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आरोग्य, ऊर्जा, शिक्षण आणि पालकत्व या विषयांतील विशेष पयत्न

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18 December 2013

To,
The Secretary,
MERC,
Mumbai

Subject: Prayas comments in the matter of Petition filed by Indiabulls Power Limited for compensation in tariff on account of increase in fuel and other incidental costs and dispute between a Generating Company and the Distribution Licensee, relating to the provisions of the Power Purchase Agreements (PPAs) dated 22nd April 2010 and 5th June 2010.

Ref: MERC case no 154 of 2013 and the hearing dated 20th November, 2013

Dear Sir,

This submission is regarding the matter mentioned above. We were present for the hearing in this matter dated 20th November and have submitted our preliminary comments orally. Please see below our written submission, as per the Commission's directions through the daily order dated 20 November 2013. We apologize for the delay in sending the written submission and request the Commission to kindly condone the same and accept this submission on record.

1. The Petitioner, India Bulls Power Limited has submitted this Petition under affidavit on 17.10.2013, under Sec.86 (1) (b, f, k) of Electricity Act, 2003 & for seeking Compensation in tariff, on account of increase in fuel and other incidental costs and dispute between a Generating Company and the Distribution Licensee, relating to the provisions of the Power Purchase Agreements (PPA) dated 22nd April 2010 and 5th June 2010.

2. The petitioner had participated in a Case-1 long term bidding process undertaken by MSEDCL. The competitive bidding guidelines issued by the Ministry of Power, define case-1 as a type of bidding: *"Where the location, technology, or fuel is not specified by the procurer".* Therefore, in a case-1 bidding, the responsibility to tie-up and ensure adequate fuel supply is entirely with the bidder and the bidder has the option of passing through these costs, transparently at the time of bidding. Further, the developer of a case-1 project is free to change the fuel source at any point of time during the term of the contract.

3. The petitioner has stated that the bid was based on the letters of assurance (LoA) that were issue to it by the Western Coalfields Ltd (WCL) and South Eastern Coalfields Ltd (SECL). The main contention of the petitioner is that the LoAs issued were for a higher grade of coal whereas the actual Fuel Supply Agreement (FSA) that was signed was for a lower grade. Thus, the petitioner is claiming that this difference in the LoA assured grade vis-a-vie the grade stated in the FSA is forcing the petitioner to buy additional quantum of coal, for which they are primarily seeking compensation. Further, it is also claimed that on account of shortage in domestic coal availability, there is a possibility of having to import part requirement of coal. It is argued, that there should a mechanism devised to pass through the cost on account of importing coal, over

and above PPA agreed tariff. The claims for this tariff increase are being made under the 'Change in law' provisions of the said PPAs.

4. To substantiate the change in law claims, the petitioner has referred to and relied upon the CCEA approved mechanism for supply of coal to power producers dated February 2013, the amendment to New Coal Distribution Policy (NCDP) dated 26 July 2013 and a letter from the Ministry of Power addressed to the secretary CERC dated 31 July 2013. Relying on these documents, the petitioner has prayed as follows:

   "*a. direct the Respondent to adopt the Change in Law in terms of the PPAs dated 22nd April 2010, and adjust tariff to the extent necessary to enable procurement of coal from sources other than the linkage coal, in the terms of the Petitioner's letter dated 21st September 2013, being Annexure P-11 hereto;*

   b. adopt the fuel cost adjustment formula provided in Schedule at Annexure P-10 of this Petition and allow compensation in terms of the said formula, so as to give effect to increase in variable cost and all other consequential cost and expenses thereto, in relation to supply of power under the PPAs dated 22nd April 2010 and 5th June 2010.

   c. in the alternative to the prayer(b) above, provide a mechanism to be implemented for allowing adequate periodic compensation to the Petitioner that shall offset the incremental cost of procuring fuel from alternative sources to meet the shortfall in quantity and quality of coal actually supplied under linkage by SECL from time to time as against the quality and quantity of coal that was agreed to be supplied under the LoAs;

   d. direct implementation of a mechanism to allow as pass through the actual additional capital expenditure that may be incurred by the Petitioner for setting up of additional infrastructure equipment for blending domestic coal with imported coal due to shortfall in supply of domestic coal under linkage;

   e. to pass such other and further order or orders as this Hon'ble Commission deems appropriate under the facts and circumstances of the present case."

5. As the petition raises issues concerning policy changes and seeks revision of tariff discovered through a transparent bidding process, it becomes extremely important for the Commission to carefully evaluate the case in terms of the larger implications that its order may have for the overall tariff as well as long term sector policy. Therefore, it is extremely important to frame the issues before proceeding further in this matter. In our opinion, for framing of issues the Commission should consider following points:
   a. Whether a letter issued by the Ministry of Power to the Central Commission can be construed as a directive to a State Commission and whether it is binding on the state Commission to act on the same?
   b. Whether the events such as the CCEA approved mechanism for supply of coal to power producers and the letter from the Ministry of Power addressed to the secretary CERC, constitute 'change in law' as per article 10 under the PPAs dated 22nd April 2010 and 5th June 2010?
   c. Whether there is indeed any change in the nature of assurance that was contractually guaranteed to the petitioner, before and after the stated events occurred?

   Let us consider these issues one by one.

6. **Advice given by Ministry of Power (MoP)**: On 31st July 2013 the MoP issued a letter to secretary of the Central Electricity Regulatory Commission (CERC) with respect to the impact on tariff in concluded PPAs due to shortages in domestic coal availability and subsequent changes in NCDP. Excerpts of para 4 and 5 of the said letter are quoted below for ready reference:

   4. As per the decision of the Government, the higher cost of import/market based e-auction coal be considered for being made a pass through on a case to case basis by CERC/ERC to the extent of shortfall in the quantity indicated in the LoA/FSA and the CIL supply of domestic coal which would be minimum of 65%, 65%, 67% and 75% of LOA of remaining four years of the 12th Plan for already PPAs based on tariff based competitive bidding.

   *5. The **ERCs are advised to consider the requests of individual power producers in this regard as per due process on a case to case basis in public interest**. The Appropriate Commissions **are requested** to take immediate steps for the implementation of the above decision of the Government. (**Emphasis added**)*

7. As the excerpts above make it clear, the ERC is merely *advised* to consider the request of individual power producers as per due process and on a case to case basis, keeping in mind the larger aspect of public interest. Thus, it clearly means that depending on the type of bidding, fuel arrangements, PPA terms and conditions and other relevant factors, the Commission will have to evaluate whether the provisions of 'change in law' become applicable and if so, determine impact on tariff, if any.

8. It would be pertinent to note that concerning the issue of open access, the MoP in a similar manner had issued a circular advising the ERCs on the steps to be taken to implement the certain provisions of the Electricity Act 2003. Through a Suo-motu petition (case no 50 of 2012) the Commission conducted a public hearing to decide whether it should implement the said advice given by the MoP. In the context of whether an advice given by MoP should be considered as binding by a State Commission, MERC ruled as follows:

   "*136. The Commission is of the view that the MoP letter based on the opinion from M/o Law and Justice on Operationalisation of Open Access in Power Sector is nature of suggestion/advisory for development of market in the Power Sector to the State Commissions and may be looked as 'Policy Vision' of the Central Government.*

   ***Conclusion- The MoP letter based on the opinion from M/o Law and Justice on Operationalisation of Open Access in Power Sector is nature of suggestion/advisory for development of market in the Power Sector to the State Commissions and may be looked as 'Policy Vision' of the Central Government**."*

   Therefore, in our opinion the letter issued by MoP is only advisory and not binding in nature. In any case, the letter only advises the Commission to consider such issues on a case to case basis after following due process and keeping in mind public interest. Therefore, there is no larger policy implication for all contracts singed under competitive bidding on account of this advice from MoP.

9. **<u>Change in Law</u>:** Now let us consider the issue of 'Change in Law'. The article 10 of the PPA which deal with the issue of change in law, states the following:

"10.1.1 "Change in Law" means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline resulting into any additional recurring/ non-recurring expenditure by the Seller or any income to the Seller:
the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;
a change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;
the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;
a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the Seller;
any change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of this Agreement.

but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission or (iii) any change on account of regulatory measures by the Appropriate Commission including calculation of Availability."

10. A case is being made to project that any change in supply of domestic coal as assured in the LoA was never envisaged. Now that the shortfall in domestic coal availability has become a reality, it is being projected as 'change in scenario' it is being claimed that this issue of shortages is now being redressed by the Government through the CCEA approved mechanism and amendment to the NCDP 2007. But before getting into these issues, it becomes essential to first establish whether there is indeed any change in the nature of assurance that was contractually guaranteed to the petitioner, before and after the said events occurred.

11. The petitioner has stated that its bids were based on LoAs issued under the NCDP 2007. In this case it is pertinent to note the following clauses of the LoA dealing with scope of assurance and price of coal: (excerpts are from page 369 of the petition, Annexure 4, LoA issued by SECL dated 06.06.2009)

"***1. Scope of Assurance***

1.1 Quantity, Grade and Source of coal

• Subject to the Assured fulfilling its obligations in accordance with Clause 2 to the satisfaction of the Assurer within the period of validity of this LOA and the signing of the Fuel Supply Agreement (FSA) within three (3) months thereafter, the Assurer shall endeavour to supply, as per the normative requirement of the Plant ***<u>27,47,000 tonnes per annum (mtpa) of F Grade. coal to the Assured, which shall be subject to review and assessment by the Assurer of the actual coal requirement of the Assured as well as the incremental availability of coal from the mines of the Assurer and of imported coal. It is expressly clarified that in the event that the incremental coal supplies available with the Assurer (after meeting out the commitments already made) is less than the incremental coal demand, such incremental availability shall be distributed on pro-rata basis and the</u>***

balance quantity of coal requirement shall be met through imported coal available with the Seller, which too shall be distributed on pro-rata basis.

• Parameters in case of imported coal shall be specified by GIUAssurer.

1.2 Price of coal

The price of coal assured herein shall be as per the notified price of GIL from time to time. Notwithstanding, in case the quantity of normative requirement, as stated in Clause 1.1 above, necessitates opening of a dedicated mine, then coal shall be priced at the higher of the cost plus reasonable return or such notified price. ***The quantity of imported coal that may be supplied to the Assured, as mentioned in Clause 1.1, shall be charged at the landed cost plus service charge. Such service charge shall be notified by the Assurer from time to time. The Assured shall be liable to pay all applicable taxes and statutory levies."(Emphasis added)***

12. Based on the above excerpts the following can be deduced:
    a. As per the LoA, the assurance regarding coal quality and quantity is subject to actual availability and certain time-bound conditions to be met by the petitioner. Strictly speaking, the coal supplier does not assume any contractual obligation to supply domestic coal as per the grade and/or quantity mentioned in the LoA.
    b. The LoA makes it very explicit that in case of shortages, coal would be imported to meet such shortfall and the price of such imports will have to be entirely borne by the petitioner.
    c. There is absolutely no break-up in terms of quantity of domestic and/or imported coal will be supplied to the petitioner at any point of time.

    Thus, based on the LoA, it becomes clear that there is no contractual assurance being given to the petitioner with regard to either quality, quantity or price, as in case coal is imported to meet the domestic supply shortfall, the petitioner is required to bear the entire cost of such imports.

13. It should be noted that it is based on such assurance that the petitioner decided to design its bid. The petitioner seems to have assumed that the entire quantity of coal mentioned in the LoA would be made available as per the stated grade and at price notified by CIL, although there is no contractual reason to assume so. Such assumption, therefore, is clearly a risk that has been knowingly and willingly taken by the petitioner to win the contract. It is important to highlight that the bidding framework gave the petitioner the option of passing through such risk transparently at the time of bidding.

14. Following the LoAs, the petitioner has signed Fuel Supply Agreement (FSA) with the SECL dated 22nd December 2012. The FSA states the percentage of Assured Coal Quantity that the coal supplier will endeavor to supply domestic coal from its sources and the possibility of importing the remaining quantity, if necessary. Following is an extract from the page no 396, Annexure 5 of the petition which is relevant in this regard:

4.3 Sources of Supply

4.3.1 The Seller shall endeavor to supply Coal from own sources as mentioned in Schedule 1. In case the Seller is not in a position to supply the Scheduled Quantity (SQ) of Coal from such sources as indicated in Schedule I, the Seller shall have the option to supply the balance quantity of Coal through import which shall not, unless otherwise agreed between the parties, exceed 15% of the ACQ in the year 2012-13 ,13-14 and 14-15, 10% of ACQ in the year 2015-16 and 5% of the ACQ for the year 2016-17 and onwards. Seller may at its discretion, make such arrangement for supply of imported coal through CIL, and /or other enterprises. Accordingly, the Purchaser has to enter into a Side Agreement with CIL and/or Seller, as the case may be, in addition to this Agreement. The Side Agreement dealing with the terms and conditions for supply of Imported Coal would be an integral part of this Agreement.

4.3.2 For supply of coal through import as stated in clause 4.3.1 above, the Purchaser shall agree to have back to back arrangements, if so required with the Importing agency (ies) to be notified by the Seller/CIL and deposit 100% of payable amount in advance. The commercial terms and conditions for such supply shall be regulated as per the Side Agreement.

4.3.3 The Seller may also offer coal from loading points / coal stocks to be lifted by the Purchaser by his own/ their transport arrangement by road / road-cum-rail or any other mode up to 5% of the ACQ.

4.3.4 CIL reserves the right to transfer part of the ACQ from the Seller to another coal producing company (Subsidiary of CIL) based on the proposal received from the Seller, which would be binding on the Purchaser.

15. Now let us look at what the amended NCDP states with regard to the percentage of Annual Contracted Quantity (ACQ) that the coal supplier will now endeavor to supply through domestic coal from its sources and the possibility of importing the remaining quantity, if necessary. The para two of the amendment to NCDP dated 26th July 2013 states as follows:
"2. Government has now approved a revised arrangement for supply of coal to the identifled Thermal Power Stations (TPPs)of 78,000 MWcapacity Commissioned or likely to be Commissioned during the period from 01.04.2009 to 31.03.2015. Taking into account the overall domestic availability and the likely actual requirements of these TPPs, it has been decided that FSAs will be signed for the domestic coal quantity of 65'%, 65%, 67% and 75% of ACQ for the remaining four years of the 12th Plan for the power plants having normal coal linkages. Cases of tapering linkage would get coal supplies as per the Tapering Linkage Policy. To meet its balance FSA obligations towards the requirement of the said 78,000 MWTPPs, CIL may import coal and supply the same to the willing power plants on cost plus basis. Power plants may also directly import coal themselves, if they so opt, in which case, the FSA obligations on the part of CIL to the extent of import component would be deemed to have been discharged." (Emphasis added)

16. Now let us consider the changes that have been suggested to be made to the FSA on account amendment to the new coal distribution policy. The table below lists the changes:

Financial year	Domestic coal quantity to be supplied in a year as per:		
	Letter of Assurance	FSA dated 22 Dec 2012	FSAs to be signed as per amended NCDP
FY 13-14	No specific assurance	65% of ACQ*	65% of ACQ
FY 14-15	No specific assurance	65% of ACQ	65% of ACQ
FY 15-16	No specific assurance	70% of ACQ	67% of ACQ
FY 16-17	No specific assurance	75% of ACQ	75% of ACQ
FY 17-18 onward	No specific assurance	75% of ACQ	No specific assurance

**ACQ stands for Annual Contracted Quantity and is defined in the clause 4.1 of the FSA*

17. As the table above shows, there is hardly any change in the FSA that the petitioner has signed and the modifications to the FSAs proposed as per the amendment to NCDP dated 26th July 2013. In fact, the FSA signed by the petitioner at least provides a better clarity in terms of the percent of the ACQ that will be met through domestic coal supply post FY 16-17. In any case, the petitioner submitted its bid based on the LoA which gave absolutely no assurance in terms of the quantity, quality or price of coal that would be supplied to the petitioner and hence the provisions as per the Change in Law article of the PPA do not apply.

18. In light of the above, we pray to the Commission as follows:

    a. **No increase in Tariff:** The analysis above highlights that the petitioner was contractually never assured supply of domestic coal at CIL notified prices. In order to win the contract, the petitioner knowingly and voluntarily took the risk of assuming domestic coal availability at notified prices, though the bidding framework gave the option of passing through such costs transparently at the time of bidding. Further, the recent changes to the coal distribution policy do not change or alter the nature of the assurance given to the petitioner and/or nature of the contract (i.e. the FSA) signed by the petitioner and hence provisions as per the Change in Law article of the PPA do not apply. Therefore, there must not be any increase in the PPA agreed tariff.

    b. **Follow due public process**: If the commission decides to provide any relief beyond the PPA agreed tariff to the petitioner, then the Commission must follow due public process as per the section 64 of the Electricity Act 2003. It is important to note that the Commission follows such process for revising and/or determining tariff of all other regulated generation plants. Further, in order to make the public process meaningful, the Commission must publish all the data and analysis relied up on for arriving at the extent of compensation, if any, and allow all stakeholders adequate time and opportunity to comment on both the methodology as well as the outcome.

We once again request the Commission to kindly take this submission on record and also allow us to make further submissions in this matter, if any.

Thanking you

Sincerely

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