

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 85 of 2006

In the matter of
Petition filed by M/s. Dodson-Lindblom Hydro Power Private Limited seeking
review of the Order dated November 9, 2005 in Case No. 25 of 2004.

Dr. Pramod Deo, Chairman
Shri. A. Velayutham, Member
Shri. S. B. Kulkarni, Member

ORDER

Dated: November 7, 2007

M/s. Dodson-Lindblom Hydro Power Private Limited (DLHPPL) filed a Petition on March 23, 2007 under Regulation 85(a) of the Maharashtra Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 read with Section 94(1)(f) of the Electricity Act, 2003 (EA 2003) seeking a review of paragraph 3.58 of the Order dated November 9, 2005 passed by the Commission in the matter of Determination of Tariff for Small Hydel Power (SHP) Projects within Maharashtra (Case No. 25 of 2004), to the extent it applies to DLHPPL.

2. DLHPPL submitted that due to the words in paragraph 3.58 of the said Order dated November 9, 2005, viz., “*However, Maharashtra State Electricity Distribution Company shall have the first right of refusal*”, it becomes imperative on every Small Hydro Power Generator to sell electricity to MSEDCL and submitted that the said words conflict with Section 10(2) of the EA 2003. DLHPPL, vide its Petition, prayed for modification of the Paragraph 3.58 of the said Order dated November 9, 2005 to the extent of the words, “*However, Maharashtra State Electricity Distribution Company shall have the first right of refusal*”.

3. At the admissibility hearing in the matter held on April 17, 2007, DLHPPL submitted that the review as sought for does not entail any re-determination of tariff for SHPs but seeks review solely on legal grounds relating to one particular provision of the impugned order.

4. The Commission observed that DLHPPL has raised the following grounds for seeking review of the aforesaid Paragraph 3.58 of the said Order dated November 9, 2005:

- a) That the said Paragraph 3.58 of the said Order dated November 9, 2005 suffers from an error apparent on the face of the record of the said Order as the same is contrary to Section 10(2), Section 42(2) and Section 49 of EA 2003.
- b) That the said Paragraph 3.58 of the said Order dated November 9, 2005 suffers from an error apparent on the face of the record as due to the said Paragraph 3.58 of the said Order dated November 9, 2005 it becomes imperative on every Small Hydro Power Generator to sell electricity to Maharashtra State Electricity Distribution Company Limited thereby frustrating the legal right of purchase by any consumer without offering the first right of refusal to Maharashtra State Electricity Distribution Company Limited.
- c) That the said Paragraph 3.58 of the said Order dated November 9, 2005 suffers from an error apparent on the face of the record as it renders the Maharashtra Electricity Regulatory Commission (Distribution Open Access) Regulations, 2005, inoperative, otiose, sterile and nugatory as the said Regulations entitle a consumer of a Distribution Licensee eligible for open access to the distribution system of such Distribution Licensee from obtaining supply of electricity from a Generating Company in accordance with certain eligibility conditions.
- d) That the said Paragraph 3.58 of the said Order dated November 9, 2005 conflicts with Section 86(1)(e) as explained at paragraph 1(f) above, by restricting "sale of electricity to any person" as the freedom to sell electricity to any person in view of paragraph 3.58 gets vitiated and is rendered nugatory and otiose when MSEDCL is given the first right of refusal.
- e) That sufficient reasons exist for review and modification of the said Paragraph 3.58 of the said Order dated November 9, 2005 as the said paragraph 3.58 impinges not only on the spirit of EA 2003, particularly Section 10(2), 42(2), 49, 86(1)(e), but also impinges on the growth of the electricity sector in the State of Maharashtra.

5. The Commission, vide its Order dated May 23, 2005, admitted the Petition for further hearings and directed MSEDCL to file counter reply within fifteen days from the date of the Order, and DLHPPL to file rejoinder within ten days from the date of filing of counter reply by MSEDCL. The Commission directed both the parties to complete the pleadings within a period of one month from the date of the Order.

6. MSEDCL, vide its affidavit in reply to the Petition filed by DLHPPL dated June 16, 2007, submitted as under:

- a) The direction relating to the right of first refusal granted to MSEDCL is incorporated in the policy formulated by the Government of Maharashtra (GoM). The jurisdiction of the Commission cannot be involved to impugn the direction passed by GoM.

- b) Any modification and review of the clause 3.58 of the said Order cannot be done in isolation to rest of the contents of the said Order.
- c) MSEDCL is purchasing renewable energy (RE) under Renewable Purchase Specification (RPS) at the tariff determined by the Commission. If only wind developers and co-generation project holders desire to sell the power to MSEDCL, MSEDCL will have to purchase energy from wind projects and other co-generation and biomass project holders to fulfill the RPS Obligation, thereby reflecting a higher tariff to the consumer.

7. Subsequently, DLHPPL, vide its affidavit dated July 5, 2007, submitted the rejoinder to the MSEDCL's counter reply as under:

- a) DLHPPL, in the Petition, have sought a review of Paragraph 3.58 of the Order dated November 9, 2005, to the extent it applies to DLHPPL and it has not challenged the SHP Policy laid down by the State Government in its Petition.
- b) Paragraph A-17 of the GoM Policy (Resolution No. PVT-1204/(160/2004)/HP dated September 15, 2005, provides that, "*MERC has exclusive jurisdiction on those provisions of this Policy which are within its regulatory mandate under the provisions of the Electricity Act, 2003, especially regarding electricity sales rate, power purchase agreements, and provisions regarding wheeling, banking, distribution and transmission loss charges etc. Similarly MERC has jurisdiction as per the provisions of the EA 2003 as regards the promotion of non-conventional energy sources, facilities for transmission of energy, sale of power to any interested consumer and sharing of purchase of power amongst the STU/ Transmission Licensee/ Distribution Licensee. Orders, regulations, directives, guidelines issued by MERC regarding these issues from time to time shall be binding on all.*"
- c) SHPs can sell power to the consumer at a rate lower than the MSEDCL tariff, which would protect the consumer interest.
- d) The Commission has no jurisdiction or power under EA 2003 to compel or direct a generating company to sell power to any particular licensee.

8. The Commission vide its Notice dated July 30, 2007, scheduled the further hearing in the matter on August 28, 2007, and directed DLHPPL to serve a copy of their counter affidavit-in-reply to the other four distribution licensees (TPC, REL, BEST, and MPECS), and four authorized consumer representatives.

9. At the hearing held in the matter on August 28, 2007, Shri. Harinder Toor, Counsel, appeared on behalf of DLHPPL. Smt. Deepa Chawan, Counsel, appeared on behalf of MSEDCL. Smt. Deepa Chawan submitted that as DLHPPL have sought to challenge the policy issued by GoM vide Government Resolution No. PVT-1204/(160/2004)/HP dated September 15, 2005; DLHPPL should take adequate steps to implead the GoM as a necessary party to the present proceedings. Further, DLHPPL should also implead the Maharashtra State Electricity Transmission Company Limited

(MSETCL) and the Maharashtra Energy Development Agency (MEDA) as necessary parties.

10. Shri. Harinder Toor submitted that GoM need not be impleaded as a party in the present proceedings. The said policy dated September 15, 2005 should be considered on its merits, as to whether it is consistent or not with the Electricity Act, 2003. To arrive at the inconsistency or otherwise of the said policy dated September 15, 2005 with EA 2003, the observations of GoM may not be necessary.

11. The Commission observed that MSETCL and MEDA need not be impleaded as necessary parties. However, GoM be put to notice about the present proceedings. The Commission adjourned the hearing of the matter and vide its notice dated September 6, 2007, scheduled the hearing on September 26, 2007 and directed Government of Maharashtra, Water Resources Department (GoMWRD) to submit its reply in the matter before the Commission.

12. Subsequently, GoMWRD filed its submission before the Commission on September 20, 2007 submitting that the provisions made in clause no. A-15 of GoM, Water Resource Department's hydel policy dated September 15, 2005 have been inserted in view of the electricity shortage in the State of Maharashtra and in furtherance of Section 11 of the EA 2003 and that therefore clause 3.58 of the Commission's Order are correct in the larger interest of the consumers in the State and submitted that DLHPPL's request for modification/ deletion of the words, "*However, Maharashtra Electricity Distribution Company shall have the first right of refusal*" should be rejected by the Commission. GoMWRD also submitted that in terms of the said policy, MERC has the final dispensation making powers in case of any disputes regarding sale of power.

13. At the hearing held in the matter on September 26, 2007, Shri Darius Khambatta, Senior Advocate appearing for DLHPPL, submitted that Petitioners are aggrieved on the creation of right of first refusal in favour of MSEDCL under paragraph 3.58 of the impugned order, as appearing hereunder:

"Sale of Power

3.58 Generated electricity can be sold to any consumer located in the State of Maharashtra or any willing distribution licensee or any power trading company. There shall be no limitation on the supply of energy units by the Developer to the Distribution Licensees. However, Maharashtra State Electricity Distribution Company shall have the first right of refusal. Sale of power shall be in accordance with the Orders, Regulations and Directions of the Commission."

It was submitted that the creation of this right of first refusal is contrary to the provisions of the EA 2003, the spirit of the said Act, and also the National Electricity Policy.

14. Referring to the Government Resolution No. PVT-1204/(160/2004)/HP dated September 15, 2005 issued by GoMWRD, in the matter of Small Hydel Policy for development of Small Hydro Power Projects through private sector participation,

Counsel submitted that so far as passing orders are concerned, the Commission is required to be guided by National Electricity Policy, the National Electricity Plan and the National Tariff Policy, in terms of Section 86(4) of the EA 2003. The said provision does not require the Commission to be bound by any policy passed by the State Government. Any order passed by the Commission in pursuance of any State Government policy which is contrary to the National Electricity Policy and/or the EA 2003, is subject for review. It was submitted by Counsel that the cited portion of the impugned Order has been passed in consideration of the said policy dated September 15, 2005 issued by the GoM-WRD, should thus be reviewed.

15. Shri. Khambatta referred to the preamble to the EA 2003, and submitted that paragraph 3.58 of the impugned Order is contrary to the legislative intent of the Parliament, especially so far as promotion of competition, reduction of subsidies and open access in power sector is concerned. Shri. Khambatta submitted that Section 10(2) of the EA 2003 provides freedom on a generating company to sell energy to any licensee and as such MSEDCL can have no vested right in such energy that the generators opt to sell to any other licensee. Reference was further drawn to Sections 42 and 49 of the EA 2003, which provides the extent to which the EA 2003 encourages open access. Reference was again drawn to Section 86(1)(e) of the EA 2003, which requires the promotion of cogeneration and generation of electricity from renewable sources of energy. Counsel submitted that in line with the cited provisions, DLHPPL is under a duty to supply energy to any licensee or any a consumer in accordance with the rules and regulations as applicable. The creation of a right of first refusal in favour of MSEDCL, shall effectively create a fetter on the application of the cited provisions of the EA 2003 and make them inoperative.

16. It was further submitted by Counsel that the creation of this right of first refusal at the time of the passing of the impugned Order, had no legal justification. No material was available on record in Case No. 25 of 2004, which necessitated or justified the creation of this fetter on small hydel projects to sell energy to MSEDCL, as contained under paragraph 3.58 of the impugned Order. It was further submitted by Counsel that none of the regulations stipulated by the Commission with respect to open access require the creation of a right of first refusal as stipulated in the impugned order.

17. Referring to the provisions contained under paragraphs 1.6, 5.2.5, 5.2.7 and 5.2.20 of the National Electricity Policy which contemplates no fetter either on the development of hydro-generated plants, or the sale of energy by a hydro electricity generator. The said provisions recognize hydro electricity as a chief form of non-conventional energy, and encourages the development of hydro-electricity generation. Reference was further drawn to paragraphs 5.4.5, 5.4.7 which promotes open access, paragraphs 5.7 which promotes competition and paragraphs 5.12.1, 5.12.2 which contemplates that purchase of energy from a generating company shall be through competitive bidding processes. A right of first refusal on the sale of energy by a generator to any specific distribution licensee is not expressly or implicitly stipulated by the National Electricity Policy. A right of first

refusal conflicts with the institution of competitive bidding process. It conflicts with the promotion of generation of electricity and adversely supports a single consumer against other consumers of electricity. While a competitive bidding process enables the generator to service the demand of a licensee, the right of first refusal negates such potential of a generator. Right of first refusal on the sale of electricity by a generator sets up anti-competitiveness and restrains the growth of hydro generation. Counsel further referred to Section 174 of the EA 2003 and submitted that the Government Resolution No. PVT-1204/(160/2004)/HP dated September 15, 2005 issued by the GoM does not amount to “law for the time being in force” or “any instrument having effect by virtue of any law” other than the EA 2003 and, therefore, to be clearly overridden by the provisions of the EA 2003.

18. Counsel Shri. Khambatta submitted that paragraph 3.58 of the impugned Order has been beneficial to MSEDCL. MSEDCL, in their affidavit-in-reply, has substantially supported the insertion of the said paragraph in the impugned order, not as a means to encourage hydro power generation but as a means of meeting the demands of their sole consumers. Counsel requested the Commission to consider that the insertion of the said disputed paragraph prejudices hydro generation and affects larger public interest, than the interests of the consumers of MSEDCL.

19. Referring to the Government Resolution No. PVT-1204/(160/2004)/HP dated September 15, 2005 issued by GoMWRD, as annexed to the affidavit-in-reply filed by GoM, Counsel submitted that the said policy promotes a right of first refusal in favour of MSEDCL. This policy may be taken into account by the Commission. However, should the said policy be in conflict of the EA 2003 or the National Electricity Policy, the same should not be considered by the Commission. It was submitted that under the present proceedings, the Petitioners do not seek to challenge the said Government Resolution dated September 15, 2005. DLHPPL herein seek to negate the reliance on the said policy in the impugned order and therefore stress the need to review the impugned Order. It was submitted by Counsel that neither MSEDCL nor the GoM has placed anything on record under the present proceedings to contend how the said policy encourages cogeneration and generation of hydro electricity, the development of renewable sources of energy or competition in the power sector in Maharashtra. The only justification that has been provided for by MSEDCL in support of the said policy is that the said policy benefits MSEDCL.

20. Shri. Khambatta referred to paragraph 2 of the affidavit-in-reply filed by the GoM, wherein it has been contended that first right of refusal on the sale of energy from a small hydro power project in favour of MSEDCL has been necessitated under Section 11 of the EA 2003. It was submitted by Counsel that the financial benefit gained by MSEDCL, on the operation of first right of refusal, cannot qualify as “extraordinary circumstances” in terms of Section 11 of the EA 2003. Counsel referred to the contentions raised by the GoM under paragraph 2.4 of the said affidavit. It has been contended thereunder that small hydro power projects shall not be able to meet the entire

energy demand in Maharashtra. Counsel submitted that such a contention fetters the development of small hydro power projects at the cost of the sole development of MSEDCL. Counsel further submitted that this reverses the principles of EA 2003 and seeks to establish the regime prevailing before the EA 2003. Encouraging small hydro power projects would encourage competitive prices on the sale of electricity. Counsel further referred to the contentions raised by the GoM under paragraph 2.4.1 of the said affidavit. It has been contended thereunder that small hydro power projects should be directed to supply to MSEDCL so that MSEDCL may supply energy at affordable rates. Counsel submitted that this contention is an argument in favour of effectively giving subsidy in favour of the consumers of MSEDCL, against all the other electricity consumers in Maharashtra.

21. Shri. Khambatta referred to the affidavit-in-reply filed by MSEDCL, wherein the argument of subsidy has been further established. It has been contended by MSEDCL thereunder that the obligation of achieving RPS targets has necessitated the creation of right of first refusal. The Commission observed that MSEDCL is not the only distribution licensee which is obligated to achieve RPS targets. Shri. Khambatta further submitted that MSEDCL has contended that the operation of first right of refusal shall not operate as a complete lack of open access. Such a contention is an admission of the fact that the operation of the disputed first right of refusal shall prevent open access.

22. Counsel Shri. Khambatta referred to the judgment dated June 2, 2006 passed by the Appellate Tribunal for Electricity (“ATE”) in Appeal Nos. 1, 2, 5, 6, 7, 8, 9, 10, 12, 15, 16, 17, 18, 19, 20, 21, 22, 34, 46, 47, 48, 49, 50, 52, 58, 67 and 80 of 2005 (paragraphs 40, 47, 48, 49, 50, 68, 75). It was submitted that the ATE has held that the EA 2003 does not vest any right on a State Electricity Regulatory Commission to direct forced sale by a generator. The disputed right of first refusal acts as a direction of forced sale, as has been prohibited in the cited judgment. Reference was further drawn on the judgment passed by the Supreme Court in *Pahwa Chemicals (P) Ltd. Vs. Commissioner of Central Excise, New Delhi* [2005(2) SCC 720] (paragraph 13). Counsel further referred to the judgment passed by the Supreme Court in *Delhi Development Authority & Ors. Vs. Joginder S. Monga & Ors.* [2004(2) SCC 297] (paragraph 30) which provides that statute shall indisputably prevail over an executive instruction. Counsel further referred to the judgment passed by the Supreme Court in *Narendra Kumar Maheshwari Vs. Union of India & Ors* [1990 (Supp) SCC 440] (paragraph 106) whereunder it is provided that state government policies are not binding or enforceable as law is.

23. Shri. V.M. Kulkarni, GoMWRD, submitted that the Government Resolution No. PVT-1204/(160/2004)/HP dated September 15, 2005 was issued by the GoMWRD pursuant to the existing power shortage in Maharashtra. It was submitted that the said power shortage, especially in the area of supply of MSEDCL, imposed a threat to the law and order situation, which qualified into an “extraordinary situation” in terms of Section 11 of the EA 2003. The said resolution has been passed in public interest and is consistent with the provisions of the EA 2003. It was further submitted that response

from developers of small hydro power projects were considered during the issuance of the said resolution. The said developers shall face no adverse financial impact on the operation of the said resolution. The Commission enquired of Shri.V.M. Kulkarni to justify why the preamble to the said resolution is silent on the incidence of the power shortage. The Commission observed that invocation of Section 11(1) of the EA 2003 would require the offsetting of adverse financial effect of the small hydro power projects, in terms of Section 11(2) of the EA 2003. Shri.V.M. Kulkarni submitted that the tariff for purchase of the energy from small hydro power projects has been fixed on a cost-plus basis and no financial effect is required to be offset.

24. Smt. Deepa Chawan, Counsel for MSEDCL, submitted that the Government Resolution No. PVT-1204/(160/2004)/HP dated September 15, 2005 has never prevented open access. It may have at the most established a right of pre-emption in favour of MSEDCL, the creation of which is not prohibited under the EA 2003. Counsel further submitted that the submissions advanced by Shri. Khambatta, so far as they substantiate that a statute shall prevail over executive directions, are not disputed by MSEDCL. The ratio of the judgments referred in support of the said contention is not refuted by MSEDCL.

25. Smt. Deepa Chawan submitted that considering the factual matrix with respect to the issuance of the Government Resolution No. PVT-1204/(160/2004)/HP dated September 15, 2005, it appears that the impugned order has not created any right of pre-emption in favour of MSEDCL in conflict with Sections 10 and 42 of the EA 2003. Counsel submitted that considering the extraordinary scarcity of power prevailing in Maharashtra, which led to determination of the principles and protocol of load shedding applicable for Maharashtra, at a later course of time, the said resolution should be interpreted as a direction by the GoM under Section 108(1) of the EA 2003. Counsel further submitted that the GoM had submitted a proposal for the development of Small Hydro Power Projects on December 28, 2002. Thereafter, based on the advice provided by the Commission on the said proposal, the policy has been issued by the GoM.

26. Smt. Deepa Chawan further submitted that the Government Resolution No. PVT-1204/(160/2004)/HP dated September 15, 2005 was not challenged by any person for a continuous period of two years. Further, the said resolution had imposed certain additional responsibility on MSEDCL (and not other distribution licensees of Maharashtra) for the promotion of Small Hydro Power Projects. Counsel referred to the evacuation facilities enjoyed by the Small Hydro Power Projects. The Commission observed that the creation of evacuation facilities is the responsibility of the Maharashtra State Electricity Transmission Company Limited and all costs towards evacuation shall be considered in the annual revenue requirement of the transmission company.

27. Smt. Deepa Chawan submitted that the developers of Small Hydro Power Projects have enjoyed the benefits arising out of the said resolution and therefore should be pre-empted to deny their obligations under the same. It was further argued by Smt. Chawan

that the Counsel for the Petitioners have submitted that the present petition has not been initiated to challenge the vires of the said resolution dated September 15, 2005. Smt. Chawan further submitted that the vires of the said resolution, as a state policy directive, cannot be challenged in the present proceedings and the Petitioners have to initiate appropriate proceedings for the same.

28. Dr. Ashok Pendse, appearing for Mumbai Grahak Panchayat, authorized on a standing basis under Section 94(3) of the EA 2003 to represent the interests of consumers in the proceedings before the Commission, submitted that the Government Resolution No. PVT-1204/(160/2004)/HP seems to establish a contractual relationship between the GoM and Small Hydro Power Projects, and do not create any right for MSEDCL.

29. The Commission enquired of Shri. V.M. Kulkarni as to whether the contention of MSEDCL that the Government Resolution No. PVT-1204/(160/2004)/HP dated September 15, 2005 is a policy directive under Section 108 of the EA 2003, is tenable. Shri. V.M. Kulkarni submitted that GoM would like to reserve the right of apprising the Commission on the said issue, in writing. Shri. Kulkarni further sought an opportunity to apprise the Commission in writing on whether the GoM is required to offset any adverse financial impact of the Petitioners and other Small Hydro Power Projects, considering the various incentives that have already been provided to the latter.

30. Shri. Darius Khambatta refuted the contentions of Smt. Chawan, and submitted that the Government Resolution No. PVT-1204/(160/2004)/HP dated September 15, 2005 does not qualify as a directive under Section 108 of the EA 2003, merely on the basis of oral contentions advanced. Counsel submitted that the GoM has not contended/confirmed in their affidavit that the said resolution is a directive under Section 108 of the EA 2003. The contention of the GoM under the affidavit is that the said resolution is a direction on Small Hydro Power Projects under Section 11 of the EA 2003. The Commission should note that a direction to a generating company under Section 11 of the EA 2003 cannot be a 'double up' as a directive under Section 108 of the EA 2003. Counsel submitted that any pronouncement of the state government cannot be, in hindsight, converted into a direction under Section 108 of the EA 2003. Referring to the provisions of Section 108 of the EA 2003, Counsel submitted that a directive under the said section shall be required to be (i) given to the Commission and (ii) in writing. It was submitted that only in rare and extraordinary situations, the State Government may issue any directive to an Appropriate Commission, and the same is required to be done in writing, specifically addressed to the Appropriate Commission. Counsel further submitted that even if the GoM submits on affidavit that the said direction is a direction under Section 108 of the EA 2003, the said resolution cannot automatically be considered as a directive under Section 108 of the EA 2003. Counsel refuted the submissions of Smt. Deepa Chawan and submitted that the Commission has jurisdiction under the EA 2003 to verify whether a particular direction issued by the Government without making any mention of Section 108 of the EA 2003, should or should not be considered as a direction under Section 108 of the EA 2003.

31. Counsel Shri. Khambatta further submitted that the said resolution cannot be even considered to be a directive under Section 108 of the EA 2003, owing to the fact that the advise of the Commission was considered by the GoM in the formulation of the said resolution. Since the Commission revised the proposal submitted by the GoM on December 28, 2002, and thereafter passed the impugned Order it cannot be held that the ultimate resolution on Small Hydro Power Projects dated September 15, 2005 should be considered as a policy directive under Section 108 of the EA 2003. In essence therefore, no purpose would be served in granting the GoM the liberty to make submissions as to whether the said resolution was a direction under Section 108 of the EA 2003.

32. On the issue of whether DLHPPL have at any earlier point of time accepted the operation of the said resolution dated September 15, 2005 or not, Counsel Shri. Khambatta submitted that the Petitioners are not challenging the vires of the said resolution because the same cannot be challenged in the present proceedings before the Commission. Counsel submitted that the vires of the said resolution is not challenged by DLHPPL because that is not the subject matter of the present proceedings. The presence of the said resolution is the subject matter and not the vires of the said resolution. The Petitioners reserve the right of challenging the vires of the said resolution if at all the same may be necessitated. The acceptance or non-acceptance of the said resolution by the Petitioners is totally irrelevant, in the present proceedings, considering that the said resolution conflicts with the provisions of the EA 2003 and the National Electricity Policy. Counsel further submitted that should an issue nevertheless arise as to whether the Petitioners accepted the operation of the said resolution, Counsel submitted that the drafts of the said resolution dated September 15, 2005 do not propose the creation of a right of first refusal in favour of MSEDCL. The comments / observations that were submitted by the Petitioners, or other developers of small hydel projects, did not therefore dwell on the aspect of the said disputed first right of refusal. Counsel vehemently argued that given the said circumstances, MSEDCL should not be allowed to contend that post the issuance of the disputed resolution, the Petitioners should be foreclosed to challenge the vires of the said resolution.

33. Smt. Deepa Chawan submitted that the disputed paragraph No. 3.58 in the impugned Order is a reproduction of the policy of the GoM under the said resolution dated September 15, 2005.

34. Subsequently, on October 3, 2007, the counsel for DLHPPL submitted the copies of compilation of documents relating to draft Hydro Power Policy.

35. GoMWRD submitted its affidavit on October 11, 2007, submitted that the Policy of the State Government has been formed considering the fact that the resources belong to the State and clause No. A-15 of the said Government Resolution may not be termed as the directions to the Commission under Section 108 of EA 2003. Further, as per EA 2003, the tariff is in complete domain of the Commission and the Government has not interfered on the tariff issue. It has also been averred therein that some states have, in

fact, gone much beyond these type of conditions of first right of refusal and have specified the quantum of power that is to be given by developer free of cost to the State since the developer has been allowed to use the State's resources. Therefore, the impugned order needs no review.

36. Having heard the parties at length, including the GOMWRD, and after considering the materials placed on record and written submissions filed by the Petitioner, MSEDCL and GOMWRD, the Commission is of the view that the following issues arise for consideration:

- (i) Whether the policy formulated by the Government of Maharashtra (GoM), ie., GoM Policy (Resolution No. PVT-1204/(160/2004)/HP dated September 15, 2005, is a direction to the Commission under Section 108 of EA 2003?
- (ii) Whether the aforesaid policy has been formulated by GoM under Section 11 of EA 2003?
- (iii) Whether the Order dated November 9, 2005 requires to be reviewed to the extent of the words "*However, Maharashtra State Electricity Distribution Company shall have the first right of refusal*", appearing in Paragraph 3.58 thereof ?

37. Taking up the first point for consideration, GoMWRD has admitted under its affidavit filed on October 11, 2007, that the policy formulated by the Government of Maharashtra (GoM), ie., GoM Policy (Resolution No. PVT-1204/(160/2004)/HP dated September 15, 2005, is not a direction to the Commission under Section 108 of EA 2003. The Commission is also of the view that, firstly, the directions of policy involving public interest to be given by the State Government under Section 108, is required to be stated to be specifically in exercise of powers under Section 108. However, the GoM Policy (Resolution No. PVT-1204/(160/2004)/HP dated September 15, 2005 does not even find a mention of Section 108. Secondly, the Commission is required to be guided by directions of policy involving public interest to be given by the State Government under Section 108. This consequently implies that the Commission is entitled to its own view even if such a direction were given by the State Government.

In view of the above, the Commission holds that GoM Policy (Resolution No. PVT-1204/(160/2004)/HP dated September 15, 2005, is not a direction to the Commission under Section 108 of EA 2003, and in any case cannot limit the Commission's powers to review the impugned order.

38. Taking up the second point for consideration, the Commission is of the view that the contention that the aforesaid policy has been formulated by GoM under Section 11 of EA 2003, cannot be sustained due to the following reasons. An extraordinary situation cannot be considered to have a permanent bearing, and therefore cannot be a long-term

policy in the matter of development of Small Hydro Power Projects through private sector participation. The said GOM policy cannot be considered to be formulated as a direction issued in pursuance of extraordinary circumstances under Section 11 of the EA 2003, when such is not mentioned in the preamble to the said GOM policy. Furthermore, considering the fact that power scarcity was prevalent in the year 2005 in the areas of all the distribution licensees in Maharashtra, extraordinary circumstances could not have been stipulated for the area of MSEDCL only, thereby necessitating the justification of the said first right of refusal in terms of the said GOM Policy. The Commission notes that GOMWRD has not issued any such directions to any other generating company to mitigate the shortage situation prevalent then. The said GOM policy, so far as it relates to the creation of a first right of refusal, should have had general application to all the distribution licensees in Maharashtra. On this account also, the Commission does not sustain the argument that the aforesaid policy has been formulated by GoM under Section 11 of EA 2003. Interestingly, there is an explanation appended to Section 11 in the EA 2003, which reads as under:

“Explanation. - For the purposes of this section, the expression “ extraordinary circumstances” means circumstances arising out of threat to security of the State, public order or a natural calamity or such other circumstances arising in the public interest.”

GOMWRD has not been able to justify whether the aforesaid policy formulated by GoM under Section 11 was to take into account or was formulated in view of any circumstance arising out of threat to security of the State, public order or a natural calamity or such other circumstances arising in the public interest. The Commission also does not sustain the contention of GOMWRD that the tariff for purchase of the energy from small hydro power projects that has been fixed on a cost-plus basis did not require the Commission to offset the adverse financial impact of the said GOM policy as referred to in sub-section (1) of Section 11. The Commission is of the view that, that is not the manner in which Section 11 would operate. For the operation of Section 11, the State Government would have to intimate the Commission regarding the directions made under Section 11(1) so that the Commission could consider to offset the adverse financial impact of such directions as referred to in sub-section (2) of Section 11. Sub-section (2) of Section 11 reads as under:

“(2) The Appropriate Commission may offset the adverse financial impact of the directions referred to in sub-section (1) on any generating company in such manner as it considers appropriate.”

In view of the above, the Commission does not sustain the contention that the aforesaid policy has been formulated by GoM under Section 11 of EA 2003. These contentions are hereby rejected. The Commission is also of the view that these contentions advanced by GOMWRD are nothing but an afterthought to justify the stand that the aforesaid policy of the GoM was formulated under Section 11 of EA 2003.

In the passing, the Commission observes that such directions may be useful if issued to existing generating stations to tide over immediate shortage crisis situation, but in no way can facilitate bringing in generation which can take over 18 to 24 months for capacity addition and also that the shortage crisis is unknown so well in advance. In fact, the provisions of Section 11(1) which deals with directions for operation and maintenance of generating stations, which are operational in nature, cannot be dealt in a manner to restrict development of generating stations. Further, the Commission is of the view that the said GOM policy for promotion of small hydel power projects with operational life of over 30 years need not be based on immediate prevalent situation ignoring long term market development and certainly cannot be contradictory to the provisions of EA 2003 or detrimental to the legal rights of the stakeholders.

39. Taking up the third and final point for consideration, the the Commission is of the view that the contentions raised by the Petitioner requires to be sustained. The continued operation of such first right of refusal is contradictory to Sections 10(2), 42 (2) and 49 of the EA 2003 which is meant to encourage generating companies to freely sell their power generated to any distribution licensee, electricity trader, or consumer through open access. Further, the renewable purchase obligations formulated by the Commission applies uniformly to all distribution licensees within the State as also to captive and open access consumers. Therefore, it would not be justified to restrict the hydro power developers to any right of first refusal in favour of MSEDCL, in order to enable MSEDCL to meet its renewable purchase obligations. The Commission is of the view that the words in paragraph 3.58 of the said Order dated November 9, 2005, viz., *“However, Maharashtra State Electricity Distribution Company shall have the first right of refusal”*, would have the effect to subject the sale of electricity generated by SHPs to the right of first refusal in favour of a particular licensee (i.e., Maharashtra State Electricity Distribution Company Limited in this case) before electricity generated could be sold to consumers, other licensees and electricity traders. This condition is not in accordance with Section 10(2) of EA 2003 and would not only lead to absurdity and make the provisions of the EA 2003 nugatory but would also create friction, contradiction and conflict with the provisions of Section 10(2), Section 42(2) and Section 49 of EA 2003 which makes it mandatory for the Commission, to introduce open access by the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Commission. Furthermore, the condition that *“However, Maharashtra State Electricity Distribution Company shall have the first right of refusal”*, contradicts, restricts and limits the words appearing in paragraph 3.58 which read thus: *“Generated electricity can be sold to any consumer located in the State of Maharashtra or any willing distribution licensee or any power trading company. There shall be no limitation on the supply of energy units by the Developer to the Distribution Licensees.”*

The said Order dated November 9, 2005, therefore, suffers from an error apparent on the face of the record and there are no two diverse possible views on it.

40. In view of the foregoing, the Commission holds that the words “*However, Maharashtra State Electricity Distribution Company shall have the first right of refusal*” appearing in paragraph 3.58 of the Order dated November 9, 2005 (Case 25 of 2004) is required to be removed and is hereby removed. Paragraph 3.58 of the Order dated November 9, 2005 (Case 25 of 2004) shall read as under:

“Sale of Power

3.58 Generated electricity can be sold to any consumer located in the state of Maharashtra or any willing distribution licensee or any power trading company. There shall be no limitation on the supply of energy units by the Developer to the Distribution Licensees. Sale of power shall be in accordance with the Orders, Regulations and Directions of the Commission.”

With the above, Case 85 of 2006 stands disposed of.

Sd/-
(S.B. Kulkarni)
Member

Sd/-
(A. Velayutham)
Member

Sd/-
(Dr Pramod Deo)
Chairman

(P. B. Patil)
Secretary, MERC