

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 14 of 2011

In the matter of
Petition filed by Wardha Power Company Limited seeking recovery of unpaid dues/tariff for supply of electricity in terms of Power Purchase Agreement dated May 13, 2009

Shri V.P. Raja, Chairman
Shri. Vijay L.Sonavane, Member

Wardha Power Company Limited
Jubilee Hills, Hyderabad

..... Petitioner

Vs.

Maharashtra State Electricity Distribution Co. Ltd.
Bandra (E), Mumbai

..... Respondents

Present during the hearing:

For the Petitioner:

Shri Sanjay Sen, Advocate, Shri Rana Biswas, Advocate; Shri Hemant Singh, Advocate, Smt Shikha Ohri, Advocate, Shri Ramesh Kumar, Director, Shri A K Mehra, Project Head and Shri Balram Murthy

For the Respondents:

Smt Deepa Chavan, Advocate, Shri Kiran Gandhi, Advocate, Ruchir Wani, Advocate, A S Chavan. C.E. (PP), Shri Ravindra Chile, Shri S P Vyavahare G.M. (PP) and S S Dhande C.E. (Comm.)

ORDER

Dated: April 30, 2012

Wardha Power Company Limited (WPCL) submitted a Petition on January 7, 2011, under Section 86 (1) (f) (k), Section 63 and 86 (1) (b) of the EA, 2003 for seeking recovery of unpaid dues/tariff for supply of electricity in terms of Power Purchase Agreement (PPA) dated May 13, 2009.

2. The prayers of the petitioner are as under:

“a) Direct the Respondent to make a payment of `64.01 Crores on account of unpaid Power purchase dues payable to the Petitioner under the PPA dated 13.05.2009

b) Direct the Respondent to make a payment of ` 4.44 Crores on account of wrongful imposition of penalty and illegally withholding such amount from the power purchase bills/ invoices raised by the Petitioner.”

3. The Petitioner in its petition submitted as under:

- a) The Petitioner is a Generating Company having an installed capacity of 540 MW. They executed a PPA dated May 13, 2009 with MSEDCL, effective from November 15, 2009 and valid upto October 31, 2010, incorporating the agreed tariff discovered through Competitive bidding process and delivery Schedule of Power was agreed as under:

Quantum	Period	Tariff (`/kWh)
50 MW	15.11.2009 to 30.11.2009	5.50
80 MW	1.12.2009 to 31.12.2009	5.50
150 MW	01.01.2010 to 31.01.2010	5.50
180 MW	1.2.2010 to 28.2.2010	5.50
250 MW	01.03.2010 to 31.03.2010	5.50
280 MW	01.04.2010 to 30.04.2010	5.50
300 MW	01.05.2010 to 31.05.2010	5.50
300 MW	01.06.2010 to 31.08.2010	4.23
300 MW	01.09.2010 to 31.10.2010	5.50

- b) Since the Petitioner's generating plants were in the process of commissioning, the scheduling of Power under the PPA was initially 50 MW and then progressively going up to 300 MW. The discovered tariff was ` 5.50/kWh for the entire period of contract except for the month of June, July and August 2010 during which period the tariff was ` 4.23/kWh.
- c) Petitioner WPCL vide letter dated October 20, 2009 informed the Respondent about delay in commissioning because of late arrival of Chinese Experts due to denial of Indian Visa. WPCL stated that this is a force majeure event and informed MSEDCL that it was expecting to commission the first unit of the project (i.e. 1*135 MW) by January/February, 2010 and was expecting to supply power to Respondent under the revised Schedule.
- d) The Respondent, vide its letter dated December 14, 2009, accepted the aforesaid request for rescheduling of supply on the ground of force majeure events . Petitioner vide its letter dated December 28, 2009 informed the Respondent of further delay in the implementation of project due to Government of India's continued insistence for proper work permits for Chinese Technical personnel to work at project site.
- e) The Respondent, vide its letter dated February 3, 2010 informed that the Board of Directors of MSEDCL has accepted the request of the Petitioner and agreed to further extend the time for commencement of supply of power by the Petitioner to April 1, 2010.

- f) The Petitioner, vide a letter dated February 5, 2010, conveyed its revised schedule for supply of power to the Respondent and requested for acceptance of new timelines for such supply.
- g) The Petitioner, vide its letter dated March 30, 2010, informed the Respondent about further delay in commissioning faced by the Petitioner due to the boiler feed pump failure. The Petitioner additionally proposed that it would arrange to supply 16 MW power from April 1, 2010, from alternate source through LANCO on a short-term basis so that the Petitioner's obligation under the PPA to supply power is fulfilled.
- h) Respondent, vide its letter dated March 31, 2010, accepted the proposal for availing power from alternate source arranged by the Petitioner, until power is scheduled from the generating plant and informed that the other terms of the PPA will continue to be in force.
- i) On the basis of the aforesaid arrangement, the original application to the SLDC for scheduling of power was withdrawn and a new application for the same was proposed.
- j) It is submitted that the arrangement for availing power from alternate source continued during the entire period of PPA. For the supplies made through alternate source in the months of April, May and June 2010, the Respondent made prompt payments in terms of the PPA.
- k) The Petitioner vide letter dated June 17, 2010 and July 2, 2010 made representations to the Respondent not to withhold any amount on account of penalties. The Petitioner submitted that the Respondent accepted the existence of force majeure events and had agreed to rescheduled timelines of supply and also accepted supply from alternate source from April 1, 2010. The Petitioner further submitted that considering the facts and circumstances of the case, it is improper on the part of Respondent to impose penalty and withhold payment of about `4.44 Crores from its power sales account.
- l) The Petitioner vide its letter dated July 30, 2010 confirmed successful completion of the reliability run test of the first unit of 135 MW, out of 4*135 MW coal based Power Project and declared Commercial Operation Date (COD) of the first unit w.e.f July 1, 2010. The aforesaid declaration of COD was accepted and steps were

taken for scheduling power from the project vide reference letters dated August 5, 2010 and August 13, 2010.

- m) The Petitioner stated that, although Force Majeure events leading to delay in commissioning of the project were earlier accepted by the Respondent and the parties had acted/proceeded on that basis, the Respondent withheld payments on account of penalties. The Petitioner without prejudice to the same additionally submitted various documents as required by Respondent, to enable the Respondent to resolve the issues amicably and waive the penalty.
 - n) The Petitioner, vide its letter dated August 24, 2010, wrote to MD, MSEDCL, to ascertain the legal and commercial basis of deductions. In the meanwhile, the Petitioner continued to supply Power to Respondent upto October 31, 2010 (till expiry of PPA).
 - o) The Petitioner informed that, Respondent made payments as per PPA for supplies made up to July 15, 2010. For supplies made from July 16, 2010 to October 31, 2010, Respondent stopped making payments. An amount of `64.01 Crores for supplies of 336.49 MU, was withheld without any valid reason.
4. MSEDCL, vide letter dated March 18, 2011, replied to the contentions in the as follows:
- a) Respondent MSEDCL issued a public tender on March 30, 2009 to procure 300 MW RTC Power on firm basis through competitive bidding process from November 1, 2009 to October 31, 2010. Petitioner, WPCL submitted bid on April 15, 2009, to supply Power from November 15, 2009 , which was accepted on April 24, 2009 by Respondent, as per following schedule:

Source	Type of Power	Quantum in MW	Rate @delivery point in p/kWh	Period
Wardha Power Co Ltd Warora Plant	FIRM	50	550.00	15 /11/09 to 30/11/09
	RTC	80	550.00	December 2009
		150	550.00	January 2010
		180	550.00	February 10
		250	550.00	March 2010
		280	550.00	April 2010
		300	550.00	May 2010
		300	423.00	June 2010
		300	423.00	July 2010
		300	423.00	August 2010
		300	550.00	September 2010
		300	550.00	October 2010

MSEDCL's acceptance was subject to WPCL giving its consent one month in advance to enable MSEDCL to book Open Access and penalty /compensation clause would be applicable to the transaction as per PPA.

- b) On May 13, 2009, parties executed the PPA, detailing various terms and conditions.
- c) Respondent recognizes that Petitioner's Warora Project got delayed due to Govt. of India imposing work permit requirements for Foreign Technicians working at Indian Project sites.
- d) MSEDCL did not receive any communication regarding Open Access from Petitioner on October 15, 2009 (30 days in advance of commencement of supply). Respondent received a communication vide letter dated October 20, 2009, stating the factors which had adversely affected the synchronization and informed that they will be able to commence supplies in January/February 2010. Petitioner also submitted following revised Schedule to commence supplies from January 15, 2010.

Source	Type of Power	Quantum in MW	Period
Wardha Power Co. Ltd. (Warora Plant)	FIRM - RTC	50	15/01/10 to 31/01/10
		80	February 2010
		170	March 2010
		200	April 2010
		290	May 2010
		300	June 2010
		300	July 2010
		300	August 2010
		300	September 2010
		300	October 2010

- e) MSEDCL vide letter dated December 14, 2009 conveyed their acceptance to WPCL revised schedule (as requested in Petitioner's letter dated October 20, 2009). WPCL vide letter dated December 28, 2009 informed MSEDCL of further technical delays in synchronization of Unit 1 (1* 135 MW capacity) and submitted a new schedule for supplies commencing April 1, 2010.

Source	Type of Power	Quantum in MW	Period
Wardha Power Co. Ltd. (Warora Plant)	RTC Firm	50	April 2010
		80	May 2010
		170	June 2010
		200	July 2010
		290	August 2010
		300	September 2010
		300	October 2010

- f) WPCL vide letter January 12 informed the Revised Schedule commencing from April 1, 2010.
- g) MSEDCL, vide letter dated February 3, 2010, conveyed its acceptance to proposed Revised Schedule of WPCL, and sought an undertaking under affidavit that WPCL will start supplying power from April 1, 2010 and penalty will be levied on failure to

do so as per terms of PPA dated May 13, 2009. WPCL gave the affidavit on February 5, 2010.

- h) Based on the consent given by WPCL, MSEDCL applied to SLDC for Open Access for supply of Power from WPCL to MSEDCL wef. from April 1, 2010. However on March 30, 2010, Respondent received a letter informing that WPCL Project will be synchronized by April end and it will take two more weeks to stabilize. WPCL offered to supply 16 MW from April 1, 2010 from alternate source. MSEDCL, vide letter dated March 31, 2010 agreed to this request at the rates at the MSETCL periphery and further subject to other terms and conditions of PPA. This was agreed by Respondent in order to mitigate the hardships on account of levy of Penalty and non-compliance of PPA. The Respondent further submitted that PPA dated May 13, 2009, did not provide for supply of Power from alternate sources, but Respondent accepted this as a temporary arrangement.
- i) Respondent submitted that from April 1, 2010 to July 15, 2010, they inadvertently paid WPCL at rate in accordance with PPA which was `5.50/kWh and `4.23/kWh. However, WPCL on June 17, 2010 represented that due to extended force majeure conditions, penalty should not be levied on them for shortfall in supplies for months of April 2010 and May 2010.
- j) Respondent rectified this inadvertent mistake on July 16, 2010. Thereafter on being aware of the rates of the Power from alternate sources, Respondent paid Petitioner at IEX/PXIL rates at MSETCL bus or contracted rates whichever was found to be lower. MSEDCL vide letter dated July 23, 2010 asked WPCL to submit the details of hour wise energy and the rates at which Power had been procured from open market for supply to MSEDCL.
- k) MSEDCL vide letter dated July 23, 2010 asked Petitioner to supply some documents for consideration of the representation of dated June 17, 2010 relating to penalty. WPCL vide letter dated July 30, 2010 submitted that Force Majeure events had continued (due to technical problem in main plant package), though the Chinese Experts had arrived in April 2010, the COD was July 1, 2010.
- l) MSEDCL vide letter dated August 5, 2010, asked WPCL the procedure adopted for declaring the COD and advised the WPCL to apply for Open Access. MSEDCL vide

letter dated August 13, 2010, sought latest documents from WPCL regarding the extension of work permits/visa for Chinese Technical Personnel of EPC Contractor.

- m) From the procurement data provided by WPCL vide their e mail dated August 17, 2010; MSEDCL observed that WPCL had procured power at much lower rates for supply from alternate sources than the rates in the PPA. WPCL vide letter dated August 24, 2010 approached MSEDCL for payment as per PPA rates for power supplied from alternate sources.
- n) Respondent submitted that the Petitioner had facilitated alternate power supply from IEX/ PXIL and as per petitioner's email dated August 17, 2010. Respondent noted the rates at which alternate power was procured and observed that rates were much lower than PPA rates hence Petitioner was paid and continued to pay accordingly at lower rate (as per actual rate of procurement).
- o) Several meetings were held between Respondent and WPCL on this issue where Respondent reiterated that the rate of `5.50/kWh is to be taken as ceiling rate only and continued to pay for power from alternate sources at IEX/PXIL rates at MSETCL bus or contracted rates whichever is lower. WPCL continued to accept this payment till October 31, 2010, without protest. Respondent submitted that the present petition filed by WPCL in January 2011 is an afterthought.
- p) Respondent submitted that petitioner's demand to recover the payment against supply of excess energy is not acceptable as there is no provision for supply of energy in excess of contracted quantum.

5. During hearing held on July 11, 2011, both parties had submitted that MSEDCL can pay on actual basis for the power procured from alternate sources and pay as per PPA for power supplied from WPCL own generation. However later on WPCL (during hearing on September 7, 2011) withdrew from this understanding.

6. According to WPCL, MSEDCL did not impose any penalty during the period it received the power and the entire cost of the PPA is also deemed to have been a factor in the ARR of MSEDCL. Therefore, MSEDCL is obliged to make payments in terms of PPA, being a legal contract document.

7. WPCL continued to supply power from WPCL & alternate sources, despite the pending payments, only to avoid levy of any arbitrary penalty on WPCL on account of non-supply. MSEDCL did not ask WPCL to suspend supplies at any point of time.

8. Both parties submitted to Commission regarding actual transaction details (given below), which shows that practically 40 % was procured from outside and balance from own generating units.

Statement of Sale of Power to MSEDCL from April 1, 2010 to October 31, 2010

Month/2010	At Supply 100%	Guarantee 80%	From Own generating plant	From Alternate source	Total
	MU	MU	MU	MU	MU
April	36	28.8	0.02	14.02	14
May	59.63	47.62	3	49	52
June	122.4	97.92	33	70	104
July (1-15)	72	57.6	36	33	69
Sub Total	289.93	231.94	72.47	166.97	239.44
July (16-31)	76.8	61.44	41	21	62
August	215.76	172.61	71	115	187
September	216	172.8	23	152	175
October	223	178.56	120	48	168
Sub Total	731.76	585.41	255.32	336.48	591.80
Total	731.76	585.41	255.32	336.48	591.80
Grand Total	1021.69	817.35	327.79	503.45	831.24
% of power supplied against Guarantee from WPCL generation					
April15-July 2010			31.25	71.99	103.23
July 16-October 2010			43.61	57.48	101.09
Total %			40.1	61.6	101.70

9. The matter was heard on several occasions and the contentions of both the parties were considered by the Commission. As per directions, service and pleadings were completed.

10. The Commission asked both the parties to settle the matter within 10 days failing which the Petitioner was directed to submit the details related to Generating station.

11. On one occasion, the Petitioner requested for adjournment on the ground that negotiations were taking place with the Respondent.

12. During the hearing on July 11, 2011, both the Parties agreed to resolve the matter amicably. The Commission directed both the parties to settle the issue of outstanding payments within three weeks and report compliance thereof to the Commission.

13. In the hearing on August 4, 2011, the Respondent submitted that the detailed calculation of unpaid dues have been completed as per the data provided by WPCL the Petitioner and the same has been put up before their Management for approval However, Learned Counsel for the Petitioner submitted that settlement, if any, will be without prejudice to their legal rights.

14. In the hearing on August 12, 2011, the Respondent submitted the reconciled statement of the unpaid amount, to the Commission. The Petitioner submitted that they need to verify the reconciled statement prepared by the Respondent MSEDCL before agreeing to the same. The Commission directed both the parties to get the joint consent on the reconciliation statement and to report to the Commission within ten days time.

15. Thereafter, on August 23, 2011, Learned Counsel for Petitioner requested for one week time to file its written submissions for clarifying the position on the reconciliation statement filed by the Respondent. Time as sought was granted.

16. In the next hearing on September 7, 2011, the Respondent sought four weeks time to study and prepare their argument with respect to an affidavit dated September 5, 2011 filed by the Petitioner. Time, as sought was granted by the Commission.

17. However, in the hearing on November 11, 2011, the issue raised was as to whether the payments are to be made as per PPA rates or at actuals. Both the Parties were directed

to submit their written notes of arguments indicating the documents germane to the issues involved in the matter.

18. The Petitioner and the Respondent submitted their written notes of arguments. The Petitioner further submitted that sale of power was done as per the agreed contract and the Respondent cannot change the rule of settlement after consuming the resource.

19. During the next hearing on January 18, 2012, the Petitioner was directed to submit details regarding the total quantum of power supplied from their own generating units and through alternate sources including the duration for which the supply was provided in the entire PPA period and the details about the CoD for both the units. The matter was reserved for orders.

20. **ANALYSIS OF THE CASE:**

- a) The PPA for 300 MW RTC Power from November 15, 2009 to October 31, 2010, was signed on May 13, 2009 between Petitioner and Respondent after the tariff was discovered through a transparent bidding process. The schedule of supplies commencing November 15, 2009, was mutually agreed and included in the PPA.
- b) As per Govt. of India directives, the Foreign Technicians were not allowed to work at Indian Project sites with Business Visa and were asked to get proper Work Permits. This affected the availability of Chinese Technicians working at Warora Project of Petitioner. Finally some Chinese Technicians of EPC contractor came in April 2010. There were also technical issues with the Plant and Machinery, which delayed the commissioning, and synchronization to July 1, 2010.
- c) The Petitioner made multiple revisions in supply schedule due to uncertainty of Plant commissioning.
- d) MSEDCL accepted that delay in Commissioning of WPCL Power Plant and vide letter dated February 3, 2010 to WPCL *“agreed to extend the time for the commencement of supply of power by WPCL to 01.04.2010 subject to the extension of the period of the agreement by an even period i.e., the end period of supply of power to MSEDCL shall be extended by 4.5 months at the sole discretion on same terms and conditions as per the PPA dated 13.05.2009”*.

- e) As regards supply from alternate sources, the Respondent by its letter dated 31-03-2010 to Petitioner , stated *inter alia* as follows:-

“MSEDCL hereby conveys its consent to avail power from any alternate source that may be arranged by you until power is scheduled from your generating plant, at the rate(s) at MSETCL periphery_and other terms and conditions as per_the Agreement dated 13.05.2009 between MSEDCL and WPCL_

As per the consent given by you on 22.03.2010, MSEDCL had already applied to the State Load Dispatch Centre for the Open Access for supply from your Wardha Plant from 01.04.2010. This is being withdrawn by us as power will be supplied from you from alternate source(s) and application fees already paid by us thereof shall be borne by you. For the supply from alternate source(s), you may arrange the Open Access.

Immediate Action may be taken accordingly to supply power alternate source(s) from 01.04.2010.”

- f) The Respondent had asked the Petitioner to provide an undertaking on affidavit to commence supplies from April 1, 2010. Therefore the Petitioner gave an affidavit (February 6, 2010) to commence supply from April 1, 2010, failing which it agreed to pay penalty as per the terms of the PPA.
- g) The Petitioner had vide letter dated February 5, 2010 has provided the revised schedule and sought approval to supply on Firm-RTC basis w.e.f April 1 ,2010. WPCL vide letter dated March 30, 2010, further requested Respondent’s consent to supply 16 MW from alternate sources w.e.f April 1, 2010. Respondent gave consent for supply of power from alternate sources *“MSEDCL hereby conveys its consent to avail power from any alternate source that may be arranged by you until power is scheduled from your generating plant”* ref: MSEDCL letter dated March 31, 2010). Accordingly, the Petitioner continued supply of power from alternate sources till October 31, 2010, power aggregating 503.48 MW The Commission observes that the Petitioner supplied additional 487.48 MU RTC FIRM power (over and above 16 MW) from alternate sources and Respondent accepted the same and paid for it.

- h) The Petitioner supplied extra energy over and above the agreed schedule from July 16, 2010 onwards, for which Petitioner has not been paid. The power has been supplied and accepted by Respondent MSEDCL. No material is on the record to the contrary which states that MSEDCL had asked the Petitioner not to supply power more than the schedule agreed with them.
- i) The Supply schedule and subsequent revisions required the Petitioner to supply Firm Power on RTC basis. The Petitioner has supplied infirm power from own generating plant pending declaration of COD (July 1, 2010), in April, May and June 2010.
- j) The Petitioner stated that the Respondent had initially paid for the alternate supplies as per PPA rates, but later on as per actual purchase cost. It has been contended that the differential rates adopted by Respondent are not in consonance with either PPA terms or as accepted in MSEDCL's letter dated March 31, 2010.

21. **Hence, the following three aspects arise for consideration in this case:-**

- A. Rate for supply of power from alternate sources
- B. Penalty imposed on the petitioner
- C. Supply of excess energy

22. The findings of the Commission on the aforesaid three aspects are as follows:-

A. RATE FOR SUPPLY OF POWER FROM ALTERNATE SOURCES

The Petitioner contends that the PPA dated May 13 , 2009 stood novated by MSEDCL's letter dated March 31 , 2010. The Petitioner also argues that MSEDCL's consent to avail power from alternate source arranged by the Petitioner at PPA rate(s) is part of the competitive bidding process, which this Commission cannot interfere with. In other words, the Petitioner states that MSEDCL's letter dated March 31, 2010 conveys consent to avail power from alternate source arranged by the Petitioner at PPA rate(s).

23. MSEDCL letter dated March 31 ,2010 states as follows –

“MSEDCL hereby conveys its consent to avail power from any alternate source that may be arranged by you [WPCL] until power is scheduled from your generating plant, at the rate(s) at MSETCL periphery and other terms and conditions as per the Agreement dated 13.05.2009 between MSEDCL and WPCL”

24. MSEDCL's letter dated March 31 ,2010 was in response to the Petitioner's letter dated March 30 ,2010 . Nowhere in the said letter dated March 31 ,2010 the Petitioner has asked for rates to be paid as per the PPA for the alternate supplies to be made by it.

25. The Respondent has stated that from the details of the rates for purchase from the power exchanges for the months of April to August 2010 submitted by WPCL through their email dated August 17, 2010 , it was observed that the rates at which WPCL had procured power from alternate sources are much lower than the rates as per the PPA dated May 13 ,2009. However, the Commission has done a comparison of the PPA rates and the market traded rates during the period when the Petitioner made alternate supplies, in the following table:-

<i>Period</i>	<i>PPA rate at delivery point paise /kWh</i>	<i>Traded Market traded rate** in paise / kWh</i>		
		<i>As per MSEDCL affidavit dated March 18,2011</i>	<i>As per data from IEX/PXIL traded volumes for Maharashtra and Gujarat</i>	<i>As per data from IEX/PXIL on National average trading volumes</i>
April 2010	550.00	534.00	784.29(IEX) 738.774(PXIL)	788.37(IEX) 745.16(PXIL)
May 2010	550.00	439.00	455.63(IEX) 438.241(PXIL)	456.86(IEX) 439.37(PXIL)
June 2010	423.00	307.00	336.12(IEX) 331.39(PXIL)	338.91(IEX) 333.89(PXIL)
July 2010	423.00	408.00	344.25(IEX) 334.96(PXIL)	345.11(IEX) 335.91(PXIL)
August 2010	423.00	423.00	335.25(IEX) 328.35(PXIL)	337.42(IEX) 332.45(PXIL)
September 2010	550.00	347.00	232.07(IEX) 249.41(PXIL)	232.87(IEX) 250.05(PXIL)
October 2010	550.00	454.00	252.09(IEX) 251.92(PXIL)	261.35(IEX) 263.72(PXIL)

** as per the data available from the market monitoring cell of the MERC (as published in IEX /PXIL websites.)

It is seen from table above that as per published data from IEX / PXIL, except for the month of April, 2010, where trading rates are higher than PPA rates, the existing traded rates were significantly lower than PPA rates. This corroborates the statement of Respondent that WPCL bought the Power at the rates much lower than PPA rates, which is also confirmed in the E-mail (August 17 , 2010) sent by WPCL to Respondent .The Commission , therefore , accepts that WPCL procured power from alternate sources at rates much lower than the rates as per the PPA dated May 13 , 2009.

26. The Commission examined the contents of MSEDCL's letter dated March 31 ,2010 which states as follows –

*“MSEDCL hereby conveys its consent to avail power from any alternate source that may be arranged by you [WPCL] until power is scheduled from your generating plant, **at the rate(s) at MSETCL periphery and other terms and conditions as per the Agreement dated 13.05.2009** between MSEDCL and WPCL”(emphasis added)*

27. The Commission is of the view that the words “*at the rate(s) at MSETCL periphery*” implies the landed cost i.e., the rate at which the trader has sold power plus the inter-state transmission losses, transmission charges, open access charges, etc. The words “*at the rate(s) at MSETCL periphery*” can never mean *at the rate (s) as per PPA*. The argument that PPA rates are payable for the quantum supplied from alternate sources militates against the concept of “*rate(s) at MSETCL periphery*”. Moreover, in terms of the PPA, it is MSEDCL who is to bear the Short Term Open Access Charges and losses if any beyond the delivery point i.e., 220 kV interconnection point between Warora GSS and MSETCL. This goes on to show that rates payable for the quantum supplied from alternate sources are the actual rates i.e., the landed cost.

28. Furthermore, the words “*and other terms and conditions as per the Agreement dated 13.05.2009 between MSEDCL and WPCL*” implies the following as stated in the PPA dated May 13 , 2009:-

“

- (i) *Delivery Point: 220 kV interconnection points between Warora GSS and MSETCL.*
- (ii) *Open Access Charges, transmission charges, transmission losses beyond delivery point*
- (iii) *Scheduling*
- (iv) *Re-scheduling*

- (v) *Compensation on failure to schedule*
- (vi) *Compensation on failure to ensure supply*
- (vii) *Prompt payment rebate*

“

Hence the argument of the petitioner, that PPA rates are payable for the quantum supplied from alternate sources, is to be rejected as it is devoid of merits.

29. As far as the contention that MSEDCL's letter dated March 31 , 2010 conveying consent to avail power from alternate source arranged by the Petitioner at PPA rate(s) cannot be interfered with , as it is a part of the competitive bidding process, the same is not true. There is nothing on record to show that the tender document for the competitive bidding process permitted the Bidders to sell power from alternate source. There is nothing on record to show that the parties agreed to amend the PPA by allowing procurement of power from alternate source. Hence, MSEDCL's letter dated March 31 ,2010 is outside of the competitive bidding process and the resultant PPA there under. It is a protem arrangement between the parties. Therefore, the contention that alternate source arranged by the Petitioner is to be at PPA rate(s) is part of the competitive bidding process which this Commission cannot interfere with, is summarily rejected.

30. The Commission is of the view that the stand of the Petitioner to claim PPA rates for alternate supplies secured through traders is not tenable as it amounts to making undue profits on sale and purchase of power as it is clearly seen from the analysis at para 25 that the rates at which WPCL had procured power from alternate sources are much lower than the rates as per the PPA dated 13.05.2009. The Commission notes that the Petitioner is not a trading licensee and hence should not profit from sale and purchase of power. A great disservice will be done to end consumers / public, if the Petitioner is reimbursed with rates higher than the actual rates. On this ground as well, the Commission is of the view that actual rates should be paid to the Petitioner for the power procured and supplied from alternate sources.

31. The Commission has noted that major supplies, about 60.6%, have come from alternate sources of supplies through traders and that about 40.1% of supplies have come from Petitioner's own generation. The supply schedule in PPA covers supplies from own generation only. The Commission therefore directs MSEDCL to pay to the Petitioner for supplies from — (A) alternate sources at actual rates; and (B) own generation at the rates discovered and accepted in the PPA. The Commission has noted Respondent MSEDCL's letter dated March 15 ,2011 which states that “1.....B. the power supplied at MSETCL bus from alternate sources viz. IEX/PXIL limited to the contracted quantum shall be paid at IEX/PXIL rate at MSETCL bus or the contracted rate whichever is lower”. The

Commission has noted from the Respondent's affidavit dated March 18, 2011 that the "5... arrangement offered vide letter dated March 30 2010, and accepted vide letter dated March 30, 2010 is an independent arrangement between the parties for which other terms and conditions were to be in accordance with the said PPA". (Emphasis added) . Hence, the words "contracted rate" in Respondent's letter dated March 15, 2011 cannot be the PPA rates and has to be actual rates. The Commission cannot allow either of the parties to make an undue gain out of the arrangement for supply of power from alternate sources.

B. PENALTY IMPOSED ON THE PETITIONER

32. As regards the issue of imposition of penalty on the Petitioner, it is noted that the PPA was signed on May 13, 2009 between the parties after a transparent bidding process for 300 MW RTC powers starting November 15, 2009 and completing on October 31, 2010. Though the PPA was effective from date of signing; it was to be operational from November 15, 2009. In October itself, due to work permit issues of Chinese Technical Staff of EPC Contractor, the Petitioner wrote a letter dated October 20, 2009 to the Respondent seeking consent on revised schedule of delivery of power to MSEDCL recognizing the "Guidelines for grant of extension of visas to foreign nationals" issued by Ministry of Home Affairs as one of the Force Majeure events mentioned in Clause 12 of the PPA. The Respondent by its letter dated December 14, 2009, agreed to accept the revised schedule as a one-off event. The Respondent stated in the said letter that "The revised schedule as above shall form an integral part of the agreement dated 13.05.2009 between MSEDCL and M/s. WPCL and the said agreement shall stand modified to that extent." The Respondent by its letter dated December 14, 2009 also clearly stated "2) i) ...that you shall strictly adhere to the revised schedule as quoted above3) M/s. WPCL shall be liable to pay penalty as per the clause (8) of the agreement dated 13.05.2009 in the event of any delay beyond 15.01.2010.....Please furnish per return the undertaking accepting the above conditions and also ensure delivery of power from 15.01.2010. Also, confirm delivery of power from 15.01.2010 to enable MSEDCL to obtain open access on a monthly basis".

33. Subsequently, by letter dated January 12, 2010, the Petitioner for the reasons stated in the said letter, sought to start supply of power from April 1, 2010 and not from January 15, 2010. In response, MSEDCL wrote a letter dated February 3, 2010 stating that it "has agreed to extend the time for the commencement of supply of power by WPCL to 01.04.2010and in the event of failure to do so penalty would be levied on WPCL as per PPA conditions".

34. The Chinese Experts arrived at Petitioner's site in April 2010, but commissioning was further delayed, and Petitioner approached and obtained permission to supply power from alternate source. The first supplies from WPCL own plant was in May 2010/July 1, 2010 was declared as COD of first unit. Petitioner approached the Respondent to extend the PPA by 4.5 months (as per revised schedule agreed by MSEDCL, first supplies started on April 1, 2010) citing occurrence of Force Majeure, however no extension was granted by MSEDCL.

35. The Respondent states that on March 30, 2010 just two days prior to the expected commencement of supply from April 2010, as per revised schedule, the Petitioner addressed a letter informing MSEDCL that 1st unit of their project will be synchronized only by the end of April 2010 and will be stabilized two more weeks thereafter. In the meanwhile, Petitioner WPCL proposed to supply 16 MW from April 1, 2010 from alternate source. The Commission is of the view that the Respondent, despite the stringent provisions contained in the PPA, towards liability of Petitioner to pay compensation for failure to ensure supply, agreed on two occasions to revise the power supply schedule on the request of WPCL. The Petitioner could not provide any document by which the Respondent agreed not to levy any penalty for the failure of the Petitioner to affect supply from April 1, 2010. Hence, the Commission is not inclined to interfere in the matter of imposition of penalty. The fact that WPCL after April 1, 2010 and till the further delay in Commencement of supply from its own generating station, arranged for power supply from alternate sources, cannot be held against the Respondent because the special dispensation granted by the Respondent to accept power supply from alternate sources does not override the penal provisions contained in the PPA. MSEDCL, in the letter dated March 15, 2011 to Petitioner states that *"The clause (4) of the agreement provides for compensation payable by either party for the shortfall in the energy off take / supply.*

As you are aware, MSEDCL has levied penalty for the shortfall in supply computed on daily basis during the months of April 2010, July 2010, August 2010, and September 2010.

In consideration of the representation dated August 24, 2010

....., MSEDCL has decided to levy penalties on shortfall on monthly basis.

Accordingly penalty charges have been worked out for the months in which there have been shortfall in supply during the contract period of April 2010 to October 2010"

The Commission is of the view that MSEDCL is entitled to levy penalty accordingly.

C. SUPPLY OF EXCESS ENERGY

36. The Commission has noted the contents of the letter dated March 15, 2011 of the Respondent relevant extracts whereof are as follows:

“3. You are also aware that energy in excess of the contracted quantum has been supplied by WPCL in certain months.

Though there is no provision for supply of energy in excess of the contracted quantum, MSEDCL has taken a lenient view and is computing payment to WPCL for the excess energy at the contracted rate/ IEX rate/PXIL rate whichever is lower.”

37. In absence of any assertion against the above, the Commission would expect the parties to abide by the aforesaid quoted provision of the MSEDCL letter dated March 15, 2011. In any case, to deny the petitioner payment for supply of energy in excess of the contracted quantum would be contrary to Section 70 of The Indian Contract Act, 1872 that reads as follows:

“70. Obligation of person enjoying benefit of non-gratuitous act.-

Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.”

The parties are directed to settle/reconcile the amounts based on the principles laid down above, and to report compliance within two months from the date of this Order.

With the above, the Petition is disposed of.

Sd/-
(Vijay L. Sonavane)
Member

Sd/-
(V. P. Raja)
Chairman