

BEFORE THE MAHARASHTRA ELECTRICITY REGULATORY COMMISSION,
MUMBAI

Filing No. _____
Case No. _____

IN THE MATTER OF

Petition by Prayas (Energy Group) seeking review of the order dated 15th July in case nos
154 of 2013, 189 of 2013 and 118 of 2013

AND

IN THE MATTER OF

Prayas (Energy Group)
Amrita Clinic, Athvale Corner,
Lakdipool-Karve Road Junction,
Deccan Gymkhana, Karve Road,
Pune – 411 004,
Phone no: 02025420720 / 9822517481
E-mail: peg@prayaspune.org
ashwini@prayaspune.org

Petitioner

V/s

M/s Indiabulls Power Ltd.
M- 62 & 63, 1st floor,
Connaught Place
New Delhi - 110 001
E-mail: shah.vatsal@indiabulls.com

...Respondent

M/s Adani Power Maharashtra Ltd
“Adani House”
Near Mithakhali Six Road,
Navrangpura,
Ahmedabad - 380 009
E-mail:- malavr.deliwala@adani.com

...Respondent

M/s JSW Energy Ltd.
JSW Centre,
Bandra Kurla Complex,
Bandra (East), Mumbai - 400051.
E-mail :- anand.aman@jsw.in / debroy.prakash@jsw.in / am.mumbai@amarchand.com

...Respondent

Maharashtra State Electricity Distribution Co. Limited
The Chief Engineer (Power Purchase)
Maharashtra State Electricity Distribution Company Ltd.
5th Floor, Plot No. G-9, Anant Kanekar Marg,
Prakashgad, Bandra (East), Mumbai 400 051
cepp@mahadiscom.in
ceppmsedcl@gmail.com

....Respondent

Consumer Representatives:-

Cc: The General Secretary,
Thane Belapur Industries Association,
Rabale Village, Post Ghansoli,
Plot P-14, MIDC,
Navi Mumbai 400 701
E-mail: tbia@vsnl.com

Cc: Mumbai Grahak Panchayat,
Grahak Bhavan,
Sant Dynaneshwar Marg,
Behind Cooper Hospital,
Vile Parle (West),
Mumbai 400 056
E-mail: mgpanchayat@yahoo.com

Cc: Vidarbha Industries Association,
1st Floor, Udyog Bhavan,
Civil Line,
Nagpur 440 001.
E-mail: rkengg@gmail.com

Cc: Maharashtra Chamber of Commerce,
Industry & Agriculture,
Oricon House, 6th Floor,
12 K. Dubash Marg,
Fort, Mumbai – 400001
(Nashik Branch)
E-mail: maccia.nsk@gmail.com

The petitioner respectfully submits as under:

1. The present petition is filed under section 85 of the Maharashtra Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 to seek review of the order dated 15th July 2014 in case nos 154 of 2013, 189 of 2013 and 118 of 2013. The said order is annexed as annexure 1 of the petition. The petitioner (hereafter referred to as 'Prayas') was made a party to these cases by the Commission in capacity of a consumer representative and has participated in the proceedings pertaining to these matters.
2. The case no 154 of 2013 and 189 of 2013 were filed under the 'change in law' related provisions of the respective power purchase contracts. To substantiate the change in law claims, the petitioners in case nos 154 of 2013 and 189 of 2013 had 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.
3. M/s Indiabulls Power Ltd, who were the petitioner in case no 154 of 2013 had stated the following prayers in the said petition pertaining to this matter.

*“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.” (Emphasis added).

As the said petition is considerably bulky and since it is a part of the records of the impugned order, the same is not annexed again to avoid unnecessary duplication.

4. The case no 189 of 2013 was a petition of M/s Adani Power Maharashtra Limited for compensation in tariff on account of “Change in Law” under the PPAs dated 31.03.2010, 19.08.2010 and 16.02.2013. The said petition states as follows:

“ ...

*3. The present Petition is filed by the Petitioner for the purpose of suitable adjustment in tariff, in order to offset the adverse financial consequences that have occurred after the execution of PPAs. It is submitted that the Ministry of Power ("MoP"), GOI has issued a circular dated 31.07.2013 which conveys the decision of the Government that higher cost of import/market based e-auction coal be considered for being made a pass through on a case to case to basis by Central Electricity Regulatory Commission (CERC)/State Electricity Regulatory Commissions (SERCs) to the extent of shortfall in the quantity in the Letter of Assurances (LoAs) / Fuel Supply Agreements (FSA). The Circular is based on a decision taken by the Cabinet Committee of Economic Affairs ("CCEA") on 21.06.2013, which further led to an amendment dated 26.07.2013 of the New Coal Distribution Policy, 2007 ("NCDP"). **Apart from the amendment of NCDP and the circular of MoP conveying the decision, there are events that are captured herein which fall within the ambit of "Change in Law" events, as they have culminated as a result of decisions taken by the Indian Governmental Instrumentalities as envisaged under the PPA.** The Petitioner humbly states that these directions have to be now accorded regulatory approval, keeping in view the background under which such directions have been issued, and the fact that power developers have no control over supply of domestic coal, which being a nationalised commodity, is entirely under the control of the Central Government.*

4. It is submitted that the Petitioner seeks adjustment in the tariff quoted in the PPA's dated 31.03.2010, 09.08.2010 and 16.02.2013 executed between the Petitioner and Respondent and adopted by this Hon'ble Commission vide its orders dated 28.12.2010, 19.05.2011 and 27.12.2012 respectively for the reasons mentioned above which is a "Change in Law" under Article 10 and has occurred after the date which is seven days prior to Bid deadline. The bid deadline was 07.08.2009 and the date which is seven days prior to the bid deadline for the purpose Of application of Change in Law is 31.07.2009.

...

35. In light of the above, the Petitioner therefore humbly prays to the Hon'ble Commission that the Hon'ble Commission may be pleased to:

a) Approve the Operational Methodology proposed for calculation of incremental energy charge as compensation and direct the Respondents to pay the revised tariff based on the pass through mechanism proposed herein for the actual cost of generation for the power supplied by using imported coal/e-auction coal/open

market coal purchased on account of shortfall in domestic coal supply through linkage at notified prices for Power Sector under PPAs dated 31.03.2010, 09.08.2010 and 16.02.2013 from the date of commencement of power supply under the respective PPAs.

*b) pass such further or orders "as this Hon'ble Commission may deem just and proper in the circumstances of the case." (**Emphasis added**)*

As the said petition is considerably bulky and since it is a part of the records of the impugned order, the same is not annexed again to avoid unnecessary duplication.

5. As per the record of proceeding of the hearing held on 19th December 2013 in case no 154 of 2013 and case no 189 of 2013, the Commission has recorded as follows:

"2. The Commission mentioned that these two cases were heard simultaneously because of the fact that both the Petitioners approached the Commission for compensation over and above the tariff discovered through Competitive Bidding. The Petitioners have relied upon the change in NCDP and advisory issued by the MoP on 31 July 2013. As per said MoP's letter, the CIL has indicated that it will not be able to supply the coal as per Letter of Assurance and coal will have to be imported to bridge the gap. The issue of possible increase in cost of power was discussed and CERC's advice was sought. The decision of the Government was conveyed vide letter dated 31 July, 2013. In the Press Note issued by MoC, it appears that this decision is in the context of the 78000 MW which are to be commissioned by 31.3.2015. It is to be seen as to how many projects are impacted by this decision in the State of Maharashtra.

The enforceability / legal force of the said MoP's communication and whether it amounts to "Change in Law" needs to be analysed and addressed. The judgment of the individual cases will be dependent on the said issues. *On Prima-facie reading of the said MoP's communication, it appears that it could have long-term implications on the competitively discovered PPA rates under Section 63 of the Electricity Act, 2003 and also raises the question of "Sanctity of Contracts". Therefore, while each Case needs to be dealt separately based on the facts of that case, overall framework needs to be taken into consideration and the legal approach and methodology to be adopted in all these cases needs to be similar.*

*Further, the issue of increasing tariff for compensating shortage of coal will have impact on retail power tariff in the State. The views of Government of Maharashtra should also be sought in these matters." (**Emphasis added**)*

The relevant records of proceedings are annexed as annexure 2 to this petition.

6. The petitioner (Prayas) had participated in the proceedings pertaining to the above-mentioned matters and had submitted in none of the cases, there were any events which constituted change in law and that the change in law related provisions do not apply in the respective cases.
7. The question of applicability of change in law provisions, effectively questions the core maintainability of the said petitions and therefore goes to the root of jurisdiction of this Hon'ble Commission. Prayas also pointed out that the Commission had ruled in an earlier matter (case no 50 of 2012) that any advice issued by the Central Ministry to a State Commission is not binding in nature and

can only be considered as a guiding principle. Thus, whether to act on the said advice or not was the State Commission's discretion. In other words, the Commission would have to make an independent conclusion and not merely rely on such advice. Therefore, it was argued by Prayas that in case the Commission decides to act on this particular advice (July 2013) of the Central Ministry, it will have to establish the reasons for such action and will have to clearly pronounce the legal principles under which it is taking such steps. All submissions made by Prayas in these matters are annexed as annexure 5 to this petition.

8. Thus, the main contentions of petitioners in case no 154 of 2013 and case no 189 of 2013 were entirely based on applicability of the provisions of the 'change in law' article of the respective Power Purchase Agreements (PPAs) in context of the CCEA decision, the advice issued by the Ministry of Power and changes made to New Coal Distribution Policy, 2007. The case no 118 of 2013 was filed by generator whose PPA is based on imported coal and hence changes in domestic coal policy are not relevant to its PPA/case. Till February 2014, this case was not combined with case no 154 of 2013 and case no 189 of 2013. However, through its daily order dated 18th February 2014 the Commission stated the following in case no 118 of 2013:

Heard the advocates of the Petitioners, Respondents and the Consumer Representatives.

The Commission is in the process of appointing a Consultant to evaluate the aspects relevant to the above mentioned case, i.e. legal aspects, Sanctity of Contracts under Section 63 of the Act, implications of Ministry of Power's communication dated 31 July 2013, methodology of computation of incremental cost, etc.

The Consumer Representatives may submit any specific issues, which need to be included in the Terms of Reference for the Consultant at the earliest. The Terms of Reference for the Consultant after approval of the Commission will be made available to all the parties and the Consumer Representatives. The parties and the Consumer Representatives are directed to submit their views on the matters highlighted in the Terms of Reference and discuss the same with the Consultant. After submission of detailed report by the Consultant, the Secretariat of the Commission will communicate the next date of hearing in this matter.

A separate hearing with respect to the Judgement of Hon'ble ATE in Appeal No. 20 of 2012 will be scheduled after five weeks.

(Emphasis added)

The relevant records of proceedings are annexed as annexure 2 to this petition.

Grounds for review:

9. The section 85 of the Maharashtra Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 deals with review of decisions, directions, and orders and states as follows:

"85. (a) Any person aggrieved by a direction, decision or order of the Commission, from which (i) no appeal has been preferred or (ii) from which no appeal is allowed, may, upon the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the direction, decision or order was passed or on account of some mistake or error apparent from the face of the record, or for any other sufficient reasons, may apply for a review of such order, within forty-five (45) days of the

date of the direction, decision or order, as the case may be, to the Commission.

(b) An application for such review shall be filed in the same manner as a Petition under these Regulations.

(c) The Commission, shall for the purposes of any proceedings for review of its decisions, directions and orders be vested with the same powers as are vested in a civil court under the Code of Civil Procedure, 1908.

(d) When it appears to the Commission that there is no sufficient ground for review, the Commission shall reject such review application.

(e) When the Commission is of the opinion that the review application should be granted, it shall grant the same provided that no such application will be granted without previous notice to the opposite side or party to enable him to appear and to be heard in support of the decision or order, the review of which is applied for."

10. Mere perusal of the impugned order dated 15th July 2014 in case nos 154 of 2013, 189 of 2013 and 118 of 2013 highlights the following apparent errors:

- a. The Commission has failed to make any findings that there is a 'change in law' event, or how any change in law related provision is applicable.
- b. The foregoing being a jurisdictional fact must necessarily be decided once such an issue is raised. In any event, the same goes to the core of the matters herein;
- c. The petitions (case no 154 of 2013 and case no 189 of 2013) were clearly and unequivocally based on applicability of change in law related provisions of the respective PPAs. In spite of this, the impugned order completely fails to address the key issue regarding enforceability / legal force of the said Ministry of Power's communication and whether it amounts to "Change in Law" as per the respective power purchase agreements.
- d. Detail submissions challenging applicability of the change in law provisions were made before the Commission. The impugned order records that these submissions were made but fails to address them at all, much less give any reasons regarding applicability/validity or otherwise of the said contentions.
- e. The impugned order fails to invoke any legal principles/provisions while deciding a framework for pass-through of costs over and above the PPA agreed tariff. The said order also fails to explicitly mention that under what circumstances and which legal or contractual provisions the said framework can be made applicable, if at all.
- f. The impugned order does not provide any reasons as to why the case no 118 of 2013 is being considered along with cases (154 of 2013 and 189 of 2013) pertaining to change in law regarding domestic coal as the said project is based on imported coal.

11. A failure to address a jurisdictional issue is, in itself an error apparent. On the issue of what constitutes as an 'error apparent', the Supreme Court of India in CIVIL APPEAL NO. 9439 OF 2003 (Sant Lal Gupta & Ors. Versus Modern Co-operative Group Housing Society Ltd. and Ors.) has ruled as follows:

*...An error apparent on the face of the record means an error which strikes one on mere looking and does not need long drawn out process of reasoning on points where there may conceivably be two opinions. Such error should not require any extraneous matter to show its incorrectness. **Such errors may include the giving of reasons that are bad in law or inconsistent, unintelligible or inadequate. It may also include the application of a wrong legal test to the facts found, taking irrelevant considerations into account and failing to take relevant considerations into account,***

and wrongful admission or exclusion of evidence, as well as arriving at a conclusion without any supporting evidence. (*Emphasis added*) The said judgement is annexed as annexure 6 of this petition.

12. The points listed in paragraph 10 of this petition highlight lack of reasoning in the impugned order regarding key issues raised by both petitioners and respondents, which certainly qualifies as an error apparent on the face of the record. Additionally, failure to invoke the necessary legal and /or contractual provisions under which the commission has acted or decided to act and has developed a framework for pass-through of costs that are over and above the PPA agreed terms and conditions, is also a serious and apparent error. More importantly, these issues also highlight how the impugned order is not in compliance with the section 74 of the Maharashtra Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 which states that: “**Every order made by the Commission shall be a reasoned order.**” (*Emphasis added*)

Jurisdiction:

13. Under section 85 of the Maharashtra Electricity Regulatory Commission (Conduct of Business) Regulations, 2004, the Commission is empowered to review any orders, decisions that are passed by it. This Hon’ble Commission issued the impugned order and the points listed in paragraph no 9 to 12 highlight certain apparent errors in the said order. Therefore, it is submitted that this Commission has the jurisdiction to entertain the present Petition and grant relief on terms herein prayed.

Time limit:

14. The Commission via letter No. MERC/Case No. 154, 118 and 189 of 2013/00749 dated 24th July 2014 communicated the impugned order and the petitioner received the same on 29th July 2014. It is submitted that this petition is within the 45 days period permitted under the Maharashtra Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 for filing a review petition.

Prayers:

15. In light of the aforesaid facts and circumstances, we pray to the Commission as follows:
- a. Admit this petition under the section 85 of the Maharashtra Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 and initiate the necessary process.
 - b. In consequence, the implementation of the Orders passed in case nos 140 of 2014, 145 of 2014 and 147 of 2014 after the impugned Order under review should be stayed till this present matter is decided. Based on the review of the impugned order, the said orders may be accordingly recalled, set aside or reviewed.
 - c. Condone any inadvertent technical or procedural error, if any, in filing this petition.
 - d. Not to reject this petition without giving the petitioner a hearing.
 - e. Pass any other order or orders as may be deemed necessary or required.

Place: Pune

Date : 9th September 2014

Signature of the Petitioner