

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 155/MP/2012

Coram:

Shri Gireesh B. Pradhan, Chairperson

Shri A. K. Singhal, Member

Shri A.S. Bakshi, Member

Dr. M.K. Iyer, Member

Date of Order: 6th of October, 2016

In the matter of

Application under Section 79 of the Electricity Act, 2003 for evolving a mechanism for regulating including changing and/or revising tariff on account of frustration and/or of occurrence of force majeure (Article 12) and/or change in law (article 13) events under the PPAs due to change in circumstances for the allotment of domestic coal by GOI-CIL and enactment of new coal pricing Regulations by Indonesian Government

And In the matter of

Adani Power Limited
Adani House, Plot No. 83
Institutional Area, Sector-32
Guargaon-122001, Haryana

.....Petitioner

Vs

- 1) Uttar Haryana Bijli Vitran Nigam Limited
Vidyut Sadan, C-16, Sector 6
Panchkula, Haryana
- 2) Dakshin Haryana Bijli Vitran Nigam Limited
Vidyut Sadan, Vidyut Nagar
Hisar-125005, Haryana
- 3) Gujarat Urja Vikas Nigam Ltd.
Sardar Patel Vidyut Bhawan, Race Course,
Vadodara-390007, Gujarat
- 4) Prayas Energy Group
Unit III A & B, Devgiri
Joshi Railway Museum lane
Kothrud Industrial Area
Kothrud, Pune, MH 411038 India

Parties Present:

Shri Amit Kapur, Advocate, APL
Ms. Poonam Verma, Advocate, APL
Shri Akshat Jain, Advocate, APL
Shri Gaurav Dudeja, Advocate, APL
Shri L.N. Sharma, APL
Shri S. Kalita, APL
Shri Malav Deliwala, APL
Shri Jatin Jalundhwala, APL
Shri Nitish Gupta, Advocate, GUVNL
Shri M. G. Ramachandran, Advocate, Prayas Energy
Ms. Ranjitha Ramachandran, Advocate, Prayas Energy
Ms. Anushree Bardhan, Advocate, Prayas Energy
Ms. Poorva Saigal, Advocate, Prayas Energy
Shri Shubham Arya, Advocate, Prayas Energy
Shri Ashwin Chitnis, Prayas Energy
Shri S.K. Nair, Advocate, GUVNL
Shri Shashank Kumar, APL
Shri Savan Path, APL
Shri Tanmay Vyas, APL
Shri Sanjay N, Advocate, APL
Shri G. Umapathy, Advocate, Haryana Discom
Ms. R. Mekhala, Advocate, Haryana Discom
Shri Aditya Dewan, GUVNL
Shri Vikrant Saini, HPPC
Shri Ravi Juneja, HPPC

ORDER

The Commission issued a Supplementary Record of Proceedings on 15.7.2016 and a subsequent corrigendum thereto seeking certain information from the petitioner. The information sought vide the RoP dated 15.7.2016 covered the following:

- (a) All FSAs/CSAs entered into by Adani Power Limited with the coal mining companies in Indonesia for supply of power from Mundra Power Project. If intermediary companies are involved, then the copies of the FSAs/CSAs between Adani Power Limited and the intermediary companies and back to back FSA/CSAs between intermediary companies and the coal companies in Indonesia.

- (b) Bid parameters assumed in the bid including escalation factors.
- (c) Guaranteed Design Parameters such as Heat Rate (Turbine Cycle Heat Rate and Boiler Efficiency), Auxiliary Energy consumption alongwith Heat Balance Diagram, any variation in the design parameters from the design parameters contended in the bid.
- (d) FSAs/CSAs with Mahanadi Coalfields or any other subsidiary of CIL for supply of power from Mundra Power Project.
- (e) Month-wise declared capacity, scheduled generation and actual generation.
- (f) Month-wise impact of Indonesian Regulation from COD till date.
- (g) Impact on station parameter due to use of low grade coal for mitigation purpose. Possibility of blending to be explored for mitigation purpose.
- (h) Applicable rates of the taxes/duties/royalty ex-mines in Indonesia and actual taxes/duties/royalty paid alongwith breakup.
- (i) HBA price index applicable on month to month basis on the quantity of imported coal.
- (j) Impact on the servicing of debt obligation, i.e. constraint.
- (k) Ratios of imported coal built into the Bid.
- (l) Information as per Formats I, II, III and IV annexed to ROP.
- (m) Copy of Price Stores Ledger of Mundra Power Project of Adani Power Limited for the following period for Imported and Domestic coal: -

- i) 1st contract year - First month of the contract year
- ii) 2nd contract year - Month of April
- iii) 3rd contract year - Month of September
- iv) 4th contract year - Month of December

(n) Bill of lading and Bill of entry for the months mentioned above.

(o) The copy of the Shareholder Agreement for investment in mining companies in Indonesia by Adani Power Ltd. / Adani Enterprise Ltd. or its associates or subsidiary alongwith their audited Balance Sheet and Profit & Loss Account on standalone basis for the years in which import of coal has taken place.

2. Serial No. (l) above contains four formats. Format I pertains to the consumption of coal from various sources for each of the PPAs. Format II pertains to actual coal price paid by the petitioner for each consignment linked to the relevant PPA. Information on Format II is required to be submitted with documentary evidence in respect of the following:

1. Bill of lading and corresponding bill of entry for the months specified in para (m) along with the details.
2. Proof of remittances to the coal Supply Company and mining companies for above bill of lading.
3. Certificate in support of GCV at loading and unloading, as the case may be.
4. Copy of the invoice raised by the Mining Company (ies) and Coal Supply Company (ies) for the months specified in para (m).

Format III pertains to reconciliation of the coal used during the month source-wise linked to relevant PPA. Format IV pertains to shortage of domestic coal for the PPA with Haryana.

3. The petitioner vide its affidavit dated 4.8.2016 filed the desired information partially. With regard to the information pertaining to column 10 (FOB Price of coal supplied as per the invoice of the mining company) and Column 14 (Payment made to the mining company by the coal supply company) of Format II, the petitioner has made the following submissions:

“I say that with regard to information sought by the Hon’ble Commission at Col. 10 and 14 of Format II, Adani Power has requested the coal supplier i.e. Adani Global Pte Limited to provide the same vide letter dated 18.7.2016. Adani Power has received the reply on 19.7.2016 indicating that the said information shall be furnished directly to the Commission.”

As regards the proof of remittance to the mining companies and the copy of the invoice raised by the mining companies, the petitioner has submitted as under:

“I say that with regard to the information of proof of remittances to the mining companies and copy of the invoices raised by the mining companies, Adani Power has requested the coal supplier i.e. Adani Global Pte Limited to provide the same. Adani Power has received the reply on 19.7.2016 indicating that the said information shall be furnished directly to the Commission. Copies of the said letters dated 18.7.2016 and 19.7.2016 have already been annexed as Annexure XI.”

In para 3 of the affidavit, the petitioner has submitted as under:

“3. I say that the details being submitted above contain commercially sensitive information. It is prayed that the same may not be disclosed or made available to any other party. It is further submitted requested that even in case where request is made by the third party or any other Government Authority under the Right to Information Act, 2005 or any other CERC Regulations, the same shall not be shared.”

It is noted that the above affidavit has been filed after serving copy thereof on GUVNL and Haryana Utilities and Prayas Energy Group. Therefore, it is understood

that the prayer made in para 3 as quoted above pertains to any party other than GUVNL and Haryana Utilities and Prayas Energy Group.

4. Adani Global Pte Limited (AGPTE) under its letter dated 3.8.2016 submitted certain information in a sealed cover. In the letter, AGPTE has submitted as under:

“The information with regard to the coal supplied by us is given in the format which is enclosed herewith alongwith the duly notarised respective invoices of the suppliers from whom we procured the coal for sale to Adani Power Limited. A summary in tabular form for each type of coal and contract with PT. Dua Samudera Perkasa are also enclosed herewith.

It is submitted that the details being submitted herewith contain commercially sensitive information which is shared only for the Hon'ble Commission's consideration and not being made available to procurers. The same may not be disclosed or made available to any party as they contain commercially sensitive information. It is further requested that even in case where request is made by third party under the Right to Information act, 2005 or under any regulations of CERC, the same shall not be shared with any individual or Government bodies.”

The petitioner in its affidavit dated 23.8.2016 has submitted that AGPTE in its reply dated 19.7.2016 informed the petitioner that AGPTE would directly furnish the information to the Commission which would be kept confidential. The petitioner has submitted that it is not aware of the submission made by AGPTE to the Commission; however, the information and/or documents submitted by AGPTE may be considered as part of the submissions made by the petitioner.

5. Prayas Energy Group in its affidavit dated 16.8.2016 has submitted that submission of certain documents by the petitioner to the Commission in confidence is not acceptable considering the nature of proceedings being held by the Commission and the mandate of transparency to be maintained as per Section 79(3) of the Electricity Act, 2003 (the Act). Prayas has submitted that it is entitled to get the copies of all such documents furnished to the Commission and make appropriate submission thereon. GUVNL in its additional submission dated 6.9.2016 has

submitted that GUVNL has not waived its rights to receive the information as sought vide RoP dated 15.7.2016.

6. In the above background, the Commission held a hearing of the petition to decide on the issue of confidentiality claimed by AGPTE. During the hearing, learned senior counsel for the petitioner submitted that the petitioner has not claimed confidentiality as the petitioner is not the owner of the documents. Learned Senior Counsel submitted that AGPTE, the owner of the documents, has claimed confidentiality and has directly submitted the documents to the Commission. The Commission is conferred with powers under Regulations 60, 66 and 109 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 as amended from time to time to allow inspection of all the records of the Commission except for those parts/documents which are considered confidential by the Commission. Learned senior counsel submitted that the Commission may decide on the issue of confidentiality. Learned counsel for Prayas Energy Group submitted that the Commission has to ensure transparency in the proceedings before it under Section 79 (3) of the Act and the petitioner cannot be an exception. Learned counsel submitted that Adani Enterprises Ltd. is the ultimate parent company and AGPTE is a subsidiary of Adani Enterprises Limited. All the Adani companies including Adani Power are connected to each other and therefore, Adani Power cannot claim confidentiality to produce these documents while claiming compensation from the Commission. Learned counsel submitted that the Commission should direct the petitioner to share the documents with other parties failing which the Commission should return the documents and draw adverse inference. In this context, learned counsel for Prayas relied upon the judgments, namely (i) Union of India Vs Ibrahim Uddin and Another[(2012) 8 SCC 148], (ii)Rajasthan State Road Transport

Corporation and Another Vs Bajrang Lal [(2014) 4 SCC 693], (iii) Dalip Singh Vs State of Uttar Pradesh & Others [(2010) 2 SCC 114] and (iv) BNP Paribas Vs United Breweries [2013 SCC Online Kar 9885]. Learned senior counsel for the petitioner submitted that the argument of transparency cannot be applied without considering the 'relevance' of the documents to the issues involved in the adjudication proceedings. Learned senior counsel further submitted that adverse inference cannot be drawn against Adani Power as it has submitted all the documents sought by the Commission which were in its possession. Learned senior counsel submitted that the invoices referred to in the affidavit dated 4.8.2016 submitted by the petitioner shows the country of origin as Indonesia and the Bill of Lading contains a declaration that goods are in conformity with the invoices and the certificate of analysis/quality report also shows the GCV of coal. Learned Senior Counsel submitted that all the information for granting relief to the petitioner have been placed on record.

7. The Commission after going through the documents submitted by AGPTE came to the conclusion that these documents are relevant for assessing the extent of impact of force majeure as directed by the Appellate Tribunal and directed the petitioner to take up the matter with AGPTE to waive the condition of confidentiality so that documents can be shared with the parties to the petition. AGPTE vide its FAX message dated 16.9.2016 with copy to the petitioner has submitted as under:

“Looking at the criticality of the matter and considering the request made by Hon’ble CERC for waiving confidentiality of the details/records/documents submitted by us vide our letter dated 3rd August, 2016, we agree to waive confidentiality subject to the condition that only the present Respondents to the Petition are given copy of the extract of details in terms of Format II titled as “Actual coal price paid by the developer for each consignment (for respective PPA) of CERC RoP of hearing dated 9th June 2016, and also allowed inspection only of the details/records/documents, in the presence of the authorised representative of M/s Adani Power Limited and on the undertaking to be given by them to the Commission that they shall not part with and/or disclose the information so made available to any other person or agency and shall use the same only for the purpose of this matter.”

8. The petitioner in its written submission has submitted that looking towards the cruciality involved, AGPTE vide its letter dated 16.9.2016 to the Commission with copy to the petitioner has agreed to part the information only with the respondents of the Petition No.155/MP/2012, either in the form of an abstract of the details/records or by way of an in camera inspection of the said details/records and accordingly, the Commission may share the information provided the respondents expeditiously verify the same and with the purpose of amicably resolve the issue. The petitioner has further submitted that there is no relevance of the documents over which confidentiality is claimed by AGPTE for the purpose of assessing the impact of force majeure event. The petitioner has submitted that for the purpose of relief, it is only seeking difference between discounted FOB price and actual price after Indonesian Regulations or benchmark price whichever is lower and for this, only the copies of the invoices at which the petitioner is purchasing coal are required to be examined which has been submitted by the petitioner as directed by the Commission. The petitioner has submitted that the judgements relied upon by Prayas during hearing with regard to the adverse inference to be drawn in case of non-submission of documents are not applicable in this case since the said judgements refer to the documents to be placed on record which are in possession of a party to the proceedings whereas in the present case the petitioner has submitted all the information/documents which are in its possession.

9. Prayas in its written submission dated 29.9.2016 has submitted that it is not clear from the stand of the petitioner that the documents made available by AGPTE should be given to the respondents in Petition No.155/MP/2012 whether the petitioner is referring to the original respondents (i.e. GUVNL and Haryana Utilities)

or it includes Prayas which was directed to be impleaded as a respondent by the Commission in the capacity of an authorised consumer representative appointed under Section 94(3) of the Act. With regard to the submission of the petitioner to disclose the documents to the respondents only in the form of an abstract of the details/records or by way of in camera inspection of the said documents or records, Prayas has submitted that such a plea is contrary to the specific provision contained in Section 79(3) of the Act which stipulates transparency to be maintained in the proceedings before the Commission. Therefore, it would be necessary to not only supply the copies to the participating entities but also make available the same in the website for consideration of all. Prayas has further submitted that the petitioner has proceeded on the basis that the documents forwarded by AGPTE in respect of which confidentiality has been claimed are not in possession of the petitioner. Prayas has submitted that both Adani Power and Adani Global Pte Ltd are subsidiaries of Adani Enterprises Limited and therefore, Adani Enterprises Limited has full control over the affairs of Adani Global Pte Ltd. There is, therefore, no justification whatsoever for Adani Group companies to claim confidentiality of the documents, particularly those which have been considered as relevant by the Commission. Prayas has submitted that Hon'ble Supreme Court in judgement dated 20.1.2016 Civil appeal No.434 of 2016 (State of Rajasthan V. Gotan Limestone Khanji Udyog Private Limited) has dealt with the principle of lifting the corporate veil. Prayas has requested the Commission to exercise its regulatory power under the provision of the Electricity Act, 2003 and direct piercing of the corporate veil between Adani Power, Adani Enterprises Limited and Adani Global Mauritius Limited, Adani Global Pte Ltd (Singapore) and all other Indonesian Companies which are all wholly owned subsidiaries of Adani Enterprises Limited. Prayas has further submitted that the

Maharashtra Electricity Regulatory Commission in its order dated 3.7.2001 in Case No. 8 of 2000 has rejected the plea of MSEDCL for confidentiality of certain documents and had directed MSEDCL to make all the documents available to the respondents. Prayas has also submitted that Regulations 66 and 109 of the Conduct of Business Regulations of Commission do not allow a litigant to withhold the documents from the respondents based on which the claim needs to be considered.

10. We have considered the submissions of the parties. The Commission vide RoP dated 15.7.2016 and the Corrigendum dated 4.8.2016 had directed the petitioner to place on record certain information and documents which the Commission considered relevant for adjudicating the issue which has been remanded by the Appellate Tribunal. The petitioner has submitted the information/documents except certain documents which the petitioner has claimed are not in its possession and requested AGPTE to supply these documents/information for submission to the Commission. AGPTE has declined to share these documents with the petitioner and has submitted the documents directly to the Commission. AGPTE in its letter dated 3.8.2016 has submitted that these documents should not be shared with any third party or Government Agency under the Right to Information Act, 2005 or under any Regulations of CERC.

11. The main contention of the petitioner is that these documents have been submitted by AGPTE directly to the Commission and the contents of the documents are not known to the petitioner. Since AGPTE is an independent legal entity, Adani Power has no control over it and therefore, the Commission may consider to treat the said information/document as confidential as requested by AGPTE. Both GUVNL and Prayas have objected to the claim of confidentiality by AGPTE. Prayas

has submitted that under Section 79 (3) of the Act, the Commission shall ensure transparency while exercising its power and discharging its functions and the claim of AGPTE for confidentiality for treating such documents as confidential which has been sought by the Commission during the course of hearing goes against the spirit of Section 79 (3) of the Act.

12. After remand of the matter by the Appellate Tribunal for Electricity in the judgment dated 7.4.2016, Petition No. 155/MP/2012 is being dealt with by the Commission under Section 79 (1) (f) of the Act read with Article 17.3 of the Power Purchase Agreements in order to assess the impact of the force majeure event on the project of Adani Power for granting such relief as may be available under the PPAs and in the light of the judgment. The Commission is discharging adjudicatory functions under Section 79 (1) (f) of the Act. Section 79(3) of the Act enjoins upon the Commission to ensure transparency while exercising its power and discharging its functions. Therefore, while discharging its adjudicatory functions under Section 79(1)(f) of the Act, the Commission has to ensure transparency in the proceedings before the Commission. The Commission after hearing the parties had directed the petitioner to file certain information/documents. The petitioner wrote a letter to AGPTE which is a group company of Adani Power for certain documents/information and the latter informed the petitioner that it would submit the said documents/information directly to the Commission. The petitioner accepted the plea of AGPTE and made a submission to that effect in its affidavit dated 4.8.2016. AGPTE submitted the information in a sealed cover to the Commission, mentioning that the information has not been shared with the procurers and claimed confidentiality for the purpose of access by any person or Government Agency. It is pertinent to mention that AGPTE is not a party to the proceedings before the

Commission and therefore, the Commission cannot enforce its directions or decisions on AGPTE. Since, the petitioner is claiming the relief as a consequence of the Indonesian Regulations which has been held as an event of force majeure by the Appellate Tribunal for Electricity, it is the responsibility of the petitioner to obtain the documents from the relevant sources if these documents are not available in its possession and submit the same for the consideration of the Commission. It is at the behest of the petitioner that AGPTE has submitted the information/documents directly to the Commission, it is for the petitioner to persuade AGPTE either to waive its claim for confidentiality unconditionally or advise AGPTE to withdraw the information/documents submitted to the Commission.

13. In order to complete the post-hearing pleadings and to enable the Commission to issue the order within the timeline, the Commission during the hearing on 15.9.2016 directed the petitioner to approach AGPTE to waive the condition of confidentiality so that documents can be shared with the parties to the petition. AGPTE in its letter dated 16.9.2016 addressed to the Commission with copy to the petitioner has agreed to waive the confidentiality with certain conditions. The petitioner in its additional submissions dated 20.9.2016 has submitted that AGPTE vide its letter dated 16.9.2016 has agreed to part the information only with respondents in Petition No.155/MP/2012 either in the form of an abstract of the details/records or by way of camera inspection of the said documents/records and accordingly, the Commission may share the information with the respondents. The petitioner has further submitted that as per Regulations 66 and 109 of the Conduct of Business Regulations, the Commission has the powers to allow inspection of all the documents/record of the case except for the documents which are considered confidential by the Commission.

14. Regulation 66 and 109 of the Conduct of Business Regulations read as under:-

“66. Records of every proceedings, except those parts which for reasons specified by the Commission are confidential or privileged or otherwise not to be disclosed to any person shall be open to inspection either during the proceeding or after the orders have been passed, subject to such person complying with such terms as the Commission may direct from time to time including in regard to time, place, and manner of inspection and payment of fees.

109. (1) Records of the Commission, except those parts which for reasons specified by the Commission are confidential or privileged, shall be open to inspection by all, subject to the payment of fee and complying with the terms as the Commission may direct.

(2) The Commission may, on such terms and conditions as the Commission considers appropriate, provide for the supply of the certified copies of the documents and papers available with the Commission to any person.

(3) The Commission may, by order, direct that any information, documents and other papers and materials produced before the Commission or any of its Officers, consultants, representatives or otherwise which may be, or come into, their possession or custody, shall be confidential or privileged and shall not be available for inspection or supply of copies, and the Commission may also direct that such document, papers, or materials shall not be used in any manner except as specifically authorised by the Commission.”

As per the above regulations, the Commission has to first decide that a part of the proceedings is confidential or privileged or otherwise not to be disclosed to any person for the reasons to be recorded in writing and in that event only, any person can be denied access to that part of the proceedings.

15. The following documents have been submitted by AGPTE:

(a) The format containing vessel name, FoB price of coal supplied as per the invoice of mining company and payment made to mining company by the coal company.

(b) Respective invoices of the suppliers from whom the coal was procured for sale to Adani Power Limited duly notarized.

(c) Copy of the Coal Supply Agreement between Adani Global Pte Ltd and PT Dua Samudera Perkasa dated 14.12.2009.

AGPTE has submitted that the above documents/details contain commercially sensitive information which should not be shared with any person or Government Agency. AGPTE has further submitted that the respondents may be allowed inspection of these documents/details/records in the presence of the authorised representative of M/s Adani Power Limited and on an undertaking given by them to the Commission that they shall not part with and/or disclose the information so made available to any other person or agency and shall use the same only for the purpose of this matter. The Commission has considered the documents in respect of which confidentiality has been claimed by AGPTE and is of the view that these documents cannot be treated as confidential or privileged in terms of Regulation 66 and 109 of Conduct of Business Regulations. Moreover, in an adjudicatory proceeding, the parties have the right to get the copies of the documents which have been sought by the Commission and make their submissions thereon. Since, AGPTE which is the owner of these documents has agreed to share these documents with the respondents with certain conditions, the petitioner may approach AGPTE to waive the conditions before these documents are shared with the respondents. Accordingly, we direct the petitioner to confirm by 10.10.2016 that the documents filed by AGPTE can be shared with the respondents to the petition without any condition. If such a confirmation is received, Chief (Legal) of the Commission is directed to supply copies of the documents to the parties or their counsel by 13.10.2016. If any additional submission is required to be made by the respondents based on the information submitted by AGPTE, the same shall be made by

17.10.2016. If no confirmation is received from the petitioner by 10.10.2016 regarding waiver of conditions to supply the documents to the respondents, the Commission shall proceed to decide the matter without considering the documents submitted by AGPTE.

16. Learned senior counsel for the petitioner argued during the hearing that documents submitted by Adani Global Pte Ltd are not relevant for the purpose of relief since the petitioner is only seeking the difference between the discounted price of coal and benchmark price whichever is lower. We are of the view that the Commission after due consideration of the facts on record and the submissions of the parties had sought the information/documents considered relevant vide RoP dated 15.7.2016. The petitioner is expected to submit the required information as per the RoP and leave it to the Commission to decide the relevance of the information/documents.

17. Prayas Energy Group has referred to the submission of the petitioner that the documents made available by Adani Global Pte Ltd will be given to the respondents in Petition No. 155/MP/2012 and has sought clarification whether the documents shall be supplied to the originally impleaded parties or to Prayas Energy Group as well which has been impleaded on the directions of the Commission. In our view, GUVNL, Haryana Utilities, Prayas are the parties before the Commission in the remand proceedings and therefore, they are entitled to be supplied with the copies of the documents/details submitted by Adani Global Pte Ltd subject to our observations/directions in Para 15 of this order.

18. In view of our above decision, it is not necessary to examine the other submissions made by the petitioner and Prayas.

sd/-
(Dr. M.K. Iyer)
Member

sd/-
(A.S. Bakshi)
Member

sd/-
(A. K. Singhal)
Member

sd/-
(Gireesh B. Pradhan)
Chairperson