

● PRAYAS

Initiatives in Health, Energy,
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22nd May 2013

To,
The Secretary,
Central Electricity Regulatory Commission
3 rd & 4 th Floor, Chanderlok Building,
36 Janpath, New Delhi- 110001

Subject: Prayas submission related to Order(s) issued by the Commission regarding the petition No.159/MP/2012

Ref: CERC order(s) dated 15-04-2013 in case no 159/MP/2012

Dear Sir,

This submission is regarding the matter mentioned above. We were present for the hearings related to the case no 159/MP/2012 and have submitted our comments which are also included in the said order(s) and relevant records of proceedings. We are writing this letter to you in our capacity as consumer representatives and one of the intervening parties in this case. Please note that this submission is without prejudice to our rights to challenge the said order(s) before the appropriate legal fora. The said order directs formation of a committee and based on the recommendations of the said committee, the Commission will decide the final tariff. In this regard and relating to the process for evaluating the committee's recommendations, we would like to make the following submission.

1. **Main contentions raised by the petitioner:**

The petitioner had sought relief primarily under article 13 of the PPA dealing with 'Change of Law'. Alternatively the petitioner has claimed that if prayers under this clause are not entertained, relief may be considered under article 12 of the PPA dealing with 'Force Majeure' events. And ultimately if none of these can be considered, then the Commission should use its power under section 79 of the Electricity Act 2003 and intervene in this matter to help the petitioner achieve a tariff that will be financially viable for the project.

2. **Ruling by the Commission:**

As far as the petitioner's claims related to Force majeure and Change of law are concerned, the Commission has ruled as follows: Para 69: *"We have considered the submissions of the parties. For the reasons already recorded, the case of the petitioner does not fall under either Change in Law or Force Majeure."* However, under the para no 86 of the said order, the Commission rules as follows: *"... Accordingly, we direct the petitioner and the respondents to constitute a committee within one week from the date of this order consisting of the representatives of the Principal Secretary (Power)/ Managing Directors of*

the Distribution Companies of the procurer States, Chairman of Tata Power Limited or his nominee an independent financial analyst of repute and an eminent banker dealing and conversant with infrastructure sector. The nominees of financial analysts and banker should be selected on mutual consent basis. The Committee shall go into the impact of the price escalation of the Indonesian coal on the project viability and obtain all the actual data required with due authentication from independent auditors to ascertain the cost of import of coal from Indonesia and suggest a package for compensatory tariff which can be allowed to the Petitioner over and above the tariff in the PPAs.” Thereafter in the subsequent para the Commission states: “The Committee is also at liberty to suggest any further measures which would be practicable and commercially sensible to address the situation. The Committee shall submit its report by 15th May 2013 for consideration of the Commission and for further directions.”

3. **Implications for the sector and public policy:**

Without prejudice to our contentions that the PPA and bidding framework does not provide any such relief, we would like to highlight the implications of such order by the commission that tries to revise competitively discovered tariff. Any re-determination of discovered tariff may imply that bidders can take un-due fuel risks to simply win contracts and later on pass-through such costs by requesting tariff revision on the grounds of supposed financial un-viability. Such signaling can only be detrimental for competition in general and governance in particular. While fuel price variation is a transient phenomenon and a particular project’s claimed financial troubles may not exist or remain as severe in the long run, an order issued by CERC will set a legal precedent and have long term implications for public policy and competition in the sector. Therefore, any decision in this matter needs to be sufficiently debated and critically evaluated after taking into account the broader sectoral and governance implications and not from the narrow perspective of claimed financial un-viability of any particular project.

4. **Committee composition and process:**

The committee proposed to be formed under the said order comprises of, on one hand parties such as the procurers who have opposed the proposed tariff increase but can entirely pass through these costs to their consumers, and on the other hand the project developer, who has direct interest in revising tariffs over and above the PPA agreed terms and conditions. The presence of independent banker and financial analysts is not adequate to represent interests of other most affected stakeholder viz. consumers of the concerned DISCOMs, in the said committee process.

5. **Need for thorough public process:**

Considering the shortcoming in the committee process and composition and in light of long term financial implications of the said order(s) on consumer tariff, there is a need for thorough public process in this matter. As highlighted above, the order also has serious policy and governance implications for the sector, as there are other projects demanding similar reliefs and hence a critical analysis and evaluation of the committee’s recommendations through a transparent public process becomes indispensable. It is

important to note that the Commission follows such process for revising and/or determining tariff of all other regulated generation plants and the same process should therefore be followed in this matter as well.

Therefore, we pray to the Commission as follows:

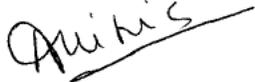
- a. Transparently share all the following information on its website. :
 - i. All the material, evidence and information made available to the committee for arriving at its final decision.
 - ii. Minutes of the all the committee meetings.
 - iii. All findings, observations and recommendations of the committee along with its final report
 - iv. Working of the proposed compensatory tariff, if any, through excel based worksheet with all the underlying assumptions being explicitly stated.
- b. Final tariff should be decided after undertaking due public hearing based on the above information.

As stated before, this submission is without prejudice to our right to challenge the said order(s) and hence the committee process, before the appropriate legal fora. Further, the order(s) issued by the Commission in respect of case no 155/MP/2012 are similar, in both their nature and recommendations, to the order(s) issued in case no 159/MP/2012 and hence the submissions made above also apply to the order in case no 155/MP/2012. Therefore, we request the Commission to follow a similar public process for deciding the final tariff in case no 155/MP/2012 as well.

We request the Commission to take this submission on record and allow us to make further submissions based on subsequent proceedings in this matter, if any.

Thanking you

Sincerely



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