** unless the same are consequences of an event of Force majeure.”* In absence of Force Majeure event, the claimed termination notice issued under section 3.3.3 ceases to have any legal validity and hence the same should be declared as ab-initio null and void.
9. The petition however highlights serious lacunae as demonstrated below, in MSEDCL’s communication with the commission and hence the consumers, which need careful scrutiny. As claimed by the petitioner, termination notice under clause 3.3.3 of the PPA was issued to MSEDCL in February 2011. It is indeed a serious concern that a hearing in this matter should come up before the commission after more than 18 months, since this crucial development took place. In the intervening period nothing was communicated to the commission regarding such termination notice and subsequent steps taken by MSEDCL, if any, in this connection.
10. Merely few weeks before this petition was filed, questions regarding status of this project and capacity addition therefrom were posed before MSEDCL during the tariff revision process. In the commission’s order dated 16<sup>th</sup> August 2012 in case no 19 of 2012, MSEDCL in its reply to such questions has stated the following with respect to status of units contracted with the petitioner:

**Adani Power (IPP)**

4.4.51 MSEDCL has contracted 1320 MW of power with Adani Power through Competitive Bidding for procurement of power under Case-I route. MSEDCL submitted that it has entered into agreement with Adani Power Ltd. for purchase of 1320 MW power from Tiroda project in Maharashtra. MSEDCL submitted that Unit 2 and 3 of 660 MW each are expected to get commissioned in August 2012. Accordingly, MSEDCL has considered a purchase of 5,566 MUs from Adani Power for FY 2012-13 considering PLF 80%. MSEDCL further submitted that it had computed the total cost by considering fixed charges of Rs. 1.42 per unit and variable charges of Rs. 1.69 per unit.

4.4.52 In reply to one of the queries raised by Consumer Representative Prayas, MSEDCL submitted that it has considered the Commissioning of Tiroda Power Project for July 2012. The Commission asked MSEDCL to justify its assumption of commissioning dates of the project. MSEDCL replied that it has considered the availability from Adani power project based on the following assumptions. MSEDCL submitted that it has considered the commissioning dates based on information provided by the generator, which is more realistic.

**Table 60: Availability of power from Adani Power under Long-term Case-I route as projected by MSEDCL**

	<b>COD</b>	<b>Capacity</b>	<b>MUs</b>
Unit 1	Aug-12	660 MW	2,661
Unit 2	Sep-12	660 MW	2,281
Unit 3	Aug-12	125 MW	624
<b>Total</b>			<b>5,566</b>

11. In fact, during the proceedings related to MSEDCL's medium and long term power procurement, time and again questions were raised regarding status of the various projects (including the units of the petitioner) from which power has already been contracted. On more than one occasion the commission, upon insistence for such data, has directed MSEDCL to submit such details. For examples order in case No. 14 of 2010 Dated: 8th September, 2010 states the following:

8. Data to be furnished :

a. During the hearing the Commission directed MSEDCL to submit the following information on all the approvals given by the Commission for Long Term power procurement by MSEDCL, within one week of the hearing:

1. Date of approval by the Commission
2. Case I/Case II bidding and MW capacities
3. RFQ issue-date
4. RFP issue-date
5. Bids received date
6. Bids accepted date
7. Project details
  - 7.1 Project Name
  - 7.2 Capacity in MW
  - 7.3 Levelised Tariff
  - 7.4 First year Tariff
  - 7.5 Likely CoD
  - 7.6 Progress of the Project( upto March 31, 2010)
  - 7.7 Present status of the Project

Thereafter, through its **order dated 28 December 2010 in case no 22 of 2010** the commission had directed MSEDCL as follows:

g. The Commission observed that the MSEDCL has not submitted any information on status of the Projects and progress report of each Project as sought by the Commission as well as Consumer Representative during the hearing. The Commission directs MSEDCL to submit half yearly progress report of each project under Case 1 Stage 2 with the following information as under:

- 1.1. Project Name
- 1.2. Contracted Capacity in MW
- 1.3. Levelised Tariff
- 1.4. Scheduled and Likely CoD
- 1.5. Progress of the Project
- 1.6. Present status of the Project
- 1.7. Intermediate milestones achieved
- 1.8. Any other information

12. The present case once again highlights the cost of regulatory failure in crucial matters such as power purchase planning and procurement. Despite such clear directions on several occasions, MSEDCL did not submit this crucial information regarding the said termination notice to the commission. Also, in spite of repeated submissions from consumer representatives in this regard (Case No. 104 of 2009, Case No. 14 of 2010, Case no 56 of 2010, Case No. 22 of 2010, etc.) the commission has neither insisted compliance on part of MSEDCL with its directives, nor has it taken the necessary steps to suo-motu assess progress and status of the projects from which capacity has been contracted on long term basis. This being the state of affairs in spite of the fact that power purchase cost accounts for more than 70% of the distribution company's revenue requirement and failure in power purchase planning has both cost and service quality implications for consumers.

13. Thus, based on the points mentioned above, we pray to the commission that:

- a. Declare the said termination notice as ab-initio null and void, as there is no force majeure event as per Article 12 of the PPA.
- b. Direct the petitioner to ensure performance of its contract as per the agreed terms and conditions under the PPA dated 8<sup>th</sup> Sept 2008.
- c. Undertake a detail scrutiny and assessment of MSEDCL's response to the said notice and steps taken by it in this regard. Direct MSEDCL to undertake necessary corrective actions to prevent such lapses in communication in future.
- d. In light of such developments, undertake suo-motu public process to asses power purchase planning of MSEDCL with emphasis on following aspects:
  - i. Project wise data such as quantum of power contracted with private generators through competitive bidding process and capacity contracted through MoU processes with IPPs, centre and state generating stations.
  - ii. Plant-wise and unit-wise actual status of this contracted capacity
  - iii. Comparative analysis of the commissioning timeframe of this capacity; such as when the capacity is/was expected to be commissioned as per the respective contract and what is the actual present status of the plant/unit.

We request the commission to our submissions in this matter on record and allow us to make further submissions based on information shared by other parties in the subsequent hearings.

Thanking you.

Sincerely

Ashwini Chitnis & Shantanu Dixit

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