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29 October 2012

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

Subject: Prayas comments regarding the petition under Sections 61, 63 and 79 of the Electricity Act, 2003 for establishing an appropriate mechanism to offset in tariff the adverse impact of the unforeseen, uncontrollable and unprecedented escalation in the imported coal price due to enactment of new coal pricing Regulation by Indonesian Government and other factors.

Ref: CERC Petition No.159/MP/2012, hearing dated 27th September 2012

Dear Sir,

This submission is regarding the matter mentioned above. We were present for the hearing held on 27th September 2012 and have submitted our comments. Please find attached our preliminary submission based on the arguments made by the petitioner during the hearing. We request the commission to allow us to make subsequent submissions, if any based on further hearings and proceedings in this matter.

1. **Broader implications of this case:** At the outset we would like to highlight that this matter should not be seen in the narrow context of financial viability of the concerned project but in the larger interest of public policy and governance. Matters such as the present petition have come up before the Maharashtra and Gujarat Electricity Regulatory Commissions, Appellate Tribunal and another similar case is also filed before the CERC itself. Therefore, any order issued by the CERC in this context will set a legal precedent which will have a long term impact on the sector. The bidding process gave the bidders complete flexibility to quote escalable charges for fuel cost, fuel handling and transportation. Using this flexibility the petitioner quoted both escalable and non-escalable components for fuel charge and managed to emerge as the lowest bidder (L-1) and thereby won the contract. After having conducted such a transparent process, revising tariff of the winning bidder is neither in interest of consumers nor competition, as bidders who lost out at that time could now have been more competitive. Also, as far as the PPA and the bidding framework 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, given such larger sectoral implications, this case should be approached from the point of view of ensuring sanctity of contracts and the spirit behind introducing a fair and transparent bidding process in generation. Thus relief given, if any, must be strictly within the provisions of the PPA and the bidding guidelines. This would imply that

procurer(s) must receive power (in terms of both quantum i.e. normative availability of 80% and cost i.e. tariff as per schedule 12) as per the agreed conditions of the PPA.

2. **Brief facts of the matter:** The Petitioner is the company that is building imported coal based Mundra Ultra Mega Power Project with a total capacity of 4000 MW. Two units of the project (1600 MW) are already declared under commercial operation and the project is likely to achieve COD by the end of this year. The petitioner is importing coal from Indonesia for this project. As per the petition, on 23.9.2010 the Indonesian Government notified a regulation which directed the holders of mining permits for coal mines in Indonesia to sell coal in domestic as well as international markets as per the prescribed benchmark price and all pre-existing contractual arrangements were to be aligned accordingly. The petitioner also holds stake in a mining company in Indonesia and is importing coal based on a long term Fuel Supply Agreement (FSA). It is claimed by the petitioner that after Indonesian Regulation came into effect on 1.9.2011, the petitioner had to pay higher cost for import of coal on account of which it would lose about 67 paise/kWh, aggregating to annual loss of around 1800 crore. Therefore, to mitigate this purported financial loss the petitioner has filed this case before the commission. During the hearing held on 27th September 2012, the petitioner has sought intervention of the commission under clause 17.3 which deals with dispute resolution as well as claimed relief under 'Change of Law' and 'Force Majeure' related articles of the PPA.
3. **Points to be considered:** This submission demonstrates that none of the contentions of the petitioner hold true in the context of the PPA terms and conditions and the legal framework comprising of bidding guidelines and the Electricity Act 2003. The submission below deals with each claim of the petitioner regarding change of law and force majeure and brings out how neither of these claims is valid or legally tenable. Further, the petitioner also holds stake in the mining company in Indonesia with which it has entered into an FSA and hence is also benefited by the increase in Indonesian coal price. Without prejudice to our claim that there is no relief under the PPA for the claims raised by the petitioner, we would like to highlight the fact that the calculation of the purported loss needs to be worked out after considering following aspects: a) increased revenue earned by petitioner on account of sale of coal at a higher price, b) possibility of blending slightly lower quality (GCV) Indonesian coal for which cost is much lower, c) any other parameter which will result in reduced fuel cost.
4. **No possibility of Arbitration:** Clause number 17.3.1 of the PPA states: "*Where any dispute arises from a claim made by any Party for **any change in or determination of Tariff** or any matter related to Tariff or claims made by any Party which partly or wholly relate to any change in the Tariff or determination of any such claims could result in change in Tariff or (ii) or relates to any matter agreed to be referred to the Appropriate Commission under Articles 4.7.1, 13.2, 18.1 or clause 10.1.3 of the Schedule 17 hereof, **such Dispute shall be submitted to adjudication by the Appropriate Commission.** Appeal against the decisions of the Appropriate Commission shall be made only as per the provisions of the Electricity Act, 2003 as amended from time to time." (***Emphasis added***). This clause makes it very clear that any dispute that has any tariff implications must be dealt with by the appropriate commission and arbitration process for dispute resolution cannot be invoked in such cases. Hence, it is the duty and mandate of the CERC, which is the appropriate commission in this matter, to pronounce a clear and unambiguous order in this matter.*

5. **Definition of 'Law' as per PPA:** The Article 1 of the PPA defines "Law" as: "*Law means, in relation to this Agreement, all laws including Electricity Laws in force in India and any Statue, ordinance, regulation, notification or code, rule or any interpretation of any of them by any Indian Governmental Instrumentality and having force of law and shall further include all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include all rules, regulations, decisions and orders of the Appropriate Commission.*" This definition makes it clear that 'the Law' that PPA is defining and is concerned with, is any Indian Law, as India Courts and any Indian Governmental Instrumentality cannot interpret any foreign law. In this context it becomes instructive to verify whether this issue regarding definition of Law and its application to foreign laws was raised for further clarification during any of the pre-bid conferences, as this project was required to be based on imported coal. The commission should direct the petitioner to submit minutes of all such pre-bid conferences where issues like this one might have been clarified by the nodal agency responsible for bidding.
6. **Petitioner's claims regarding change of law:** During the hearing conducted on 27th September 2012, the petitioner has claimed that definition of Law, as per PPA can be construed to mean that it implies change of law in context of not just any Indian Law but 'any Law' that can be related to this agreement. Therefore, the petitioner claimed that change in the Indonesian Law regarding the price of coal in that country can be considered as 'change in law' and hence relief as per section 13.4 of PPA (which deals with Tariff Adjustment Payment on account of Change in Law) should be granted to the petitioner. This is indeed a far-fetched argument and is certainly not tenable on legal grounds. In this context, it becomes relevant to consider whether interpretation of this clause as rendered by the Petitioner can be tenable in light of the way this clause is defined in the PPA. Under section 13.3.2 the seller is obliged to notify all Procurers regarding any implications on account of change in law, even if it affects him beneficially. Now consider the fact that the Seller (i.e. the petitioner) is free to source coal from any country, at any time and at any price that it deems fit. Therefore, it is hard to imagine how can change of law in one particular country which at this point of time affects the seller adversely, be considered under this clause. Further, there is nothing in the PPA or as part of bidding processes that bounds the petitioner to buy coal from the source that it has identified. The petitioner is free at all points of time to source coal from the most economical supplier and no clause of this PPA prevents him from doing so. Also as already mentioned, it is not a legally tenable proposition to say that change of law can imply change of any law and in any country which can be related to the PPA, as imported coal is a global market and many countries are involved. Hence, this contention of the petitioner is completely incorrect and legally untenable and hence must not be entertained at all.
7. **Force Majeure:** During the hearing, the counsel for the petitioner stated that if not under Change of Law (thereby conceding that such proposition would be difficult to defend) the petitioner certainly deserves relief under Force Majeure related provisions of the PPA. 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***). It is important to note here that Force

Majeure event implies inability of the affected party to materially perform its obligations as per the contract on account of events beyond its reasonable control. However, the petitioner is not claiming any inability to perform its obligations under the PPA, as it is simultaneously seeking tariff revision which clearly implies that sourcing fuel or generating power is not the problem. Therefore, the petitioner is making it clear that there is no material impact on its ability to perform as per its contractual obligations and hence there is prima-facie no case for force majeure related claims and the same should not even be entertained. Beyond this obvious fallacy in seeking relief under force majeure while simultaneously asking for tariff revision, the points mentioned below make it further clear how force majeure claim cannot hold true on account of the PPA terms and conditions and the bidding framework design.

8. **Direct Non-Natural Force Majeure Event:** Without prejudice to our claim that no force majeure event has taken place, if for the sake of argument contentions of the Petitioner in this regard are considered, then such force majeure claim will have to be considered under direct non-natural force majeure event, as no other force majeure definition is applicable in this context. The section 12.3 (ii) of the PPA defines Direct Non - Natural Force Majeure Event based on following conditions:
- a. *Nationalization or compulsory acquisition by any Indian Governmental Instrumentality of any material assets or rights of the Seller or the Seller's contractors; or*
 - b. *the unlawful, unreasonable or discriminatory revocation of, or refusal to renew, any Consent required by the Seller or any of the Seller's contractors to perform their obligations under the Project Documents or any unlawful, unreasonable or discriminatory refusal to grant any other consent required for the development/ operation of the Project. Provided that an appropriate court of law declares the revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down; or*
 - c. *any other unlawful, unreasonable or discriminatory action on the part of an Indian Government Instrumentality which is directed against the Project. Provided that an appropriate court of law declares the revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down.*

As the petitioner's claim is regarding change in Indonesian law, clauses 12.3 (ii)(a) and 12.3(ii)(c) cannot apply as they deal with changes in Indian laws. Therefore, in case the petitioner wants to make a claim under force majeure clause it will have to be under clause 12.3(ii)(b). This would mean that the petitioner should demonstrate that the actions of the Indonesian Government can be proved to be unlawful, unreasonable or discriminatory or are of such nature that clause 12.3(ii)(b) can be applicable. However, the petitioner has not given any evidence to this effect.

9. **Force Majeure Exclusions:** Further, the section 12.4 of the PPA deals with 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;"*

The bidding framework gives bidders complete flexibility for sourcing fuel from any location and passing through fuel cost related risks by quoting escalable components for fuel price, transportation and handling. Therefore, the force majeure exclusion clause clearly excludes

fuel cost and availability related issues from force majeure related concerns. The Maharashtra Electricity Regulatory Commission has already upheld this interpretation of the PPA through 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.”*

10. **No relief under force majeure:** As would follow from harmonious reading of the PPA and bidding guidelines, force majeure related provisions are meant to address unforeseen and uncontrollable events which directly and significantly affect any Party’s ability to perform its obligations under the PPA. Therefore, naturally the PPA assumes that if Force Majeure event has taken place, then the affected Party will not be able to perform its material obligations which in this case implies that Generation will be not be possible. Hence, the Article 12 of the PPA provides relief only related to the capacity charge and not for fuel cost, as the same has also been explicitly excluded from force majeure definition. This is quite obvious, as the bidding guidelines give the bidder complete flexibility to quote escalable components for all constituents of fuel cost and pose no restriction on source from which fuel should be procured.
11. Therefore, the points stated above make it clear that there is neither case for relief under ‘Change of Law’ or ‘Force Majeure’ related provision of the PPA, as claimed by the petitioner. The bidding framework is designed to rely on market forces for discovery of the most efficient and economical tariff, while ensuring a transparent process using standard bidding documents, to provide level playing field for all bidders. After conducting such process, revising tariff of the winning bidder is neither in interest of competition nor the consumers. It is important to remember that the main objective of introducing competition was to ensure economy and efficiency in generation costs and not merely to encourage investments or ensure viability of some select projects. Therefore, the commission should deal with this matter keeping in mind the larger sectoral implications and issue a clear and unambiguous order which will discourage projects which have won the bid and signed PPA from making any such efforts to renegotiate competitively discovered prices.

We request the Commission to kindly take this submission on record.

Thanking you

Sincerely



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