



सत्यमेव जयते

केन्द्रीय विद्युत विनियामक आयोग  
CENTRAL ELECTRICITY REGULATORY COMMISSION



**Dr. Pramod Deo**

Chairperson

D.O. No.: 10/5/2013-Statutory Advice/CERC

Dated : 20<sup>th</sup> May, 2013

**Sub : Statutory advice of CERC under section 79 (2) of the Electricity Act, 2003 regarding Impact on Tariff on the concluded PPAs due to domestic coal availability.**

Dear *Shri Uma Shankar*,

This has reference to the Ministry of Power's letter No.FU-12/2011-IPC (Vol.-II) dated 09th May, 2013 seeking advice of CERC on the above subject.

2. The matter was considered in the Commission. The Commission appreciates the need for securing fuel supply for various projects in order to ensure optimum generation from the power plants in the country. Non-availability of adequate quantum of coal has posed serious challenge to power generation as reflected in the data compiled by the Central Electricity Authority (CEA); the Plant Load Factor (PLF) of the generating stations across the country has been severely affected for want of adequate coal supply by CIL/Coal companies.

3. The proposal to make CIL supply imported coal on cost plus basis to all power projects commissioned or to be commissioned during the period 1.4.2009 to 31.3.2015 and willing to take such coal would require appropriate change in the NCDP, as at present it is the full responsibility of CIL to meet full requirement of coal under FSAs even by resorting to import, if necessary. As a follow up, the FSAs between the CIL/its subsidiaries and the power producers will have to be modified through Supplementary Agreements.

4. As regards allowing the additional cost of imported coal under the existing provisions of the PPA, Article 10.1.1 of the Standard PPA for Procurement of Power under Case 1 Bidding Procedure provides for 'Change in Law' as under:

"10.1.1. "Change in Law" means the occurrence of any of the following events after the date which is seven days prior to the Bid Deadline resulting into any additional recurring/non-recurring expenditure by the Seller or any income to the Seller:

- The enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;
- A change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply any Law or any competent court of law;

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- The imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;
- A change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms and conditions for obtaining such Consents, Clearances and Permits; except due to any default of the Seller.
- Any change in tax or introduction of any tax made applicable for supply of power by the Seller as per terms of this Agreement;  
but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI charges or frequency intervals by an Appropriate Commission or (iii) any change on account of regulatory measures by the Appropriate Commission including calculation of Availability."

The terms "Consents, Clearances and Permits" have been defined as under:

"Consents, Clearances and Permits shall mean all authorisation, licences, approvals, registration, permits, waiver, privileges, acknowledgements, agreements, or concessions required to be obtained from or provided by any concerned authority for the purpose of setting up of the generation facilities and/or supply of power."

For claiming any benefits under change in law, the Project Developer would have to move the appropriate Commission and the decision of that Commission in this regard would be final, in terms of the provisions of Articles 10.3.3 and 10.3.4 of the Standard PPA. The appropriate Commissions are expected to take decisions on the merits of each case including the claims of the Project Developers for compensation on account of imported coal after consultation with the stakeholders.

5. The issues under reference relate to the process of competitive bidding. The Commission would, therefore, like to advise that the bidding guidelines under section 63 of the 2003 Act, be suitably modified to enlarge the scope of regulatory intervention to take care of such situations arising from 'change in policy of the Sovereign Government'.

6. The Commission would also like to advise that since the appropriate Commissions are guided by the National Electricity Policy and Tariff Policy in the discharge of their statutory functions in accordance with the 2003 Act, suitable amendments may be called for in the long run, in the National Electricity Policy and Tariff Policy providing for intervention by the Appropriate Commission to take care of situations which have arisen and have been referred by the Ministry of Power.

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7. The views expressed in the preceding paragraphs are based on general legal interpretation of the available documents including the model PPA. However, the issues raised in the reference of the Ministry of Power shall be decided by the Appropriate Commission on a case to case basis based on the pleadings of the parties, provisions of the PPAs and in pursuance of the provisions of the Electricity Act, 2003, National Electricity Policy and Tariff Policy. This Commission decides such issues in respect of the projects which fall under section 79(1)(a) and (b) of the 2003 Act as part of its proceedings after hearing all stakeholders.

*With regards,*

Yours sincerely,

*Pramod Deo*

(Dr. Pramod Deo )

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