Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
World Trade Centre, Centre No.1, 13th Floor, Cuffe Parade, Mumbai 400005.
Tel. 022 22163964/65/69 Fax 22163976
Email: mercindia@merc.gov.in
Website: www.mercindia.org.in/www.merc.gov.in

Case No. 189 of 2013

Dated: 25 October, 2017

CORAM: **Shri. Anand B. Kulkarni, Chairperson**
Shri. Azeez M. Khan, Member
Shri. Deepak Lad, Member

In the matter of Petition of Adani Power Maharashtra Ltd. for compensation in tariff on account of "Change in Law" under its PPAs with Maharashtra State Electricity Distribution Co. Ltd.

Adani Power Maharashtra Ltd. ...…Petitioner
V/s
Maharashtra State Electricity Distribution Co. Limited ……Respondent

For the Petitioner: Shri. Sanjay Sen (Adv.)
Shri. Kandarp Patel (Rep.)

For the Respondent: Smt. Deepa Chawan (Adv.)

For Authorised Consumer Representative: Smt. Ashwini Chitnis, Prayas (Energy Group)

Daily Order

1. The matter had earlier been partly heard before a two-Member Bench. The Chairperson of the Commission having assumed office since then, the Parties were informed at the hearing held on 27 October, 2017 that the matter would now be heard before the Chairperson and the two Members. The Parties agreed to the hearing being in continuation of the earlier proceedings, which would be taken on record.

2. APML stated that:

   a) APML has 5 Generating Units of 660 MW each at Tiroda, with a total installed capacity of 3300 MW tied up with MSEDCL through 4 Power Purchase Agreements

(PPAs). Of this, 800 MW was based on coal from the Lohara Coal Block which was originally allocated to APML but subsequently cancelled. Of the remaining 2500 MW capacity, 1180 MW was based on FSAs (against which there were shortfalls), and there were no FSAs for 1320 MW. In its Reply, to which APML has submitted its Rejoinder, MSEDCL has contended that

(i) APML's bid for Units 4 and 5 (1320 MW) was premised on imported coal and, therefore, it cannot claim any impact of Change in Law in respect of these Units arising from the decision of the Cabinet Committee on Economic Affairs (CCEA) and the amendment to the New Coal Distribution Policy (NCDP) 2007, in 2013;

(ii) As per NCDP 2007, the LoAs and Fuel Supply Agreements (FSA) constitute the firm commitment of supply under the Bids, and Units 4 & 5 did not have firm LoA/FSA from Coal India Ltd. (CIL) or its subsidiaries at the time of the bid.

b) The Request for Proposal (RfP) floated by MSEDCL in the competitive bidding process required that a bidder offering power based on imported coal quote Energy Charges in USD/kWh.

c) Regarding the Commission's query, for 1180 MW there were FSAs with SECL/WECL. For 1320 MW, APML had applied for linkage coal and it was pending before Ministry of Coal, Government of India (GoI). Hence, as mentioned in its bid and reflected in Schedule 5 of the PPAs, APML had cited a FSA for 5 years for imported coal for this 1320 MW since, coal being a nationalised resource, there was no other alternative for obtaining domestic coal other than from CIL under the NCDP 2007 and its linkage coal application was pending. The NCDP 2007 had assured that coal linkage would be provided to Power Plant upto the normative capacity. After the bid, APML's linkage application was assessed by the GoI Standing Committee in 2010, and was under consideration. Had APML intended to supply 1320 MW based only on imported coal, the question arises as to why it would have applied for linkage coal at all.

d) As regards the assessment of imported coal cost, it would be based on the standard Indonesian HBA Index or the actual cost of procurement of imported coal, whichever is lower.

e) In reply to another query, APML stated that there are different components in the bid document for domestic coal and imported coal. There are also different Escalation Indices for domestic coal and imported coal. At present also, for payment of tariff, the CERC escalation index for domestic coal is being used.

f) As per Ministry of Coal's OM dated 18 October, 2007, 100% of the required coal was to be supplied to Power Plants with FSAs, which also covered Plants which were yet

to be commissioned. Independent Power Producers (IPPs) were entitled to enter into FSAs within the stipulated time, and CIL was responsible for fulfilling the coal requirements under the FSAs even by resorting to imports, if necessary.

g) At its meeting on 14 February, 2012, the Standing Linkage Committee noted the gap between the commitment through LoAs/FSAs with the power sector and other consumers, and desired that coal production be enhanced to overcome the shortage to the maximum extent possible.

h) At its meeting held on 31 May, 2013, the Committee, in view of the large gap in demand and supply of coal, recommended that the new applications for LoAs as well as the applications which were already received but were under process be carried forward and kept in abeyance.

i) To a query of the Commission with regard to the applicability of the Change in Law provisions to APML when it did not have coal linkage, APML stated that the Supreme Court, in its Judgement dated 11 April, 2017, had held that the amendment in the NCDP in 2013, the Ministry of Power (MoP)'s letter of advice dated 31 July, 2013 and the provisions of the revised Tariff Policy, 2016 are statutory documents having the force of law, and referred in particular to paras. 15, 48, 53 and 54 of the Supreme Court Judgment. Hence, the additional cost of coal procured from other sources due to the reduction in domestic coal from CIL as compared to the quantity assured in the LoA/FSA has to be allowed as a pass through considering the MoP advisory dated 31 July, 2013.

j) As regards the absence of FSA for 1320 MW raised by MSEDCL, in the Haryana case also which was covered by the Supreme Court Judgment, there was no LoA/FSA at the time of the Bid.

k) As per Clause 2.2 of the NCDP 2007, in cases where LoAs had been given, the reference to 'future commitments' would not arise. Therefore, the future commitments referred to are in respect of new application for coal linkages. Clause 5.2 of NCDP 2007 may be referred to.

l) Clause 6.1 of the Tariff Policy, 2016 states that some of the competitively bid projects as per the Guidelines dated 19th January, 2005 have experienced difficulties in getting the required quantity of coal from CIL. In case of a lower quantity of domestic coal being supplied by CIL as against the assured quantity indicated in the LoA /FSA, the cost of imported or domestic e-auction coal procured for making up the shortfall shall be considered as a pass through by the Appropriate Commission on a case to case basis.

3. MSEDCL stated that:

a) In reply to the Commission's query, it was clarified that bids were evaluated in Rs/kWh, and the documents had no separate column in this respect for domestic and imported coal. In APML's bid, 5 years' FSA was cited for imported coal, and domestic coal for the remaining period.

b) The Supreme Court Judgment refers to the actual procurement of imported coal only to the extent of the reduction in the quantity of domestic coal as against what had been assured by CIL. The NCDP amendment reduced the assured coal quantity from CIL from 100% to 65%, 65%, 67% and 75%, respectively, for 4 years. That defines the extent of the change in the commitment resulting from the amendment of NCDP in 2013. It is only to the extent of that reduction in assured domestic supply that the impact of alternative coal imports can be claimed. However, APML is claiming the impact of the Change in Law for the entire quantity of imported coal.

c) The NCDP 2007 covered Plants which were yet to be commissioned but whose coal requirements had already been assessed and accepted, and future commitments. These 'future commitments' did not include mere applications but cases where commitments had been given by Ministry of Coal.

d) Thus, the reference to 'future commitments' in the NCDP 2007 was not regarding new linkage applications. In the RfP document (page 2, para. C), APML had stated that it had applied for fuel linkage, but submitted the FSA for imported coal. Even in the Environmental Clearance for 1320 MW, it was recorded that imported coal would be used.

4. Prayas stated that:

a) The bids were based on Case 1 bidding, in which sourcing fuel is entirely the responsibility of the bidder. Whatever the bidders quoted, MSEDCL was only required to apply the Escalation Index to compare the various bids and determine the lowest bidder. Under the PPA, the bidder is free to change the source of the fuel at any time.

b) Schedule 5 of the PPAs is crucial. It reflects the statements made by APML itself in its bids, and states the fuel sources as captive coal block for 800 MW, long-term coal linkage for 1180 MW and includes imported coal FSA for 5 years for the remaining 1320 MW.

c) Whether or not the NCDP amendment in 2013 amounts to a Change in Law that financially impacts APML depends on whether there was a LoA/FSA which would reflect the commitment made in the original NCDP. While bidding, APML took the

risk of the eventuality of not getting coal linkage and accordingly decided to enter into a FSA for imported coal. Hence, it is not entitled to claim that it has been affected by the Change in Law arising from the NCDP amendment with regard to reduction in the supply of linkage coal where it had been assured earlier.

d) Related to this is the fact that the Environmental Clearance given for two Units of 660 MW each stipulated the use of imported coal as a condition. Only from January, 2014 was the use of domestic coal allowed.

e) The NCDP amendment of July, 2013 set out the reduced quantum, in terms of a percentage of the assured 100% quantity, of domestic coal that would now be supplied. While this has been accepted as a Change in Law event by the Supreme Court, the benefit can be only post July, 2013. For any shortfall in coal supply by CIL even below the reduced NCDP 2013 percentage, APML can take up the matter with CIL and at the appropriate fora and cannot claim the financial impact of imported coal to the extent of this further shortfall. This is the limited relief that is available. CERC has dealt this issue in Case No.79/MP/2013 dated 3.2.2016.

f) The impact of Change in Law may be considered only in respect of Units having LoA/FSA with CIL or its subsidiaries as on July, 2013, when the NCDP was amended. APML has to show with invoices, etc. that coal has been imported or obtained from other sources to the extent required to meet the shortfall of upto 35% etc. in coal supply from CIL allowed by the amended NCDP for claiming relief. In its written response, Prayas has set out the data and supporting material that needs to be provided by APML. The claim before the Commission cannot merely an indicative calculation, and without the information and data required it will not be possible to assess the methodology and determine the extent of relief that is admissible.

5. The Commission observed that 'fuel' is defined in the 1320 MW PPA as 'the primary fuel used to generate electricity such as coal i.e., Coal from Captive Mine, Linkage coal and Imported Coal.' In the other 3 PPAs, it is defined as 'the primary fuel used to generate electricity namely domestic coal'. Schedule 5 of these 3 PPAs states the fuel sources as being from captive Coal Block (800 MW); long-term coal linkage with SECL/WCL (1180 MW); and, imported coal supply FSA for five years and long-term coal linkage (1320MW).

6. The Commission had asked earlier in the hearing whether, as per the bid document, the tariff component would be different for domestic coal and imported coal; whether MSEDCL had evaluated the bid for 1320 MW considering domestic coal as the fuel source; and whether the NCDP 2007 envisaged that commitments made in future would also be covered. APML and MSEDCL's responses are set out above.

7. APML may clarify within 5 days
   (a) whether imported coal was being supplied for the full five years of the relevant FSA
   (b) the source of coal thereafter.

   MSEDCL and the Consumer Representatives may file their responses, if any, within 5 days thereafter.

The next date of hearing will be communicated to the parties by the Secretariat of the Commission.

Sd/-	**Sd/-**	**Sd/-**
(Deepak Lad)	**(Azeez M. Khan)**	**(Anand B. Kulkarni)**
Member	**Member**	**Chairperson**