CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

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 and Shri M Deena Dayalan, Member. In the order, the learned Members have come to the following conclusions:

(a) Promulgation of "Regulation of Ministry of Energy and Mineral Resources No.17 of 2010" on 23.9.2010 by Minister of Energy and Mineral Resources, Republic of Indonesia (hereinafter "Indonesian Regulations") which required the sale price of coal in Indonesia to be aligned with the international benchmark price has altered the premise on which the energy charges were quoted by the petitioner in the bids submitted to Gujarat Urja Vikas Nigam Limited and Haryana Utilities comprising Uttar Haryana Bidyut Vitaran Vikas Nigam Limited and Dakshin Haryana Bidyut Vitaran Vikas Nigam Limited for supply of power from the Mundra Power Project of the petitioner and has rendered it commercially unviable and impracticable to supply electricity to

the respondents at the tariff agreed in the Power Purchase Agreements (PPA).

(b) The case of the petitioner does not satisfy the conditions of force majeure under Article 12 and Change in Law under Article 13 of the PPAs and therefore, no relief can be granted to the petitioner under these provisions.

(c) The petitioner cannot be allowed to suffer and bleed on account of the unprecedented increase in the price of coal being sourced from Indonesia which will affect the interest of the petitioner as the project developer and the interests of the consumers of Gujarat and Haryana in case of inability of the petitioner to supply power at the PPA rates. Therefore, in the interest of the power sector, the Commission in exercise of its plenary power under Section 79(1)(b) of the Electricity Act, 2003 i.e. “power to regulate tariff” read with the mandate of the National Electricity Policy and Tariff Policy to ensure financial turnaround of the power sector and supply of electricity to the consumers at the competitive prices is statutorily obliged to work out a solution to help the petitioner to get over the unprecedented situation arising out of the promulgation and operation of the Indonesian Regulations.

(d) By way of relief, the Commission has decided to grant relief in the form of compensatory tariff which will be granted over and above the tariff agreed in the PPAs for a specified period till the unprecedented situation persists. Accordingly, the Commission has directed for constitution of a Committee consisting of the Principal Secretaries of the concerned States/CMDs of the concerned distribution companies, Chairman of the Petitioner company or his nominee, an independent financial analyst and an eminent banker to recommend the compensatory tariff within a period of one month.

2. I am in respectful disagreement with the 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 PPAs and the relief proposed to be granted. With regard to the prayers of the petitioner under the 'force majeure' and 'change in law' provisions of the PPAs, I am in agreement with the conclusion of the learned Members that the petition does not satisfy the conditions of force majeure under Article 12 and change in law under Article 13 of the PPAs, though I would supplement findings with additional reasons.

3. The submissions of the petitioner based on which the reliefs have been claimed in the petition are summarized as under:

(a) Drawing upon the past experience of its holding company namely Adani

Enterprises Limited, the petitioner calculated the bid price primarily based on the price of the domestic coal, for bidding to sell power from the Mundra Power Project. Wherever and to the extent the use of imported coal was contemplated, the petitioner factored the price of Indonesian coal in its bid.

(b) In-principle commitment dated 14.11.2006 made by the Gujarat Mineral Development Corporation (GMDC) to supply coal from Morga – II coal block in the State of Chhatisgarh from its proposed plant at Morga was the basis of the bid submitted by the petitioner on 4.1.2007 for supply of 1000 MW power to Gujarat Urja Vikas Nigam Limited (GUVNL). It was clearly envisaged in the bid submitted by the petitioner that coal was to be blended with imported coal from Indonesia sourced through Kowa Company Ltd, Japan and Coal Orbis Trading GMBH, Germany for optimum techno-commercial utilization for which the Memorandum of Understandings with the said companies were submitted..

(c) As GMDC reneged from its commitment to supply coal from the Morga-II coal block, the petitioner entered into the FSA with Adani Enterprises on 24.3.2008 for supply of coal for Phase III (Units 5 and 6) of Mudra Power Project, which was to be imported from Indonesia through its subsidiary, PT Adani Global.

(d) Government of India announced a New Coal Distribution Policy ("NCDP") on 18.10.2007 which provided for supply of coal to meet the requirement of 100% capacity of independent power projects and subsequently changed to 70% for coastal projects. As coal is a nationalized commodity, the petitioner had relied upon the commitments given by the Government Authorities time to time while taking any business decisions.

(e) The bid for supply of power to the Haryana Utilities (comprising Uttar Haryana Bijli Vitaran Nigam Limited and Dakshin Haryana Bijli Vitaran Nigam Limited) was based on usage of domestic and imported coal in the ratio of 70:30. The requirement of imported coal was to be met from the coal imported from Indonesia.

(f) Under the Fuel Supply Agreement (FSA) dated 9.6.2012 executed with Mahanadi Coalfields Ltd, the 'take or pay' commitment has been pegged at supply of coal up to 80% of the annual contracted quantity, which cannot meet the entire requirement of coal for supply of power committed in the PPAs executed with the Haryana utilities and Coal India Limited (CIL) can meet its obligation to supply balance of 20% by importing coal to meet shortage of domestic coal, at the petitioner's cost.

(g) No penalty is payable by CIL during initial contract period of three years for its failure to supply the committed quantity of coal and thereafter the

meager penalty of 0.01% is imposable.

(h) The petitioner entered into a Coal Supply Agreement with Adani Enterprises Limited on 15.4.2008 for supply of imported coal from Indonesia for Phase IV of the Mundra Power Project from which power is to be supplied to the Haryana Utilities.

(i) The Coal Supply Agreements dated 24.3.2008 and 15.4.2008 between the petitioner and Adani Enterprises Ltd and back-to-back agreements of Adani Enterprises Limited with the coal suppliers in Indonesia have been directly impacted by the Indonesian Regulations with effect from 24.9.2011, thus affecting the supply of coal at the negotiated price.

(j) The subsequent unforeseen and unprecedented events on account of Indonesian Regulations and limited domestic coal linkage have made it commercially impracticable for the petitioner to supply power at the bid out tariff as the fundamental premises on which the bids were made have been completely wiped out/altered.

(k) In such a situation, the petitioner will be forced to shut down its Mundra Power Project unless the tariff is adjusted or revised to address the above unprecedented and unforeseen circumstances.

4. The respondents have fiercely contested the contention of the petitioner as noted above and submitted that the petitioner was selected as the successful bidder in Case 1 biddings whereunder it is the responsibility of the bidder to arrange for fuel. Moreover, the petitioner had quoted non-escalable capacity charges and non-escalable energy charges to win the bid, thereby absorbing all future escalation in capacity charges or 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 and the present petition goes against the spirit of section 63 of the Act as it seeks to convert a tariff discovery under section 63 of the Act into tariff determination under section 62 of the Act which is not permissible.

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

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

(b) Coal linkages and Coal Supply Agreements;

(c) Scope and impact of Indonesian Regulations;

(d) Grounds of relief claimed by the petitioner;

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

Bid Processes leading to selection of the petitioner for supply of power to the respondents

Gujarat Bid

6. The petitioner has relied upon two MoUs with Kowa Company and Coal Orbis and a commitment letter from GMDC while submitting the bids. These documents are discussed briefly as under:

(a) Adani Enterprises Limited (hereinafter referred to as "AEL") which holds majority stake in Adani Power Limited which is the petitioner before the Commission, entered into a Memorandum of Understanding (MoU) dated 9.9.2006 with Coal Orbis Trading GMBH, a German firm, for supply of basic tonnage of 3 MMT of coal and optional tonnage of 2 MMT of coal per annum. Under the MoUs, the price of coal would be fixed for the basic tonnage and additional tonnage for each contract year on an FOBT loading port (Base Price) which would be mutually discussed and agreed between the Buyer and Seller prior to entering into contract. The MoU was valid till the date when the parties entered into contract unless terminated earlier with one month written notice by either of the parties. Since AEL did not execute the Coal Supply Agreement, Coal Orbis terminated the MoU vide its letter dated 18.3.2008.

(b) Adani Enterprises Limited entered into a MoU dated 21.12.2006 with Kowa Company Limited, a Japanese firm, for supply of basic tonnage of 3

MMT of coal and optional tonnage of 2 MMT of coal per annum. As per the MoU, the price of coal would be fixed for the basic tonnage and additional tonnage for each contract year on an FOBT loading port (Base Price) which would be mutually discussed and agreed between the Buyer and Seller prior to entering into contract. The MoU was valid till the date when the parties entered into contract unless terminated earlier with one month written notice by either of the parties. Since no confirmation regarding Fuel Supply Agreement was received from AEL, Kowa Company cancelled the MoU vide its letter dated 5.2.2008.

(c) GMDC vide its letter dated 14.11.2006 had issued a commitment to Adani Group for fuel supply to the proposed Morga Power Plant at Morga, Chhatisgarh in the following terms:

> "Subject to execution of a detailed take or pay agreement, we agree to supply you adequate quantity of coal for your pithead power project of 1000 MW from Morga II Coal block allotted to us.
>
> We expect to finalise the FSA with you within the next two months."

The FSA with GMDC never materialized. The matter was under litigation before Gujarat Electricity Regulatory Commission and Appellate Tribunal for Electricity and is presently before the Supreme Court.

7. GUVNL invited three bids through a public notification dated 1.2.2006 for procurement of power under section 63 of the Act. Bid No.2 was invited for

maximum quantity of 2000 MW and minimum of 100 MW. GUVNL issued RFP to qualified bidders including the petitioner on 24.11.2006. Clause 3.1.3 of the RFP provided as under:

> "3.1.3 The size and location of the power station(s) and the source of fuel and technology shall be decided by the seller. The seller shall assume full responsibility to tie up the fuel linkage and to set up the infrastructure requirements for fuel transportation and its storage."

Clause 4.1.1.8 of the RFP provided as under:

> "8. Proof of Fuel Arrangement – Bidders need to indicate the progress/proof of fuel arrangement through submission of the copies of one or more of the following:
> (a) Linkage letter from fuel supplier;
> (b) Fuel Supply Agreement between Bidder and Supplier;
> (c) Coal Block Allocation letter/In principle approval for allocation of Captive Block from Ministry of Coal;
> (d) Other details submitted by the Bidder subject to being accepted by GUVNL as sufficient proof for demonstration of ability."

8. From the above provisions, it is clear that the procurer of power, GUVNL had no responsibility whatsoever towards the location, size, technology and source of fuel for the plant from which the bidder was to supply in the event of its selection. The proof of fuel arrangement was only meant to demonstrate the ability of the bidder to supply power in case of its selection. In my view, submission of the MoUs from Kowa and Coal Orbis and commitment letter from GMDC alongwith the bid by the petitioner needs to be seen and appreciated in the context of demonstration of the petitioner's ability to supply power and not as confirmation to GUVNL about the source of fuel for operation of the Project which was in any case not required under the terms and conditions of the RFP.

Therefore, the argument that the supply of power from Phase III of the Mundra Power Project to GUVNL was premised on the coal linkage by GMDC is misplaced. There is no generic link between the two in so far as the bid was concerned. In this connection, it would be appropriate to quote the following observations from the judgement dated 7.9.2011 of the Appellate Tribunal for Electricity in Appeal No.184/2010:

> "45. According to the Appellant, the coal supplied from Gujarat Mineral Corporation was the basic condition of the PPA dated 2.2.2007 and the PPA was entered into solely on the basis of the availability of the coal from Gujarat Mineral Corporation.
>
> 46. It is noticed that it was the Adani Enterprises Ltd which had represented that it had tied-up with the Gujarat Mineral Corporation for supply of Coal. Adani Enterprises Ltd also represented that it had tied-up with supply of imported coal with various Companies in Germany and Japan. The 2nd Respondent, Gujarat Holding Company had nothing to do with the sources of the fuel supply or locations of the plant of any bidder or seller. All bidders bidding for supply of electricity to Gujarat Holding Company were free to choose the location and the source of procurement of fuel. Gujarat Holding Company did not make any representation to any person of availability of power from Gujarat Mineral Corporation under the PPA. The absence of any reference to Gujarat Mineral Corporation in the bidding documents itself establishes that there was no pre-condition of availability of fuel to any Bidder including the Appellant for implementation of the PPA.
>
> 47. On the date of bidding, the Appellant did not have a firm agreement with Gujarat Mineral Corporation for supply of fuel. Appellant was required to execute a detailed agreement with Gujarat Mineral Corporation within two months but no such agreement was ever executed.
>
> 48. On the contrary, the Appellant had a Memorandum of Undertaking (MOU) with other Companies. Despite the same, the Appellant did not enter into any agreement with any of the Coal suppliers.
>
> 49. The Claim made by the Appellant that fuel supply from Gujarat Mineral Corporation was the only source for implementation of the PPA is patently wrong. There was no such stipulation either in the bid documents or in the PPA. The condition subsequent as specified in Article 3.1.2 (ii) dealing with Fuel Supply

Agreement was duly satisfied with firming up of the coal supply from Adani Enterprises Ltd/Indonesian Mines as per the admissions of the Appellant."

9. The RFP of GUVNL also provided complete freedom to the bidders to quote either the escalable capacity charge and escable fuel energy charge or non-escalable capacity charge or non-escable fuel energy charge or a combination of both. Clause 4.1.2.1 of the RFP provided that the Bidder should quote the Quoted Escalable Capacity Charge and Quoted Non-Escalable Capacity Charge. In case of Quoted Escalable Capacity Charges, the Bidder should quote the charges only for the first Contract Year after scheduled COD of first Unit. The Bidder should also quote the components of Quoted Energy Charges under the following heads:

(a) Quoted Escalable Fuel Energy Charge (Rupees/kWhr),

(b) Quoted Non-Escalable Fuel Energy Charge (Rupees/kWhr)

(c) Quoted Freight Energy Charge (Rupees/kWhr)- Only if relevant.

Further, Clauses 4.1.2.7, 4.1.2.8 and 4.1.2.9 of the RFP document provided as under:

"7. Bidders shall have the option to quote firm Quoted Energy Charges and/or firm Quoted Capacity Charges for the term of the PPA, i.e. Where the Quoted Escalable Fuel Energy Charges & Quoted Freight Energy Charges; and/or Quoted Escalable Capacity charges shall be 'nil' for all the Contract Years.

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

9. The Bidder shall also build in the cost of related Transmission Charges and Losses (as outlined in Format 2.1 of Annexure 2) and related charges such as SLDC/RLDC charges into the quoted Non Escalable Capacity Charge."

10. As per the above provisions, where the bidder has quoted only firm capacity charge or firm energy charge, the bidder has to indicate the quoted escalable capacity charge or quoted escalable fuel energy charge or the quoted freight energy charge for the contract years as "Nil". Moreover the bidder is required to build in the cost of secondary fuel into the quoted tariff and the cost of transmission charges and losses in the non-escalable capacity charges. In other words, where the bidder has quoted non-escalable capacity charge and non-escalable energy charge, it has taken the risk of not insulating itself from any sort of escalation either in the capacity charge or in the energy charge.

11. The Financial Bid submitted by the Consortium of Adani Power Limited and Vishal Export Overseas Limited shows that bids were quoted for a period of 25 years starting from 2011-12 till 2036-37 at the uniform non-escalable capacity charge of Rs.1.000/kWh and non-escalable energy charge of Rs.1.345/kWh for each contract year. In the Bid, Quoted Escalable Capacity Charge, Quoted Escalable Energy Charge and Quoted Escalable Freight Energy Charge were quoted as NIL. Thus the Consortium and the petitioner which was floated as a Special Purpose Vehicle to execute the project, by quoting on non-escalable basis have assumed full risks on account of the capacity and fuel of the project

for supply of 1000 MW power to GUVNL and the benefits of subsequent escalation are not available to the petitioner.

Haryana Bid

12. After the Haryana Electricity Regulatory Commission (HERC) approved the initiation of the Case 1 bidding process, Haryana Power Generation Company Limited (HPGCL) issued a Request for Qualification on 25.5.2006 and Request for Proposal on 4.6.2007 to procure 2000 MW of power on long-term basis on behalf of Haryana Utilities. Clause 2.7.2.2.1 of the RFP document provided for the following with regard to the Capacity Charge and Energy Charge to be quoted by the Bidder:

"**2.7.2.2.1 Capacity Charge**

(a) Capacity Charge may be firm or a combination of non-escalable and escalable capacity charge.

(i)Quoted Non-Escalable Capacity Charge (Rs./kWh) for each year of the operating period shall be based on the normative availability of 80% for the thermal stations or on design energy for hydel stations, and shall include the cost of secondary fuel. No separate reimbursement shall be allowed on account of secondary fuel.

(ii) Quoted Escalable Capacity Charge shall be quoted only for the first Contract Year after the Scheduled CoD of first part of the Contracted capacity. Quoted Escalable Capacity Charge shall be quoted based on the normative availability of 80% for the thermal stations or on design energy for hydel stations.

2.7.2.2.2 Energy Charge

(a) The Bidder shall have the option to quote either:

(i) Firm Energy Charges (Rs./kWh) for each year of the operating period i.e. where the Quoted Escalable Energy Charge shall be 'nil' for all the Contract Years or;

(ii) Combination of escalable and non-escalable Energy Charges (Rs/kWh)

(b) In case of hydel stations, no Energy Charge shall be quoted for supply of power.

(c) Energy Charge shall be payable per kWh for Schedule Dispatch;

(d) Quoted Non-Escalable Energy Charge- Quoted Non-escalable Energy Charge shall have the following components:

(i)Quoted Non-Escalable Energy Charge- Quoted Non-escalable Energy Charge shall cover the cost of Representative Fuel consumed for generation of electricity;

(ii) Quoted Non-Escalable Ocean Freight Energy Charge- Quoted Non-escalable Ocean Freight Energy Charge shall cover cost of transportation of the Representative Fuel from the fuel source to the Indian port;

(iii) Quoted Non-Escalable Fuel Handling Charge- Quoted Non-escalable Fuel Handling Charge shall be applicable only in case of imported fuel and shall cover the charges paid to the Indian port;

(iv) Quoted Non-escalable Inland Transportation Energy Charge- Quoted Non-escalable Inland Transportation Energy Charge shall cover the cost of transportation of Representative Fuel from the port of the Project in case of imported fuel and the cost of transportation of the Representative Fuel from the fuel source to the project in case of domestic fuel. This charge shall be paid only when Representative Fuel from the fuel source is imported coal or the domestic coal or gas transported through Hazira-Bijapur-Jagdishpur (HBJ) pipeline. In case Bidder is not envisaging usage of HBJ pipeline for gas transportation, this charge shall not be quoted.

(e) Quoted Escalable Energy Charge shall be quoted only for the first financial year starting from the Bid Submission Date only and shall have the following components:

(i)Quoted Escalable Energy Charge- Quoted Escalable Energy Charge

shall cover the cost of Representative Fuel consumed for generation of electricity;

(ii) Quoted Escalable Ocean Freight Energy Charge- Quoted escalable Ocean Freight Energy Charge shall cover cost of transportation of the Representative Fuel from the fuel source to the Indian port;

(iii) Quoted Escalable Fuel Handling Charge- Quoted Escalable Fuel Handling Charge shall be applicable only in case of imported fuel and shall cover the charges paid to the Indian port;

(iv) Quoted Escalable Inland Transportation Energy Charge- Quoted Escalable Inland Transportation Energy Charge shall cover the cost of transportation of Representative Fuel from the port of the Project in case of imported fuel and the cost of transportation of the Representative Fuel from the fuel source to the project in case of domestic fuel. This charge shall be paid only when Representative Fuel from the fuel source is imported coal or the domestic coal or gas transported through Hazira-Bijapur-Jagdishpur (HBJ) pipeline. In case Bidder is not envisaging usage of HBJ pipeline for gas transportation, this charge shall not be quoted.

(f) The Bidder shall have to submit details on the Representative Fuel as per Format 4 of Annexure 3."

13. From the above provisions of the RFP, it was clear that the Bidder had the full freedom to quote either firm capacity charge or a combination of escalable and non-escalable capacity charges. Similarly, the Bidder had the full freedom to quote firm energy charge for each of the 25 contract years or a combination of escalable and non-escalable energy charges. The Bidder was required to submit the details of representative fuel as per Format 4 of annexure 3. In support of the proof of fuel linkage, the bidder was required to submit the proof as per clause 7 of the RFP which provided as under:

"7. All bidders are required to submit copies of one or more of the following:
(a) linkage letter from fuel supplier;

(b) Fuel Supply Agreement between Bidder and Fuel Supplier;

(c) Coal block allocation letter or in-principle approval for allocation of captive block from Ministry of Coal; or

(d) Other details submitted by Bidders subject to acceptance by the procurer as sufficient proof for demonstration.

The above proof of fuel arrangement is not required in case the fuel to be used by the bidder is imported coal."

14. The petitioner submitted the bid on 24.11.2007, quoting a levelised tariff of Rs. 2.94/kWh consisting of non-escalable capacity charge of Rs.0.977/kWh and non-escalable energy charge of Rs.1.963/kWh. As regards the representative fuel, the petitioner submitted as under:

"Charateristics of the Representative Fuel"

Ser No.	Particular	Details
1.	Representative Fuel	**Imported/Indigenous Coal**
2.	Fuel Type	Not Applicable
3.	Fuel Grade	Not Applicable
4.	CIL subsidiary from which coal is proposed to be sourced/Location of the Captive coal mine	Not Applicable
5.	Distance from source of coal to the power station where railway network will be required for coal transportation	Not applicable
6.	Is the representative fuel covered under Administrative Price Mechanism("APM") or is controlled and notified by an Independent Regulator or by the Government of India or Government of India Instrumentality?	Not Applicable
7.	Is the Gas pipeline envisaged for transportation of HBJ pipeline?	

In support of the proof of fuel linkage, the petitioner submitted the copies of

the MoUs with Kowa Company and Coal Orbis by Adani Enterprises Limited. In the petition, the petitioner attached a letter from Ministry of Coal relating to allocation of coal in support of its arrangement for fuel linkage which however pertained to the Maharashtra Project of the petitioner and not the Mundra Power Project. Haryana Utilities in their affidavit dated 5.2.2013 have confirmed that only the copies of the MoUs with Kowa Company and Coal Orbis were submitted by the petitioner during the bid. Therefore, it appears that the petitioner did not have any coal linkage or arrangement for domestic coal as on the date of submission of the bids. In any case, the MoUs submitted by the petitioner to HPGCL had very limited relevance only to the extent of demonstrating the capability of the petitioner to produce the power for supply to Haryana Utilities if it is successful in the bid.

15. The petitioner had quoted only the non-escalable capacity charges and non-escalable energy charges. It is only in case of escalable capacity and escalable energy charges that the escalation as per the escalation indices of this Commission are admissible. The petitioner by quoting the non-escalable charges, even though it had the full freedom to quote escalable charges has foreclosed all its options against possible increase in fuel prices either on account of price fluctuation or change in exchange parity of Indan Rupee vis-à-vis other currencies, in future.

Coal Linkages and Coal Supply Agreements of the Petitioner

16. The petitioner has relied upon the following Agreements for coal supply to contend that subsequent developments in the form of absence of fuel linkage and increase in coal prices as a result of Indonesian Regulations has made the project unviable.

(a) The petitioner entered into a Coal Supply Agreement dated 24.3.2008 with AEL for supply of coal for 2x660 MW Phase III of Mundra Power Project (Firm Quantity 4.04 MMT, Optional Quantity 0.202 MMT and Excess Quantity 0.202 MMT during a contract year) with reference to GCV of 5200 kcal/kg @ USD 36/MT for five years with escalation of 10% in every block of 5 years. By an amendment dated 15.4.2008, the Coal Supply Agreement dated 24.3.2008 was further amended to provide for supply of 4.33 MMT of coal per annum for a period of 25 years (in place of 15 years in the original agreement) for an average GCV of 5200 kcal/Kg @ USD 34/MT. The Coal Supply Agreement was further amended and merged into a Consolidated Coal Supply Agreement dated 26.7.2010 for supply of coal to Phase I, Phase II and Phase III of the Mundra Power Project.

(b) The petitioner entered into a Coal Supply Agreement dated 15.4.2008 with AEL for supply of coal for 3x660 MW Phase IV of Mundra Power

Project (Firm Quantity 6.5 MMT, Optional Quantity and Excess Quantity 5% of the firm quantity during a contract year) with reference to 5200 Kcal @ USD 24/MT with escalation of 2% every year. The Coal Supply Agreement was further amended and merged into the Consolidated Coal Supply Agreement dated 26.7.2010 for Phase I, Phase II and Phase III of the Project.

(c) The Consolidated Coal Supply Agreement dated 26.7.2010 provided that the CIF price for coal with specification of average GCV of 5000 to 5200 kcal/kg would be USD 36/MT until 5 years from the start-up date and thereafter would be increased by 10% in every block of 5 years for delivery of contracted quantity of standard coal at Mundra port. The CSA further clarified that the minimum coal price would not be less than CIF price of USD 30/MT and maximum price would not be more than CIF price of USD 45/MT so as to ensure average CIF price of USD 36/MT.

It is to be noted that all these agreements as discussed above were entered after the bids were received and only MoUs with Kowa and Coal Orbis were enclosed with the bids as the basis of fuel arrangement.

(d) The petitioner in its letter dated 28.1.2008 applied for coal linkage to the Standing Linkage Committee (Long Term), Ministry of Coal, Government of India for the entire capacity of 4620 MW with an annual

coal requirement of 28 million tonnes per annum based on 'F' grade coal from the Talcher Coalfields of Mahanadi Coalfield Ltd. The Standing Linkage Committee (Long Term) {(hereinafter "SLC(LT)} in its meeting held on 12.11.2008 decided that projects considered as coastal projects would have an import component of 30% for which the developer had to tie up sources directly and Letter of Assurance would be issued for 70% of the recommended capacity only. Accordingly, SLC (LT) authorised issuance of LOA by Coal India Limited for capacity of 1386 MW for Phase IV of the project (70% of installed capacity of 1980 MW) in accordance with the provisions of New Coal Distribution Policy. The petitioner got the Letter of Assurance from Mahanadi Coalfield Ltd. vide letter dated 5.5.2009 for supply of 6.409 Million MT of coal which corresponded to 70% of fuel requirement of Phase IV of the project. The petitioner entered into a Coal Supply Agreement (CSA) dated 9.6.2012 for supply of annual contracted quantity of 64.05 lakh tonnes of coal for a period of 20 years with Mahanadi Coalfields Ltd.

17. Examination of the provisions of the arrangements for fuel made by the petitioner as noted above shows that the agreements dated 24.3.2008, 15.4.2008 and 26.7.2010 are between the petitioner and its holding company, AEL. The agreement dated 9.6.2012 is between the petitioner and Mahanadi

Coalfield Limited. These agreements have been entered into by the petitioner much after the bids were submitted and the LOIs were issued in favour of the petitioner. Therefore, the performance under the PPAs is not contingent upon these Fuel Supply Agreements including the prices so as to bind the parties to the PPA. It has been submitted by the petitioner in its written submission that "by way of a subsequent development, as directed by Hon'ble Appellate Tribunal in its judgement dated 07.09.2011, the Petitioner is now required to generate and supply power from unit nos.5 and 6 to GUVNL based on FSA with AEL for supply of Indonesian coal." What is intended to be conveyed by the petitioner is that the petitioner is now bound to supply power to GUVNL on the basis of the coal imported under the Agreement dated 24.3.2008 in pursuance of the judgement of the Appellate Tribunal. In my view, the submission of the petitioner is not correct as nowhere the Appellate Tribunal has said that the petitioner will have to buy coal from Indonesia to supply power to GUVNL. The issue before the Appellate Tribunal was whether the condition subsequent as per Article 3.1.2(ii) of the PPA was satisfied by the petitioner after the FSA of the petitioner with GMDC did not materialise. The Appellate Tribunal has held as under:

> "PPA dated 2.2.2007 was not based on the premise of availability of coal from Gujarat Mineral Corporation only. It was for the Appellant to arrange the coal from any source. It was Adani Enterprises Limited which had represented that it had tied-up with Gujarat Mineral Corporation for supply of Coal. It also represented that it had tied-up for supply of imported coal with various Companies in Germany and Japan as source of fuel supply. Therefore, it is for the Appellant to make arrangements for fuel from any source. The conditions subsequent as specified in Article 3.1.2 (ii) dealing with Fuel Supply Agreement was duly satisfied with firming-up of coal supply from Adani Enterprises/ Indonesian mines as per the admissions of the Appellant itself through various

documents. Since subsequent were duly satisfied as per Article 3.1.2 (ii), there was no basis for invoking Article 3.4.2 of the PPA to terminate the PPA in as much as Article 3.4.2 has no obligation. Hence, the termination notice is not a valid one and as such the PPA has not been validly terminated."

Thus the Appellate Tribunal held that the FSA between the petitioner and AEL dated 24.3.2008 was in due satisfaction with condition subsequent under the PPA and there is no basis for terminating the PPA. However, in my view, this observation of Appellate Tribunal neither makes the PPA dated 2.2.2007 contingent upon the FSA dated 24.3.2008 nor precludes the petitioner to arrange for coal from alternative sources if purchase of coal under PPA dated 24.3.2008 has become onerous. Similarly, it has been submitted that the petitioner has informed the Haryana Utilities about the purchase of coal under the FSA dated 15.4.2008 with AEL and the FSA dated 9.6.2012 with Mahanadi Coalfield Limited. In my view, these agreements have been brought to notice of Haryana Utilities in satisfaction of the conditions subsequent under the PPA dated 7.8.2008. The fact remains that under the provisions of the PPAs, it is the sole responsibility of the petitioner to arrange coal for supply of power to the respondents and the respondents cannot be fastened with any liability arising out of any contingency affecting the FSAs of the petitioner with the fuel suppliers.

18. It is also observed that the petitioner and its holding company, AEL, have been mutually changing the terms and conditions of the Coal Supply Agreements and have been adjusting the price of coal from time to time. First of all, the MoUs

with Kowa and Coal Orbis which were the documents enclosed to the bid, had commitment for supply of coal only subject to entering into Fuel Supply Agreement and did not have any firm price for supply of coal which was to be decided prior to entering into agreement. The MoUs were terminated as the AEL did not proceed to enter into Fuel Supply Agreements. As regards coal supply for Phase III, the price of coal was initially agreed to be USD 36/MT in Coal Supply Agreement dated 24.3.2008 which was changed to USD 34/MT vide amendment dated 15.4.2008 and was further changed to an average CIF of USD 36/MT in the Consolidated Coal Supply Agreement of 25.7.2010. In respect of coal supply for Phase IV, the price agreed was USD 24/MT in the CSA dated 15.4.2008 which was changed to average CIF of USD 36/MT in the Consolidated Coal Supply Agreement of 25.7.2010. Moreover, the quality of coal agreed in the CSA dated 24.3.2008 and 15.4.2008 was GCV 5200 kcal/kg which was changed to GCV of 5000 to 5200 kcal/kg. Thus it is a matter between the petitioner and its holding company, AEL with regard to the supply of fuel for the different phases of Mundra project. The petitioner was at liberty to source coal from any other supplier. Therefore, in my view, the Coal Supply Agreements as noted above are the internal arrangement between the petitioner and AEL and do not bind the respondents as the respondents are neither parties to these agreements nor the bids are based on these agreements. Even the Coal Supply Agreement dated 9.6.2012 was executed between the petitioner and MCL and the Haryana Utilities were not parties to the agreement.

Scope and Impact of Indonesian Regulations

19. The immediate cause for filing the present petition is promulgation of "Regulation of Ministry of Energy and Mineral Resources No.17 of 2010" (hereafter " the Indonesian Regulations) 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. The petitioner has submitted that in view of the promulgation of the Indonesian Regulations, the export price of coal from Indonesia has substantially increased, though it is still cheaper than coal exported by other coal-exporting countries like Australia and south Africa, the cost of generation of electricity from the Mundra Power Plant has tremendously increased. The petitioner has submitted that supply of power to the respondents at the tariffs agreed under the

PPAs has been rendered commercially unviable. The petitioner has submitted that the additional cost on account of increase in prices of Indonesian coal is likely to be about ₹1.11/kWh in case of GUVNL in the first year of operation and the additional impact in case of the Haryana utilities is likely to be around ₹0.64/kWh during the year 2012-13 based on exchange rate and coal price as applicable in August, 2012. The petitioner has worked out per annum loss of approximately ₹790 crore for supply of power to GUVNL and ₹580 crore for supply of power to Haryana Utilities. The petitioner has submitted that while making the bids, express disclosures were made to the buyers that imported coal would be used along with indigenous coal. Accordingly, the petitioner has approached the Commission and sought mitigation of the impact of the Indonesian Regulations on prices.

20. 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. There was neither any prohibition nor any embargo on the petitioner to purchase coal from Indonesia except that the petitioner may not have been found the lowest bidder. In other words, the aggressive and predatory bidding by the petitioner by not factoring in the market price of coal and carrying rupees exchange rates and not quoting the escalable

energy charges 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, Adani Enterprises Limited 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 PPAs as the PPAs are not contingent upon the FSAs between the petitioner and AEL and does not prevent the petitioner to arrange coal from alternative sources. Moreover, when fuel is the exclusive responsibility of the petitioner, the respondents cannot be fastened with the additional liability because the petitioner is unable/unwilling 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. It came up during the hearing that Adani

Enterprises held 74% of shares in the Indonesian coal company through which the coal was being imported. 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 Adani Enterprises in the shape of return for the investment and thus the Adani Group as a whole may be the ultimate beneficiary of the Indonesian regulations.

21. The petitioner has submitted an illustrative per unit based energy cost calculation in respect of GUVNL and Haryana Utilities on account of Indonesian Regulations which have been quoted and discussed in paras 48 to 52 of the order of the Members of the Commission. The net effect as per the submissions of the petitioner and respondents are summerised as under:

Particular	**Unit**	**After Enactment**		
		Adani	**Respondents**	
			Melewan Coal (5400 kcal/kg)	**Envirocoal (5000 kcal/kg)**
Quoted Levelised Energy Charges(Gujarat)	Rs./Kwh	**1.350**	**1.350**	**1.350**
Increase in fuel cost over quoted levelised tariff (Gujarat)	Rs./Kwh	**1.122**	**0.141**	**0.143**

Quoted Levelised Energy Charges(Haryana)	Rs./ Kwh	**1.963**	**1.963**	**1.963**
Increase in fuel cost over quoted levelised tariff(Haryana)	Rs./ Kwh	**0.504**	**--0.477**	**--0.475**

22. It is evident from the above that there is marginal increase in the fuel cost after promulgation of Indonesian Regulations in case of Gujarat and negative increase in case of Haryana Utilities. It has been argued by Mercados Energy Markets India Pvt. Ltd. during the hearing that transmission charges and losses upto Rs.0.48/kWh were factored in the energy charge. First of all, this submission cannot be accepted as the said documents clearly defines the components of energy charges such as fuel cost, ocean freight cost, inland freight cost, handling cost etc. and the petitioner was expected to factor in these fixed cost under the capacity charges. It is also pertinent to mention that by adopting the formula for calculation of energy charges as given under the Tariff Regulations of the Commission, the respondents have made a reverse calculation based on the Gross Station Heat Rate at the generator terminals in kcal/kWh(SHR), Auxilliary consumption(Aux) Gross Calorific Value (GCV) as considered by GERC in its order dated 7.1.2013 in Petition no.1210/2012 to find out the landed price of primary fuel on the basis of the energy charge quoted by the petitioner. The respondents have carried out sensitivity of different energy charges to find out

the corresponding landed cost of imported coal for GCV 5200 kcal/kg. The corresponding landed cost of imported coal at the energy charges quoted by the petitioner are as under:

Energy Charge	Landed Coal cost		
Rs/kWh	Rs./kg	Rs/MT	Equivalent USD/MT
0.1345	3.041	3041.2	67.6
0.1950	4.409	4409.2	98.0

23. The above calculation shows that the petitioner has factored the cost of coal to a large extent. The prevailing price of the coal in Indonesian Market is extracted below:

(USD/MT)

Month	**HBA (USD ton) GCV 6322 kcal/kg**	**Melawan Coal GCV 5400 kcal/ kg (gar)**	**Envirocoal GCV 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

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

GAR : Gross As Received

24. Phase III of the Project was commissioned in February 2012. It may be seen that the price of coal in Feb 2012 was USD 85.89 (GCV 5400 kcal/kg) and USD 79.30 (GCV 5000 kcal/kg). Phase IV of the Project was commissioned in July 2012. The price of coal in July 2012 was USD 68.60(GCV 5400 kcal/kg) and USD 64.02 (GCV 5000 kcal/kg). The price of coal has gradually reduced to USD 70.42(GCV 5400 kcal/kg) and USD 65.63(GCV 5000 kcal/kg) as on March 2013. Therefore, except for a marginal hike in case of GUVNL, the petitioner has not suffered as such if we consider the project as a whole, particularly when the Commission has accepted the Mundra Power Project comprising all phases as a composite scheme.

25. It is worthwhile to point out that the petitioner signed PPAs for supply of 1424 MW of power to the Haryana utilities against Phase IV which has the total capacity of 1980 MW. The petitioner has been allocated coal linkage against 1336 MW capacity. The petitioner has not committed supply of power against the surplus available capacity of 556 MW (1980 MW – 1424 MW) and may sell the balance available power in the open market. The coal linkage against capacity of

1336 MW allocated to the petitioner by SLC for which FSA has been executed with Mahanadi Coalfields Ltd at regulated prices is considered adequate to maintain supply of power to the Haryana utilities. The petitioner cannot have any grievance on this ground also.

26. 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 36/MT[1]. It is to be noted the USD 36/MT figure has been arrived at based on the subsequent agreement dated 24.3.2008 between the group companies of Adani Group after the submission of the bids. The bids were submitted both in respect of Gujarat as well as Haryana much before the agreements between the group companies for USD 36/MT. It has already been indicated that the only documents submitted along with the bids were the MOUs signed with Coal Orbis Trading GMBH and Kowa Company Ltd. which mentioned the price to be negotiated at the time of entering into contract. Hence, the assumption that the bids were quoted assuming coal price of USD 36/MT against market price of USD 45/MT appears to be erroneous. M/s. Adani Enterprises Limited as stated by them are having wide experience in the coal trade particularly import of coal for a long time and obviously are aware of the movement of the prices of coal over a period of time. A tender for supply of power for 25 years where the major input cost is cost of fuel, one can safely understand and assume that the bidder was aware of the market condition of

coal in the international market. It is also a fact that a trader who is active in international market would be aware of the variations of exchange rate of Indian rupee vis-à-vis US$ in which coal trade takes place. It is wrong to assume that an experienced bidder will assume the coal price lower than market price and also will not provide for variations in the prices as well as in the exchange rate. 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 as well as the exchange rate 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 as well as the exchange rates do not match with the actuals but those risks are commercial risks which he has voluntarily accepted.

Relief under the PPA

27. The petitioner has claimed relief under “Change in Law”, “Force Majeure” under the PPAs 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 PPAs

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……."

28. In my respectful view, the above ruling of the Hon'ble High Court binds us even though the learned Judge has observed that that views expressed therein are tentative only. Apart from the binding nature of the above observation, with all humility I find myself in complete agreement with the above finding. 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 PPAs, and Section 56 of the Indian Contract Act, 1872. My conclusions in this regard are in sync with the findings of the Members of the Commission.

29. The other ground that remains to be considered is based on clause (b) of sub-section (1) of Section 79 of the Act. Learned counsel for the petitioner

argued that in exercise of its power under Section 61 of the Act read with regulatory power under clause (b) of sub-section (1) of Section 79, the Commission is competent to grant the relief claimed so as to mitigate the adverse impact on the petitioner of increase in prices of coal imported from Indonesia. Learned counsel urged that Section 63 of the Act which empowers the Appropriate Commission to adopt tariff determined through competitive bidding process does not override Sections 61 and 79 but overrides Section 62 only. Learned counsel argued that by virtue of power to 'regulate the tariff', the Commission has the power to determine, adjust tariffs as the 'power to regulate' very wide power as held by the Hon'ble Supreme Court in a number of judgments which were cited by learned counsel. Learned counsel argued that If Section 63 is given overriding effect *qua* Sections 61 and 79 there will be complete chaos. This will result in Section 63 denuding the Commission of its power under Section 79 and rendering nugatory Section 61, without any express statutory provision. It was submitted by learned counsel that both, Section 62 and Section 63 provide for determination of tariff by following two different routes and thus are intended to serve the same purpose and are subject to same conditions. Learned counsel submitted that the policy and objective of the Act is to encourage private sector participation in generation, transmission and distribution of electricity and to entrust the regulatory responsibility earlier vested in the Government to the Regulatory Commissions. Learned counsel submitted that by virtue of Section 61 of the Act, the factors to be considered by this Commission

on the tariff-related matters include encouraging competition, efficiency, economical use of the resources, good performance and optimum investments; safeguarding of consumers' interest and at the same time, ensuring recovery of the cost of electricity in a reasonable manner and the principles rewarding efficiency in performance and this Commission is obligated to act in accordance with these principles irrespective of whether the tariff is determined under Section 62 or Section 63. Learned counsel submitted that the competitive bidding guidelines notified by the Central Government pursuant to power under Section 63 also contemplate that this Commission shall continue to exercise regulatory oversight even after culmination of the bidding process. Learned counsel emphasized that by virtue of sub-section (4) of Section 79, this Commission is guided by the National Electricity Policy and the tariff policy notified by the Central Government under Section 3 of the Act. He relied upon the different provisions of these policies to draw support for his argument that this Commission should ensure recovery of cost of generation by the petitioner.

30. Learned counsel for the respondents submitted that under clause (b) of sub-section (1) of Section 79 of the Act, this Commission has the power of regulation of tariff. It was urged that regulatory power cannot be exercised for adjudication of disputes arising in the present case as the disputes involve the questions of interpretation, application and implementation of the PPAs. He submitted that the tariff adopted under Section 63 of the Electricity Act pursuant

to the competitive bidding process could not be revised or modified because there is no provision for revision or modification of competitively bid tariff after adoption by the Appropriate Commission, the respective State Commissions in the present case.

31. Section 61 of the Act prescribes that the Appropriate Commission shall specify the terms & 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 tariff policy. When the Commission notifies regulations/orders with regard to determination of t 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. The Commissions while adopting the tariff have 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.

32. 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. There is another aspect which merits attention before invoking regulatory power. 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. In case there is again some development of similar nature, will the Commission interfere again at the instance of the project developer? Will such an exercise of power not jeopardize the consumers' interest? These are the pertinent questions to which answer has to be found. 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. When level playing field having been provided between the project developer and the distribution licensees and opportunity having 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 PPAs. 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 which are of the nature of self-inflicted wounds.

33. During the course of hearings learned counsel for the petitioner argued 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. Learned counsel for the petitioner argued 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. He also relied upon 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 was 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. Learned counsel further relied 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), learned counsel 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. Further, by invoking the principle of *contra proferentem* in the context of interpretation of contracts, learned counsel argued that in case, two interpretations were possible the contracts were to be interpreted against the party which controlled the drafting of the document. Based on this proposition, learned counsel argued that the PPAs were drafted by the respondents as the procurers of power and were to be interpreted against them in case the principle of commercial viability could not be applied in the present case.

34. Per contra, it was argued by learned counsel for the respondents 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. According to learned counsel, the facility of renegotiation cannot be

used to correct for the mistakes in the bidding committed by the petitioner while firming up its bids.

35. In my opinion, renegotiation of tariff cannot be ordered when such tariff has been discovered through the International Competitive Bidding process. The renegotiation of tariff in such cases defeats the competitive bidding process. Though learned counsel for the petitioner had 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, 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.

36. 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. "

37. 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 State 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.

38. It has been observed in para 55 of the order of the Members of the Commission that the levelized tariff discovered at present by the distribution companies in various States are on the higher side and range from Rs.3.50/kWh to as high asRs.7.00/kWh. It has been further observed in para 56 of the said order that on account of non-availability of adequate coal from the Coal India Ltd., to meet the minimum coal requirement equivalent to normative availability of the power plants, the Ministry of Power had initiated the process for modification of the standard bidding document, proposing pass through of the fuel cost. In my view, the comparative higher price of electricity discovered through the competitive bidding process at present cannot be the ground for reopening the tariff discovered more than five years ago. As regards the proposal of the Ministry of Power in the standard bid document to make the fuel cost a pass through item, I am of the view that such a proposal after being approved and implemented will be prospective in its application and cannot be retrospectively applied to re-open the already settled tariff on the basis of which the distribution companies of Gujarat and Haryana have arranged their affairs.This consideration cannot be used to sacrifice the sanctity of the competitive bidding under section 63 of the Act and the objective of the Act to achieve competition and transparency in the process of tariff determination. The petitioner may have resorted to aggressive and predatory bidding to win the bids by edging out the other competitors for which the petitioner is accountable and the consumers of Gujarat and Haryana should not be made to pay for the miscalculation/mistake of

the petitioner, if any, and to ensure profitability of the petitioner irrespective of assumption of commercial risks. As the price of imported coal has considerably come down, the petitioner even does not have a case on the basis of unwarranted and unprecedented rise in Indonesian coal price. Moreover, nothing prevents the petitioner to further explore the possibility of domestic coal to reduce its dependence on imported coal.

39. The objectives of Electricity Act 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 bid 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.

40. 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 invited by the State of Gujarat and State of Haryana 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 tenderers have quoted variable prices whereas the petitioner has quoted firm prices for twenty years fully knowing the fluctuating market conditions with regard to price of coal as well as variations in Rupee exchange as bids were only in rupees. 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 prices quoted are firm and 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 prices arrived at under Section 63 through competitive bidding is untenable. Hence, I am of the view that the petition is nothing but a misuse of the process of law and is liable to be dismissed. I direct accordingly.

sd/-
(S Jayaraman)
Member

Dated: 2nd April, 2013

[1]Corrigendum dated 4.4.2012