CENTRAL ELECTRCITY REGULATORY COMMISSION
NEW DELHI

Petition No. 159/MP/2012

Coram:
Dr. Pramod Deo, Chairperson
Shri S.Jayaraman, Member
Shri V.S.Verma, Member
Shri M.Deena Dayalan, Member
Shri A S Bakshi, Member(EO)

Date of Hearing: 31.01.2013
Date of Order: 15.04.2013

In the matter of:
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

In the matter of:
Coastal Gujarat Power Limited …**Petitioner**
Vs

1. Gujarat Urja Vikas Nigam Limited, Vadodara
2. Maharastra State Electricity Distribution Company Limited, Mumbai
3. Ajmer Vidyut Vitaran Nigam Limited, Ajmer
4. Jaipur Vidyut Vitaran Nigam Limited, Jaipur
5. Jodhpur Vidyut Vitaran Nigam Limited, Jodhpur
6. Punjab State Power Corporation Limited,
7. Haryana Power Generation Corporation Limited, Panchkula
8. Union of India through Secretary, Ministry of Power, New Delhi

…**Respondents**

Advocates/Parties present:

For the petitioner:

Shri Aspi Chenoy, Sr Advocate
Shri Amit Kapur, Advocate
Ms Sugandha Somani, Advocate, CGPL
Shri Apoorva Mishra, Advocate, CGPL
Shri Abhishek Munot, Advocate, CGPL
Shri Bijoy Mohanty, CGPL
Shri B J Shroff, CGPL

Shri R Subramanyam, Tata Power
Shri Saurabh Shankar, Tata Power
Shri Sandeep Mehta, Tata Power
Ms Smera Chawla, Tata Power
Shri Arun Srivastava, Tata Power

For the Respondents:
Shri M G Ramachandaran, Advocate, GUVNL
Ms Swapna Seshadri, Advocate, GUVNL
Shri P J Jani, GUVNL
Shri Padamjit Singh,PSPCL

For Consumers
Ms Ashwini Chitnis, Prayas Energy Group
Shri Shantanu Dikshit, Prayas Energy Group

Per: Dr Pramod Deo, chairperson, Shri V S Verma, Member,
Shri M Deena Dayalan,Member, Shri A S Bakshi, Member(Ex-Officio)

ORDER

The Petitioner, Coastal Gujarat Power Limited, a subsidiary of Tata Power Company Limited is engaged in developing and implementing the 4000 MW Ultra Mega Power Project at Mundra in the State of Gujarat based on imported coal. The petitioner has filed the present petition seeking the following reliefs:

> "(a) Establish an appropriate mechanism to offset in tariff the adverse impact of:
>
> (i) The unforeseen, uncontrollable and unprecedented escalation in the imported coal price and
>
> (ii) the change in law by Government of Indonesia.
>
> (b) Evolve a methodology for future fuel price pass through to secure the Project to a viable economic condition while building suitable safeguards to pass to Procurers benefit of any reduction in imported coal price.
>
> (c) Pass any other order that this Commission may deem fit in the facts and circumstances of the present case."

Facts of the Case

2. The facts leading to the filing of the present petition are briefly summarized as under:

(a) Ministry of Power, Government of India issued the "Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees" on 19.1.2005 under section 63 of the Electricity Act, 2003 (hereinafter referred to as "the Act").

(b) The Central Government has been facilitating development of a number of Ultra Mega Power Projects by using the economy of scale which aims at making available comparatively cheaper power to more than one State. Mundra Ultra Mega Power Project (4000 MW) in the State of Gujarat was conceived with the purpose of supplying power to the distribution licensees in the **States of Gujarat, Maharashtra, Rajasthan, Punjab and Haryana (hereinafter referred to as "the procurers")**. In accordance with the Guidelines, Power Finance Corporation was notified as the Bid Process Coordinator and Coastal Gujarat Power Limited (CGPL) was incorporated on 10.2.2006 as a wholly owned subsidiary of Power Finance Corporation to undertake the process of bidding under Case 2 on behalf of the procurers.

(c) On 31.3.2006, Request for Qualification (RfQ) was issued by CGPL for selecting the successful bidder to build, own, operate and maintain Mundra

UMPP to be located at Mundra in Gujarat for supply of contracted power to the procurers for 25 years based on imported coal.

(d) On 7.11.2006, 11 bidders including Tata Power Company Limited who were qualified at RfQ stage, were issued with Request for Proposal (RfP) documents. As per the RfP, the tariff to be quoted by the bidders consisted of two main components such as Energy charge and Capacity charge. As per the bidding guidelines, the above two components were further split into escalable and non-escalable components and bidders were allowed to quote based on their respective assumptions. Six bidders responded to the RfP including Tata Power Company Limited which submitted its bids on 7.12.2006. After evaluation of all the bids, Tata Power Company Ltd was declared as the successful bidder having quoted a levelized tariff of ₹ 2.26367/kWh. Letter of Intent (LoI) was issued to the successful bidder on 28.12.2006.

(e) The Tata Power Company Limited acquired 100% of the shareholdings of CGPL on 22.4.2007. Thereafter CGPL as the seller entered into a Power Purchase Agreement with the procurers on 22.4.2007 for supply of 3800 MW power from Mundra UMPP at the tariff mentioned in Schedule 11 of the PPA calculated in accordance with Schedule 7 for each of the contract years during the term of the PPA.

(f) This Commission vide order dated 19.9.2007 in Petition No. 18/2007 adopted the tariff of the generating station discovered through competitive bidding under section 63 of the Act in the following terms:

> "Based on the facts placed on record, we find that the tariff discovery for the Mundra UMPP was the result of a transparent process of bidding in conformity with the "Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees". Accordingly, in terms of Section 63 of the Act, we adopt the tariff as quoted by the selected bidder, M/s Tata Power Company Limited for Mundra Ultra Mega Power Project to supply power to the procurers as per their respective shares as indicated at para 4 above. The adopted tariff shall be charged in accordance with Schedule 7 of the PPA signed on 22.4.2007."

(g) The petitioner entered into a Supplemental PPA with the procurers on 31.7.2008 for advancement of the scheduled commercial operation dates in terms of Article 3.1.2(iv) of the PPA as per the following details.

	Unit- I	Unit- II	Unit- III	Unit- IV	Unit- V
Scheduled Commercial Operation Date	22.8.2012	22.2.2013	22.8.2013	22.2.2014	22.8.2014
Revised Scheduled Commercial Operation Date	30.9.2011	31.3.2012	31.7.2012	30.11.2013	31.3.2013

(h) Mundra UMPP is envisaged to be **executed based on imported coal** and has an estimated coal requirement of approximately 12 MMTPA. The petitioner has made arrangement of imported coal from Indonesia by entering into Coal Supply Agreement dated 31.10.2008 with IndoCoal Resources (Cayman) Limited, a corporation organised and existing under the laws of Republic of Indonesia, for supply of 5.85 MMTPA (+/-20 %). Tata Power had also entered into an agreement with petitioner on 9.9.2008 for meeting the balance coal requirement of 6.15 MTTPA on best effort basis. Subsequently, Tata Power has assigned its agreement with IndoCoal Resources (Cayman) Limited for supply of 3.51 MMTPA (+/-20 %) (which was earlier meant for Coastal Maharashtra facility) in favour of the petitioner vide Assignment and Restatement Agreement dated 28.3.2011.

The coal requirement of Mundra UMPP is stated to be met by sourcing coal on the basis of these two agreements.

(i) Government of Indonesia promulgated the "Regulation of Minister of Energy and Mineral Resources No.17 of 2010 regarding Procedure for Setting Mineral and Coal Benchmark Selling Price" (hereinafter "Indonesian regulations") on 23.9.2010. According to the Indonesian Regulations, the holders of mining permits for production and operation of mineral and coal mines are required to sell mineral and coal in domestic and international markets including to their affiliates by referring to the benchmark price and the spot price of coal in the international market. All long term coal contracts for supply of coal from Indonesia are required to be adjusted with the Indonesian Regulations within a period of 12 months i.e. by 23.9.2011.

(j) On account of promulgation of Indonesian Regulations and escalation in international coal prices, the petitioner is stated to be supplying power to the procurers by purchasing coal at a higher price that what was agreed in the Coal Supply Agreements without any adjustment of tariff and is consequently stated to suffer a loss of ₹1873 crores per annum and ₹47,500 crores over a period of 25 years. The petitioner took up the matter with Gujarat Urja Vikas Nigam Limited (GUVNL) who is the lead procurer and the Ministry of Power, Government of India vide its letter dated 4.8.2011. The petitioner also took up the matters with the procurers in the Joint Monitoring Meeting dated 6.2.2012 for suitable adjustment in tariff. Ministry of Power, Government of India in its reply dated 30.9.2011

responded to the petitioner's representation by stating that "….PPA is a legally binding document exclusively between the procurers and the developer. Therefore, any issue arising therein is to be settled within the provisions of PPA by the contracting parties for which Gujarat being the Lead Procurer may take necessary action…..". The procurers sought some further details which the petitioner furnished by its letter dated 6.3.2012.

(k) The petitioner approached the Indonesian Government vide its letter dated 16.2.2012 requesting to exempt the existing coal supply contracts from the purview of Indonesian Regulations, without any success.

(l) IndoCoal Resources (Cayman) Limited which supplies coal to the petitioner under the Coal Supply Agreements (CSA) issued a notice to the petitioner on 9.3.2012 calling upon it to align the original CSAs with the Indonesian Regulations. The petitioner is stated to have amended the Coal Supply Agreements on 23.5.2012 and 22.6.2012 to align them with the Indonesian Regulations and to ensure uninterrupted supply of coal under the provisions on the PPA.

(m) Under these circumstances, the petitioner has filed the present petition seeking relief under Article 12 (Force Majeure) and Article 13 (Change in Law) of the PPA and section 79 read with section 61 and 63 of the Act.

3. The matter was heard for admission on 19.7.2012. The Commission directed the petitioner to make a representation to the lead procurer with

copy to other procurers regarding its claim for change in tariff in terms of Article 17.3 of the PPA and further directed the lead procurer, GUVNL to convene a meeting of the procurers to consider the proposal of the petitioner to resolve the issues and convey the decision to the petitioner. Pursuant to our directions, the petitioner made a proposal to all procurers on 27.7.2012 regarding revision of elements of tariff under the PPA to mitigate the impact of the unprecedented increase in the price of imported coal. On 3.8.2012, a Procurers' Meet was convened in which petitioner made a presentation on the revision of the Quoted Escalable Fuel Energy Charges in the PPA on account of increase in imported coal price. The procurers after considering the proposal subsequently conveyed their disapproval to the proposal of the petitioner for revision of energy fuel charge. The petitioner in its affidavit dated 13.9.2012 submitted to the Commission that since its proposal has not been accepted by the procurers, a dispute has arisen which the Commission should adjudicate in terms of Article 17.3.1 of the PPA. Thereafter, the matter was heard on admission and admitted vide the Commission's order dated 11.10.2012. The respondents including Prayas Energy Group were directed to file their objections to the petition on merit. The respondents and Prayas Energy Group have filed their replies to the petition and the petitioner has filed its rejoinders.

4. The petition was heard on merit on 4.12.2012, 11.12.2012, 20.12.2012 and 31.12.2012. We have perused the materials on record and submission of the parties. We proceed to examine the prayers of the

petitioner in the light of the pleadings of the parties and oral submissions during the hearings in the succeeding paragraphs.

Submission of the Petitioner

5. The petitioner has submitted that the project was envisaged on the imported coal and the bidders were required to quote the tariff for 25 years in the format prescribed in the RfP. The tariff to be quoted by the bidders consisted of two elements such as (i) Capacity Charge consisting of cost relating to depreciation, operation and maintenance, interest, repayment of debt and return on equity and (ii) Energy Charge comprising of costs relating to coal, shipping, port and handling charges. As per the Bidding Guidelines, these two components are further split into escalable and non-escalable components and bidders were allowed to quote escalable and non-escalable portions based on their assumptions and expectations about the variability of the costs and differed from bidder to bidder. The quoted tariff were required to be evaluated on a levelised basis and awarded to the lowest bidder.

6. The petitioner has submitted that Tata Power Company Ltd submitted its bid for Mundra UMPP in December 2006 after considering the prevailing economic situation at the time of the bidding. The petitioner has submitted that Tata Power surveyed the global coal market before it submitted its bid for the project, based on which Indonesia was chosen as the source given the coal availability, time-frames and costs as compared to the two other major coal exporting countries namely Australia and South

Africa apart from Indonesia having a legal regime honouring bilateral contracts since 1967. The petitioner has submitted that the mining costs (which normally drive the floor prices in a normal market) were in the range of USD 20 to 25/MT of the grade that the project was likely to use and the same was reflected in the then prevailing market prices of USD 30 to 40/MT for similar coal. The petitioner has submitted that the then price for benchmark coal of GCV 6322 kcal/kg was USD 49.75 which was equal to USD 42 for GCV 5350 kcal/kg. Moreover, the petitioner also took into consideration the potential scales of economy of a single reputed off-taker like Tata Power/the Petitioner tying in long term purchase of over 12 MPTA coal resulting in further discounts in coal purchase price which was reflected in the bid submitted by the petitioner.

7. The petitioner has further submitted that in 2006, the Commission notified the methodology for determining the rates of escalation consisting of two indices, namely, Bid Evaluation Escalation Rate and Actual Payment Escalation Rate. Bid Evaluation Escalation Rate was notified at 3.46% for energy charges predicated on the analysis of the preceding 12 years' data and was used for bidding as it was an indicative market rate based on factual long term price data and is reflective of the typical increases in commodity prices over long periods which can be reasonably assumed to repeat itself in the future. The petitioner has submitted that in the context of the then prevalent regime, the bid was based on the following methodology to arrive at the tariff quoted for the fuel energy charges:-

(a) Since the benchmark coal prices are normally quoted for calorific value of 6322 kcal, the calorific value adjusted price was worked out for the

grade of coal to be used for the project using estimated market price. For example, if the grade of coal proposed to be used is 5350 kcal, then price per tonne would be arrived as follows:-

$$\frac{\text{Market Price (for 6322 kcal)}}{6322} \times 5350 \text{ Minus negotiated discount}$$

(b) Past market data on demand supply and price trends were analysed to arrive at appropriate percentage of fixed and escalable components.

(c) Specific consumption per unit of generation based on estimated efficiency parameters of the generating units were arrived.

(d) Energy cost per unit of generation by multiplying cost per kg of coal by specific consumption of coal per unit of generation was arrived.

8. The petitioner has submitted that while arriving at the tariff quoted in the bid, the Petitioner had used the widely available past market data and demand supply projections to arrive at the conclusion that even if it assumed a doubling of past escalation trends, it could consider a significant part of the coal cost on non-escalable basis. The Petitioner is stated to have carried out sensitivity analysis which showed that even an escalation of upto 7% per annum over historic escalation rates would still not seriously impact the viability of the project. The petitioner has submitted the data quoted overleaf based on historic escalations rates and actual market prices in support of its contention.

Table: Calorific Value adjusted FOB rates in terms of USD per metric tonne

	6322 GCV	5350 GCV
At the time of Bid (7.12.2006)	49.79	42.13
Escalated price at 3.46% p.a. escalation (bid evaluation) as notified by CERC	59.01	49.94
Escalated price at 7% p.a. escalation	69.83	59.09
Market Price as on June 2012(HBA* rate)	96.65	74.44

*Harga Batubara Acuan (HBA) Price (Notified by Govt of Indonesia)

9. The petitioner has submitted that as required under Article 3.1.2 (v) of the PPA, one of the conditions subsequent to be fulfilled by the petitioner was to execute a Fuel Supply Agreement within 14 months from the date of issuance of LoI. In order to secure supply of coal, Tata Power invested 30% in the ownership of two coal mines owned by Bumi Resources Indonesia in March 2007, when bilateral contracts for supply of fuel (based on mutually agreed firm quantity and firm price) was permitted by Indonesian law since 1967 and was also the prevailing practice. The petitioner has submitted that the project required approximately 11 million tonnes per annum of imported coal and accordingly, the petitioner's attempt was to tie up a substantial part of its coal requirement (55%) through contracts with fixed price or with low escalation rate.

10. The petitioner has submitted that on 30.3.2007, Tata Power entered into a Coal Sales Agreement with IndoCoal Resources (Cayman) Limited ("**IndoCoal**") whereby IndoCoal agreed to sell and consequently deliver and provide to Tata Power a total of approximately 10.11 MMTPA (±20%) of the coal for its three electricity generating facilities namely (a) Trombay with an allocation of 0.75 MMTPA (±20%); (b) Mundra with an allocation of 5.85

MMTPA (+20%); and (c) Coastal with an allocation of 3.51 MMTPA (+20%). The petitioner has submitted that it entered into an agreement on 9.9.2008 with Tata Power for balance coal requirement of approximately 6.15 MMTPA to meet the total coal requirement of 12 MMTPA under the PPA on a best effort basis. The petitioner has submitted that it is clearly stated in Clause 2.1 read with Clause 2.4 of the Agreement dated 9.9.2008 that Tata Power intended to divert the coal allocated for Coastal Maharashtra Project to the Petitioner if required. On 31.10.2008, the Coal Sale Agreement dated 30.3.2007 between Tata Power and IndoCoal was split into three agreements, one for each identified user within Tata Power. Accordingly, the petitioner entered into Coal Sales Agreement with IndoCoal for approximately 5.85 MMTPA quantity of coal with an option to purchase an additional a margin of +20%. The petitioner has submitted that the fuel supply agreement had two components, i.e. 55% of the total base quantity at a price of USD 32/MT with 2.5% per annum escalation for 5 years and balance 45% was at a base price of USD 34.15/MT with escalating per month or part of the month as per the escalation rate notified by CERC. The petitioner has submitted that as against the historical trend of 3% to 4% escalation, it could negotiate an escalation of 2.5% per annum. Therefore, the contract price of coal tied up by the petitioner reflected a steep discount over the prevailing market prices. The petitioner has further submitted that subsequent to the split of the Coal Supply Agreement dated 30.3.2007 between Tata Power and IndoCoal, another agreement was entered between Tata Power and IndoCoal on 31.10.2008, for the supply of 3.51 MMTPA +20% of coal for its Coastal Maharashtra facility. Due to the steep

increase in international coal prices it became impossible to tie up the balance coal quantity at a price better than the existing coal supply agreement. In order to secure the fuel supply and also meet lenders conditions, the said agreement dated 31.10.2008 executed between Tata Power and IndoCoal was assigned to the Petitioner by way of the 'Assignment and Restatement Agreement' dated 28.3.2011 in terms of clause 22.2 of the said agreement. The petitioner has submitted that the Assignment and Restatement Agreement was a mere ratification of the contractual obligation assumed by Tata Power under the Agreement dated 9.9.2008.

11. The petitioner has submitted that it informed the Lead Procurer, GUVNL by its letter dated 18.12.2008 about satisfaction of the condition subsequent by the petitioner including the execution of the Fuel Supply Agreement. The petitioner also addressed the concern of GUVNL regarding fuel supply arrangements in its letters dated 28.2.2012 and 6.3.2012. GUVNL by its letter dated 7.3.2012 also confirmed that the Petitioner was in compliance of the condition under Article 3.1.2 (iv) of the PPA.

12. The petitioner has submitted that due to certain subsequent unforeseen and unprecedented developments such as promulgation of Indonesian regulations and rise in international coal prices from USD 40 to 50/MT in 2006 to USD 110 to 120/MT in 2011, mainly due increase in its spot price on account of increase in coal import by India and China, it has become commercially impracticable for the Petitioner to supply power at the bid out tariff as the fundamental premise on which the bid was made stands

completely wiped out/altered. The petitioner has submitted that between the bid date (7.12.2006) and the time of filing the Petition (as on June 2012), the cumulative escalation using the bid evaluation escalation rate notified by the Commission works out to 20% as against the actual increase of 153% as per present escalation rates. The petitioner has submitted that such an unforeseeable and unprecedented increase in coal prices could not have been foreseen by any bidder and is not a normal risk by any stretch of imagination.

13. The Petitioner has submitted that even today Indonesia remains the most competitively priced source of coal for India. The promulgation of Indonesian Regulations has a direct impact on the Project as coal to be procured by the Petitioner can now be imported at an additional escalated cost of over USD 30 per tonne. The petitioner has submitted that based on the coal price of USD 74/MT as on June 2012, the consequential financial burden on the petitioner would be to the tune of ₹1873 Crores and based on the notified rate of coal at USD 67.69/MT as on January 2013, the consequential financial burden will be to the tune of approximately ₹1600 crore per annum.

14. According to the petitioner, promulgation of Indonesian Regulations on 23.9.2010 affected the price of coal at which coal was imported by the petitioner for the project. Consequently, the petitioner is stated to have taken the following measures to mitigate the adverse impact on price escalation and to ensure viability of the project:

(a) The Petitioner had expected that the Indonesian Regulations would be prospectively applied and in that direction, the Petitioner had discussed the issue with its lawyers in Singapore and Indonesia and was advised that there was little chance of success and the judicial process could take a long time.

(b) Under the Coal Sales Agreement, the governing law is law of Indonesia and it provides for arbitration. However, the petitioner could not refer the matter to arbitration since it was not a commercial dispute under the fuel supply agreement but the issue was promulgation of a law by Indonesian Government. The arbitral court cannot not overrule Indonesian law and cannot award damages since the seller is acting in accordance with Indonesian law.

(c) The petitioner through the Association of Power Producers, as a member, had sought clarity on the applicability and the nature of the Indonesian Regulations, and the impact of the same on the coal exports from Indonesia to India under long term contracts. In response, the Indian Embassy at Jakarta by its letter dated 22.7.2011 conveyed the clarifications received from the Director General of Coal, Ministry of Energy and Mineral resources of the Government of Indonesia*, inter alia*, stating that:

(i) Coal sales in Indonesia is now regulated by Ministry of Energy and Mineral Resources Regulation of September 2010;

(ii) The Regulation stipulates benchmark price for coal sale;

(iii) The Regulation also expects for adjusting within twelve months the contracts negotiated earlier prior to the enactment.

(d) On 4.8.2011, the Petitioner informed GUVNL (as Lead Procurer) and Ministry of Power, Government of India regarding the issue of escalation in price of imported coal due to the new regulation in Indonesia which was well beyond any developer's reasonable expectations, requesting Ministry of Power to intervene. On 30.9.2011, Ministry of Power, Govt. of India responded to the Petitioner's representation stating that the PPA is a legally binding document exclusively between the Procurers and the developer. Therefore, any issue arising therein is to be settled within the provisions of PPA by the contracting parties for which Gujarat being the Lead Procurer may take necessary action.

(e) The Petitioner had also organized two Procurers' meetings on 9.9.2011 and 18.11.2011 to inform them about the challenges in respect of procuring the imported coal on account of "Change in Law" introduced by the Government of Indonesia. During the meetings, the Petitioner is stated to have shared all the commercial details of equity infused by Tata Power and debt borrowed by the Petitioner for the Project along with the impact on account of change in law on commercial viability of the Project. Further the Petitioner

had also shared with the Procurers its risk mitigation strategy on account of Indonesian Regulations. Both the Parties agreed to continue discussions to find our amicable solution to the problems being faced by the Project.

(f) Tata Power being the parent company of the Petitioner, on 12.12.2011 made representations to various agencies such as members of the Planning Commission, Ministry of Power, Government of India, Central Electricity Authority, ("CEA"), Joint Monitoring Committee comprising of representatives of all the Procurers ("JMC"), Government of Gujarat and Government of Maharashtra and the Procurers emphasizing the gravity of the issue of unforeseeable and unprecedented rise in cost of imported coal.

(g) On 6.2.2012, the 11th Meeting of the JMC was held, wherein the issue of change in price of coal due to Indonesian Regulation was specifically raised and discussed. The Petitioner had in the said meeting as also in several other Procurers' meetings shared the critical challenges facing the Project including the steep increase in coal price followed by change in law introduced by Government of Indonesia. During this meeting, the Procurers sought details from the Petitioner. The said minutes of the meeting were forwarded by GUVNL to the Petitioner and other members of the JMC under cover of its letter dated 28.2.2012.

(h) On 16.2.2012, the Petitioner approached the Indonesian Government and requested that the existing contracts for coal supply should be exempted from the purview of the Indonesian Regulations but to no avail.

(i) The petitioner also explored the remedies under the Coal Supply Agreement and found that the Fuel Supplier/KPC (who holds the mining rights in Indonesia) was required to adhere to the Law of Land (Indonesia) while discharging its obligations under the CSA. Moreover in the event of breach of the Coal Supply Agreement, the liability of IndoCoal on account of all losses, costs and expenses incurred by the Petitioner as result of the loss of under the CSA and in entering into any alternative arrangement for the supply of coal, is limited to the extent of US $ 55 million only. As per the petitioner, the termination of the existing CSA would have served no purpose as it would have been default under the terms of the PPA and Financing Documents and despite introduction of the Indonesian Regulation, the coal from Indonesia is still the cheapest source of imported coal.

(j) As per Article 2.1.4 of the CSA, the Fuel Supplier has furnished a Performance Guarantee from KPC in respect of its obligations under the CSA. The possibility of invoking the Performance Guarantee issued by KPC under the CSA was also explored by the Petitioner. Since the Performance Guarantee is subject to the Laws of Singapore, it was imperative to analyse the position of law as would be applicable in Singapore. The Petitioner sought a legal opinion from its Singapore

Counsel on the possibility of initiating legal action for the enforcement of Performance Guarantee. The Petitioner was informed by the Singapore Counsel that as per Singapore Law, KPC's liability towards the Petitioner is limited to such amount that IndoCoal is liable to pay the Petitioner for breaches under the CSA.

(k) On 13.8.2012, Tata Power issued another communiqué to Ministry of Power, Government of India requesting it to take up the matter with the Government of Indonesia and exempt contracts entered before the announcement of change in law in 2010.

(l) The petitioner also explored opportunities to buy early stage mines in various countries like South Africa, Australia, Indonesia and Mozambique to secure coal supplies on cost plus basis. However, the sudden and unanticipated rise in demand from India and China had an inflationary impact on the valuations of early stage mines as also the overall FOB costs of coal (reflecting such high valuations).

15. The petitioner has submitted that IndoCoal has issued a 'Notice of Change in Government Approvals' dated 9.3.2012 calling upon the Petitioner to align the original CSA with the Regulations and amend the CSA. In order to ensure the compliance under the Indonesian Regulations and to ensure the uninterrupted supply of coal under the provisions of the PPA, the Petitioner has suitably amended the Coal Sales Agreements on 22.5.2012 and 23.6.2012 as the other option was to cancel the CSA, thereby affecting the viability of the project.

16. The petitioner has submitted that the Indonesian Regulation has drastically exacerbated the fuel supply and pricing situation for Mundra UMPP by mandatorily overriding the price advantage and substituting it by international benchmark prices. The Petitioner has submitted that unprecedented and unforeseeable escalation in the price of coal has resulted in a situation where the project has become commercially impracticable. The annual cumulative impact of the rise in the international coal prices on the Project is approximately ₹1873 crores per annum based on June 2012 Coal Price & Escalation and which can vary depending on Coal Price at any given period. The petitioner has submitted the following workings in support of its contention based on the coal price on June 2012 and CERC escalation as on 30.6.2012:

		Qty(MMT)	Price considered in the bid	Current Price	Difference		FX rate	Annual loss(Rs in Crores)
					$/MT	$/MMT	$/INR	
A	B	**C**	**D**	**E**	**F**	**G**	**H**	**I**
Coal Qty		11.22						
Fixed	55%	6.17	30.00	74.00	44	271.00	54.00	1,463.00
Escalable	45%	5.05	59.00	74.00	15.00	76.00	54.00	410.00
Total			43.24	74.44	31.00	347.00		1873.00
Add: Insurance & Taxes			3.00	3.00	0.00	0.00	0.00	0.00
Total						347.00		1873.00

17. The petitioner has submitted that the financial impact of the unprecedented and unforeseeable increase in prices of imported coal on account of Indonesian Pricing Regulations and change in international coal market scenario is approximately ₹1900 crores per annum based on June 2012 price which are for factors beyond the control of the petitioner. The

petitioner has submitted that similar to the regulatory hurdle imposed by Indonesian Government, two other major coal sourcing countries such as South Africa and Australia have enacted laws which have made sourcing of coal from these countries extremely expensive.

18. The petitioner has further submitted that in order to mitigate the impact of rise in prices, the Petitioner is exploring the usage of coal with lower calorific value which is slightly cheaper than the contracted coal but has limitations in availability and its use in the existing boiler. The coal properties for Boilers as per its Boiler design is extracted as under:-

Proximate Analysis (As Received Basis)	**Unit of Measurement**	**Design Coal (Typical)**	**Design Coal (Worst)**
Gross Calorific Value	kCal/kg	5700	4900
Total Moisture	% wt	15	26
Ash	% wt	13	12-16
Fixed Carbon	% wt	34	29
Volatile matter	% wt	38	33
Initial Deformation Temperature (Reducing)	ºC	1180	1180
Hardgrove Grindability Index	HGI	40	40

The details of specifications of coal presently being used by the Petitioner is as under:

Coal Properties	**Units of Measurement**	**Melawan Coal (Typical,** as per Schedule 1 of CSA**)**
Gross Calorific Value (As Received Basis)	KCal/kg	5350
Total Moisture (As Received Basis)	% wt	23.5%
Ash (Air Dried Basis)	% wt	4.5%
Fixed Carbon (Air Dried Basis)	% wt	39.5%
Volatile Matter (Air Dried Basis)	% wt	38%
Sulphur (Air Dried Basis)	% wt	0.45%
Initial Deformation Temperature (Reducing)	ºC	1150
Hardgrove Grindability Index	HGI	40
Country of Origin		Indonesia

19. The petitioner has submitted that the trials for using lower grade coal are still in progress, though the usage of this coal is unlikely to reduce the cost of generation substantially. The petitioner has further submitted that in the near future the exporting countries will put restrictions on export even on these lower CV coals. The petitioner has submitted that the Indonesian government is planning to impose a ban on export of coal with lower GCV to preserve supplies for domestic power consumption and there are indications that South Africa is already considering such options.

20. The petitioner has submitted that in the conspectus of the problems faced by the petitioner on account of escalation of international coal prices and promulgation of Indonesian Regulations aligning the export price of coal to international benchmark price, it will be commercially impracticable for the petitioner to supply power to the procurers at the PPA rates by purchasing coal from Indonesia and other countries. Therefore the petitioner has sought to invoke the plenary power of the Commission under the Act and the reliefs available under the PPA. The petitioner has submitted that keeping in view the objectives of the Act, National Electricity Policy and Tariff Policy, the Commission in exercise of its power under section 79 of the Act which vests in the Commission to regulate the tariff of the generating station having a scheme to generate and supply electricity to more than one State and to adjudicate the dispute related to tariff, can provide relief to the petitioner to mitigate the impact of the Indonesian Regulations and the unprecedented rise in the international price of coal. The petitioner has submitted that the Act has been enacted with the objectives to take measures conducive to development of electricity

industry, to promote competition, to protect consumer interest and to rationalise electricity tariff. Further, the National electricity Policy notified on 12.2.2005 by the Central government under section 3 of the Act has one of the primary objectives to achieve “financial turnaround and commercial viability of the Electricity sector”. The petitioner has also submitted that the Tariff Policy notified by the Central government on 6.1.2006 has sought to achieve the objective to “ensure financial viability of the sector and attract investment”. The petitioner has further submitted that section 61 of the Act mandates the Commission to specify the terms and conditions for determination of tariff and while specifying such terms and conditions shall be guided by such factors viz. generation of electricity is conducted on commercial principles, tariff progressively reflects the cost of electricity, and tariff safeguards the consumer interest while ensuring recovery of cost of electricity in a reasonable manner. The petitioner has submitted that these principles will govern the tariff determination envisaged under section 62 of the Act on cost plus basis and under section 63 of the Act by adoption of tariff discovered through international competitive bidding. In this connection, the petitioner has relied upon the judgement of the Appellate Tribunal for Electricity dated 16.11.2011 in Appeal No.82/2011(Essar Power Ltd. Vs. UPERC & Others) and judgement dated 31.5.2012 in Appeal No.29/2011 (Tarini infrastructure Limited Vs Gujarat Urja vikas Nigam Limited). The petitioner has further submitted that the Commission has been vested with the power to regulate the tariff under section 79(1)(a) and (b) of the Act and the term “regulate” has wider connotation than the term “determine”. Reliance has been placed on the judgements of the

supreme Court in jiyajirao Cotton Mills Ltd Vs. M.P. Electricity Board {(1989) Supp (2) SCC 52}, D.KTrivedi & Sons Vs. State of Gujarat {(1986) Supp SCC 20} and V.S. Rice and Oil Mills Vs. State of A.P. {AIR 1964 SC 1781}. The petitioner has further submitted that Hon'ble Supreme Court in its judgement in Tata Power Company Limited Vs. Reliance Energy Limited {(2009) 7 SCALE 513} while discussing the scope of the term "regulation" in the context of section 86(1)(b) of the Act has held that as part of the regulations, the Commission has the power to adjudicate upon the disputes between the generating company and the licensees in regard to implementation, application or interpretation of the agreement. The petitioner has submitted that in view of the above authorities, the Commission can take into consideration the impact of the fuel cost escalation and other factors and regulate the tariff in such a manner that the petitioner is restored to the same economic position as existed prior to the unprecedented, uncontrolled and unforeseen escalation in fuel prices.

21. The petitioner has submitted that PPA dated 22.4.2007 envisages a scenario where the Commission can interfere with the issues relating to the claim made by a party for any change and/or determination of tariff or any matter relating to the tariff or claims made by any party which partly or wholly relate to any change in tariff or determination of any such claim which result in the change in tariff. In this connection, the petitioner has referred to Articles 17 (Dispute Resolution), Article 12(Force Majeure) and Article 13(Change in Law) of the PPA. The petitioner has further submitted that in terms of Clause 5.17 of the Bidding Guidelines, any dispute pertaining to tariff shall be dealt with by the Commission. The petitioner has

submitted that the Commission has the jurisdiction and is empowered under the legal and regulatory framework as well as under the PPA to regulate the tariff and interfere with the quoted tariff under the PPA and restore the petitioner in such a manner that fuel cost escalation is absorbed and the petitioner continues to perform its obligations under the PPA.

22. The petitioner has submitted that 'Change in Law' in the PPA has been defined to mean 'change in consent/approvals or licences available or obtained for the project'. Project under the PPA has been defined to be the power station undertaken for design, financing, engineering, procurement, construction, operation and maintenance and definition of Project Document includes Fuel Supply Agreements. The petitioner has submitted that the operation of the power station would necessarily require fuel, which in the given case is the imported coal sourced from Indonesia. This coal was to be procured at an agreed price from IndoCoal, who has a back to back arrangement with the mining companies in Indonesia. These mining companies have license/consent from the Government of Indonesia for mining and selling coal. It has been submitted that in the light of the back to back arrangement between the mining companies and IndoCoal, any impact or change in consent will have a direct bearing on the arrangement between the IndoCoal and the Petitioner. The petitioner has further submitted that in terms of the Indonesian Regulations, the fuel cannot be supplied at the agreed rate and if it were supplied at the agreed rate, the same would amount to violation of the Regulations/Law of Indonesia. According to the petitioner, the change in license/consent to the mining companies is a change in consent for the Project and this non-supply of fuel

at the agreed price is because of the change in law i.e. the promulgation of the Indonesian Regulations falling within the ambit of Article 13 of the PPA. The petitioner has pointed out that such unprecedented change in price of coal is something beyond the comprehension and control of any of the parties to the project. In case the fuel has to be procured at the escalated price, which escalation is due to Change in Law as also due to circumstances which are beyond the control of the Petitioner, the provisions of PPA relating to restoration through monthly tariff payments come into play which provide for restoration of affected party, through monthly tariff payments, to the same economic position as if the change in law has not occurred. The petitioner has submitted that under the PPA, the affected party can claim a pass through for the escalated price owing to Indonesian Regulations.

23. The petitioner has submitted that Article 13.2 of the PPA dated 22.4.2007 clearly envisages restitutive remedy through the regulator to restore the party affected by the consequence of Change in Law through Monthly Tariff Payments, to the extent contemplated in this Article 13, to the same economic position as if such Change in Law has not occurred. The petitioner has pointed out that Article 13.2 was not part of the original draft PPA at the initial stage and was specifically included during the pre-bid discussions between the procurers and the bidders in order to make the contract complete and to restitute a party to its original economic situation in case the same has been altered due to change in law, which is beyond the control of any party. It has been submitted that the term 'law' as defined

in the PPA is qualified by the word ‘all’ and the question, whether ‘law’ in “Change in law” should include foreign laws or be restricted to Indian laws must be understood in the context of the PPA, which is a contract to supply power based on imported coal. The petitioner has submitted that the express and underlying purpose of Article 13 of the PPA is to make the PPA work by providing compensation and restitute a party affected by Change in Law to a position as if such Change in Law had not taken place. The petitioner has submitted that the Commission has the option of either giving a plenary meaning to the term ‘law’ as was intended by the parties to the PPA or giving it a restricted meaning which will result in making the PPA unworkable which will be contrary to business efficacy and result in a situation contrary to the purpose of Article 13 of the PPA. The petitioner has further submitted that any restricted meaning to the term ‘law’ can only be given by adding words to the PPA, which the parties chose not to do. The petitioner has submitted that for the petitioner to effectively perform its obligations under the PPA, it is imperative that tariff under the present PPA be suitably revised so as to bring the Petitioner in a position as if the escalation in fuel price never occurred.

24. The petitioner has submitted that there has been an unprecedented and unforeseeable escalation in the price of coal after the Petitioner bid for the Project. This situation has been further precipitated by the Indonesian Regulations, which have led to situation where the fuel cannot be supplied at the agreed contractual rate. The fuel, if supplied, has to be supplied in consonance with the Indonesian Regulations, which means that the fuel

has to be supplied at a much higher rate. The procurement of the fuel at such unprecedented escalated rate would totally alter the project dynamics making the project economically unviable without suitable tariff adjustment. The petitioner has submitted that the promulgation of Indonesian Regulation and consequent escalation of fuel price was not and could not have been foreseen. The petitioner has submitted that if the tariff for Mundra UMPP is not revised to include the escalation of fuel cost, then it would be commercially impossible on part of CGPL to perform its obligations under the PPA. The petitioner has relied on the following judgements of the Supreme Court and High Court on the principles of commercial impossibility of the contract:

(a) Satyabrata Ghose Vs. Mugneeram Bangur & Co. and Anr. {AIR 1954 SC 44}

(b) Smt. Sushila Devi and Anr. Vs. Hari Singh and Ors. {(1971) 2 SCC 288}

(c) Alopi Parshad and Sons Ltd. Vs. Union of India {AIR 1960 SC 588}

(d) Mugneeram Bangur & Co. v. Sardar Gurbachan Singh {AIR 1965 SC 1523}

(e) Govindbhai Gordhanbhai Patel and Ors v. Gulam Abbas Mulla Allibhai and Ors. {(1977) 3 SCC 179}

(f) Jai Durga Finvest Pvt. Ltd. v State of Haryana and Ors. {AIR 2004 SC 1484}

(g) Jagatjit and Allied vs. Bharat Nidhi Ltd {ILR 1978 Delhi 526 (DB)}

(h) Smt. Sharda Mahajan vs. Maple Leaf Trading International (P) Ltd. {(2007) 139 CompCas 718 (Delhi) (SJ)}

(i) Krishna & Co. vs. The Government of Andhra Pradesh and Ors. AIR {1993 AP 1 (DB)}

25. Based on the principles laid down in the above judgements, the petitioner has submitted that the interpretation of the term impossible has not been restricted to merely physical impossibility but also expands to commercial impossibility. Even the performance of acts which may be possible but is impracticable commercially and materially affecting the performance of the contract itself, would be liable to be held void, under the doctrine of frustration. The petitioner has submitted that the unprecedented rise in imported coal prices and the enactment of Indonesian Regulations by the Government of Indonesia is an unforeseen event, beyond the control of the petitioner which makes the performance of the PPA impossible. The petitioner has submitted that in the present scenario due to Indonesian Regulations, there has been unforeseen increase in coal price destroying the very basis or foundation of PPA. The Petitioner has submitted that the change of circumstances is well beyond the control of the petitioner which would result into frustration of the PPA entered into with the procurers if not remedied forthwith.

26. The petitioner has also submitted that the change in the Indonesian Mining Law is an event completely outside the control of the petitioner and is therefore an event of force majeure within the meaning of Article 12.3 of the PPA in so far as the said event has denied availability of fuel at pre-contracted price to the petitioner and as a consequence the petitioner is unable to perform its obligation under the PPA. The petitioner has submitted that force majeure exclusions provided under Article 12.4 of the PPA have been made subject to force majeure which means that if the

exclusions are consequences of force majeure, they fall within the force majeure clause. It has been submitted that since in the present case, escalation in the fuel price is due to change in the Indonesian Mining Law which is beyond the reasonable control of the petitioner and could not have been foreseen, it is clearly a case of force majeure.

27. Replies to the petition have been filed by Gujarat Urja Vikas Nigam Limited (GUVNL) and Haryana Power Purchase Centre on behalf of Haryana Power Generation Corporation Limited. Reply to the petition has also been filed by Prayas Energy Group, representing the consumer interests. These submissions have been discussed in the succeeding paragraphs.

Submission of GUVNL

28. GUVNL has submitted that neither the provisions of Article 12 of the PPA dealing with force majeure nor the provisions of Article 13 of the PPA dealing with Change in Law will have any application to the case of the petitioner and therefore, no relief on these accounts can be granted. The respondent has submitted that in terms of Article 12 of the PPA, the petitioner can claim force majeure only if there is an event or circumstance or a combination of events or circumstances which wholly or partly prevent or unavoidably delay the performance of the petitioner's obligations under the PPA as provided in Article 12.3 of the PPA. GUVNL has further submitted that promulgation of Indonesian Regulations on 23.9.2010 does not in any manner, wholly or partly prevents or unavoidably delays the

petitioner from performance of its obligations under the PPA. The respondent has submitted that the there is no prohibition in the Indonesian Regulations either wholly or partly on the purchase of coal from Indonesia or otherwise on the implementation of the Fuel Supply Agreements between CGPL and the Indonesian supplier of coal. The respondent has submitted that the Indonesian Regulation has the only effect of matching the coal price with the prevalent international market price for export of coal by Indonesian company which cannot in any manner be considered as force majeure. It has been further submitted that since the market price is being charged, the same cannot be treated as an external and supervening factor making the performance of the contract impossible. GUVNL has further submitted that it is a settled principle of law that the increase in the price or terms and conditions making the performance onerous or difficult cannot be said to be an event making the procurement of fuel impossible within the meaning of Article 12.3 of the PPA or to be considered as frustration under section 56 of the Indian Contract Act, 1872. GUVNL has relied upon the judgement of the Delhi High Court in Coastal Andhra Pradesh Limited Vs. Andhra Pradesh Power distribution Company limited (OM No. 267 of 2012 decided on 2.7.2012) to contend that the Hon'ble High Court had considered similar force majeure condition and rejected the claim under force majeure. With regard to change in law within the meaning of Article 13 of the PPA, it has been submitted that the term 'Law' is a defined term and it includes only Indian Law and not law of any country other than India. It has been further submitted that Law as defined in the PPA is to be construed as laws in force in India and not that of laws of any

country including Electricity Laws in force in India. It has been further submitted that in terms of Article 13.1.1 of the PPA, Change in Law provided for in sub clauses (i) to (iv) are all related to Indian Laws and not to the Laws of Indonesia or any other country. GUVNL has further submitted that the petitioner in its letter dated 12.12.2011 addressed to Secretary (Power) Government of India, Government of Maharashtra, Government of Gujarat, Member(Energy) of the Planning Commission has specifically acknowledged that notification by Indonesian Government regarding benchmarking of coal price is not covered under 'change in law' as it is limited to Indian Law only.

29. GUVNL has further submitted that the bidding documents including draft PPA was circulated to all bidders including Tata Power and the bidders were allowed the option of quoting either the escalable fuel charges or non-escalable fuel charges or even part of the fuel charges as escalable and the remaining to be non-escalable alongwith the capacity charges. Moreover the bid documents as well as the PPA provide for a formula for escalation based on indices to be notified by the Commission from time to time including the fuel charges. It has been submitted that no party can claim escalation other than the escalation notified by the Commission. GUVNL has submitted that though Tata Power had the option to quote the fuel charges as entirely escalable to take care of the fluctuation of international coal prices including Indonesian regulations, Tata Power did not choose to do so due to commercial consideration. Relying on the results of the competitive bidding through which Tata Power was selected,

GUVNL has submitted that the selection of Tata Power as the successful bidder was on the basis of the lowest tariff quoted with partly escalable and partly non-escalable fuel charges. It has been further submitted that there is no provision under the PPA which provides for adjustment to be done in the quoted tariff as a result of any change in price of coal to be imported from Indonesia.

Submission of Haryana Power Purchase centre

30. Haryana Power Purchase Centre has made similar submission as that of GUVNL and therefore the same has not been discussed to avoid repetition.

Submission of Prayas Energy Group

31. Prayas Energy Group has submitted that the matter should not be seen from the narrow context of financial viability of the project of the petitioner but in the larger interest of public policy and governance. It has been submitted that 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 emerged as the lowest bidder and was awarded the project. It has been submitted that having conducted a transparent process of bidding, it is neither in the interest of consumers nor of competition as the bidders who lost out at that time could now have been more competitive. Prayas has submitted that the definition of 'law' makes it clear that law in the context of the PPA is any Indian law as Indian Courts

or any Indian Government Instrumentality cannot interpret any foreign law. It has been further submitted that change of law cannot 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. As regards force majeure, Prayas has submitted that as per the meaning of the term in the PPA, force majeure events imply inability of the affected party to materially perform its obligation as per the PPA on account of events beyond its reasonable control. Since the petitioner is not claiming any inability to perform its obligations under the PPA, there is no *prima facie* case for force majeure related claims. As regards the force majeure exclusion under Article 12.4(a) of the PPA, Prayas has submitted that the bidding framework gives bidders complete flexibility for sourcing fuel from any location and passing the fuel cost related risks by quoting escalable components for fuel price, transportation and handling and therefore, force majeure exclusion clause clearly excludes fuel cost and fuel availability related issues. Prayas has concluded that there is neither any case for relief under change in law nor under force majeure in favour of the petitioner.

Submissions during the hearing

32. Learned Senior Counsel appearing for the petitioner submitted that the claim of the petitioner is premised on three independent foundations namely, Article 13 of the PPA due to change in law, Article 12 of the PPA pertaining to force majeure and the power of the Commission to regulate tariff under section 79(1)(b) of the Act.

With regard to change in law, Leaned Senior Counsel submitted that the definition of ‘law’ under the PPA is an inclusive one and not exhaustive and the definition of ‘law’ covers ‘any law’ and is not restricted to Indian law. He submitted that the term ‘law’ is required to be interpreted in a contextual basis with a view to give business efficacy to the PPA since the project is based on imported coal and the fuel supply arrangements are a part of the Project Documents. Learned Senior Counsel further submitted that the words 'any law' or 'all laws' used in the PPA are plenary in nature and the context does not require these expressions to be interpreted differently. It was further submitted that when the contract is based on imported coal which constitute 60 to 70 per cent of the cost of generation, law would cover foreign laws also in order to give full import to the terms used. It was argued that if foreign law is excluded from the operation of Article 13 of the PPA, whole economics of continued operation of the plant would be affected. Learned Senior Counsel further submitted that the promulgation and enforcement Indonesian Regulations led to an unprecedented, uncontrollable and unforeseeable rise in coal prices which constitutes a ‘Change in Law' under the PPA. Learned Senior Counsel for the Petitioner submitted that the correct way of interpreting any commercial agreement like the PPA is to interpret it as per the intention of the parties at the time of signing the contract and to give the contract business efficacy. The intention of the parties while entering into the PPA was to make the PPA work and to ensure that the 4000 megawatt capacity of the generating station is utilized to secure supply to the procurers. This must be understood in context of the legislative intent of the Act and the needs of

the economy reeling under shortage of power. Learned Senior Counsel submitted that the intent of providing a restitutionary mechanism in the PPA is to put the affected party to the same position as if such Change in Law had not occurred in terms of Article 13.4 of the PPA and the intent should be duly honoured by granting relief.

As regards Article 12 pertaining to "force majeure", the Learned Senior Counsel for the Petitioner submitted that the definition of force majeure under Article 12.3 of the PPA covers "any event or circumstance or combination of events or circumstances that wholly or partly prevents or unavoidably delays an Affected Party in performing its obligations under the PPA to the extent 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". It was submitted that the definition of force majeure under Article 12.3 of the PPA is couched in wide inclusive terms and is not limited to the situations envisaged thereunder which are only illustrative. Learned Senior Counsel submitted that the promulgation of the Indonesian Regulation is an event which is beyond the control of the Petitioner and has resulted in making it impossible for the petitioner to perform its obligations as per the contracted price. Therefore, coming into force of Indonesian Regulations is clearly covered as a Force Majeure event under Article 12.3 of the PPA.

Learned Senior Counsel for the petitioner submitted that Article 12.4 of the PPA regarding force majeure exclusions will have to be read with Article 12.3 of the PPA. Learned Senior Counsel submitted that Article 12.4 specifically includes change in cost of fuel, if change is caused by an act of

force majeure. He emphasized that Article 12 of the PPA contemplates that if due to an event of force majeure, price of fuel goes up, the increase in price of fuel is an event of force majeure since the purpose of Article 12 is to ensure that the PPA retains cogency and viability when the circumstances are outside the control of the parties and to restrict the scope of force majeure will be costly to the parties and negate the object of Article 12 of the PPA. Accordingly, the Learned Senior Counsel submitted that since in the present case, hike in price of fuel is a consequence of a force majeure event (Indonesian Regulation), exclusion under Article 12.4 will not apply. Learned Senior Counsel further submitted that as per Article 12.7 of the PPA, the relief available to a party in case of a force majeure event was not limited to those specified under Article 4.5 of the PPA pertaining to extension of time since the relief stipulated under Article 12.7 was an inclusive one. It was submitted that Central Commission is free to exercise its powers to fashion a just and fair relief.

Learned Senior Counsel for the petitioner submitted that without prejudice to the reliefs available under the PPA, if a project has lost its viability and it has become commercially impossible for a party to perform its obligations under the contract, it can approach this Commission under Section 79(1)(b) of the Act with a request to revisit/restructure the tariff in a manner which makes the project viable in view of its wide powers to 'regulate' under Section 79(1)(b) of the Act. Learned Senior Counsel submitted that Hon'ble Supreme Court in a catena of judgments has given a broad and wide interpretation to the term 'regulate' to mean "to control,

adjust, govern, or direct by rule or regulation, to subject to guidance or restrictions, to adapt to circumstances or surroundings including ensuring payment and fixation of fair price". In the context of the powers of the Commission to regulate tariff under Section 79(1)(b) of the Act, Learned Senior Counsel for the Petitioner submitted that whether tariff is adopted under Section 63 of the Act or determined under Section 62 of the Act, the principles enshrined under Section 61 of the Act will apply in both the cases. In response to our query regarding sanctity of the competitive bidding, Learned Senior Counsel replied that sanctity of competitive bidding is a part of the process of arriving at the tariff and cannot be the purpose of ensuring supply of electricity when the project becomes unviable on account of subsequent developments beyond the control of the petitioner.

33. Learned Counsel for GUVNL submitted that the definitions of 'Law' and 'Change in Law' under the PPA unambiguously cover only laws in India. Learned Counsel further submitted that as per Article 17.1 of the PPA, the Governing Laws will be laws of India and the same have to be read consistently with Article 13 of the PPA. Learned Counsel emphasised that had the parties agreed to include within the definition of 'law' the law of the country from which coal would be sourced, the same would have been provided in the PPA. In the absence of reference to foreign law, the interpretation of definition of law being proposed by the petitioner cannot be accepted. Learned Counsel submitted that the understanding of the parties even at the time of bidding was that only the Indian law would apply which is evident from the letter of Tata Power dated 12.12.2011 addressed to Ministry of Power, Government of India and Government of Gujarat among others. Learned Counsel refuted the

contention of the petitioner that the qualification ‘in India’ in the definition of law applies only to ‘Electricity Laws’ and not to ‘all Laws’ and submitted that the term ‘Electricity Laws’ is a defined term which includes not only the statutes but also various other aspects namely, Rules, Regulations and any other Law pertaining to electricity including Regulations framed by the Appropriate Commission from time to time. Learned Counsel submitted that it is in that context that the term ‘Electricity Laws’ has been incorporated specifically. Therefore, law as defined in the PPA applies to all laws in force in India including Electricity Laws.

As regards force majeure, Learned Counsel for GUVNL agreed that the definition of force majeure under the PPA is an inclusive one and not limited to the events stipulated thereunder. Learned Counsel however submitted that force majeure covers only such events that ‘prevents or delays an affected party in performing its obligations under the PPA’. Learned Counsel submitted that merely because the PPA has become onerous and costly to perform will not attract Article 12 of the PPA since the Petitioner has not been prevented from performing the PPA. Learned counsel relied upon the following judgments in support of his contention that change in the price of Indonesian coal cannot be treated as force majeure:

(a) Judgment dated 18.10.2002 of United States court of Appeals in Seaboard Lumber Company and Capital Development Company Vs United States{308 F.3d 1283}

(b) Court of Appeal judgment dated 21.11.1963 in Ocean Tramp Tankers Corporation V s V/O Sovfracht {(1964) I All E.R. 161}

(c) Supreme Court of India Judgment dated 7.3.1988 in Continental Construction Co. Ltd Vs State of Madhya Pradesh {(1988) 3 SCC 82}.

(d) Supreme Court of India judgment dated 5.3.2003 in Travancore Devaswom Board Vs Thanath International{(2004) 13 SCC 44}

(e) Delhi High Court judgment dated 6.5.1998 in Eacom's Control India Ltd. Vs Bailey Controls Co. & Others {AIR 1998 DELHI 365}

The learned counsel submitted that merely because a contract has become onerous or difficult to perform is not sufficient to claim frustration. In this case, Indonesia has not prohibited export of coal and coal is available in international market. The international market prices are the basis on which the petitioner had submitted its bid. The Indonesian Regulation merely provides that export price should be aligned to international market prices. Learned counsel submitted that on account of Indonesian Regulations, It may become onerous or difficult to perform, but it is not an impossibility to perform, particularly in the context of section 56 of Indian Contract Act which provides for frustration or impossibility of performance or within the meaning of force majeure under Article 12 of the PPA which categorically recognizes that only if somebody is prevented from performance of the contract. Learned counsel submitted that the event of increase in price of Indonesian coal cannot be said to be an event of force majeure affecting the CGPL within the meaning of Article 12.2.

As regards the relief prayed for under section 79(1)(b) of the Act, Learned Counsel for GUVNL submitted that power of the Commission under

section 79(1)(b) read with sections 61 and 62 of the Act to determine the tariff should not be confused with the power of the Commission to adopt tariff under section 63 of the Act. Learned Counsel submitted that when tariff under Section 63 is adopted, the Commission is not concerned with the components of the tariff quoted by the bidder. The Commission's role under Section 63 is limited to adopting the tariff only if it has been discovered through a transparent process of competitive bidding. The Petitioner in the present case cannot convert the adoption process under Section 63 to a tariff determination process under Section 62 of the Act. The tariff discovered through competitive bidding process under Section 63 is sacrosanct and if the sanctity of Section 63 is given a go-bye, it can be used for any and every kind of eventuality which makes it onerous for a party to perform the contract. Learned Counsel submitted that the regulatory power under Section 79 of the Act cannot be invoked to change the tariff discovered through competitive bidding. Learned counsel submitted that the decision of the Appellate Tribunal in Essar Power case relied on by the Petitioner is totally misconceived. Learned counsel submitted that in the said judgement, the Appellate Tribunal has clarified that the Commission has no jurisdiction to revise the tariff discovered under Section 63 once the tariff petition has been filed based on the recommendation of the Evaluation Committee for adoption of tariff. The role of the concerned Commission is to see whether the bidding process as per the standard Bidding Guidelines has been conducted. Learned Counsel further submitted that the reliance placed on Tarini judgment and other judgments on the issue of exercise of regulatory power are all in the context of the tariff determined under Sections 61 and 62 and more importantly, in the context of renewable energy sources where the section provides for fixation of promotional tariff. Learned

Counsel submitted that these judgements have no application to the cases of tariff adopted under Section 63 of the Act.

34. The representative of PSPCL submitted that the documents relating to the pre-bid conference would reveal whether the issue of change in foreign law was raised at the pre-bid conferences and if so, what was the response. Referring to the letter dated 12.12.2011 written by Managing Director, Tata Power Ltd and Chairman of the petitioner company, the representative of PSPCL submitted that it is the understanding of the petitioner that the benefit of change of domestic law is available in case of Sasan UMPP which operates on domestic coal, but the benefit of change of foreign law had not been extended to Mundra UMPP which was to operate on imported coal. He submitted that when the Managing Director of Tata Power Ltd himself admitted that benefit of change of foreign law was not available under the PPA dated 22.4.2007, there was no scope for extending the benefit at this stage. The representative of PSPCL further submitted that the petitioner has exaggerated the issue of escalation of price of coal. He submitted that between the bid date and date of hearing of the petition, cumulative escalation using the bid evaluation escalation rate was 220% as against the actual increase of 153%. He submitted that six monthly escalation rate notified by the Commission is applicable for charging the tariff. He further submitted that on account of lead and lag effect during the life cycle of 25 years of the PPA, the escalation may get neutralized. He further submitted that the financial impact of the project should not be seen as restricted to Mundra UMPP, but should be seen on a holistic basis for

Tata Power Ltd., as a company. He further submitted that the 93rd Annual Report of Tata Power Ltd. for 2012 shows that the company is in a comfortable financial position and is poised to improve over a period of time and therefore there is no need for asking revision in tariff.

35. The representative of Prayas submitted that Clause 17.1 of the PPA made it clear that the governing law was the Indian law and therefore to read the change in price of coal on account of change of Indonesian law under the 'change in law' clause would be misleading. The representative of Prayas further submitted that the petitioner is trying to construe the definition of 'change in law' not intended under the PPA. The increase in price of coal was on account of market dynamics based on the demand and supply and was not a phenomenon covered under the 'change in law' clause.

As regards the force majeure, the representative of Prayas submitted that as per the Bidding Guidelines, the fuel price and choice of sourcing of fuel are completely at the bidder's discretion. The force majeure clause expressly excludes fuel price change and fuel availability. The representative of Prayas submitted that the force majeure clause in the PPA made it categorically clear that only an unforeseen, uncontrollable event which materially and significantly affects the project is covered under the force majeure clause. Therefore, non-availability of project on account of variation of fuel price by interaction of market forces of demand and supply is not envisaged to be a force majeure under any circumstances. As regards the tariff under section 79 of the Act, representative of Prayas

submitted that the Electricity Act, 2003 does not envisage that tariff being discovered through a transparent competitive process is to be re-determined on account of financial issues raised by project developer.

Analysis and Decision

36. We have very carefully considered the rival submissions. The main issues that arise for our consideration is whether the promulgation and coming into effect of Indonesian Regulations and non-availability of domestic coal linkage have resulted in a situation where the project of the petitioner has become commercially unviable, making it impossible for the petitioner to supply power to the respondents at the tariff agreed in the PPA. If the answer to this question is in the positive, we have to consider whether the case of the petitioner falls under '*force majeure*' or 'change in law' for the purpose of granting relief to the petitioner under the provisions of the PPA dated 22.4.2007. Alternatively, whether the Commission has power under the Act and the National Electricity Policy and tariff policy to grant relief to the petitioner without revisiting the tariff agreed in the PPA. We shall deal with the issues in the succeeding paragraphs.

Impact of Indonesian Regulations on tariff agreed in the PPA

37. On 23.9.2010, Minister of Energy and Mineral Resources, Republic of Indonesia promulgated "Regulation of Ministry of Energy

and Mineral Resources No.17 of 2010" (hereinafter referred to as "Indonesian Regulations). Article 2 of the Indonesian Regulations provides that the holders of the mining permits and special mining permits for production and operation of mineral and coal mines shall be obliged to sell the minerals and coals by referring to the benchmark price either for domestic sales or exports, including to its affiliated business entities. As per Article 11 of the Indonesian Regulations, the Director General on behalf of the Minister shall set a benchmark price of coal on monthly basis based on a formula that refers to the average price index of coal in accordance with the market mechanism and/or in accordance with the prices generally accepted in the international market. The Indonesian Regulations recognizes direct sale contract (spot) and term sale contract (long term) which have been signed by the holders of mining permits and special mining permits and further provides that the existing direct sale contracts and term sales contracts shall adjust to the regulations within a period not later than 6 months and 12 months respectively. In case of violation, the holders of mining permits and special mining permits are liable for administrative sanction in the form of written warning, temporary suspension of sales or revocation of mining operations permits.

38. As per the bid documents, Mundra UMPP was conceived under Case 2 bidding to be executed on the basis of imported coal. The petitioner was required to quote as per the format given in Annexure 1 of the RfP. The petitioner had the option to quote the bids under separate heads namely, Quoted Non-Escalable Capacity Charges, Quoted Escalable Capacity Charges, Quoted Non-Escalable Fuel Energy Charges, Quoted Escalable Fuel Energy Charges, Quoted Non-Escalable Transportation Energy Charges, Quoted Escalable Transportation Energy Charges, Quoted Non-Escalable Fuel Handling energy Charges, Quoted Escalable Fuel Handling energy Charges. The petitioner had submitted the bids as under:

TATA POWER COMPANY LIMITED										
Contract year	Commencement date of contract year	End date of contract year	Quoted non-escalable capacity charges (₹/kWh)	Quoted escalable capacity charges (₹/kWh)	Quoted non-escalable fuel energy charges (US$/kWh)	Quoted escalable fuel energy charges (US$/kWh)	Quoted non-escapable transportation energy charges (US$/kWh)	Quoted escapable transportation energy charges (US$/kWh)	Quoted non-escalable fuel handling energy charges (₹/kWh)	Quoted escalable fuel handling energy charges (₹/kWh)
1	27-Jun-12	31-Mar	0.872	0.033	0.00705	0.00585	0.00285	0.00109	0.042	0.046
2	1-Apr	31-Mar	0.870	Same as above	0.00707	Same as above	0.00284	Same as above	0.046	Same as above
3	1-Apr	31- Mar	0.868	Same as above	0.00707	Same as above	0.00284	Same as above	0.048	Same as above
4	1-Apr	31- Mar	0.866	Same as above	0.00707	Same as above	0.00284	Same as above	0.047	Same as above
5	1-Apr	31- Mar	0.864	Same as above	0.00707	Same as above	0.00284	Same as above	0.051	Same as above
6	1-Apr	31- Mar	0.862	Same as above	0.00707	Same as above	0.00284	Same as above	0.051	Same as above
7	1-Apr	31- Mar	0.859	Same as above	0.00707	Same as above	0.00285	Same as above	0.051	Same as above
8	1-Apr	31- Mar	0.857	Same as above	0.00707	Same as above	0.00284	Same as above	0.056	Same as above
9	1-Apr	31- Mar	0.854	Same as above	0.00707	Same as above	0.00284	Same as above	0.055	Same as above
10	1-Apr	31- Mar	0.852	Same as above	0.00707	Same as above	0.00284	Same as above	0.055	Same as above
11	1-Apr	31- Mar	0.849	Same as above	0.00707	Same as above	0.00284	Same as above	0.060	Same as above
12	1-Apr	31- Mar	0.846	Same as above	0.00711	Same as above	0.00286	Same as above	0.060	Same as above
13	1-Apr	31- Mar	0.842	Same as above	0.00714	Same as above	0.00287	Same as above	0.059	Same as above
14	1-Apr	31- Mar	0.839	Same as above	0.00714	Same as above	0.00287	Same as above	0.065	Same as above
15	1-Apr	31- Mar	0.836	Same as above	0.00714	Same as above	0.00287	Same as above	0.065	Same as above
16	1-Apr	31- Mar	0.832	Same as	0.00714	Same as	0.00288	Same as	0.063	Same as

				above		above		above		above
17	1-Apr	31- Mar	0.828	Same as above	0.00714	Same as above	0.00287	Same as above	0.071	Same as above
18	1-Apr	31- Mar	0.824	Same as above	0.00714	Same as above	0.00287	Same as above	0.069	Same as above
19	1-Apr	31- Mar	0.819	Same as above	0.00714	Same as above	0.00287	Same as above	0.067	Same as above
20	1-Apr	31- Mar	0.550	Same as above	0.00714	Same as above	0.00287	Same as above	0.076	Same as above
21	1-Apr	31- Mar	0.545	Same as above	0.00714	Same as above	0.00287	Same as above	0.074	Same as above
22	1-Apr	31- Mar	0.540	Same as above	0.00719	Same as above	0.00289	Same as above	0.072	Same as above
23	1-Apr	31- Mar	0.534	Same as above	0.00721	Same as above	0.00290	Same as above	0.082	Same as above
24	1-Apr	31- Mar	0.529	Same as above	0.00721	Same as above	0.00290	Same as above	0.079	Same as above
25	1-Apr	31- Mar	0.523	Same as above	0.00721	Same as above	0.00290	Same as above	0.076	Same as above
26	1-Apr	25th anniversary of the scheduled COD of the first unit	0.516	Same as above	0.00723	Same as above	0.00291	Same as above	0.088	Same as above

The petitioner's bid was found to be lowest having a levelised tariff of ₹2.26367/kWh and the petitioner was awarded the project. The petitioner has quoted 55% of the Fuel Energy Charge as non-escalable and 45% of the Fuel energy Charge as escalable. The petitioner has submitted that it made arrangement for imported coal on similar terms, namely, 55% non-escalable and 45% escalable in terms of the Coal Supply Agreements dated 31.10.2008 between CGPL and IndoCoal.

39. In so far as the fuel linkage is concerned, the holding company of petitioner, Tata Power Limited, is stated to have invested in two coal mines in Indonesia and acquired 30% stake in each mine whereas the remaining 70% equity is owned by Bumi Resources, Indonesia. Tata Power has also entered into a Coal Sales Agreement

with IndoCoal Resources (Cayman) Limited on 30.3.2007 for purchase of 10.11 MMTPA (+/-20%) for use by its three generating facilities namely, Trombay {0.75 MMTPA(+/-20%)}, Mundra {5.85 MMTPA (+/-20%)} and Coastal in Maharashtra {3.51MMTPA (+/-20%)}. The Mundra UMPP generating station of the petitioner requires approximately 12 MMTPA of coal. After the coal arrangement with IndoCoal for 5.85 MMTPA, the petitioner had a requirement of 6.15 MMTPA for which the petitioner entered into an agreement with Tata Power Limited. On 31.10.2008, a Coal Sales Agreement was entered between the petitioner and IndoCoal for supply of 5.85 MMTPA (+/-20%) as per the following coal price:

(a) 55% of the contracted quantity i.e. 3.28 MMTPA @ USD 32/MT with a nominal escalation of 2.5% per annum for five years after one year of commissioning of the first unit.

(b) 45% of the contracted quantity i.e. 2.63 MMT @ USD 34.15/MT escalating per month or pro rata for the part of the month as per escalation rate notified by this Commission.

On the same date 31.10.2008, Tata Power entered into Coal Sales Agreement with IndoCoal for supply of 3.51 MMTPA for its Coastal Maharashtra plant. By an Assignment and Restatement Agreement dated 28.3.2011, the Tata Power assigned the said quantity of coal earlier meant for Maharashtra plant for the Mundra Project. The petitioner has notified the lead procurer as regards the fulfilment of

conditions subsequent by the petitioner in terms of Article 3.1.2 of the PPA vide its letter dated 22.11.2011 and GUVNL as the lead procurer has confirmed compliance of the condition by the petitioner vide its letter dated 7.3.2012.

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40. The petitioner has submitted that the project requires 11.22 MMTPA of imported coal with GCV of 5350 kcal/kg. The petitioner has submitted the financial impact of the Indonesian Regulations on the existing Coal Supply Agreements in the petition as under:

"45. The coming into effect of the Indonesian Regulation has dramatically exacerbated the fuel supply and pricing situation for Mundra UMPP by mandatorily overriding the price advantage and substituting it by international benchmark prices.

46. As already stated hereinabove, the Project requires approximately 11 million tonnes of coal per annum as fuel. The bid of the Petitioner was premised on following basis:-

(a) 55% (approx. 6 MTPA) on fixed price/low escalation basis.

(b) 45% (approx. 5 MTPA) on escalations linked to market price.

47. Out of the fixed portion of approximately 6MMTPA, the petitioner managed to secure a contract of 3.22 MTPA, at the price of USD 32 per tonne (compared to the market price of USD 74 per tonne as on june 2012) escalable at 2.5% per annum. Thus, the petitioner was exposed to only 2.78 MTPA. The petitioner also managed to negotiate steep discount of approximately 24% to the market price at the time of entering into the contract on the entire 11 MTPA of coal. This could be made possible due to the following reasons:-

(a) The off-take quantity covered a substantial part of the mine production.

(b) The assuarance and reputation of TATA group as a counter party.

(c) Prevailing discount for such large volumes and long term supply.

However, after the promulgation of Indonesian regulations, not only did the

petitioner loose the benefits of the lower rate of USD 32 per tonne on the 3.22 MTPA of coal but it also lost the benefit of volume discount on the entire 11 MTPA of coal.

48.The impact of the said change on the existing coal contract owing to the Indonesian Regulations works out to an enhancement of coal price by ₹1113 crore (June 2012 reference rate) per annum. The Financial Impact of the Indonesian Regulations is tabulated and explained as under:-

Tabulated Chart No.2

	Qty MT	Price as per contract	Current Market Price	Difference	Impact	Impact
	MT	$/MT	$/MT	$/MT	$/MMT	Rs in Crores
	A	B	C	D	E	F
Indo Coal Contract(55%)	**3.22**	**32.00**	**74**	**(42)**	**(135)**	**(729)**
Indo Coal Contract(45%)	**2.63**	**66.00**	**74.00**	**(8.00)**	**(21)**	**(113)**
IndoCoal Contract +/-20% option	**1.17**	**66.00**	**74.00**	**(8.00)**	**(9.00)**	**(49)**
Coastal Maharashtra Contract assigned	**4.20**	**66.00**	**74.00**	**(8.00)**	**(34)**	**(184)**
Total (Contracted Quantity/Weighted average)	**11.22**	**56.00**	**74.00**	**(18.00)**	**(199)**	**(1,075)**
Insurance (assumed at 1.60%)	**1.60%**				**(3)**	**(16)**
Tax	**2.16%**				**(4)**	**(22)**
Total Coal FoB impact					**(206)**	**(1,113)**

(a) Contracted Quantity and Price (Refer to Column A & B above):
Coal Sales Agreement dated 27.10.2008 entered into by Petitioner with IndoCoal CCSA'):-

(i) Total Quantity 5.85 MMT (+/- 20%)

(ii) Price of Coal under the CSA

(1) Under the CSA price of 55% (of 5.85 MMT which is 3.22 MMT) is fixed at USD 32 per MT fixed (to be escalated at 2.5% upto 5 years and thereafter at the same price of 45% mentioned below)

(2) Under the CSA price for 45% (approximately 2.63 MMT) is fixed at USD 34.15 per MT to be escalated as per CERC index from the date of Contract. As on

30.06.2012 this works out to USD 66 per metric tonne.

(3) Additional 20% of 5.85 MMT which is 1.17 MMT is contracted at -same price of 45% portion i.e. escalable at per CERC Index.

(b) Assignment and Restatement Agreement dated March 2011 executed between Indo Coal, Supplier; Tata Power and the Petitioner
for assigning and restating the Coal Sales Agreement dated 31.10.2008
('Assigned Coal Agreement'):-

(i) Total Quantity 3.51 (+/- 20%) for Mundra UMPP

(ii) Price of Coal under the Assigned Coal Agreement:-

(1)For 3.51 MMT price is fixed at USD 34.15 to be escalated as per CERC index from the date of Contract (As on 30.06.2012 after applying the CERC Index* works out to USD 66/mt)*

(2) For 0.69 MMT (+-20% of 3.51 MMT) - USD 34.15 to be escalated as per CERC index from the date of Contract (As on 30.06.2012 after applying the CERC index" works out to USD 66/MT)*

Escalation Index is worked out as under:

(i) Coal FOB Price at the time of Bid (08.12.2006): USD 49.79/tonne

(ii) Coat FOB Price as per Indonesian HBA price for June 2012: USD 96.65/tonne

(Hi) Escalation as on June 2012 (ii/i): 194% or 1.94 times.

Explanatory note on above escalation calculation: CERC escalation Index for Imported Coal Payment as on June 2012 works out be 253.8% or 2.54 times, but this Index has a lead/lag effect of Coat Market Price. The escalation index is based on previous 12 months coal benchmark index

prices i.e. March 2011 to February 2012, hence may not necessarily represent Current Coal Prices. For ease of understanding the lead tag effect caused by the time lag between the current market prices and inclusion of the same in the CERC index subsequently has been ignored and in the above illustration it is assumed that the CERC index is based on the current market price of the coal.

(c) *Current market price (Refer Column 'C' in Tabulated Chart No.2): The Indonesian Coal Price Index **('HBA Price')** as on June 2012 for bench mark coal is USD 96.65 & 5,400 CV coal USD 75.14, for 5350 CV it works out USD 74.44 (which includes a market discount of 9% approx)].*

(d) *Increase in coal price (Refer Column 'D' 'E' and 'F' in tabulated Chart No.2): Out of total coal quantity of 11.22 MTPA, price has increased by USD 42 per tonne is increased coal price on 3.22 MTPA and on the balance quantity, the increase is USD 8 per tonne. The annual impact due to change in Indonesian Regulation is USD 206 million per annum and equivalent Indian rupees is ₹1113 crores per annum."*

41. The petitioner has also explained the cumulative impact of escalation of coal price in the international market and on account of Indonesian Regulations as under:

"51. The petitioner submits that the unprecedented and unforeseeable escalation in the price of coal has resulted in a situation where the project has become commercially impossible. The annual cumulative impact of the rise in the international coal prices on the Project is tabulated and explained below:

Tabulated Chart No.3

		Qty MMT	Price considered in bid	Current price	Difference		FX rate	Annual loss Rs Crs
					$/tonne	$ mio		
A	B	C	D	E	F	G	H	I
Coal quantity		11.22						
Fixed 55%	55%	6.17	30.00	74.00	44	271.00	54.00	(1,463.00)
Escalable 45%	45%	5.05	59.00	74.00	15.00	76.00	54.00	(410.00)
Total			43.24	74.44	31.00	347.00		(1873.00)
Add: Insurance and taxes			3.00	3.00	0.00	(0.00)	0.00	(0.00)
Total						(347.00)		(1873.00)

42. The respondents in their Written submission have submitted that Tata Power consciously decided to bid 45% of the Energy Charges as escalable and the remaining 55% as non-escalable thus taking the risk and reward of market fluctuations to the Petitioner's account to the extent of 55 percent. The submission of respondent is extracted as under:

> "12. The claim of the Petitioner is that it is being subjected to huge losses on account of the increase in coal price need to be considered in the light of the fact that the Promoter of the Petitioner had submitted the bid with 45% escalable Fuel Energy Charges and 55% as non-escalable Fuel Energy Charges. The Petitioner has given the following characteristics of the fuel to be used in the written submissions now filed such as Station Heat Rate, Auxiliary Consumption etc.

Contracted capacity	MW	3800
Annual Generation	MUs	33288
SHR	Kcal/KwH	2050 (as per page 240 of written submissions)
Aux	Percentage	4.75% (as per page 240 of written submissions)
GCV	Kcal/Kg	5350
Sp. Fuel consumption	Kg/KwH	0.399
Annual Fuel consumption	Million Tonnes	13.27
Monthly Fuel consumption	Million Tonnes	1.11

> The Petitioner was required to give the Guaranteed Performance Parameters of the Equipment Manufacturers particularly in regard to Station Heat Rate, Auxiliary Consumption, Boiler Efficiency etc to enable proper calculation of the quantum of coal that would be required to generate the electricity in a prudent and efficient manner. Despite assuring the Hon'ble Commission during the course of hearing that they would give such particulars, the Petitioner has so far not given the above particulars supported by the documents evidencing the Guaranteed Performance given by the Equipment Manufacturers. In the absence of the above, and only for the purpose of calculation the Respondents have proceeded on the above parameters, without admitting that the above are parameters to be taken into account.
>
> Though Gross Calorific Value of coal to be used has been given as 5400 Kcal/Kg, the statement in the written submissions is that the Petitioner can use coal of much lesser GCV, namely, 4900 instead of 5350 and further the Petitioner is experimenting further to use much lower GCV coal.
>
> As mentioned above, the Petitioner had voluntarily bid for 55% as non-escalable Fuel Energy Charges though the Petitioner had an opportunity to bid for the entire 100% as escalable Fuel Energy Charges. This was a

business decision on the part of the Petitioner to make the bid competitive and to edge out others in the bidding process.

13. The coal cost on the basis of the above mentioned parameters determined as per the following formula would indicate that the Petitioner would save substantial amount, if the Petitioner had quoted for 100% as escalable Fuel Energy Charges. The formula is as under:

Formula

Coal cost (Rs/Kg)= V.C. x GCV x (1 -Aux)/Gross SHR at Generator Terminals.

The calculation for the month of July 2012 i.e. at the time of filing of the above Petition is as under:

Month (Supply of power by CGPL)	Jul-12
Station Heat Rate at Generator Terminal in Kcal/kWh	2050
Auxiliary consumption in percentage	4.75%
GCV of coal in Kcal/Kg. (Assumed)	5400
Exchange Rate considered for billing purpose in ₹/US	55.025
Escalable Fuel Energy charge claimed by CGPL from Procurers in ₹/Kwh	0.7984
Non-escalable Fuel Energy charge claimed by CGPL from Procurers in ₹/Kwh	0.3890
Total Fuel energy charge claimed by CGPL in ₹/Kwh	1.1874
Worked out Fuel cost in US $ / MT (as per above formula)	54.14
HBA marker notified by Indonesia Authority in US $ / MT	68.60
Assuming CGPL had bidded with 100% escalation then total fuel energy charge they could have claimed	1.77
Corresponding worked out Fuel cost in US $ per MT (as per formula)	80.90
Margin available in fuel cost if bid was with 100% escalation in US $ per MT	12.30
Savings in Million US $ per month	13.60
Savings in ₹ Crores per month	74.84

The calculation for the period from April 2012 to January 2013 is attached hereto as Annexure 1.

14. If the GCV of the coal to be used is lesser than 5350 k cal say 4900 k cal or even less, the savings will be much larger. In this regard it is relevant to note that the lower GCV coal cost is lesser not proportionately to higher GCV Coal cost and in fact, the difference is much more than being

proportionate. It is, therefore, not correct to calculate coal cost of 5350 Kcal GCV Coal by taking 6322 Kcal GCV coal and calculating the price proportionately or similarly 4900 Kcal coal proportionately from the price of 6322 Kcal GCV or 5350 Kcal GCV Coal."

43. From the above submissions, it prima facie emerges that the respondents indirectly acknowledge that because the petitioner has quoted 55% fuel energy cost as non-escalable, it is suffering losses on account of the Indonesian Regulations. The Commission does not intend at this stage to go into the detailed calculations of energy charges as submitted by the parties since the purpose is to find out whether prima facie there is any merit in the claim of the petitioner for enhanced tariff on account of import of coal from Indonesia at benchmark international price. For this purpose, it will suffice if we compare the landed cost of coal as on the date of the bid as per the Coal based on which coal is being supplied and the prevailing market price of coal since the promulgation of the Indonesian Regulation. For this purpose the following data available in the public domain (Source : http://www.djmbp.esdm.go.id) have been considered:

(USD/MT)

Month	HBA (USD ton) 6322 kcal/kg	Melawan Coal 5400 kcal/ kg (gar)	Envirocoal 5000 kcal/ kg (gar)
	2013		
Mar 2013	90.09	70.42	65.63
Feb 2013	88.35	69.17	64.52
Jan 2013	87.55	68.60	64.02
Rata 2	88.66	69.40	64.72
	2012		
Dec 2012	81.75	64.42	60.33
Nov 2012	81.44	64.20	60.13
Oct 2012	86.04	67.51	63.05
Sep 2012	86.21	67.63	63.16
Aug 2012	84.65	66.51	62.17
July 2012	87.56	68.60	64.02
June 2012	96.65	75.14	69.80

May 2012	102.12	79.08	73.28
Apr 2012	105.61	81.59	75.50
Mar 2012	112.87	86.81	80.12
Feb 2012	111.58	85.89	79.30
Jan 2012	109.29	84.24	77.84
Rata 2	95.48	74.30	69.06
2011			
Dec 2011	112.67	86.67	79.99
Nov 2011	116.65	89.53	82.53
Oct 2011	119.24	91.40	84.17
Sep 2011	116.26	89.25	82.28
Aug 2011	117.21	89.94	82.88
July 2011	118.24	90.68	83.54
June 2011	119.03	91.25	84.04
May 2011	117.61	90.22	83.14
Apr 2011	122.02	93.40	85.94
Mar 2011	122.43	92.29	84.12
Feb 2011	127.05	95.62	87.06
Jan 2011	112.40	85.08	77.74
Rata 2	118.40	90.93	83.61
2010			
Dec 2010	103.41	78.61	72.02
Nov 2010	95.51	72.92	67.00
Oct 2010	92.68	70.89	65.20
Sep 2010	90.05	68.99	63.53
Aug 2010	94.86	72.46	66.59
July 2010	96.65	73.74	67.72
June 2010	97.22	74.16	68.09
May 2010	92.07	70.45	64.81
Apr 2010	86.58	66.50	61.32
Mar 2010	86.64	66.54	61.36
Feb 2010	87.81	67.44	62.15
Jan 2010	77.39	59.88	55.47
Rata 2	91.74	70.21	64.60

HBA: Harga Batubara Acuan (Official benchmark price of Indonesia)

44. It is to be noted that coal was sold at the spot price of around USD 45/MT in the year 2007 in the Indonesian Market as submitted by the petitioner. No indexing of coal price was available in Indonesia at that point of time. In the absence of indexed coal price, it can be assumed that the then prevailing market price in Indonesian market in 2007 was about USD 45/MT. As against the then prevailing market price, the petitioner had arranged coal at the discounted price of around USD 32/MT and below which is evident from the coal price

agreement between petitioner and indoCoal. The agreements were for a period of 20 years with a provision for escalation as under:

> "For Mundra UMPP
>
> In relation to each shipment:
>
> (1) 55% of such shipment: $32/T until the first anniversary of the Commercial Operation date of the first Unit, and thereafter, escalating (pro rata for the part of the month) at 2.5% per annum for the next five(5) years. Thereafter the Coal Price will be the same as the 45% portion referred to in the following paragraph(2).
> (2) 45% of such shipment: $34.15/T, escalating per month or pro rata for part of the month as per CERC escalation rate as notified by CERC.
>
> For Coastal
>
> $ 34.15/T escalating per month or pro rata for part of the month as per CERC escalation rate as notified by CERC."

The coal meant for Coastal was subsequently diverted for the CGPL vide the assignment and Restatement agreement dated 28.3.2011. It is noticed that the petitioner has factored in the CERC escalation rate upto 45% of the coal sourced by it as the petitioner has quoted about 45% of the fuel charge under escalable head. It goes without saying that the agreement of the petitioner to source coal @ USD 32/MT has gone into the calculation of low tariff quoted in the bid which was the prevailing economics at that point of time. After promulgation the Indonesian Regulations w.e.f. 23.9.2010, all terms supply contracts are to be adjusted to the benchmark index prices within 23.9.2011. It may be seen from the data in Para 43 above that FOB price of coal from Indonesia in September 2011 was USD 89.25/MT for 5400 kcal/kg. However, since May 2012, the price of coal has been declining and in March 2013, the FOB price of coal is USD 70.42/MT

for GCV 5400 kcal/kg. It has been argued that on account of escalation of coal prices subsequent to Indonesian Regulations, the petitioner should arrange coal from alternative international sources. As regards the possibility of arranging coal from alternative sources in international market, it is noted that apart from Indonesia, South Africa and Australia are the largest exporters of coal. However, the FOB prices of coal from API-4 (South Africa) and Global Coal (Australia) as on 1.3.2013 are USD 84.77/MT and USD 94.46/MT for GCV 5400 kcal/kg respectively (Source: http://www.djmbp.esdm.go.id). As per the Coal Sales Agreements placed on record, the petitioner is depending upon the coal from Indonesia for meeting the entire fuel requirement of the Mundra UMPP. In our view, *prima facie,* the petitioner is adversely hit by the operation of Indonesian Regulations.

45. From the above analysis, we have come to the conclusion that the promulgation of Indonesian Regulations which required the sale price of coal in Indonesia to be aligned with the international benchmark price has, *prima facie,* altered the premise on which the energy charges were quoted by the petitioner in its bid. No doubt, the petitioner had taken huge risk by quoting 55% of the energy charges under non-escalable head as a result of which the benefits of escalation index are not available to the petitioner. Though the

petitioner had quoted non-escalable energy charges to keep the bid price low, it was however factored on the basis of the then prevailing coal price for import from Indonesia. The petitioner has subsequently entered into Coal Sales Agreements for supply of coal @ USD 32/MT. Moreover, quotation of low bid price was in the interest of the consumers as the power would be available at the levelized tariff of ₹2.26367/kWh to the respondents. The petitioner would have continued to supply power at this price, had the Indonesian Regulations not made it mandatory for sale of coal from Indonesia at international bench-mark prices. Therefore, the competitive advantage of hedging in coal prices that the petitioner was enjoying by acquiring mining rights in Indonesia or by entering into long term contract with the coal suppliers in Indonesia appears to have been fundamentally altered/wiped out, after the coal sales are required to be aligned with international benchmark prices of coal. It is pertinent to note that the coal price in the international market is fluctuating. Therefore, the exact impact of the Indonesian Regulations will vary from time to time. We are also aware that other sources of imported coal are presently costlier than the Indonesian coal and it would not serve any purpose to say that the petitioner has got other viable options to source imported coal.

46. In the recent past, there has been wide variation in the availability and the price of fuel, which has seriously affected the power sector development. In recognition of the problem, Ministry of Power Government of India has initiated the process for revision of the Model Power Purchase Agreements (MPPA) for competitive bidding. The summary of the Model Power Purchase Agreement emphasizes that "so far as fuel charge is concerned, the MPPA makes it a pass through, subject to appropriate safeguards, which would address a major risk faced by the power producers due to uncertainty relating to fuel prices over the medium term and long term". The MMPA further explains that "since the risks of variation in fuel price cannot normally be managed by the concessionaire, it must be passed on to the Utility, which in turn, will have to reflect it in the distribution tariff. Since pass through of the fuel charge affords full protection to the concessionaire against potential losses on account of price rise in fuel prices, it follows that the benefits of reduced or concessional fuel prices cannot be retained by the concessionaire. As a result, Fuel Charge cannot be profit centre for the concessionaire and the principles for determination of Fuel Charge must ensure that costs are recovered on the basis of actual, assuming that the concessionaire would function with the efficiency expected of a prudent and diligent operator". The Summary of MPPA further goes on to explain that "when the imported coal is to be used, reliance

should be placed on pre-selected coal indices used widely in international supplies of coal, but always subject to the actual cost incurred by the concessionaire.” We have relied upon this document with the limited purpose of driving home the point that the prevailing Standard Bidding Documents which basically postulates that it is the exclusive responsibility of the project developer to decide the type, source and price of fuel and factor it as per its assumptions in the bid, have been adopted over the past six years by the distribution companies for selecting the power producers for supply of power. Based on the experience gained and due to the uncertainty in the coal availability in the domestic market and volatility of coal price in both domestic and international market, the Ministry of Power has proposed to change the concept of fuel being the exclusive responsibility of the project developer to fuel being made a pass through. In other words, the model in the existing Standard Bidding Documents has not delivered the results as was expected on account of development of factors which were not in the contemplation of policy makers while making the SBDs. We are conscious that the MPPA is still in the discussion/approval stage and after its notification by the Ministry of Power under section 63 of the Act, it will be applicable prospectively. However, the point which should not be lost sight of is that unless the concerns of the project developer to factor in the volatility in the fuel price are taken care of, the viability of the

project will be jeopardized which will affect interests of the project developers and the buyers. The impact of price volatility of coal is also being felt in the competitive bidding being undertaken now. The bidders are quoting price by factoring in extra risk factors which jack up the bid prices. The levelized tariffs discovered at present in the bids invited by the distribution companies in various States are on the higher side and range from ₹3.50/kWh to as high as ₹7.00/kWh. It is understood that the recent bid invited by Uttar Pradesh Power Corporation Limited (UPPCL) under Case-1 (long term), the financial bids opened in December, 2012, reveals that the levelized tariff has been quoted by the bidders in the range of ₹4.4486/kWh to ₹7.100/kWh. Though the tariff in that case is yet to be adopted by UPERC, the trend of bidding also reflects an over-cautious approach on the part of the bidders to factor in perceived risk margins in the bids which is not in the interest of the consumers. This defeats the very purpose of the competitive bidding to provide electricity to the consumers at the best possible prices.

47. The prevailing international market prices of coal, particularly in the countries like Australia and South Africa are on the higher side compared to the coal purchased from Indonesia under bilateral negotiation and the petitioner's coal supply contracts were based such bilateral negotiation. However, promulgation of the Indonesian

Regulations requiring the existing agreements to align with the International benchmark price has created problems regarding project viability of the Mundra UMPP to supply power at the rates agreed to between the parties in the PPA. Therefore, there is an imminent need to find out a practical and acceptable solution to the problem for ensuring supply of power to the consumers at competitive price while seeking to ensure sustainability of the electricity sector.

48. After coming to the conclusion that the petitioner has a *prima facie* case on account of the increase in coal price due to the impact of Indonesian Regulations, we next proceed to examine as to the nature of relief that can be granted to the petitioner to make the project financially viable. The petitioner has prayed for the relief under Article 12 of the PPA regarding *"force majeure",* Article 13 of the PPA regarding "change in law" and regulatory jurisdiction of the Commission under section 79 of the Act. We have examined the claim of the petitioner under these provisions in the succeeding paragraphs.

Force Majeure

49. The provisions regarding Force Majeure under Article 12 of the PPA dated 22.4.2007 is extracted as under:

> "12.3 Force Majeure
> 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 to 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 Utility Practices." (emphasis supplied)

i. Natural Force Majeure Events:

Act of God, including, but not limited to lightening, drought, fire and explosion (to the extent originating from a source external to the Site), earthquake, volcanic eruption, landslide, flood, cyclone,typhoon, tornado, or exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred (100) years,

ii. Non-Natural Force Majeure Events:

1. Direct Non-Natural Force Majeure Events

a) Nationalisation 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 Governmental Instrumentality which is directed against the Project, provided than appropriate court of law declares the revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down.

2. Indirect Non-Natural Force Majeure Events

a) Any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action; or

b) Ratio active contamination or ionizing radiation originating from a source in India or resulting from another Indirect Non Natural Force Majeure Event excluding circumstances where the source or cause of contamination or radiation is brought or has been brought into or near the site by the affected party or those employed or engaged by the affected party; or

c) Industry wide strikes and labour disturbances having a nationwide impact in India.

12.4 Force Majeure Exclusions

Force Majeure shall not include (i) any event or circumstances 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:

b) Delay in the performance of any contractor, sub-contractors or their agents excluding the conditions as mentioned in Article 12.2;

c) Non-performance resulting from normal wear and tear typically experienced in power generation materials and equipment;

d) Strikes or labour disturbances at the facilities of the Affected Party;

e) Insufficiency of finances or funds or the agreement becoming onerous to perform; and

f) Non-performance caused by, or connected with, the Affected Party's:

i. Negligent or intentional acts, errors or omissions;

ii. Failure to comply with an Indian Law; or

iii. Breach of, or default under this Agreement or any Project Documents."

50. The petitioner has submitted that the change in the Indonesian Mining Law through Indonesian Regulations is an event that was completely outside the control of the Petitioner and therefore is an event of Force Majeure within the meaning of Article 12.3 of the PPA in so far as the said event has denied availability of fuel at pre-contracted price to the petitioner as a consequence of which the petitioner is unable to perform its obligations under the PPA. The petitioner has submitted that the definition of Force Majeure in Article 12 is not exhaustive but is inclusive and as such, it is not restricted to the specific events/circumstances mentioned under the said Article. The petitioner has submitted that the expression "include" is a verb which means "to contain as a part of something" and the participle "including" typically indicates a partial list. In this connection, the petitioner

has relied upon the judgement of the Hon'ble Supreme Court in Regional Director, Employees State Insurance Corporation v. High Land Coffee Works of P.F.X Saldanha and sons and another [(1991) 3 SCC 617] wherein it has been held that "the word "include" in a statutory definition is used to enlarge the meaning of the preceding words. The petitioner has further referred to the judgement of the Hon'ble Supreme Court in the South Gujarat Roofing Tiles Manufacturers Association and Anr. v. The State of Gujarat and Another [(1976) 4 SCC 601] where also it has been held that the word "includes" has an extending force, it adds or phrases a meaning, which does not naturally belong to it.

51. The petitioner has submitted that the unforeseen and uncontrollable escalation in coal price as a consequence of the Indonesian Regulation which came into effect much after submission of the Petitioner's bid on 7.12.2006 and signing of the PPA on 22.4.2007 is a force majeure event under the PPA and has made it impossible for the Petitioner to secure coal at agreed contracted rate either from Indonesia or from any other source, and made it commercially impossible for the Petitioner to perform its obligations under the PPA. Moreover, promulgation of Indonesian Regulations is beyond the control of the petitioner and the unforeseeable, unprecedented and uncontrollable increase in coal prices will not be covered by the exclusions carved out under Article 12.4 (a) since the same is a consequence of a force majeure event.

52. GUVNL has agreed that the definition of force majeure under the PPA was an inclusive provision and not limited to the events stipulated

under specific heads such as Natural Force Majeure Events, Direct Non-Natural Force Majeure Events and Indirect Non-Natural Force Majeure Events. GUVNL has submitted that force majeure events cover only such events that 'prevents or delays an affected party in performing its obligations under the PPA'. It has been submitted that the petitioner has not been able to show even remotely how the Indonesian Regulations has prevented or delayed the supply of coal from Indonesia to India. GUVNL has submitted that the fact that petitioner is required to pay market prices for the coal supply cannot be said to be force majeure in general term or making the contract frustrated or impossible under section 56 of the Indian Contract Act, 1872. It has been submitted that Indonesian Regulations neither prevents nor delays the export and supply of coal from Indonesia to India and it aligns the sale price to international market price. As regards the force majeure exclusions, it has been submitted that the petitioner needs to first establish the existence of force majeure within the scope of Article 12.3 and after establishing the same to show that it does not fall under the exclusion provided in Article 12.4. It has been submitted that the petitioner cannot rely upon double negative wordings of Article 12.4 to contend that the said clause independently provides for force majeure events.

53. According to Prayas, the force majeure clause in the PPA makes it categorically clear that only an unforeseen and uncontrollable event which materially and significantly affects the project is covered under the force majeure. Moreover, the force majeure clause expressly excludes fuel price

change and fuel availability from its purview. It has been further submitted that the unavailability of project on account of variation of fuel price by interaction of market forces of demand and supply has not been envisaged to be a force majeure under any circumstances.

54. We have considered the submissions of the parties. The petitioner has submitted that the definition of force majeure is inclusive one which can cover the events not covered under the specific events. The respondent GUVNL has agreed that definition of force majeure is an inclusive one. There is no disagreement that the case of the petitioner is not covered either under Natural Force Majeure events or under Non-Natural Force Majeure events. Therefore, the issue for consideration is whether the promulgation of Indonesian Regulations is an event which wholly or partly prevents or unavoidably delays the petitioner in performance of its obligations under the PPA and if so, whether such an event is not within the reasonable control of the petitioner or could not have been avoided if the petitioner has taken reasonable care or complied with Prudent Utility Practices.

55. A reading of the Indonesian Regulations clearly establishes that there is no prohibition of any nature either wholly or partly on the export of coal from Indonesia or otherwise on the implementation of the Fuel Supply Agreement(s) entered into by the petitioner with the Indonesian Supplier of coal. Therefore, the Indonesian Regulations neither delays nor prevents the performance of the obligations by the petitioner under the PPA. The

Indonesian Regulation has the only effect of matching the coal sale price with the prevalent international market prices for export of coal by the Indonesian companies. The petitioner is finding it difficult to meet the purchase cost of coal as per the international benchmark price since the same cannot be met through the tariff which has an element of 55% of non-escalable fuel energy charges on which the escalation index for payment notified by this Commission is not applicable. Had the petitioner taken reasonable care or followed prudent utility practices by quoting the bid on the basis of international benchmark prices of coal and making it escalable to take care of future escalation, the petitioner would not have been affected by the impact of Indonesian Regulations. Though it was open to the petitioner to quote for Escalable Energy Charges in the bid which would have aligned the bid to market prices but the petitioner decided to quote non escalable fuel charges for 55% of the contacted coal supply.

56. The next question arises whether increase in price of imported fuel is an event of force majeure. Article 12.4 of the PPA clearly provides that changes in cost of fuel cannot be considered as force majeure unless it is a consequence of an event of force majeure. Rise in international price of coal or alignment of Indonesian coal with the benchmark international price cannot be considered as an event of force majeure. Fluctuation in prices is a normal event in free market conditions and cannot be considered as an event of force majeure. In this connection, the following observations of the Hon'ble Supreme Court in M/s Alopi Pershad & Sons Ltd. Vs Union of India {AIR 1960 SC 588} are relevant:

> "The Indian Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. "The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate – a wholly abnormal rise or fall in price, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet, this does not in itself affect the bargain they have made,. If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point – not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because of its true construction it does not apply in that situation,."

The petitioner and the respondents never intended in the PPA that the tariff to be charged will be dependent on the coal price which the petitioner will be required to pay to the Indonesian coal supplier under its Coal Sales Agreements. In fact the responsibility for arrangement of fuel rests with the petitioner only. Therefore, it cannot be said that any consideration of the terms of the PPA between the petitioner and the respondents has changed on account of the promulgation of Indonesian Regulations which changed the bilaterally agreed price to international benchmark price for import of coal. We find force in the argument of the respondents that alignment of the Indonesian coal price with the Indonesian benchmark price has not prevented the petitioner from importing the coal. In our view, Indonesian Regulations or increase in the international price of imported coal is not an event of force majeure and therefore, change in the cost of the fuel imported by the petitioner cannot be covered under the provisions of force majeure.

Change in Law

57. Change in Law has been defined in the PPA as under:

> "**13.1.1** "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:
>
> (i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law or (ii) a change in interpretation of any Law by a Competent Court of law; tribunal or Indian Governmental Instrumentality provided such Court of law, Tribunal or Indian Governmental Instrumentality is the final authority under law for such interpretation; or (iii) change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurers under the terms of this Agreement, or (iv) any change in the (a) Declared value of Land for the Project or (b) the cost of implementation of the resettlement and rehabilitation package of the land for the Project mentioned in the RFP or (c) the cost of implementing Environmental Management Plan for the Power Station mentioned in the RFP, indicated under the RFP and the PPA;
>
> But shall not include (i) any change in law 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.
>
> Provided that if Government of India does not extend the Income Tax holiday for power generation projects under Section 80 IA of the Income Tax Act, upto the Scheduled Commercial Operation Date of the Power Station, such non-extension shall be deemed to be a Change in Law."

58. The petitioner has based its claim under 'change in law' on two counts. Firstly, promulgation of Indonesian Regulations is an event which is covered under Change in Law and its impact should be passed on through tariff. Secondly, change in licence/consent to the mining company is a change in consent for the project and non-supply of the fuel price is because of change in law. Therefore, the main consideration to determine whether the Indonesian Regulations has resulted in Change in Law is to first consider whether the term 'Law' can be interpreted to embrace within its fold law of any other country. 'Law' has been defined in the PPA as under:

> "Law" means, in relation to this Agreement, all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule or any interpretation of any of them by an 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 all rules, regulations, decisions and orders of the Appropriate Commission;"

59. With regard to the submission on change in law, Learned Senior Counsel for the petitioner submitted that the definition of law under the PPA is an inclusive (and not exhaustive) definition. It was further submitted that the definition of law covers 'any law' and is not restricted to Indian law. The term 'law' is required to be interpreted in a contextual basis with a view to give business efficacy to the PPA since the project is based on imported coal and the fuel supply arrangements are a part of the Project Documents. Learned Senior Counsel submitted that the definition of Law must be given a plenary meaning and cannot be read down by confining it to Indian laws. The promulgation Indonesian Regulations led to an unprecedented, uncontrollable and unforeseeable rise in coal prices which constitutes a 'Change in Law' under the PPA. Learned Senior Counsel submitted that the intent of providing a restitutionary mechanism is to put the Affected Party to the same position as if such Change in Law had not occurred and therefore, in terms of Article 13.4 of the PPA, the petitioner should be granted relief for Change in Law on account of Indonesian Regulations.

60. Learned counsel appearing for GUVNL submitted that the provision of Article 13 read with the definition of the terms 'Law' and 'Change in Law' relate to Indian Law and not to any law outside India. The Petitioner's contention that the qualification 'in India' in the definition of law applies only

to Electricity Law and not to all Laws is not correct. The term ‘Electricity Law’ is a defined term which includes not only the statutes but also various other aspects namely, Rules, Regulations and any other Law pertaining to electricity including Regulations framed by the Appropriate Commission. The Electricity Laws can also be replaced from time to time. It is in that context that the term ‘Electricity Laws’ has been incorporated specifically. Learned counsel submitted that law as defined in the PPA applies to all Laws in force in India including Electricity Laws. Learned counsel further submitted that Article 13.1.1 of the PPA deals with the changes in the interpretation of any law by a competent court of law, Tribunal or Indian Government instrumentality. All these refer to India only. The scheme of both the definition of 'law' and Article 13 clearly is with reference to India only. Learned counsel submitted that the laws of Indonesia cannot be part of the definition of 'Law' in the PPA as the bidding documents cannot be possibly concerned with the laws all over the world. It would lead to impossibility of implementation.

61. The representative of Prayas argued that the plea of change in law clause in the PPA was not tenable because Clause 17.1 of the PPA made it clear that the governing law was the Indian law and To read the change in price of coal on account of change of Indonesian law under the ‘change in law’ clause would be misleading.

62. We have considered the submission of the parties. In our view, "all laws" would refer to the laws of India, which includes Electricity Laws. An

examination of the various provisions of the PPA shows that only Indian Laws are applicable. Moreover, the term governing laws has been defined in the PPA as the laws of India. If the term "all laws" is interpreted as to include the foreign law, it will lead to absurd results as any change in foreign law would be given effect to which would result in the changes in the rights and liabilities of the parties under the contract. In our view, if any foreign law is to be made applicable, it should be specifically provided for in the contract. For example, in some international contracts, the adjudication of the dispute is conferred on the courts of a third country. In the absence of any provision in the PPA that the change in law of the fuel exporting country would have to be given effect to as change in law under the PPA, change in the Indonesian Regulations cannot be considered as change in law.

Section 79 of the Act (Relief under regulatory power of the Commission)

63. Learned Senior Counsel for the Petitioner submitted that without prejudice to the reliefs available under the PPA, if a project has lost its viability and it has become commercially impossible for a party to perform its obligations under the contract, it can approach this Hon'ble Commission under Section 79(1)(b) of the Act requesting the Commission to revisit/restructure the tariff in a manner which makes the project viable in view of its wide powers to 'regulate' under Section 79(1)(b) of the Act. Learned Senior counsel submitted that Hon'ble Supreme Court in a catena of judgments has given a broad and wide interpretation to the term 'regulate' to mean to control, adjust, govern, or direct by rule or regulation,

to subject to guidance or restrictions, to adapt to circumstances or surroundings including ensuring payment and fixation of fair price.

64. In context of the powers of the Commission to regulate tariff under Section 79(1)(b) of the Act, Learned Senior Counsel for the Petitioner submitted that whether tariff is adopted under Section 63 of the Act or determined under Section 62 of the Act, the principles enshrined under Section 61 of the Act will apply in both the cases. In this regard, reliance was placed upon judgment dated 31.05.2012 passed by the Appellate Tribunal for Electricity in Appeal No. 29 of 2011 titled as Tarini Infrastructure Ltd. vs. Gujarat Urja Vikas Nigam Ltd and judgment dated 16.11.2011 passed in Essar Power Limited v. UPERC in Appeal No.82 of 2011 [2012 ELR (APTEL) 0182].

65. As regards the relief in exercise of the regulatory power of the Commission, the petitioner in its written submissions has mainly submitted as under:

(a) The regulatory jurisdiction entrusted to the Commission under the Act cannot be abridged, reduced or taken away by a contract.

(b) Section 63 is only an exception to Section 62 and not to Section 61 or Section 79 of the Act.

(c) Section 63 does not eclipse or take away the 'regulatory' powers of the Central Commission under Sections 79(1)(b) and (f), which power is cast as an obligatory function to be exercised to attain the objectives of the Act and the principles envisaged in Section 61 of the Act. The

regulatory jurisdiction is not excluded for the entire life cycle of a generating company covered by Section 63. On the contrary, Section 79(1)(b) and (f) are independent of Sections 62 and 63, and the ambit of Section 79(1)(b) is wider. The phrase "regulate" used in Section 79(1)(b) is comprehensive and extends to change or revision of the tariff or correction of the tariff which may include tariff adopted under Section 63 or determine under Section 62. Once the conditions of Section 79(1)(b) i.e. generating company not owned or controlled by the Central Government enters into a composite scheme for generation and sale of electricity in more than one state is satisfied, the Commission is obliged to revise and/or correct the tariff keeping mind the salutary objective in Section 61 of the Act, if the need so arises.

(d) To mitigate the situation and salvage the investment is neither determination of tariff under Section 62 nor adoption of tariff under Section 63. Such an exercise falls within the ambit of regulation of the tariff under Section 79 of the Act.

(e) In the facts and circumstances in the present case, once the contract becomes commercially impracticable for implementation under Section 56 the Contract Act, 1872 or on account of Force Majeure circumstances, the same become unenforceable in law.

(f) With the stated objectives of the Electricity Act read with the National Electricity Policy and Tariff Policy to ensure financial viability of the sector, if the circumstances demand, necessary interventions must be made by the various authorities to achieve this object while balancing the interest of consumers as well as generators. The same object and

purpose underlies the PPA which talk about debt service and payment to restore the same economic conditions. The Contract/PPA was issued with the intention of attracting private investment and ensuring the financial health of the power producers. Any circumstance, such as the Subsequent Events in the present case, which have the effect of negating this objective enshrined in law as well as in policy and manifested in the intention of the Government of India, must be neutralized to ensure economic stability of the power producers.

(g) The present petition clearly raises issues with regard to the tariff and/or related to the determination of tariff/adjustment of the escalated coal price which ultimately impacts the tariff at which the power has to be supplied to the Procurers. Therefore, this Commission has jurisdiction to regulate the tariff, meaning thereby that the Commission can take into consideration the impact of fuel cost escalation and other factors and regulate the tariff in such a manner that the fuel cost escalation is absorbed in the tariff and the Petitioner is restored to the same economic condition as existed prior to the unprecedented, unforeseen and uncontrollable escalation in fuel price thereby abiding and realizing the principles as laid down in the Act.

66. The respondent, GUVNL has refuted the contention of the petitioner that the Commission has overriding power under Section 79(1)(b) read with Section 61 of the Act to regulate the tariff, which has been determined through competitive bidding under Section 63 of the Act. GUVNL has

submitted that the contention of the petitioner is complete misinterpretation of the scheme of the Act and objective and purpose sought to be achieved. Section 63 does not contemplate the Commission to frame regulation for the method and manner of determination of tariff by competitive bidding process. Therefore, it is not possible for Commission to determine by regulation the terms and conditions for competitive bidding process to be adopted under Section 63 of the Act. It has been further submitted that under Section 63 of the Act, the tariff stands determined by a bidding process and the question of redetermination of such tariff under the regulatory power of the Commission does not arise. It has been submitted that the prayer of the petitioner to intervene and establish a mechanism for providing increase in energy/variable charges is without any basis as the decision to go on the basis of non-escalable charges and thereby absorb the consequences of all changes in the energy charges to the extent of 55% was entirely that of the petitioner. GUVNL has submitted that there cannot be any re-negotiation to correct for mistakes in bidding or for overly risky or aggressive bids. GUVNL has further submitted that the market price of coal of GCV 5400 kcal/kg in August 2011 was USD 89.94/MT, which has come down to USD 68.60/MT in January, 2013 and its price was USD 67.44/MT in February 2010. GUVNL has submitted that the market fluctuation of price of coal for export from Indonesia cannot be considered to have impacted substantial increase in price of coal.

67. Shri Padamjit Singh, the representative of Punjab State Power Corporation Ltd (PSPCL) submitted that the petitioner has exaggerated the issue of escalation in price of coal. Between the bid date and now,

cumulative escalation using the bid evaluation escalation rate was 220% as against the actual increase of 153%. The six-monthly escalation rate notified by the Commission, and not the bid evaluation escalation rate is applicable for charging the tariff. The petitioner is liable to charge the tariff to the procurers based on the escalation rates notified by the Commission. Moreover, because of the lead and lag effect during the lifecycle of 25 years of the PPA, escalation may get neutralised.

68. The representative of Prayas pointed to the following difficulties and challenges in evaluation of the financial impact of the market fuel dynamics on the financial viability of the project due to the following reasons:

(a) It would be very difficult to estimate the real impact of increase in price on the petitioner's cash flows.

(b) Indonesian coal is not a homogenous commodity and the prices may vary significantly for a slightly lower grade of coal as the prices are not in proportion with the quality of coal. Monitoring of quality of coal and prices in such cases is not possible.

(c) The financial viability of the project is to be evaluated based on the cheapest source of coal available at any point of time world over, and identification of such source in itself is a difficult task.

(d) Indocoal with whom the petitioner has executed FSA is only a trader but petitioner has stake in the companies which actually own the mines. For this reason it will not be possible to work out profitability of the petitioner and this is a very complicated process.

(e) Evaluation of the financial viability would require examination of operational parameters such as the station heat rate, auxiliary consumption, PLF of the power plant, which will lead to micromanaging the project at many levels.

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, it cannot be denied that the petitioner is entirely dependent on the imported coal for running the Mundra UMPP and therefore the petitioner can be said to be immune from the impact of the Indonesian Regulations which made it compulsory for the sellers of coal from Indonesia to align the sale prices with the international benchmark price. There is a perceptible difference between the prices which were prevalent in the Indonesian market prior to the Indonesian Regulations and those prevalent subsequent to the Indonesian Regulations. We have already come to the conclusion in the earlier part of the order that the petitioner is suffering on account of escalation of coal price subsequent to the promulgation of Indonesian Regulations and the petitioner deserves to be compensated to make the project commercially viable to operate and supply power to the respondents in terms of the PPA.

70. The respondents have contested the contention of the petitioner that change in price on account of the Indonesian Regulations would render the project commercially impracticable and unviable. In our view, while it is expected that the parties to the PPA would factor all possible contingencies

including price escalation, there are certain events which are beyond the contemplation of the parties and if the impact of such events are not taken into account, it would make the PPA unworkable and the project commercially unviable. If the price escalation is on account of some event which was beyond the contemplation of the parties, then the impact of price escalation needs to be duly considered and addressed in order to save the PPA from being frustrated. Hon'ble Supreme Court in Continental Construction Company Limited Vs. State of M.P. [AIR 1988 SC 1166] has held as follows:

> "The question about specific reference on a question of law was examined by this Court recently in the case of Tarapur and Company Vs. Cochin Shipyard Limited, Cochin (1984 SCC 680; AIR 1984 SC 1072). There it was observed that if the very affected situation, on the basis of which agreement was entered, ceases to exist, an agreement to that extent becomes otiose. If rates initially quoted by the contractor became irrelevant due to subsequent price escalation, it was held in that case that the contractors claim for compensation for the excess expenditure due to price rise would not be turned down on the ground of absence of price escalation clause in that regard in the contract. Agreement as a whole has to be read. "

Further, in the case of Tarapore and Company Vs. Cochin Shipyard Ltd, Cochin and Anr {(1984)2 SCC 680}, the Hon'ble Supreme Court inter alia held as follows:

> "These clauses were presumably referred to in to context of an argument that the price escalation clause does not cover the claim for compensation for additional expenditure on imported plant and machinery and technical know-how, because the contract substantially provided for the same to be spelt by the contractor. In our opinion, this oversimplification of the clause of the contract involving works of such magnitude is impermissible. The whole gamut of discussions, negotiations, and correspondence must be taken into consideration to arrive at a true meaning of what was agreed to between the parties."

71. The principles that emerge from the above judgements is that absence of a clause for price escalation in the contract cannot be the

ground for denying the compensation on account of actual expenditure on account of price rise. Considering the said principle in the context of the present case, it has to be held that if the actual cost of production of electricity goes beyond what was agreed in the PPA, compensation should not be denied merely on the ground that there is no provision in the PPA. This is because there is no other alternative to save the PPA from being frustrated. Therefore, in our view, ways and means need to be found to compensate the petitioner for the loss or additional expenditure incurred by it on account of procurement of coal from Indonesia at the international benchmark price as it was never in the contemplation of the petitioner and even the respondents that purchase price of coal from Indonesia will increase manifold on account of promulgation of Indonesian Regulations.

72. The Statement of Objects and Reasons accompanying the Electricity Bill 2001, which led to enactment of the Electricity Act inter alia provides that

> "1.3 Over a period of time, however, the performance of SEBs has deteriorated substantially on account of various factors. For instance, though power to fix tariffs vests with the State Electricity Boards, they have generally been unable to take decisions on tariffs in a professional and independent manner and tariff determination in practice has been done by the State Governments. Cross-subsidies have reached unsustainable levels. To address this issue and to provide for distancing of government from determination of tariffs, the Electricity Regulatory Commissions Act, was enacted in 1998. It created the Central Electricity Regulatory Commission and has an enabling provision through which the State governments can create a State Electricity Regulatory Commission. 16 States have so far notified/created State Electricity Regulatory Commissions either under the Central Act or under their own Reform Acts."

> "2.3. With the policy of encouraging private sector participation in generation, transmission and distribution and the objective of distancing the regulatory responsibilities from the Government to the Regulatory Commissions, the need for harmonising and rationalising the provisions in the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the

> Electricity Regulatory Commissions Act, 1998 in a new self-contained comprehensive legislation arose. Accordingly it became necessary to enact a new legislation for regulating the electricity supply industry in the country which would replace the existing laws, preserve its core features other than those relating to the mandatory existence of the State Electricity Board and the responsibilities of the State Government and the State Electricity Board with respect to regulating licensees. There is also need to provide for newer concepts like power trading and open access. There is also need to obviate the requirement of each State Government to pass its own Reforms Act. The bill has progressive features and endeavours to strike the right balance given the current realities of the power sector in India. It gives the State enough flexibility to develop their power sector in the manner they consider appropriate. The Electricity Bill, 2001 has been finalised after extensive discussions and consultations with the States and all other stake holder and experts."

73. The Statement of Objects and Reasons makes it clear that the Electricity Regulatory Commissions at the Centre and in the States have been established as independent institutions to discharge the functions assigned under the statutes under which they have been established. Another objective in accordance with the Statement of Objects and Reasons is to encourage private sector participation in generation, transmission and distribution of electricity. The objects of the Electricity Act are further set out in the long title, reproduced below:

> "An Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalisation of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto."

74. It follows from the above that the objectives of the Act include taking of measures conducive to development of electricity industry, promotion of competition, protection of the interest of the electricity consumers and rationalisation of the electricity tariff.

75. The present petition relates to the impact of Indonesian Regulations on tariff. The provisions relating to determination of tariff are contained in Part VII of the Electricity Act, comprising Sections 61 to 66. The tariff for the commercial activities of generation, transmission, distribution and supply of electricity undertaken under the Electricity Act is determined by the Appropriate Commission by specifying the terms and conditions for the purpose as laid down in Section 61. The factors that guide the Appropriate Commission while specifying the terms and conditions for determination of tariff have been prescribed under Section 61 which reads as under:

> "61. The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-
> (a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;
> (b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;
> (c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;
> (d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;
> (e) the principles rewarding efficiency in performance;
> (f) multi year tariff principles;
> (g) that the tariff progressively reflects the cost of supply of electricity and also, reduces and eliminates cross-subsidies within the period to be specified by the Appropriate Commission;
> (h) the promotion of co-generation and generation of electricity from renewable sources of energy;
> (i) the National Electricity Policy and tariff policy:
>
> Provided that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948, the Electricity Regulatory Commission Act, 1998 and the enactments specified in the Schedule as they stood immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier."

76. Thus section 61(d) clearly provides for safeguarding of the interest of the consumers of electricity and at the same time ensuring recovery of cost

of electricity in a reasonable manner. In other words, in accordance with Section 61, the Appropriate Commission has to strike a balance between the consumers' interest and the investors' interest, with emphasis on the need for applying commercial principles in conducting the activities of generation, transmission, distribution and supply of electricity.

77. Section 3 of the Act provides that the Central Government shall from time to time prepare the National Electricity Policy and Tariff Policy for development of the power system based on optimum utilisation of resources such as coal, natural gas, nuclear substances or materials, hydro or renewable sources of energy.

78. The salient features of the National Electricity Policy are that it lays down the guidelines for (a) accelerated development of the power sector, (b) providing supply of electricity to all areas and (c) protecting interests of consumers and other stakeholders, the investors being one category of such stakeholders. One of the objectives sought to be achieved under the National Electricity Policy is the financial turnaround and commercial viability of the electricity sector since the performance of SEBs, the major players in the sector had deteriorated substantially over a period of time. Accordingly, the National Electricity Policy addresses the issues of recovery of cost of services to make the electricity sector sustainable, promotion of competition which ultimately benefits the consumers and protection of consumers' interests, among others. The National Electricity Policy further recognises the need for providing adequate return on investment so that

the electricity sector is able to attract adequate investments. The tariff policy has been formulated with the similar objectives in contemplation. The relevant provisions of the National Electricity Policy and the Tariff Policy, referred by learned counsel for the petitioner are extracted hereunder for facility of reference:

> National Electricity Policy
> “1.0 INTRODUCTION
> 1.6 Electricity Act, 2003 provides an enabling framework for accelerated and more efficient development of the power sector. The Act seeks to encourage competition with appropriate regulatory intervention. Competition is expected to yield efficiency gains and in turn result in availability of quality supply of electricity to consumers at competitive rates.
> 1.8 The National Electricity Policy aims at laying guidelines for accelerated development of the power sector, providing supply of electricity to all areas and protecting interests of consumers and other stakeholders keeping in view availability of energy resources, technology available to exploit these resources, economics of generation using different resources, and energy security issues.
>
> 2.0 AIMS AND OBJECTS
> The National Electricity Policy aims at achieving the following objectives:
>
> Financial turnaround and commercial viability of the Electricity sector.
> Protection of consumers’ interests.
> 4.0 ISSUES ADDRESSED
> The policy seeks to address the following issues:
>
> Recovery of cost of services and Targetted Subsidies.
>
> Competition aimed at Consumer Benefits
>
> Protection of Consumer interests and Quality Standards
>
> 5.1 RURAL DEVELOPMENT
> 5.1.6 Necessary institutional framework would need to be put in place not only to ensure creation of rural electrification infrastructure but also to operate and maintain supply system for securing reliable power supply to consumers.
>
> 5.5 RECOVERY OF COST OF SERVICES & TARGETTED SUBSIDIES
> 5.5.1 There is an urgent need for ensuring the recovery of cost of service from Consumers to make the power sector sustainable.
>
> 5.8 FINANCING POWER SECTOR PROGRAMMES INCLUDIN PRIVATE SECTOR PARTICIPATION
> 5.8.2 It would, therefore, be imperative that an appropriate surplus is generated through return on investments, and, at the same time, depreciation reserve created so as to fully meet the debt service obligation. This will not only enable financial closure but also bankability of the project

would be improved for expansion programmes, with the Central and State level public sector organisations, as also private sector projects, being in a position to fulfil their obligations toward equity funding and debt repayments.

5.8.4 Capital is scarce. Private sector will have multiple options for investments. Return on investment will, therefore, need to be provided in a manner that the sector is able to attract adequate investments at par with, if not in preference to, investment opportunities in other sectors. This would obviously be based on a clear understanding and evaluation of opportunities and risks. An appropriate balance will have to be maintained between the interests of consumers and the need for investments."

Tariff Policy

"4.0 OBJECTIVE OF THE POLICY

The objectives of this tariff policy are to:

(a)...

(b) Ensure financial viability of the sector and attract investments.

(c)..

(d)..

5.0 GENERAL APPROACH TO TARIFF

5.3 Tariff policy lays down following framework for performance based cost of service regulation in respect of aspects common to generation, transmission as well as distribution. These shall not apply to competitively bid projects as referred to in para 6.1 and para 7.1 (6). Sector specific aspects are dealt with in subsequent sections.

(a) Return on Investment

Balance needs to be maintained between the interests of consumers and the need for investments while laying down rate of return. Return should attract investments at par with, if not in preference to, other sectors so that the electricity sector is able to create adequate capacity. The rate of return should be such that it allows generation of reasonable surplus for growth of the sector."

79. The statutory scheme under the Electricity Act, 2003 and the National Electricity Policy and Tariff Policy aim to ensure protection of the consumers' interest and adequate return on the investments in the sector. The consumers' interest is protected not only by fixing competitive tariff but it is equally imperative to ensure continuous, uninterrupted and reliable supply of electricity. For the purpose of qualitative supply of electricity, it is necessary that adequate investments are made for creating infrastructure for generation, transmission, distribution and supply of electricity and this is

possible only when the investor gets adequate return on the investments made. Therefore, in the final analysis, the recovery of costs of the investors serves the consumers' interest by attracting investments in the sector by improving quality of supply of electricity to the consumers. Thus, twin objectives of protection of consumers' interest and recovery of cost of services provided are complementary. All the authorities established under the Electricity Act, 2003 have the mandate to strive towards achieving these objectives. This Commission as the apex regulatory body for power sector has the mandate to achieve these objectives of the statute.

80. The petitioner has sought to make out a case that promulgation of the Indonesian Regulation has led to abnormal increase in the cost of generation of electricity which has made the project totally unviable. Accordingly, the petitioner has sought to be insulated against the ill-effects of enforcement of the Indonesian Regulation. In our view the petitioner's plea deserves serious consideration and in depth examination of facts to address its concern. Unless the concerns of the petitioner are addressed, the possibility of the petitioner defaulting in discharging its obligations under the PPA due to the perceived financial burden cannot be totally ruled out and that will affect the interest of the consumers. In that event, the respondents shall be required to invite fresh bids to meet their requirement of power and till the selected project or projects are operationalised, the consumers will be deprived of power. Moreover, the ruling tariff for the new projects are in the range of ₹3.50 to ₹7.00/kWh which the consumers of Mundra UMPP shall also be required to pay. Thus at the macro level, it will

be a serious setback for the electricity sector and will adversely affect the investment for the sector and at the micro level, it will affect the continued and reliable supply of power to the consumers. Accordingly, this Commission in discharge of its statutory functions to regulate the tariff feels it necessary to intervene in the matter in the interest of the consumers, investor and the power sector as a whole to consider adjustment in tariff the impact of unanticipated increase in price of imported coal.

81. This Commission has been vested with the function under clause (b) of sub-section (1) of Section 79 of the Act to "regulate the tariff of the generating companies having a composite scheme for generation and sale of electricity in more than one State". It has been held by the Hon'ble Supreme Court in a catena of judgements that the power to "regulate" confers plenary power over the subject matter of regulation. Some of the judgements are extracted as under:

(a) Jiyajeerao Cotton Mills Ltd. Vs. M.P.Electricity Board {(1989)SCC Supl (2) 52}

> "The word 'regulate' has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the relevant provisions, and the court while interpreting the expression must necessarily keep in view the object to be achieved and the mischief sought to be remedied."

(b) D.K.Trivedi & Sons Vs. State of Gujarat {(1986) SCC Supl 20}

> "The word 'regulate' means 'to control, govern, or direct by rule or regulations; to subject to guidance or restrictions; to adapt to circumstances or surroundings."

(c) V.S.Rice and Oil Mills & Others Vs. State of A.P. {AIR 1964 SC 1781}

> "The word 'regulate' is wide enough to confer power on the State to regulate either by increasing the rate, or decreasing the rate, the test being what is it that is necessary or expedient to be done to maintain, increase, or secure supply of the essential articles in question and to arrange for its equitable distribution and its available at fair prices".

(d) K. Ramanathan Vs State of Tamil Nadu & Anr. {(1985) SCC(2)116}

> "It has often been said that the power to regulate does not necessarily include the power to prohibit and ordinarily the word 'regulate is not synonymous with the word 'prohibit'. This is true in a general sense and in the sense that mere regulation is not the same as absolute prohibition. At the same time, the power to regulate carries with it full power over the thing subject to regulation and in absence of restrictive words, the power must be regarded as plenary over the entire subject. It implies the power to rule, direct and control and involves the adoption of a rule or guiding principle to be followed, or the making of a rule with respect to the subject to be regulated, the power to regulate implies the power to check and may imply the power to prohibit under certain circumstances, as where the best or only efficacious regulation consists of suppression. It would therefore appear that the word 'regulation' cannot have any inflexible meaning as to exclude 'prohibition'. It has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the legislation, ……….."

82. The principles enunciated in the above judgements establish that the Commission has the plenary power to regulate the tariff of the generating stations, which fall under its jurisdiction which shall extend beyond the determination of tariff, keeping in view the objects of the Act to promote competition, encourage investment in electricity sector and protect consumer interest. The power to regulate tariff will also extend to the tariff determined through the competitive bidding. Therefore, if the situation so demands, the Commission can fashion a relief even in case of the tariff of the generating stations, which have been discovered through the competitive bidding, by providing for suitable adjustment in tariff while retaining the sanctity of competitive bidding under Section 63 of the Act.

83. Having decided that the Commission can provide a relief for the petitioner even in case of tariff discovered through competitive bidding, the next question arises is what relief should be granted to the petitioner. It has been submitted by the petitioner in the Written Submission based on certain studies {"Granting and Renegotiating Infrastructure Concessions –Doing It Right" by J Louis Guasch - World Bank Institute and " The relationship between regulation and contracts in infrastructure industries: Regulation as ordered renegotiation" by Jon Stern, Centre for Competition and Regulatory Policy, Department of Economics, City University of London, UK} that renegotiation and readjustment of contractual obligations in the case of long-term contracts is the internationally accepted norm since long-term contracts are considered to be incomplete in the sense that it is not possible for the parties to precisely and adequately foresee all future developments having implications on viability of such contracts. It has been further submitted that the UNIDROIT principles recognise 'hardship' as the basis of renegotiation of the long-term contracts. The respondents in their Written Submission have submitted that the analysis in the study by Guasch applies to only future contracts and not to concluded contracts. Some of the relevant and important findings of John Stern and J. Louis Guasch as quoted by the petitioner are recalled for considering the prayer of the petitioner to provide relief:

a) To revise the terms of contract, the parties must both agree to renegotiate its terms. If the renegotiation is unsuccessful, the contract collapses;

b) All long-term contracts are incomplete and it is not always possible to imagine all possible contingencies;

c) On the basis of experience in developing countries and in some continental European countries, it has been found that Governments often establish semi independent or independent monitoring and enforcement agencies who have the power to review and in particular to modify these contracts following a review instituted either by the buyer or by the seller;

d) In the long-term contracts spreading over twenty one years and above, prices may need to be varied sharply in unpredictable ways because of major commodity price shocks and/or exchange rate crisis;

e) In many cases, the need for major renegotiations and the high rates of cancellation for concession contracts involving investment commitments represent major regulatory failures. There are no provisions for negotiation and absence of genuine independence to regulators to revisit the tariff;

f) External regulator could help align trust perceptions, for example, through dispute resolution methods, periodic and emergency reviews and so on;

g) Allowing some room for renegotiation and regulatory adoption may seem appropriate and socially desirable in the fact of new

problems, changed circumstances and additional information and experience;

h) Opportunistic renegotiation should be discouraged in both existing and future concessions. The key issue is how to design better concession contracts and how to induce both parties to comply with the agreed upon terms of the concession to secure long term sector efficiency and vigorous network expansion;

i) Restoration of financial equilibrium should clearly specify the capital base on which the firm is allowed to earn a fair return;

j) Another element that needs to be very clearly stated in the financial equilibrium clause of the contract is the period of application. The period of application refers to the period of time over which the financial equilibrium is evaluated and in principle it could range from one year to life of the concession. Both these extreme points are inappropriate; A three to five year period seems more appropriate. The financial equilibrium should not bail the operator out for adverse realisations of normal commercial risk;

k) The principle is that small changes that affect the financial equilibrium of the firm that are not controlled by the firm should not require adjustments, but large ones may. Renegotiations should be undertaken in the most transparent manner as possible;

l) When facing petitions for renegotiation, the sanctity of the bid contract must be upheld. The operator should be held accountable for its submitted bid. The financial equation set by the winning bid should always be the reference point and the financial equilibrium behind the bid should be restored in the event of renegotiation or adjustment;

m) Renegotiation should not be used to correct for mistakes in bidding or for overtly risky or aggressive bids.

84. The study provides sufficient guidelines for renegotiation of all long-term contracts in the light of the international practice. However, we are not inclined to favour any re-negotiation of the tariff discovered through the process of competitive bidding as in our view, the sanctity of the bids should be maintained. The parties should not renegotiate the tariff discovered through the competitive bidding as that will bring uncertainty to the power sector and is prone to misuse. In our view, the parties should confer to find out a practicable solution and agree for compensation package to deal with the impact of subsequent event while maintaining the sanctity of the PPA and the tariff agreed therein. In other words, the compensation package agreed should be over and above the tariff agreed in the PPA and should be admissible for a limited period till the event which occasioned such compensation exist and should also be subject to periodic review by the parties to the PPA.

85. In the present case, the escalation in price of imported coal on account of Indonesian Regulation is a temporary phenomenon and will be stabilized after some time. Therefore, the petitioner needs to be compensated for the intervening period with a compensation package over and above the tariff discovered through the competitive bidding. The compensation package could be variable in nature commensurate with the hardship that the petitioner is suffering on account of the unforeseen events leading to increase in international coal price affecting the import of coal. As and when the hardship is removed or lessened, the compensatory tariff should be revised or withdrawn. In our view, this is the most pragmatic way to make the PPA workable while ensuring supply of power to the consumers at competitive rates.

86. The Electricity Act, 2003 vests in the Commission the responsibility to balance the interest of the consumers with the interest of the project developers while regulating the tariff of the generating companies and transmission licensees. Financial viability of the generating stations is an important consideration to enable them to continue to supply power to the consumers. The present case is one of the first of its kind where the tariff was determined through competitive bidding under Section 63 of the Act. The petitioner had quoted the bids on certain assumptions and those assumptions have been negated on account of the unexpected rise in coal price in international market coupled with the promulgation of Indonesian Regulations, required all long term contracts to be adjusted to the international benchmark price. In our view, under the peculiarity of the facts

of the present case and also keeping in view the interest of both project developer and consumers, we consider it appropriate to direct the parties to set down to a consultative process to find out an acceptable solution in the form of compensatory tariff over and above the tariff decided under the PPA to mitigate the hardship arising out of the need to import coal at benchmark price on account of Indonesian Regulations. 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 PPA. The Committee shall keep in view inter-alia the following considerations while working out and recommending the compensatory tariff applicable upto a certain period:

(a) The net profit less Govt. taxes and cess etc. earned by the petitioner's company from the coal mines in Indonesia on account of the bench mark price due to Indonesian Regulation corresponding to

the quantity of the coal being supplied to the Mundra UMPP should be factored in full to pass on the same to the beneficiaries in the compensatory tariff.

(b) The possibility of sharing the revenue due to sale of power beyond the target availability of Mundra UMPP to the third parties may be explored.

(c) The possibility of using coal with a low GCV for generation of electricity for supply to the respondents without affecting the operational efficiency of the generating stations.

87. 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.

sd/-	sd/-	sd/-	sd/-
(A. S. Bakshi)	**(M. Deena Dayalan)**	**(V. S. Verma)**	**(Dr. Pramod Deo)**
Member	**Member**	**Member**	**Chairperson**

CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No.159/MP/2012

Shri S. Jayaraman, Member

ORDER

I have gone through the order circulated by the Hon'ble Members of the Commission comprising Dr Pramod Deo, Chairperson, Shri V S Verma, Member, Shri M Deena Dayalan, Member and Shri AS Bakshi, Member (Ex-Officio). I am in respectful disagreement with the analysis and findings of the learned Members of the Commission with regard to the impact of the promulgation and operation of the Indonesian Regulations on the project viability of the petitioner to supply power to the respondents at the agreed tariff in terms of the PPA and the relief proposed to be granted. With regard to the prayers of the petitioner under the 'force majeure' and 'change of law' provisions of PPA, I am in agreement with the conclusions of the learned Members that the petition does not satisfy the conditions of force majeure under the Article 12 and change of law under Article 13 of the PPA dated 22.4.2007, though I would supplement my findings with additional reasons. Accordingly, I am recording my views in this order.

2. The petitioner, a wholly owned subsidiary of Tata Power Limited has executed the 4000 MW Mundra UMPP after the holding company was selected as the lowest bidder in the international competitive bidding carried out by Power Finance Corporation in accordance with the Guidelines dated 19.1.2005 notified by the Government of India, Ministry of Power under section 63 of the Electricity Act, 2003 (hereinafter "the Act"). The petitioner has filed the present petition seeking relief from the impact of escalated price of imported coal on account of escalation of fuel price in the international market and due to promulgation of the "Regulation of Ministry of Energy and Mineral Resources No.17 of 2010 Regarding Procedure for Setting Mineral and Coal Benchmark Selling Price" (hereinafter "Indonesian Regulations") on 23.9.2010 by the Indonesian Government which required the export price of coal from Indonesia to be aligned with the international coal price. The petitioner has prayed for the following in its petition:

> "(a) Establish an appropriate mechanism to offset in tariff the adverse impact of:
>
> (i) The unforeseen, uncontrollable and unprecedented escalation in the imported coal price and
>
> (ii) The change in law by Government of Indonesia.
>
> (b) Evolve a methodology for future fuel price pass through to secure the Project to a viable economic condition while building suitable safeguards to pass to Procurers benefit of any reduction in imported coal price.
>
> (c) Pass any other order that this Commission may deem fit in the facts and circumstances of the present case."

3. The submission of the petitioner in the present petition may be capitulated as under:

(a) The project was envisaged to be executed on the basis of imported coal for supply of power to the distribution licensees in the States of Gujarat, Maharashtra, Haryana, Rajasthan and Punjab. It was the responsibility of the bidders to arrange for the coal in the event of their selection for execution of the project. The bidders were required to quote tariff consisting of two elements namely, capacity charge in Rupees and energy charge in USD which are further split into escalable and non-escalable elements with complete freedom on the part of the bidders to quote escalable and non-escalable portions based on their assumptions. The quoted tariffs were required to be evaluated on a levelised basis and awarded to the lowest bidder.

(b) Tata Power Company Limited submitted its bid in response to the Request for Proposal (RfP) on 7.12.2006. Tata Power Company Limited is stated to have taken into consideration availability of coal in the global coal market and the prevailing price in the international market. The petitioner has submitted that the then prevailing price of imported coal adjusted to the calorific value of 5350 GCV was USD 42.13/MT. The petitioner is also stated to have taken into consideration the escalation indices notified by the Commission while quoting the bid. The petitioner has accordingly

quoted the bid with 55% of the Fuel Energy Charges on non-escalable basis and 45% on escalable basis.

(c) Tata Power Company Limited was selected as the successful bidder having quoted a levelised tariff of ₹2.26367/kWh and Letter of Intent was issued on 28.12.2006. Tata Power Company Limited signed the PPA with the procurers on 22.4.2007 and acquired the Coastal Gujarat Company Limited on 22.4.2007 and its tariff was adopted by the Commission on 19.9.2007.

(d) In order to secure supply of coal, Tata Power invested 30% in the ownership of two coal mines in Indonesia owned by Bumi Resources Indonesia in March 2007. According to the petitioner, bilateral contracts for supply of fuel based on mutually agreed firm quantity and firm price was permitted by Indonesian Law since 1967 and accordingly the petitioner tied up a substantial part of its coal requirement to the tune of 55% through the contract with fixed prices for imported coal.

(e) As required under Article 3.1.2(v) of the PPA, one of the conditions subsequent to be fulfilled by the petitioner was to execute a Fuel supply agreement within 14 months from the date of issuance of LoI. Accordingly, the holding company of the petitioner, Tata Power company Limited entered into a Coal Sales Agreement with IndoCoal Resources(Cayman) Limited (hereinafter referred to as "IndoCoal") on 30.3.2007 whereby

IndoCoal agreed to sell and deliver a total quantity of approximately 10.11 MMTPA (+/- 20%) of coal for its three facilities as under:

i. Trombay : 0.75 MMTPA (+/-20%)

ii. Mundra UMPP : 5.85 MMTPA(+/-20%)

iii. Coastal : 3.51 MMTPA (+/-20%)

The petitioner has submitted that Mundra UMPP has a total coal requirement of 12 MMTPA out of which 5.85 MMTPA was proposed to be met through the CSA between Tata Power and IndoCoal dated 30.3.2007 and Tata Power entered into an agreement dated 9.9.2008 with the petitioner to supply the balance requirement of 6.15 MMTPA. Subsequently, the Coal Sale Agreement dated 30.3.2007 was split into three agreements, one for each identified user within Tata Power. CGPL entered into a Coal Sale Agreement dated 31.10.2008 with IndoCoal for supply of 5.85 MMTPA (+/- 20%) of coal. The quantity of coal agreed to be supplied to Coastal Maharashtra was diverted to CGPL by way of Assignment and Restatement Agreement dated 28.3.2011 among Tata Power, IndoCoal and CGPL.

(f) The petitioner has submitted that its Coal Sales Agreement with IndoCoal has two components, namely, 55% of the total base quantity at a price of USD 32/MT with 2.5% per annum escalation for 5 years and balance 45%

at a base price of USD 34.15/MT with escalation based on the escalation rate notified by CERC. It is the case of the petitioner that as against the historical trend of 3% to 4% escalation, it could negotiate an escalation of 2.5% per annum which reflected a steep discount over the prevailing market prices.

(g) The petitioner has submitted that due to subsequent unforeseen and unprecedented developments such as promulgation of Indonesian Regulations and rise in international coal prices from USD 40 to 50/MT in 2006 to USD 110 to 120/MT in 2011, (mainly due to increase in its spot price on account of increase in coal import by India and China), it has become commercially impracticable for the petitioner to supply power at the bid out tariff as the fundamental premise on which the bid was made stands completely wiped out/altered. Accordingly, the petitioner has approached the Commission for evolving a mechanism to address the adverse impact of the rise in coal prices in order to make the project economically viable.

4. At the instance of the Commission, the petitioner and respondents explored the possibility of a negotiated settlement in terms of article 17.3 of the PPA which did not succeed. The respondents have filed their replies and contested the claims of the petitioner during the oral arguments. The consumer

group, Prayas Energy Group has also opposed the claims of the petitioner. The main thrust of the submissions of respondents and consumer group is that the petitioner was selected as the successful bidder based on its bid which comprised 55% of fuel energy charges on non-escalable basis and 45% of fuel energy charges on escalable basis. Though the petitioner had the option to quote 100% fuel energy charges as escalable, the petitioner had quoted non-escalable fuel energy charges upto 55% to win the bid, thereby absorbing all future escalation in energy charges. The respondents have submitted that the sanctity of the competitive bidding under section 63 of the Electricity Act, 2003 (the Act) should be maintained keeping in view the objectives of the Act to promote competition and protect consumer interest. The respondents have urged to reject the claims of the petitioner as it seeks to convert a tariff discovery through competitive bidding based on market forces under section 63 of the Act into cost plus tariff determination under section 62 of the Act which is not permissible.

5. In view of the rival contention of the parties, I have dwelled upon the issues under the following heads:

(a) Bid process and the provisions of the PPA;

(b) Coal linkages and Coal Supply Agreements;

(c) Scope and impact of Indonesian Regulations;

(d) Reliefs under the PPA as claimed by the petitioner;

(e) Relief under section 79 of the Act as claimed by the petitioner

(f) Relief, if any, which can be granted to the petitioner.

Bid Process and the provisions of the PPA

6. The Request for Proposal for Mundra UMPP clearly states that the process was initiated for "Tariff Based Bidding Process for Procurement of Power on long term Basis from Power Station to be set up at Mundra, District Kutch, Gujarat based on imported coal". Clause 2.4 of the RfP provides as under:

> **"2.4 Tariff**
>
> The Tariff shall be as specified in the PPA and shall be payable in Indian Rupee only. The Bidder shall quote Tariff for each Contract Year during the term of the PPA as per Format 1 of Annexure 4.
>
> Each of the Procurers shall provide Collateral Arrangement as per the terms of the PPA.
>
> (a) **Fuel arranged by the Bidder** The Bidder shall quote the Quoted Indexed Energy Charges in US$ /kWhr. The Bidder is required to quote same Quoted Indexed Energy Charges for each Contract Year for the term of the PPA. The Quoted Indexed Energy Charges in US$/kWhr shall be escalated as per the terms of the PPA."

Further Clause 2.7.1.4 of the RfP provides for the details to be taken into consideration while preparing the financial bid:

> "**2.7.1.4** The Bidder shall inter-alia take into account the following while preparing and submitting the Financial Bid:-
>
> 1. In case of Quoted Escalable Capacity Charges, the Bidder shall quote charges only for the first Contractor Year after Schedule COD of first Unit.
>
> 2. Ratio of minimum and maximum Quoted Capacity Charges during the term of PPA shall not be less than zero point seven (0.7) and this ratio shall be applied at the Bid evaluation stage on the Quoted Capacity Charges after duly escalating the Quoted Escalable Capacity Charge on the basis of the escalation rates specified therefor.

3. The Quoted Tariff is Format 1 of Annexure 4 shall be all inclusive tariff and no exclusion shall be allowed. The Bidder shall take into account all costs including capital and operating, statutory taxes, duties, levies. Availability of the inputs necessary for generation of power should be ensured at the project site and all costs involved in procuring the inputs (including statutory taxes, duties, levies thereof) at the project site must be reflected in the Quoted Tariff.

4. Bidders are required to insert the Contract Years commencing from the Scheduled COD of the first Unit, in the Format 1 of Annexure 4. For instance, if the Scheduled COD of first Unit is as on June 1, 2011, then Contract Year corresponding to such date shall be 2011-2012. Thereafter, the Contract Year shall be in terms of subsequent financial years (April 1 to March 31) i.e. the next Contract Year shall be 2012-13 and so on.

Provided the last Contract Year in the Format 1 Annexure 4 shall be the financial year (i.e. April 1 to March 31) in which the 25th anniversary of the Scheduled COD of the Power Station occurs. For the avoidance of doubts, in case the Scheduled COD of the Power occurs on June 1, 2013 then the 25th anniversary of the Scheduled COD of the Power Station shall occur on June 1, 2038, i.e. in the Contract Year 2038-09.

5. The Bidders should factor the cost of the secondary fuel into the Quoted Tariff and no separate reimbursement shall be allowed on this account."

7. Thus the RfP provided complete discretion to the bidders to quote the capacity charges and energy charges as escalable or non-escalable or combination of both based on the bidders' assumption of risk. Tata Power Company Limited in its bid dated 7.12.2006 had quoted the following financial bid for each year of the contract period of 25 years:

TATA POWER COMPANY LIMITED										
Contract year	Commencement date of contract year	End date of contract year	Quoted non-escalable capacity charges (Rs./kWh)	Quoted escalable capacity charges (₹/kWh)	Quoted non-escalable fuel energy charges (US$/kWh)	Quoted escalable fuel energy charges (US$/kWh)	Quoted non-escalable transportation energy charges (US$/kWh)	Quoted escalable transportation energy charges (US$/kWh)	Quoted non-escalable fuel handling energy charges (₹/kWh)	Quoted escalable fuel handling energy charges (₹./kWh)
1	27-Jun-12	31-Mar	0.872	0.033	0.00705	0.00585	0.00285	0.00109	0.042	0.046
2	1-Apr	31-Mar	0.870	Same as above	0.00707	Same as above	0.00284	Same as above	0.046	Same as above
3	1-Apr	31- Mar	0.868	Same	0.00707	Same as	0.00284	Same as	0.048	Same

				as above		above		above		as above
4	1-Apr	31- Mar	0.866	Same as above	0.00707	Same as above	0.00284	Same as above	0.047	Same as above
5	1-Apr	31- Mar	0.864	Same as above	0.00707	Same as above	0.00284	Same as above	0.051	Same as above
6	1-Apr	31- Mar	0.862	Same as above	0.00707	Same as above	0.00284	Same as above	0.051	Same as above
7	1-Apr	31- Mar	0.859	Same as above	0.00707	Same as above	0.00285	Same as above	0.051	Same as above
8	1-Apr	31- Mar	0.857	Same as above	0.00707	Same as above	0.00284	Same as above	0.056	Same as above
9	1-Apr	31- Mar	0.854	Same as above	0.00707	Same as above	0.00284	Same as above	0.055	Same as above
10	1-Apr	31- Mar	0.852	Same as above	0.00707	Same as above	0.00284	Same as above	0.055	Same as above
11	1-Apr	31- Mar	0.849	Same as above	0.00707	Same as above	0.00284	Same as above	0.060	Same as above
12	1-Apr	31- Mar	0.846	Same as above	0.00711	Same as above	0.00286	Same as above	0.060	Same as above
13	1-Apr	31- Mar	0.842	Same as above	0.00714	Same as above	0.00287	Same as above	0.059	Same as above
14	1-Apr	31- Mar	0.839	Same as above	0.00714	Same as above	0.00287	Same as above	0.065	Same as above
15	1-Apr	31- Mar	0.836	Same as above	0.00714	Same as above	0.00287	Same as above	0.065	Same as above
16	1-Apr	31- Mar	0.832	Same as above	0.00714	Same as above	0.00288	Same as above	0.063	Same as above
17	1-Apr	31- Mar	0.828	Same as above	0.00714	Same as above	0.00287	Same as above	0.071	Same as above
18	1-Apr	31- Mar	0.824	Same as above	0.00714	Same as above	0.00287	Same as above	0.069	Same as above
19	1-Apr	31- Mar	0.819	Same as above	0.00714	Same as above	0.00287	Same as above	0.067	Same as above
20	1-Apr	31- Mar	0.550	Same as above	0.00714	Same as above	0.00287	Same as above	0.076	Same as above
21	1-Apr	31- Mar	0.545	Same as above	0.00714	Same as above	0.00287	Same as above	0.074	Same as above
22	1-Apr	31- Mar	0.540	Same as above	0.00719	Same as above	0.00289	Same as above	0.072	Same as above
23	1-Apr	31- Mar	0.534	Same as	0.00721	Same as above	0.00290	Same as above	0.082	Same as

				above						above
24	1-Apr	31- Mar	0.529	Same as above	0.00721	Same as above	0.00290	Same as above	0.079	Same as above
25	1-Apr	31- Mar	0.523	Same as above	0.00721	Same as above	0.00290	Same as above	0.076	Same as above
26	1-Apr	25th anniversary of the scheduled COD of the first unit	0.516	Same as above	0.00723	Same as above	0.00291	Same as above	0.088	Same as above

8. Financial bids were submitted by six bidders including Tata Power Company Limited. Based on the financial bids quoted by six bidders, Tata Power Company Limited was selected as the successful bidder having quoted the levelised tariff of ₹2.26367/kWh. The comparative bids of the bidders as assessed on levelised basis are as under:

Sl. No.	Bidder	Equivalent Levelised Tariff (₹/kWh)	Ranking
1.	Tata Power Company Limited	2.26367	L1
2.	Reliance Energy Generation Limited	2.66119	L2
3.	Adani Enterprises Ltd.	2.69601	L3
4.	Essar Power Ltd.	2.80054	L4
5.	Larsen & Tourbo Power Limited	3.22049	L5
6.	Sterlite Industries (India) Limited	3.74625	L6

9. The tariff quoted by the petitioner, which has been extracted in para 7 above has been made part of the Power Purchase Agreement dated 22.4.2007 in Schedule 11 of the PPA. The PPA defines the quoted non-escalable energy

charge as "the sum total of Quoted Non-Escalable Fuel Energy Charge, Quoted Non-Escalable Transportation Energy Charge and Quoted Non-Escalable Fuel Handling Energy Charge, each of which shall have the meaning as assigned thereto in Schedule 11". Similarly, Quoted Escalable Energy Charge has been defined to mean "the sum total of Quoted Escalable Fuel Energy Charge, Quoted Escalable Transportation Energy Charge and Quoted Escalable Fuel Handling Energy Charge, each of which shall have the meaning as assigned thereto in Schedule 11". The tariff is calculated in accordance with the methodology given in Schedule 7 of the PPA. As per the said schedule, only the Quoted Escalable Energy Charge component of the tariff can be escalated as per the Escalation Indices of CERC. It is, therefore, clear that on account of the bid quoted by the petitioner, it has been selected as the lowest bidder. In the bid, the petitioner has admittedly quoted 55% of the fuel energy charges as non-escalable, as a result of which the benefits of escalation as per the CERC Escalation Indices are not available to the petitioner on 55% of the quoted energy charge. The petitioner had the full liberty to quote the entire energy charges under the escalable head, thereby insulating itself from any change in the international coal prices, particularly when the project is based on imported coal and is subject to the price volatility of the international market and laws of the coal exporting countries. It is obvious that the petitioner has made a reasoned business decision to offer a bid with 55% non-escalable fuel charges and the risks associated with such decision should be borne by the petitioner.

Coal arrangements made by the petitioner

10. The project is based on the imported coal. The petitioner has submitted that its holding company, Tata Power Ltd. has invested in two coal mines in Indonesia and acquired 30% stakes in each mine and the remaining 70% equity is owned by PT Bumi Resources, Indonesia. Tata Power Ltd. has entered into a Coal Sale Agreement on 30.3.2007 with IndoCoal Resources (Cayman) Ltd., which is subsidiary of PT Bumi Resources for supply of 10.11 MMTPA (+/- 20%) for use by its three generating facilities namely Mundra UMPP (5.85 MMTPA (+/- 20%), Coastal in Maharashtra (3.51 MMTPA (+/- 20%) and Trombay (0.75 MMPTA (+/- 20%). The petitioner has entered into a Coal Supply Agreement on 31.10.2008 with IndoCoal for supply of 5.85 MMTPA (+/- 20%). The provisions of the Coal Sales Agreement regarding the price of coal and escalation factors agreed to between the parties are extracted as under:

"For Mundra UMPP

In relation to each shipment:

(1) 55% of such shipment: $32/T until the first anniversary of the Commercial Operation date of the first Unit, and thereafter, escalating (pro rata for the part of the month) at 2.5% per annum for the next five(5) years. Thereafter the Coal Price will be the same as the 45% portion referred to in the following paragraph (2).

(2) 45% of such shipment: $34.15/T, escalating per month or pro rata for part of the month as per CERC escalation rate as notified by CERC.

For Coastal

$ 34.15/T escalating per month or pro rata for part of the month as per CERC escalation rate as notified by CERC."

11. It is noticed that the petitioner has factored in the CERC escalation rate upto 45% of the coal sourced by it, which corresponds to its quote of about 45% of the fuel charge under escalable head. About the remaining 55%, the petitioner has agreed for a fixed escalation of 2.5% per annum for the next five years from the date of commercial operation of the first unit of the generating station, which will be escalated thereafter at the CERC rate of escalation. For the remaining 45% of supply of coal, the escalation is in accordance with the escalation indices notified by CERC. In other words, the petitioner shall be paying 100% escalation at the CERC rate to the coal supplier for the entire quantum of 5.85 MMTPA of coal after 5 years from the date of commercial operation of the first unit of Mundra UMPP. The coal quantity of 3.51 MMTPA (+/-20%) meant for Coastal Maharashtra was also to be purchased after escalating it as per CERC indices. In order to meet balance requirement of coal, Tata Power has diverted the coal meant for Coastal Maharashtra to CGPL vide the Assignment and Restatement Agreement dated 28.3.2011. Therefore, this coal will be purchased after escalating as per CERC indices. In other words, 3.22 MMTPA (+/-20%) {55% of 5.81 MMTPA (+/-20%)} will be escalated @ 2.5% from the date of commercial operation of the first Unit and 6.14 MMTPA (+/- 20%) will be escalated as per the CERC indices from the date of the date of the CSA between Tata Power and

Indocoal in March 2007. After 5 years of the commercial operation of first unit of Mundra UMPP, price of entire quantity of coal will be as per the base price escalated by CERC indices. It emerges that the petitioner has factored in the escalation on year to year basis on the coal procured under the CSA dated 31.10.2008 and the Assignment and Restatement Agreement dated 28.3.2011, which is based on the petitioner's assessment of the price of coal to be procured on year to year basis vis-à-vis the tariff quoted by the petitioner on the basis of which it was awarded the project. In other words, the petitioner has already accepted the liability to pay for the purchase of coal at the base price and escalation rates agreed in the Coal sales agreement.

12. In its rejoinder dated 30.11.2012 to the reply of GUVNL, the petitioner has submitted that "the investment made by Tata Power in Indonesian coal mines, the income received out of such investment and the direct impact on CGPL due to unprecedented coal price hike needs to be evaluated separately." It is noticed from the letter written by Tata Power on 16.2.2012 to the Director General Mines & Coal, Indonesia (Annexure P-19 at Pages 905-907 of the petition) that Tata Power had made a strategic investment of USD 1.2 billion in Indonesia in February 2007 for acquiring 30% stake in PT Kaltim Prima Coal (KPC), PT Arutmin Indonesia and IndoCoal Resources (Cayman) Ltd from PT Bumi

Resources. In para 2 of the 'Note on coal supply agreement' attached to the said letter, the following has been mentioned:

> " 2. With a view to securing our coal requirements for the 4000 MW Mundra Ultra Mega Power Project being set up by Coastal Gujarat Power Limited (a wholly owned subsidiary of Tata Power), a long term Coal Supply Agreement (CSA) was entered alongwith the investment, on 30th March 2007 between the Tata Power and Indocoal Resources (Cayman) Ltd for supply of Melawan quality coal from KPC for an overall quantity of 10.11 million tonnes per annum +/- 20% for Tata Power's various projects as per the staggered time schedule."

It is clear from the above that the investment in mines in Indonesia and Coal Sales Agreement with IndoCoal was made for arrangement of coal for Mundra UMPP. Therefore, the impact of Indonesian Regulations on the coal price has to be viewed holistically by taking into account the profits earned by Tata Power from the mining business in Indonesia. The production capacity of the mines in which Tata Power has acquired 30% stake is not known. It is possible that the total requirement of coal for the Mundra UMPP may be met within the quantity of coal produced corresponding to 30% capacity of the mines. In that case, the petitioner is not taking any undue risk as its holding company Tata Power Ltd., will be benefitted by enhanced coal price, being a part owner of the mines in Indonesia.

Scope and Impact of Indonesian Regulations

13. The main cause for filing the present petition is the promulgation of "Regulation of Ministry of Energy and Mineral Resources No.17 of 2010" on 23.9.2010. According to the Indonesian Regulations, the persons holding permits

for production and operation of coal mines are obliged to sell coal based on the benchmark price to be set by the Director General on monthly basis, based on a formula that refers to the average price index of coal in accordance with the market mechanism and/or in accordance with the prices generally accepted in the international market. The Indonesian Regulations direct the holders of mining permits to adjust the existing term contracts within a period not later than 12 months from the date of promulgation, that is, by 23.9.2011. The Indonesian Regulations contain the penal provisions which lay down that in case of their violation, the holders of mining permits are liable for administrative sanction in the form of written warning, temporary suspension of sales or revocation of mining operations permits.

14. The petitioner has submitted that in view of the promulgation of the Indonesian Regulations, the export price of coal from Indonesia has substantially increased. The petitioner has submitted that Mundra UMPP is based on imported coal and therefore, the petitioner has explored the possibility of alternate sources of imported coal. The petitioner in its written statement has submitted that the price of Indonesian coal is cheapest compared to the Australian coal and South African coal as per the table given below:

Particulars	Applicable Index	FOB ($/tonne)		CFR Price ($ /tonne)		CFR Price ($/Mkcal)	
		Dec 2006	Nov 2012	Dec 2006	Nov 2012	Dec 2006	Nov 2012
Australian Coal	New Castle	50.69	86.20	67.54	104.20	10.68	16.48

South African Coal	AP14	50.83	88.51	59.22	103.51	9.87	17.25
Indonesian Coal Melawan	Negotiated FOB	34.15		43.30		8.09	
Melawan	HBA (w.e.f. Sept 2011)		64.20		77.20		14.30

HBA: Harga Batabura Acuan (Official benchmark price of Indonesia)

15. The petitioner has submitted that supply of power to the respondents at the tariffs agreed under the PPA has been rendered commercially unviable on account of Indonesian Regulations. The petitioner has submitted that the additional cost on account of increase in prices of Indonesian coal is likely to be about ₹0.67/kWh in July, 2012. The petitioner has worked out per annum loss of approximately ₹1873 crore as per July, 2012, as per the details given below:

> "51. The petitioner submits that the unprecedented and unforeseeable escalation in the price of coal has resulted in a situation where the project has become commercially impossible. The annual cumulative impact of the rise in the international coal prices on the Project is tabulated and explained below:

Tabulated Chart No.3

		Qty MMT	Price considered in bid	Current price	Difference		FX rate	Annual loss ₹ in Crore
					$/tonne	$ mio		
A	B	C	D	E	F	G	H	I
Coal quantity		11.22						
Fixed 55%	55%	6.17	30.00	74.00	44	271.00	54.00	(1,463.00)
Escalable 45%	45%	5.05	59.00	74.00	15.00	76.00	54.00	(410.00)
Total			43.24	74.44	31.00	347.00		(1873.00)
Add: Insurance and taxes			3.00	3.00	0.00	(0.00)	0.00	(0.00)
Total						(347.00)		(1873.00)

16. The respondents in their Written submission have submitted that Tata Power consciously decided to bid 45% of the Energy Charges as escalable and the remaining 55% as non-escalable thus taking the risk and reward of market fluctuations to the Petitioner's account to the extent of 55 percent, which is extracted below:

> "12. The claim of the Petitioner is that it is being subjected to huge losses on account of the increase in coal price need to be considered in the light of the fact that the Promoter of the Petitioner had submitted the bid with 45% escalable Fuel Energy Charges and 55% as non-escalable Fuel Energy Charges. The Petitioner has given the following characteristics of the fuel to be used in the written submissions now filed such as Station Heat Rate, Auxiliary Consumption etc.

Contracted capacity	MW	3800
Annual Generation	MUs	33288
SHR	Kcal/KwH	2050 (as per page 240 of written submissions)
Aux	Percentage	4.75% (as per page 240 of written submissions)
GCV	Kcal/Kg	5350
Sp. Fuel consumption	Kg/KwH	0.399
Annual Fuel consumption	Million Tonnes	13.27
Monthly Fuel consumption	Million Tonnes	1.11

> The Petitioner was required to give the Guaranteed Performance Parameters of the Equipment Manufacturers particularly in regard to Station Heat Rate, Auxiliary Consumption, Boiler Efficiency etc to enable proper calculation of the quantum of coal that would be required to generate the electricity in a prudent and efficient manner. Despite assuring the Hon'ble Commission during the course of hearing that they would give such particulars, the Petitioner has so far not given the above particulars supported by the documents evidencing the Guaranteed Performance given by the Equipment Manufacturers. In the absence of the above, and only for the purpose of calculation the Respondents have proceeded on the above parameters, without admitting that the above are parameters to be taken into account.
>
> Though Gross Calorific Value of coal to be used has been given as 5400 Kcal/Kg, the statement in the written submissions is that the Petitioner can use coal of much lesser GCV, namely, 4900 instead of 5350 and further the Petitioner is experimenting further to use much lower GCV coal.

As mentioned above, the Petitioner had voluntarily bid for 55% as non-escalable Fuel Energy Charges though the Petitioner had an opportunity to bid for the entire 100% as escalable Fuel Energy Charges. This was a business decision on the part of the Petitioner to make the bid competitive and to edge out others in the bidding process.

13. The coal cost on the basis of the above mentioned parameters determined as per the following formula would indicate that the Petitioner would save substantial amount, if the Petitioner had quoted for 100% as escalable Fuel Energy Charges. The formula is as under:

Formula

Coal cost (Rs/Kg)= V.C. x GCV x (1 -Aux)/Gross SHR at Generator Terminals.

The calculation for the month of July 2012 i.e. at the time of filing of the above Petition is as under:

Month (Supply of power by CGPL)	Jul-12
Station Heat Rate at Generator Terminal in	2050
Auxiliary consumption in percentage	4.75%
GCV of coal in Kcal/Kg. (Assumed)	5400
Exchange Rate considered for billing purpose in ₹/US	55.025
Escalable Fuel Energy charge claimed by CGPL from Procurers in ₹/Kwh	0.7984
Non-escalable Fuel Energy charge claimed by CGPL from Procurers in ₹/Kwh	0.3890
Total Fuel energy charge claimed by CGPL	1.1874
Worked out Fuel cost in US $ / MT (as per above formula)	54.14
HBA marker notified by Indonesia Authority in US $ / MT	68.60
Assuming CGPL had bidded with 100% escalation then total fuel energy charge they could have claimed	1.77
Corresponding worked out Fuel cost in US $ per MT (as per formula)	80.90
Margin available in fuel cost if bid was with 100% escalation in US $ per MT	12.30
Savings in Million US $ per month	13.60
Savings in ₹Crores per month	74.84

The calculation for the period from April 2012 to January 2013 is attached hereto as Annexure 1.

If the GCV of the coal to be used is lesser than 5350 k cal say 4900 k cal or even less, the savings will be much larger. In this regard it is relevant to note that the lower GCV coal cost is lesser not proportionately to higher GCV Coal cost and in fact, the difference is

> much more than being proportionate. It is, therefore, not correct to calculate coal cost of 5350 Kcal GCV Coal by taking 6322 Kcal GCV coal and calculating the price proportionately or similarly 4900 Kcal coal proportionately from the price of 6322 Kcal GCV or 5350 Kcal GCV Coal."

17. Without going into the claim and counter claim of the parties, it is suffice to say that the petitioner has submitted the bid for 55% of the energy charges under non-escalable and under no circumstances, escalation of coal prices on account of Indonesian Regulations can be allowed on the corresponding portion of the energy charges. In my view, the Indonesian Regulations has merely aligned the sale price of coal to the international benchmark price and has required all existing contracts to adjust to the benchmark price. There is no prohibition on the supply of coal from Indonesia. The petitioner was at liberty to factor in the then prevailing international price and quote the bid. by not factoring in the market price of coal and not quoting the escalable energy charges in full has helped it in winning the bids. The petitioner in the face of the Indonesian Regulations cannot renege on its commitment and seek restitutionary remedy in the form of additional tariff to offset the impact of Indonesian Regulations. I am fully in agreement with the respondents that the increase in price or terms and conditions of an Agreement making the performance onerous or difficult cannot be said to be an event making the performance under Force Majeure within the meaning of Article 12.3 of the PPA or otherwise the agreement to be considered as frustrated under Section 56 of the Indian Contract Act, 1872. The petitioner has strenuously argued that the Indonesian Regulations would constitute Change

in Law under Article 13 of the PPA. I am of the view that on account of Indonesian Regulations, the petitioner may have to buy coal at a higher price than was agreed by it with the suppliers of coal in Indonesia but that should not affect the responsibility of the petitioner to discharge its obligations under the PPA as the PPA is not contingent upon the CSAs between the petitioner and the procurers. Moreover, when fuel is the exclusive responsibility of the petitioner, the respondents cannot be fastened with the additional liability because it becomes onerous for the petitioner to buy fuel at the prevailing benchmark prices. It is further noted that the petitioner belongs to the Group of Companies with decades of experience in commercial matters. It can be presumed that the petitioner while submitting the bids for supply of power took a deliberate commercial decision by factoring 55% of the energy charges under non-escalable energy charges. It is an admitted fact that Tata Power Limited is having 30% of stakes in the coal mines in Indonesia in which PT Bumi Resources of Indonesia is having 70% stake. Moreover, the subsidiary of the PT Bumi Resources namely, IndoCoal (Cayman) Limited has entered into CSA with the petitioner for supply of coal. Considering the inter-company transactions/agreements within the Group/Conglomerate affecting transfer price of coal, it is difficult to calculate loss or gain for a particular company. The increase in price of coal directly benefits the Indonesian company which benefits are passed on to Tata Power Limited in the shape of return for the investment

and thus the Tata Power Limited, as a whole may be the ultimate beneficiary of the Indonesian Regulations.

18. The petitioner has submitted that the notification of the Govt. of Indonesia with regard to coal prices has created problems relating to viability of the project considering the prices quoted by the petitioner in the bids. The basis for such assumption is that the market price in Indonesia in 2007 was USD 45/MT and the petitioner has arranged coal at a discounted price of USD 32/MT. It is to be noted that the USD 32/MT figure has been arrived at based on the subsequent CSA dated 31.10.2008 after the submission of the bids. At the time of bid, Tata Power Limited has not produced any document regarding its tying up of coal linkage in Indonesia or any other country. It has been stated in the petition that the petitioner has quoted the price after detailed survey of the international market. The prevailing price of coal in the Indonesian market in December, 2006, when bid was submitted by the petitioner was USD 33/MT for GCV 5000/kcal/kg and USD 43/MT for GCV 5900/kcal/kg. The petitioner is using the coal with GCV 5350/kcal/kg. Therefore, the prevailing price of coal with GCV 5350/kcal/kg would be below USD 40/MT. In other words, the petitioner has quoted the bid largely in alignment with the then market price prevailing in Indonesia. Indonesian Regulations has merely aligned the bilateral contract price with the market price, which is linked to international coal price. In other words, it is not the Indonesian Regulations, but the rise in international coal prices, which is

responsible for the increase in coal prices imported from Indonesia. It is to be noted that the calculations submitted by the petitioner regarding the loss per year as indicated in para 15 of this order shows as under:

Relating to	Annual loss (₹ in Crores)
Firm fuel price quoted (55%)	1463 (78%)
Escalable fuel price quoted	410 (22%)
TOTAL	**1873**

Hence the loss, if any, incurred by the petitioner is mainly due to his business decision of partly quoting firm fuel rate for 25 years. Loss in the case of escalable fuel price would get covered in future as the indices lag in movement compared to actuals and in a cycle they get adjusted. The petitioner being in business for a pretty long time is expected to factor in the possible market variation, while quoting for a period of more than 25 years. It can be concluded that a bidder who quoted firm price of power for a period of 25 years has safely assumed his own perception of the market variations with regard to fuel price and has suitably provided for the same in the tender quoting firm prices. It may be that in actual practice, his assumptions and actuals may vary depending on the market conditions and economic conditions. Hence, it cannot be assumed that the bidder is losing money on account of the notification of the Govt. of Indonesia. It is possible that the bidder may lose if his assumptions of variation in the prices of coal do not match with the actuals but those risks are commercial risks which he has voluntarily accepted.

Relief under the PPA

19. The petitioner has claimed relief under "Change in Law" and "Force Majeure" under the PPA and the regulatory jurisdiction of the Commission under section 79 of the Act. As regards force majeure, it is noted that Hon'ble High Court of Delhi in its judgment dated 2.7.2012 in ***Coastal Andhra Power Limited v Andhra Pradesh Central Power Distribution Company Ltd.*** **(*OMP No. 267/2012)*** while interpreting a provision exactly similar to Article 12 of the PPA under similar circumstances as applicable to the present case, rejected the plea of applicability of *Force Majeure* provision. The Hon'ble High Court observed that:

> "…………it is not possible to agree with the submissions made on behalf of CAPL that the increase in fuel costs would, notwithstanding the exception carved out in Clause (a) of Article 12.4, constitute force majeure. There is no doubt about there being a double negative on a collective reading of the above clauses. Still, it does appear prima facie that the parties intended that rise in fuel costs would not be treated as a force majeure event. In a supply contract, particularly where the commodity in question is being imported, parties generally factor in the possibility of sudden fluctuations in international prices. Supply contracts therefore provide for risk purchase and such like clauses. Article 13.2 permits CAPL to seek compensation for any loss it might suffer on account of change in the law. Therefore, that very event, viz., change in the law, could not also have been intended to constitute a force majeure event leading to increase in fuel costs. Change in law and the consequences thereof are treated separately under the PPA……."

20. Even though the learned Judge has observed that views expressed in the above quoted judgment are tentative only, with all humility I find myself in complete agreement with the above finding. The parties have agreed in the PPA

dated 22.4.2007 that change in fuel price will not be considered as force majeure. Therefore, change in fuel price as a result of Indonesian Regulations cannot be considered as force majeure. Moreover, Indonesian Regulations cannot itself be considered as an event of force majeure as it neither prevents nor unavoidably delays the petitioner in the performance of its obligations under the PPA.

21. I cannot bring myself to agree to the contention of the petitioner that the Indonesian Regulations has resulted in 'change in law' under Article 13 of the PPA dated 22.4.2007. The Indonesian Regulations merely require the contracts to align with coal prices with the Government determined benchmark prices, which is based on the market price of Indonesian coal. The increase in coal price therefore is on account of market dynamics about which the petitioner was well aware and had the discretion to factor it under the escalable charges at the time of the bid. Apart from the above, it is the understanding of the parties that 'law' in the PPA refers to Indian Law and consequently, change in law would refer to the impact of Indian Law only. In the representation dated 12.12.2011 made by Tata Power to the procurers and various authorities (pages 890 to 897 of the petition), Tata Power, the holding company of the petitioner, has indicated its understanding about the scope of the term 'law' in the PPA dated 22.4.2007 in the following terms:

"It is important to add that the bidding documents for the first set of UMPPs - Mundra & Sasan UMPP, were released at the same time in 2006. While Mundra was conceptualized as an imported coal based project, Sasan was conceptualized as domestic Pithead Coal based project. The Clause relating to Change in Law as it appears in the PPAs for both these UMPP, is exactly same i.e. change of law under Indian Statutes are only allowed as pass-thru.

Due to this while domestic coal based project enjoys the pass through of impact in change in law, similar benefit has not been given in case of a change in law in a foreign country, which is relevant for an imported coal based project, which is sourcing its raw material from a foreign country(s) for the next 25 years. This clearly seems to be an act of omission by all stakeholders while finalizing the PPA document."

The respondents in their reply have submitted that the above letter clearly establishes the intention of Tata Power at all relevant time till 12.12.2011 that they had participated in the bid and entered into the PPA on the clear understanding that the Law would include only Indian Law. The petitioner in its rejoinder has submitted that the letter dated 12.12.2011 was communicated by Tata Power to bring forth the impact of the phenomenal rise in coal prices globally and the Indonesian Regulations on the Mundra project. The petitioner has submitted that the context in which submission regarding Change in Law was made was to raise the concerns with the Governments that PPAs did not specifically envisage such a situation as Change in Law, since the definition of law specifically did not include foreign law. The petitioner has further submitted that subsequently upon seeking legal advice, the petitioner was advised that since the entire project was based on imported coal and the FSA was a part of the Project Documents under the PPA, it was only logical to interpret the definition of law to include foreign laws, the same being an inclusive definition.

22. In my view, the PPA dated 22.4.2007 between the petitioner and the procurers needs to be interpreted on the express provision of the said document and the intention of the parties. Though the project was based on imported coal, the PPA has not been made subject to the import of coal from any particular country or source or any particular price. Arrangement of coal is the exclusive responsibility of the project developer and the submission of the CSA to the lead procurer was for the limited purpose of informing that the project was being implemented by the petitioner as per the schedule agreed in the PPA. The intention of the parties to the PPA appears to be that the petitioner shall be entitled for escalation on the escalable part of the fuel energy charge as per the indices of CERC and no escalation will be paid for the non-escalable part of the fuel energy charge, irrespective of the source and price of fuel being arranged by the petitioner. In the absence of any express provision in the PPA to include foreign law in the definition of law and in view of the intention of the parties as gathered from the various provisions of the PPA, I am of the view that the case of the petitioner is not covered under 'Change in Law".

23. In the light of the above discussion, I rule out the applicability of Article 12 (*Force Majeure)* and Article 13 (Change in Law) of the PPA, and Section 56 of the Indian Contract Act, 1872. My conclusions in this regard are in line with the findings of the other Members of the Commission.

Relief under Section 79 of the Act

24. Learned Senior Counsel for the Petitioner submitted during the hearing that without prejudice to the reliefs available under the PPA, if a project has lost its viability and it has become commercially impossible for a party to perform its obligations under the contract, the petitioner can approach this Commission under Section 79(1)(b) of the Act requesting the Commission to revisit/restructure the tariff in a manner which makes the project commercially viable in view of its wide powers to 'regulate' under Section 79(1)(b) of the Act. The contention of the petitioner is that the Commission has overriding powers under Section 79 (1) (b) read with Section 61 of the Act to regulate the tariff which has been determined through a Competitive Bidding Process under Section 63 of the Act. It has also been contended that the Guidelines issued by the Central Government for the Competitive Bidding Process under Section 63 itself envisages that all tariff and tariff related matters shall be subjected to the decision by the Appropriate Commission which necessarily implies that the Appropriate Commission can exercise regulatory jurisdiction in respect of such tariff under Section 63 also. In this regard the Petitioner has cited decisions of the Hon'ble Supreme Court to the effect that the regulatory powers are wide in nature which enables the Central Commission to revisit and re-determine the tariff from time to time.

25. The respondents have submitted that above contention of the petitioner is a complete mis-interpretation of the scheme of the Act and the objective and purpose sought to be achieved. Sections 61, 62 and 64 constitute one scheme of things, where the tariff is determined based on the approval of each element of cost by the Regulatory Commissions. The nature of such determination is provided in Section 62 and the process of determination is provided in Section 64 of the Act. Section 61 provides for the Commission to frame Regulations for such determination of tariff. Section 61 is therefore in the context of section 62 and 64. On the other hand, Section 63 does not contemplate the Appropriate Commissions to frame a regulation for the method and manner of determination of tariff by a Competitive Bidding Process. The Parliament in its wisdom has vested the Guidelines to be issued not by the Central Commission or the State Commission but by the Central Government. The respondents have submitted that it is not possible for the Commission to determine by regulation the terms and conditions for Competitive Bidding Process to be adopted under Section 63 of the Act. Though, Section 63 does not refer to Section 61 but the scheme of things contained in Section 63 is absolutely clear. There will be no determination of tariff by the Central Commission or the State Commission in the Competitive Bidding Process. Therefore, there is no need to frame a regulation for such determination. It has been submitted that notwithstanding the fact that the regulatory jurisdiction is much wider than the adjudicatory or administrative jurisdiction, such jurisdiction is vested in the Commission by Law i.e. the

Electricity Act, 2003 and is circumscribed by the provisions of the Electricity Act, 2003. The respondents have argued that it is not correct on the part of the petitioner to contend that the Commission in exercise of regulatory jurisdiction can do a thing even if they are contrary to the scheme of the provisions of the Act. It has been submitted that the prayer of the petitioner requesting the Commission to intervene and establish a mechanism for providing increase in the energy/variable charges is without any basis as there cannot be any formulae for the fuel cost escalation or adjustment of the same as a pass through in the tariff payment to accommodate the petitioner for the alleged fuel cost escalation in the background of the petitioner having quoted tariff of 55% fuel charges on non-escalable basis.

26. I have considered the contention of the parties. Section 61 of the Act prescribes that the Appropriate Commission shall specify the terms and conditions of tariff and in doing so shall be guided by the principles indicated therein, such as, generation, transmission, distribution etc. to be conducted on commercial principles, the factors to encourage competition, efficiency, economical use of the resources, good performance, optimum investments, safeguard of consumers' interest, recovery of cost in a reasonable manner etc. It also prescribes that the Commissions shall be guided by the National Electricity Policy and the Tariff Policy. When the Commission notifies regulations/orders with regard to determination of tariff under Section 62, these principles are taken into account while prescribing the norms of performances, norms of

capacities, rates of interests, rates of return and all other related matters. In respect of competitive bidding under Section 63, these principles are taken into account while prescribing the guidelines for the competitive bidding as well as bid documents for the competitive bidding. In fact, the guidelines and bid documents issued by the Ministry of Power for competitive bidding give the options to the bidders to take care of his interest including future escalation in the cost of various inputs and at the same time to take care of interest of the consumers. These documents were also issued by the Government of India after consultation with stakeholders and also with this Commission. Hence, it can be safely assumed that the principles enunciated in Section 61 of the Act are adequately incorporated in the competitive bidding guidelines issued by the Govt. of India. Section 63 of the Act prescribes that "notwithstanding anything contained in Section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government". It is clear from the provisions of the Act that if the bidding guidelines by the Central Government have been followed scrupulously, the Appropriate Commission shall adopt the tariff. In this case, this Commission while adopting the tariff of the petitioner in its order dated 19.9.2007 in Petition No.18/2007 had observed regarding the role of the Commission in the case of adoption of tariff under section 63 of the Act.

> "15. It is evident from the guidelines that in contrast to the elaborate role of the Commission in the tariff determination under Section 62 of the Act, its role in case of tariff discovery through the competitive bidding process undertaken under Section 63 is essentially confined to adoption of tariff on being satisfied that transparent process of bidding in accordance with the guidelines have been followed in determination of such tariff. While adopting the tariff discovered through the competitive bidding process, the Commission is not required to go into the merits or analysis of the tariff so discovered. Neither, it is possible for the Commission to do so as no supporting details are required to be submitted by the bidders".

Therefore, the Commission has no role to examine whether the principles enunciated under Section 61 have been followed for each of the parameters bid by the parties. The Appropriate Commissions also do not get into the details of various parameters as in the case of determination of tariff under Section 62. The original tariff bids have not been examined by the Appropriate Commission while adopting the tariff to find out whether the recovery of the cost of electricity in a reasonable manner has been made or not as the bidders are expected to take care of their interest. If the original bids have not been examined towards this while adopting the tariff, I am unable to comprehend as to how the same can be examined after the adoption of tariff based on the petition of the bidder subsequently.

27. In my view, the present case primarily involves adjudication of disputes raised by the petitioner and is outside the scope of regulatory power. The regulatory power is a general power vested in the Commission which can be exercised while formulating regulatory policies. The regulatory power cannot be invoked for settlement of individual disputes arising out of commercial relations between the parties, though power of regulation is considered to be expansive and vast. None of the authorities relied upon by learned counsel for the petitioner involves exercise of regulatory power to upset the agreed commercial arrangements between the parties. The exercise of regulatory power amounts to invasion on the exercise of free will by the parties. Moreover, the decision in the present case will be the precedent to be followed in future. The exercise of

regulatory power in such cases will have the cascading effect and sanctity of competitive bidding will be lost. It was argued on behalf of the petitioner that the Commission has a responsibility to ensure reasonable return to the investor while safeguarding the interest of the consumers at large. Level playing field have been provided between the project developer and the distribution licensees and opportunity have been provided to cover their respective commercial risks, it is not the mandate of the Commission to ensure that the project developer earns profit in every situation, irrespective of business risks assumed by the developer. The consumers had no say in the matter when the petitioner made its bids for supply of power at the tariff which subsequently translated into the PPA. The relief to the petitioner in any form in the present set of circumstances will impinge upon the avowed object of the law mandating protection of the consumer interest. Therefore, I am opposed to exercise of regulatory power under clause (b) of sub-section (1) of Section 79 of the Electricity Act to redress the petitioner's grievances arising out of the risks which the petitioner has assumed while quoting the bids.

28. In the Written submission, the petitioner has submitted that renegotiation of long-term contracts is the worldwide accepted principle where external uncontrollable factors have impacted the viability of a project, though such a ground has not been taken in the petition. It has been further submitted that the statute of International Institute for the Unification of Private Law ("**UNIDROIT**")

has developed a general set of rules on commercial contracting which recognize the hardship caused to a party to the contract of relevance to renegotiation of long-term contracts. Reliance has been placed on a study by J. Luis Guasch, published by World Bank Institute of Development Studies (2004) which also points out that renegotiation of a contract is considered relevant if a concession contract has undergone a significant change or amendment not envisioned or driven by stated contingencies. It has been pointed out in the study that renegotiation was a positive instrument to address the inherently incomplete nature of concession contracts as mechanism can enhance welfare if used properly. The study shows that more than 46% of the contracts entered through competitive bidding were renegotiated. The petitioner has also upon the Report of Jon Stern titled 'Relationship between Regulation and Contract in Infrastructure Industries: Regulation as ordered renegotiation' published by Centre for Competition and Regulatory Policy, Department of Economics, City University London, London (2012). According to this report, all long-term contracts are incomplete as it is not possible to imagine all possible contingencies arising during their currency. The report points out that the longer the duration, more flexible are the contracts on the issue of price renegotiations. By placing reliance on 'Interpretation of Contracts' by Sir Kim Lewison (2007), it has been argued that while interpreting the contract, the law generally favours a commercial sensible construction since a commercial construction is more likely to give effect to the intention of the parties.

29. It has been submitted by the respondents in the Written Submission that Gausch in his study referred to only future contracts/concessions and that this study does not provide any guidance for its application to the contracts already executed. Therefore, the facility of renegotiation cannot be used to correct for the mistakes in the bidding committed by the petitioner while firming up its bids.

30. In my opinion, renegotiation of tariff cannot be favoured when such tariff has been discovered through the International Competitive Bidding process. The renegotiation of tariff in such cases defeats the competitive bidding process. The petitioner in its Written Submission has cited certain authorities in support of the claim that long-term contracts can be subjected to renegotiation as it is not possible to foresee the future developments with a reasonable degree of certainty. I feel that these authorities have no relevance to the present case involving long term contracts. In fact the World Bank Institute Write up by John Luis Guasch does not advocate the renegotiation of existing contracts but seeks to serve as a guide and aid in design of future concession and regulations and to contain the incidence of inappropriate renegotiation by means of thorough analysis and detail policy issues. The following extract from the book makes the position clear beyond doubt.

> "In assessing the concession process this book begins with the premise that the exiting model and conceptual framework are appropriate but that problems have arisen because of faulty designs and implementation. The book's main

objectives are to aid in the design of future concessions and regulations and to contain the incidence of inappropriate renegotiation by means of thorough analysis and detail policy lessons. The key issue is how to design better concession contracts and how to induce both parties to comply with the agreed upon terms of the concession to ensure long term sector efficiency and vigorous network expansion".

Further, the book has highlighted the sanctity of the bid as under:

"**Sanctity of the Bid:** When facing petitions for renegotiation, the sanctity of the bid contract must be upheld. The operator should be held accountable for its submitted bid. The financial equation set by the winning bid should always be the reference point and the financial equilibrium behind that bid should be restored in the event of renegotiation or adjustment. Renegotiation should not be used to correct for mistakes in bidding or for overly risky or aggressive bids – another reason for the superiority and desirability of transfer fees over minimum tariff as award criteria for concession awards".

Thus J. Luis Guasch has clearly brought out that negotiation should not be used to correct the mistakes in the bidding or for overly risky or aggressive bids. The book prescribes a blueprint for future concession and clearly advocates that the sanctity of the bids should not be affected. In the case of the petitioner, the bidding process clearly allowed the bidder to bid tariff in an escalable manner to deal with long term situations by opting for escalation. The petitioner through its own economics decided to bid for non-escalable energy charges for 55%, presumably based on its mining interest in Indonesia. The petitioner should have built in the escalation factor and the risk associated with sourcing coal from foreign countries to insulate it from any future adverse development. The petitioner by quoting non-escalable energy charges has assumed the commercial risks and to corner the award of contract and in my view renegotiation should not

be allowed as it would give an opportunity to the petitioner to pass on the risks he assumed to the consumers and defeat the purpose of section 63 of the Act.

31. The tariff has been adopted in this case after it is discovered through the competitive process under section 63 of the Act. When tariff is discovered through competitive bidding, the role of the Regulatory Commission is limited to adoption of tariff and subsequent adjudication of dispute inter parties is confined to what is permissible under the provisions of the PPA. In other words, the sanctity of the competitive bidding has to be maintained throughout the life of the contract. The Appellate Tribunal for Electricity in its judgment dated 16.12.2011 in the case of Essar Power Limited V UPERC & Another (Appeal No.82 of 2011) has emphasized the sanctity of the Competitive Biddings under Section 63 of the Act as under:

> "40. Section 63 starts with non-obstante clause and excludes the tariff determination powers of the State Commission under Section 62 of the Act. The entire focus of the competitive bidding process under Section 63 is to discover the competitive tariff in accordance with the market conditions and to finalize the competitive bidding process in accordance Central Government's guidelines, standard document of Request for Proposal and the PPA. Under Section 62 of the Act, the State Commission is required to collect various relevant data and carryout prudence check on the data furnished by the licensee/generating company for the purpose of fixing tariff. Hence determination of tariff under Section 62 is totally different from determination of tariff through competitive bidding process under Section 63.
>
> 41. The competitive bidding process under Section 63 is regulated in various aspects by the Statutory Framework. To promote competitive procurement of electricity by distribution licensees with transparency, fairness and level playing field, the Central Government has framed the Bidding Guidelines to achieve the following objectives: (a) To promote competitive procurement of electricity by the distribution licensees;

(b) To facilitate transparency and fairness in procurement processes;

(c) To facilitate reduction of information asymmetries for various bidders:

(d) To protect consumer interests by facilitating competitive conditions in procurement of electricity;

(e) To enhance standardization and reduce ambiguity and for materialization of projects;

(f) To provide flexibility to suppliers on internal operations while ensuring certainty on availability of power and tariffs for buyers"

x x x x

49. The competitive bidding process adopted under the Act must, therefore, meet the following statutory requirements:

(a) Competitive bidding process under Section 63 must be consistent with the Government of India guidelines. Any deviation from the standard Request for Proposal(RFP) and model PPA notified by the Government of India must be approved by the State Commission.

(b) This process must discover competitive tariff in accordance with market conditions from the successful bid- consistent with the guiding principles under section 61 of the Act.

(c) If the deviations are permitted by failing to safeguard the consumer interests as well as to promote competition to ensure efficiency, it will destroy the basic structure of the guidelines. "

32. In that case the Appellate Tribunal disapproved the decision of the State Commission allowing renegotiation by Noida Power Ltd with third party after the completion of the competitive bidding but before the adoption of tariff as it would destroy the sanctity of competitive bidding under section 63 of the Act. The present case stands on a more serious footing as the tariff has already been adopted by the Central Commission and the parties have been acting on the tariff so adopted. Permitting negotiation at this stage will not only render the bidding

process redundant but will also open up a potent legal issue affecting the rights of the bidders who have been edged out even after quoting tariff lower than what is sought to be determined through renegotiation.

33. The objectives of Electricity Act, 2003 as stated are to consolidate laws relating to generation, transmission, distribution, trading and use of electricity and generally taking measures conducive for development of the electricity industry, promoting competition therein, protecting interests of the consumers etc. National Electricity Policy framed under the Act also lay down the guidelines for accelerating development of power sector, providing supply of electricity to all areas and protecting interest of consumers as well as other stakeholders. Definitely, encouraging investment in the electricity industry is one of the objectives of the reforms started through the Electricity Act and various policy guidelines. In pursuance of the above, Central Govt. as well as State Governments, Central Commission as well as State Commissions have framed policies, guidelines, rules, regulations which encourage investment in the electricity sector and for protecting the interest of all stakeholders. The competitive bidding guidelines as well as bid documents framed by the Government in consultation with all the stakeholders and CERC are also towards achieving such objectives only. The objectives of the Act are to be translated through the policies, frameworks, regulations etc. to be implemented for the benefit of all. Relief for the grievances or the claims of any individual participant

or company cannot be moulded on the plea that it subserves the national policy. Such grievances have to be dealt with as per the commitments, obligations, liabilities assumed amongst the parties in legally binding agreements. In deciding the individual case based on the rights and obligations undertaken by the parties, in no way contradicts the general objectives of working towards development of the electricity sector.

34. The petitioner has submitted in its Written Submission that the capacity charge quoted by the petitioner is among the lowest in the industry at approximately ₹0.90/kWh which compares extremely favourably with the rates quoted in the recent past in various projects awarded in the country. The petitioner has submitted that unless the cost of fuel is not adjusted in tariff, the project would become unviable and the consumers in the procurer States will be required to buy power at a much higher price. It is noticed that for quite sometime, there has been no competitive bidding under Case 2. Under Case 1, the price discovered is in the range of ₹3.50- ₹.7/kWh. In my view, the contractual obligations between the parties as enshrined in the PPA cannot be reopened based on the price discovery through competitive bidding now. I am also aware that the Central Government in recognition of the problem of imported fuel has proposed to amend the Model PPA to make fuel pass through. In my view, the initiative of the Ministry of Power to make the fuel cost a pass through is still in the draft stage and even the Commission in its statutory advice to the

Government has not fully favoured the proposal. In any case, any change in the Bidding Guidelines will be applicable for the future competitive bidding. Viewed from any angle, there is no scope to allow the relief to the petitioner for the escalation in fuel cost due to increase in international fuel price and promulgation of Indonesian Regulations.

35. For the detailed reasons above, I am of the view, that the petitioner, a corporate house having long experience in building industrial projects as well as dealing with the imported coal has participated in the tender for supply of power for twenty five years. The bid documents provided for opportunity to quote firm, partly variable and fully variable (variable according to the indices notified by CERC from time to time) for fixed as well as fuel charges. It is also seen that many bidders have quoted variable prices whereas the petitioner has quoted 55% of the energy charges under non-escalable for twenty five years fully knowing the fluctuating international market conditions with regard to price of coal. It is obvious that the petitioner has built up adequate provisions in the rates to cover the variations. It is also obvious that the petitioner is using the notifications of Govt. of Indonesia as an opportunity to cover some of its commercial risks or to improve his margins further. The PPA provides only two occasions where the prices can be varied namely under Article 12 under force majeure and Article 13 under change of Law. The above two conditions have been ruled out for the reasons stated earlier. The petitioner's attempt to invoke

Section 79 to raise the tariff arrived at under Section 63 through competitive bidding is untenable.

36. In my view, there is no scope either under the PPA or under the Act to establish a mechanism to grant relief to the petitioner as prayed for. The petition lacks merit and is liable to be dismissed. I direct accordingly.

sd/-
(S Jayaraman)
Member

Dated: 15th April, 2013