

**MBPMPL/ANP-I/MPERC/2024-25/24072024****24.07.2024**

To,

The Secretary,  
7<sup>th</sup> Floor, World Trade Centre,  
Tower B, Nauroji Nagar,  
New Delhi-110029

**Subject:** *Comments/suggestion of MB Power (Madhya Pradesh) Limited on Draft Central Electricity Regulatory Commission (Suo-Moto petition no.4/SM/2024) for installation of emission control system in compliance of the revised emissions standards by competitively bid coal based Thermal Power Generating Station.*

**Ref:** *Hon'ble CERC Public Notice dated 03.07.2024 on the subject matter.*

Dear Sir,

We write in reference to the above referred Public Notice dated 03.07.2024 issued by this Hon'ble Commission vide which comments/suggestions of the various stakeholders have been invited on the Draft Central Electricity Regulatory Commission (Suo-Moto Petition No.4/SM/2024) for installation of emission control system in compliance of the revised emissions standards by competitively bid coal based Thermal Power Generating Station.

MB Power (Madhya Pradesh) Limited, being an IPP, has an operational coal-based thermal power project in the District Anuppur of Madhya Pradesh. We are furnishing our detailed comments/suggestions on the said Draft Central Electricity Regulatory Commission (Suo-Moto Petition No.4/SM/2024) (enclosed herewith as **Annexure-1**) for your kind consideration.

We hope you will acknowledge the genuine merit in our comments/suggestions and will consider the same favourably while issuing the final Order for installation of emission control system in compliance of the revised emissions standards by competitively bid coal based Thermal Power Generating Station.

Thanking You,



**Himanshu Srivastava**  
**GM (Business Development)**  
**MB Power (Madhya Pradesh) Limited**

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**GENERAL**

1. The Hon'ble Central Electricity Regulatory Commission ("CERC/Commission") vide its order in 6/SM/2021 dated August 13, 2021, issued a mechanism to determine the compensation for recovery of the expenditure incurred or to be incurred by the generating companies on account of installation of emission control systems (ECS) in compliance with the revised emission standards issued the Ministry of Environment, Forest & Climate Change (MoEFCC), Government of India for the electricity supplied from Coal or Lignite based Thermal Generating stations, applicable to those coal-based thermal generating stations
  - i. that have valid power purchase agreements (PPA) with the procurer(s) on the basis of the tariff based competitive bidding carried out under section 63 of the Electricity Act, 2003 (short as "the Act") as on date of issue of revised emission standards by MoEF&CC and
  - ii. where the notification of the revised emission standards is admissible as change in law event in terms of the respective PPA(s).
2. CERC has proposed a revision of the mechanism of compensation vide Draft Order dated 3<sup>rd</sup> July 2024 as set out in the order dated August 13, 2021 in Suo-Motu Petition No. 6/SM/2021 on account of installation of emission control system in compliance of the revised emission standards by the competitively bid Coal based Thermal Power Generating station & sought comments/suggestions/objections on the same by 24<sup>th</sup> July 2024.
3. At the outset, we appreciate the proactive action of the Hon`ble Commission on taking cognizance of the implication of the revised emission standards issued by MoEFC on the power plants and having evolved a mechanism of compensation for competitively bid projects vide order in 6/SM/2021 on August 13, 2021. We also appreciate the effort taken by the Commission in designing the mechanism of the compensation for recovery of the expenditure on account of emission control system. While this mechanism of compensation was developed by the Commission first time and the extent of complexities involved in the tariff of competitively bid projects, this Commission had taken extensive efforts to ensure the accuracy. **However, these kinds of mechanisms need to be evolved and regularly strengthened to achieve the greater accuracy, based on practical experience, as already recognized by CERC in para 3 of the instant order.**
4. It is further submitted that the Commission, while proposing this revised mechanism, may have overlooked and not considered the experience & additional challenges faced by the Section 63 PPAs. **We hereby submitting our comments/suggestions/submissions & request the Commission to consider these aspects in the interest of strengthening and improving the compensation mechanism.**

**ISSUE WISE COMMENTS / SUGGESTIONS / SUBMISSIONS ON THE PROPOSED REVISION:**

**A. Principle of Restitution: Request CERC to follow the principle of restitution in letter and spirit**

5. The Hon'ble Commission, while determining the mechanism of compensation for emission control system (ECS), has relied on the principle of restitution laid down in PPAs. **As per this principle, the affected party is to be restored to the same economic position as if no Change in Law had occurred.** In this context, it is submitted that the implementation of ECS to meet the revised emission standards, results in increase in cost or expenses and decrease in revenue. **Hence, in order to ensure that the affected party is adequately restored to the same economic position, the Commission should allow the all parameters that increases the cost or expenses and decrease the revenue. It is submitted that non consideration or part consideration of any parameter would result in inadequate compensation.** Consequently, the affected party would not be able to restore itself to the same economic position.

6. It is submitted that **the Commission, while applying the principle of restitution, has unilaterally been drawn to the principle of compensation.** The Commission has failed to differentiate between the principle of restitution & the principle of compensation. The difference between restitution and compensation can be drawn from the restitutionary damage and compensatory damage under the law. In case of compensatory damage, there is a need to assess the loss (linked to decrease of revenue) whereas the restitutionary damage requires the assessment of profits also. **The Hon'ble Madras High Court vide its judgement dated 15.12.2021 in Civil Suit No. 258 of 2020 in the matter of 'E-merge Tech Global Services Pvt. Ltd. vs. M.R. Vindhyaasagar & Anr. elucidates the difference between compensatory damages and restitutionary damages.** Accordingly, we request the Hon`ble Commission **not to consider the principle of compensation as an alternative to the principle of restitution and apply the principle of restitution as per the power purchase agreement (PPA).**

7. The Article 13.2 of the model PPA in respect of Case-2 bidding (similar provisions exist in Case-1 bidding PPA) provides that the **parties affected by Change in Law should be restored to the same economic position as if the Change in Law had not occurred.** While interpreting this provision, the Appellate Tribunal for Electricity in its judgement dated 13.4.2018 in Appeal No. 210 of 2017, held as under:

***“..... Further, the provisions of Article 13.2 i.e. restoring the Appellant to the same economic position as if Change in Law has not occurred is in consonance with the principle of ‘restitution’ i.e. restoration of some specific thing to its rightful status.”***

8. Subsequently, the Hon'ble Supreme Court upheld the above judgment of APTEL and vide its judgment dated 25.02.2019 in the matter of Uttar Haryana Bijli Vitran Nigam Ltd. and Ors. vs. Adani Power Ltd. and Ors. held as under:

***“7. Article 13.2 is an in-built restitutionary principle which compensates the party affected by such change in law and which must restore, through monthly tariff payments, the affected party to the same economic position as if such change in law has not occurred. This would mean that by this Clause a fiction is created, and the party has to be put in the same economic position is if such change in law has not***

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***occurred, i.e., the party must be given the benefit of restitution as understood in civil law.”***

9. It is clear from above judgments of APTEL and the Hon’ble Supreme Court that the implication of the revised emission standards issued by MoEFC on the power plants, requires to restore the affected generating plants to the same economic position as if the event of Change in Law had not occurred “is in consonance with the principle of ‘restitution’ i.e. restoration of some specific thing to its rightful status”. In this regard, it is noteworthy to mention that the PPA dated 18.01.2014 entered into between MB Power (Madhya Pradesh) Limited and UP Discoms has an in-built restitutionary change in law provision, which reads as under:

***“10.2.1 While determining the consequence of Change in Law under this Article 10, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to **restore** through monthly Tariff Payment, to the extent contemplated in this Article 10, the affected Party to the **same economic position** as if such Change in Law has not occurred.”***

10. It has been held that an in-built restitutionary principle compensates the party affected by such ‘Change in Law’ and the affected party must be restored through monthly tariff payment to the same economic position as if such ‘Change in Law’ had not occurred. Such a restitutionary principle has also been upheld by the Hon’ble Supreme Court in the several cases such as **Indian Council for Enviro-Legal Action vs. Union of India, (2011) 8 SCC 161, T.N. Generation & Distribution Corpn. Ltd. vs. PPN Power Generating Co. (P) Ltd, (2014) 11 SCC 53, Uttar Haryana Bijli Vitran Nigam Ltd. & Anr. vs. Adani Power Ltd. & Ors [(2019) 5 SCC 325], GMR Warora Energy Limited vs. Central Electricity Regulatory Commission (CERC) & Ors., 2023 SCC OnLine SC 464, Uttar Haryana Bijli Vitran Nigam Limited vs. Adani Power (Mundra) Limited [(2023) 2 SCC 624]**.
11. It is further submitted that for the purpose of granting compensation by applying principle of restitution, the CERC needs to consider the mechanism followed for regulated tariff mechanism under Section 62 projects for complying with the principle of restitution or at least consider all the parameters that has been considered in Tariff Regulations for Section 62 projects.
12. The consideration of parameters of Section 62 for the purpose of compensation is accepted by the Hon’ble Supreme Court vide its judgment dated 02.07.2029 in the matter of M/s. Adani Power (Mundra) Ltd. vs. Gujarat Electricity Regulatory Commission, Civil Appeal No. 11133 of 2011, wherein it was held that the in case of termination of PPA, the generating company is compensated for the power supplied during the interim period by applying principle of regulated tariff mechanism under section 62 project. The relevant extracts of the judgements are as under:

***“50. Section 62 of the Electricity Act, 2003, provides entire mechanism for determination of the tariff by the CERC. It will also be relevant to note that the CERC (Terms and Conditions of Tariff) Regulations 2009 also consider various factors which are required to be taken into consideration by the CERC while determining the compensatory tariff. We find that it will be appropriate to relegate the parties to CERC for determination of the compensatory tariff payable to the appellant from the date of termination of the PPA. After such determination, the procurer would be entitled to adjust the amount if already paid in accordance with affidavit dated 23.11.2015, from the amount so determined by the CERC.***

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51. Hence, the following order:

(i) .....

(iii)..... **CERC is directed to decide the said issue in the light of what has been observed by us hereinabove and in the light of the provisions of Section 62 of the Electricity Act** so also the CERC (Terms and Conditions of Tariff) Regulations, 2009 within a period of three months from the appellant's approaching it.....”

13. We hereby request the Hon'ble CERC,

- a. to apply the **principle of restitution strictly as per the power purchase agreement and not to consider the principle of compensation as an alternative to the principle of restitution**
- b. to **adopt all the parameters of Tariff Regulations, 2024 applicable for Section 62 projects to comply with the principle of restitution.** The mechanism or procedure of determination of tariff may be different but the resultant tariff awarded by the Commission should be equitable.

**B. Cost of Debt & Equity of Emission Control System:**

1. At the outset, we welcome the proposed approach in the draft Order allowing the **servicing of debt & equity at normative rate instead of capping at debt rate**. This, in present case, is achieved with the return on capital employed (RoCE) approach considered by the Commission.
2. It is submitted that **the normative rate of servicing the aggregate debt and equity is kept at such a low level that it does not offer adequate servicing of equity component, which is inconsistent with the principle of restitution**. In support of above argument, we submit the following grounds and analysis:

**Ground No. 1: In-adequacy of the Normative Rate for Debt & Equity in view of non-consideration of taxation aspect.**

3. The Commission vide this Draft Order has proposed the servicing of capital employed under Sec 63 PPAs **to be delinked from the actual weighted average rate of interest & shall be worked out at normative cost of capital at 1-year SBI MCLR + 250 bps (11.15% at prevailing 1-Yr SBI MCLR - 8.65% as on 1<sup>st</sup> April 2023)**.
4. However, the said Draft Order, while formulating the normative cost of capital (debt & equity), has not considered the taxation aspect associated with the equity component which **would effectively reduce the return on equity part of the capital on post tax basis when grossed up with actual taxes paid up by generating companies**.

		For Sec 62 PPA	For Sec 63 PPA draft Suo Moto order	Effect on RoE due to non-consideration of tax
a	Debt: Equity Ratio (D/E)	70:30	70:30	70:30
b	1 Year SBI MCLR as on 1 <sup>st</sup> April 2024	8.65%	8.65%	8.65%
c	Actual Rate of Interest on Loan	11.15%	11.15%	11.15%
d	Rate of Interest for Compensation	<b>11.15%</b>	<b>11.15%</b>	<b>11.15%</b>
e	Margin allowed by the Commission (1 Yr SBI MCLR + 350 bps)	3.5%	2.5%	-
f	Rate of Return on Equity [f = b + e]	<b>12.15%</b>	<b>11.15%</b>	<b>7.25%*</b>
g	Tax Rate	34.94%	Not considered	34.94%
h	Gross up rate of Return [ h = f/(1-g)]	<b>18.68%</b>	<b>11.15%</b>	<b>11.15%</b>
i	WACC [ i = D*d + E*h ]	<b>13.41%</b>	<b>11.15%</b>	<b>11.15%</b>
j	<b>MCLR + Margin Format (bps)</b>	<b>MCLR + 476</b>	<b>MCLR + 250</b>	<b>MCLR + 250</b>

*\*Effective Rate of Return reduced to 7.25% considering corporate tax for first year & it will reduced further with NFA basis)*

5. It may be observed from the above table that the weighted average rate of servicing cost of debt & equity is considered as 13.41% for the Section 62 projects whereas for Section 63 projects, it works out to 11.15%. **By considering the debt @ 11.15% per annum, the rate of return on equity will get effectively reduced to 7.25% for first year (which will further reduce on NFA basis) which indicates that it is not consistent with the principle of restitution.**
6. It is submitted that the **payment of taxes to tax authorities is treated as an expense for the purpose of accounting, as well as, the tariff determination purpose**, by the Hon'ble Commission. The **tax component is pass through to the buyer as an expense which is an accepted commercial principle for all the transactions**, except it is specifically agreed by the buyer and seller. **The Commission allows the pass through of the tax component for Sec 62 PPAs through grossing up of the RoE with taxes.**

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7. Some relevant extracts can be seen in **Para 7.3.4 of CERC Order 4/2000 dated 21.12.2000 in Petition No. 4/2000** below:  
*“7.3.4 We understand that presently the tax liability is apportioned to various stations or lines on the basis of capacity..... **The tax allocated to stations/regions shall be charged to the Beneficiaries on the same lines as annual fixed charges/existing charge.**”*
8. Further, as per Para 6.2(4) of the Tariff Policy, 2016, the Ministry of Power has specifically **considered the tax as change in law and pass through**. The para is mentioned below for reference:  
*“6.2. (4) After the award of bids, if there is any change in domestic duties, **levies, cess and taxes** imposed by Central Government, State Governments/Union Territories or by any Government instrumentality leading to corresponding changes in the cost, **the same may be treated as “Change in Law”** and may unless provided otherwise in the PPA, be allowed as pass through subject to approval of Appropriate Commission.”*
9. Accordingly, in case of change in law event as in the case of emission control system for competitively bid projects, **the pass through of tax component is acceptable and undisputable. We humbly requests the Commission that the tax on the servicing of equity infused for the emission control system for Sec 63 PPAs should be allowed**. This is consistent with the sound commercial practice, accounting standards, the principles laid down by the Commission and the Tariff Policy, 2016.

**Ground No. 2: Equitable return in terms of Sec 62 (GFA approach) & Sec 63 (NFA approach)**

10. The Hon`ble Commission, in the instant draft order, has considered a differential treatment for the regulated tariff mechanism-based Section 62 PPA & competitively bid project under Section 63 PPA. **We understand that there may not be an equitable treatment for both type of projects because of the inherent difference in treatment**. However, we rely upon the principle of restitution and submit that at least the restitution in terms of the quantum should be same, i.e. **Rate of return may be applied for debt and equity on normative basis for section 63 project but it should be set in such a way that total return on aggregate equity and debt should be same for Sec 63 and section 62 projects.**
11. The rate of return for Section 62 project fixed by the CERC is 15.50% under Tariff Regulations, 2024 which is based on GFA approach & for ECS, it is provides as MCLR+350 basis points i.e. 12.15% at prevailing MCLR. If we convert the approach to NFA basis, the rate of return would be much higher owing to reduction in asset base.
12. As per our assessment, the return to be allowed for ECS under Sec 63 PPAs , to arrive **at the same level of return for Sec 62 PPAs, should be ~ 1-1.5% for initial five years** on an average basis. It is submitted that while applying the NFA approach, the Commission has ignored the above aspect, that for same level of return as per GFA approach, **the rate of return should be higher in the NFA approach**.
13. **It is requested that the above differentiation in commercial aspects of GFA & NFA approach may be taken on cognizance before arriving the decision for normative rate of return.**

**Summarizing the Grounds:**

14. Considering the above grounds for the impact of taxes on returns & equitable returns under principle of restitution, **the returns on debt & equity (as part of capital cost) for Sec 63 PPAs should be allowed at the normative cost of capital of 13.80 %.**

**C. Recovery of Depreciation: The depreciation should be linked with the loan tenor as well as balance life in line with the Tariff Regulations, 2024**

1. The Commission in the instant proposed draft Suo-Moto order dated 3.7.2024 has continued to consider the life of 25 years for recovery of depreciation, however, the recovery has been staggered in two trenches i.e. in first 12 years and balance 13 years. We welcome this step as this approach is pragmatic and reasonable. However, the Commission has observed that only a few projects have completed 15 years and therefore, the operational life has been considered as 35 years. However, if the emission control system is installed after 25 years, this situation is not address.
2. Accordingly, the instant CERC Order may be suitably amended to incorporate following para:  
***“ If the date of operation of the emission control system is subsequent to the date of completion of the useful life of 25 years of the generating station or tariff period under the contract not less than 25 years, entire depreciation to be recovered over 10-year period from the date of operation of the emission control system or over the period as mutually agreed by the generating company and beneficiaries, whichever is higher.”***