

**Before the**  
**MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**  
**World Trade Centre, Centre No.1, 13th Floor, Cuffe Parade, Mumbai 400 005**  
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**Case No. 11 of 2011**

**In the matter of**  
**Petition filed by M/s. Wardha Power Company Ltd. seeking for adoption of Tariff and approval of Power Purchase Agreement dated June 4, 2010 for 260 MW of power pursuant to Case-1 Bidding procedure through Tariff based Competitive Bidding process initiated by M/s. Reliance Infrastructure Ltd. in terms of Request of Proposal for Medium Term issued on July 30, 2009**

**and**

**Dispute between a Generating Company and Distribution Licensee as a result of the deliberate and willful failure of the Distribution Licensee to seek statutory adoption of tariff and approval of Power Purchase Agreement within a reasonable timeframe so as to enable supply of power from April 1, 2011 in terms of the Power Purchase Agreement dated June 4, 2010**

M/s. Wardha Power Company Ltd. .....Petitioner  
M/s. Reliance Infrastructure Ltd. .... Respondent

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

**ORDER**

**Dated: May 31, 2011**

Wardha Power Company Limited (WPCL) submitted its Petition under affidavit on January 24, 2011 under Sections 63 and 86 (1) (b) and 86 (1) (f) of the Electricity Act, 2003 read with the Guidelines for determination of tariff by bidding process for procurement of power by Distribution Licenses, 2005.

2. The main prayers of the Petitioner, WPCL are as under:

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- a. *Direct the Respondent to place all the requisite documents, information and details necessary for adoption of tariff under Section 63 of the Electricity Act, 2003 read with Clauses 6 of the Bidding Guidelines, 2005 and thereafter adopt the Petitioner's tariff as confirmed and accepted in the Letter of Intent dated 10.05.2010 and PPA dated 04.06.2010;*
- b. *To take on record the Power Purchase Agreement dated 04.06.2010 being Annexure P-11 of this Petition and approve the same and issue such consequential directions as may be necessary to ensure that the Respondent fulfills its obligations under the said PPA.”*

3. The Petitioner in its Petition submitted as under:

**A. Background:**

The Petitioner is a generation company setting its 540 MW (4 x 135 MW) coal based power plant in Warora MIDC, Chandrapur District, and Maharashtra. The first three units of 135 MW are likely to be commissioned around March/April 2011. The Respondent Reliance Infrastructure Ltd. (RInfra) is a Distribution Licensee who initiated the Request for Proposal (RFP) for supply of power on a tariff based Bidding process (Case-1) on Medium Term basis for two to five years in four supply periods as given in the RFP.

**B. Dates and events:**

**a. Introduction:**

- i. On July 30, 2009 RInfra issued a RFP for supply of power in Mumbai on Medium Term basis (2-5 years) in four supply periods under Case-I, Competitive Bidding process.
- ii. The Petitioner participated in the bid by placing an offer vide its letter dated September 10, 2009 for supply of 260 MW Power on Medium Term basis for period 2 at a levellised tariff of Rs. 5.248/kWh.
- iii. The bid was valid for an initial period of 120 days from bid deadline i.e. up to January 17, 2010.

**b. Negotiations on Tariff rate and Extension of Bid validity:**

- i. RInfra sought clarifications vide its letter dated September 22, 2009 with a request for extension of time and vide its letter dated September 24, 2009 fixed submission date till September 30, 2009. The required extension and clarification provided by the Petitioner which RInfra acknowledged vide its letter dated October 8, 2009. Again, on request of RInfra, the Petitioner vide its letter dated January 9, 2010 extended the bid validity period to January 26, 2010 since the original bid was expiring on January 17, 2010.
- ii. RInfra conducted several rounds of negotiations in the intervening period with the Petitioner. After several negotiations, the Petitioner confirmed that it is ready to supply 260 MW Power on Medium Term basis for period 3 at a reduced levelled tariff of Rs. 4.945/kWh vide its letter dated January 15, 2010. However, RInfra failed to issue a Letter of Intent (LoI) to the Petitioner in terms of the RFP.
- iii. On the request of RInfra, the Petitioner extended the bid validity period till April 30, 2010 and by a separate letter extended the validity of bid bond of Rs. 7.8 Crore till May 28, 2010 with an additional claim period of 30 days i.e. till June 27, 2010. RInfra carried out further negotiations with the Petitioner which resulted in the levelled tariff to Rs. 4.850/kWh.
- iv. RInfra vide its letter dated April 9, 2010 informed the Petitioner that the evaluation of the revised financial bid is being undertaken and hence RInfra requested extension of the revised offer till April 30, 2010. On April 21, 2010 a meeting was held where RInfra informed the Petitioner that they need some more time to finalise the bid and requested them to extend the bid validity. The Petitioner extended the bid validity till May 10, 2010 and also submitted the revised financial bid in format requested by RInfra.

**c. Letter of Intent :**

RInfra, on May 10, 2010, issued a Letter of Intent (LoI) for purchase of 260 MW of power from the Petitioner at a levelled tariff of Rs. 4.85/ kWh as per the Clause 3.5.8 of the RFP. The Petitioner vide its letter dated May 12, 2010 acknowledged and unconditionally accepted the LoI issued by the Respondent.

**d. Contract Performance Guarantee:**

After issue and acceptance of the LoI, the Petitioner executed the PPA on June 4, 2010. Further, the Petitioner in terms of the Article 3.5 of the PPA provided a Contract Performance Guarantee of Rs. 78 Crores to RInfra. The Guarantee shall remain in force till June 30, 2011 with an additional claim period of thirty days thereafter .i.e. up to July 30, 2011.

**e. Collateral agreement:**

- i. In addition, as per the Article 8.4.11 of the PPA, collateral agreement had to be finalized between both the parties. Therefore, the Petitioner vide its email dated September 4, 2010 initiated discussions for execution of the collateral agreements. RInfra proposed to execute the Default Escrow and Hypothecation agreement which were different from the standard formats. The Petitioner reviewed the terms of the collateral agreements, and by its mail dated October 18, 2010 made certain changes in the draft agreement sent by the Respondent and requested for early execution of the documents.
- ii. Both the parties had several rounds of discussions on various clauses, but could not reach any common understanding on main issues.

**C. Major issues concerning the case:**

**a. Expression of Interest (EoI):**

The Commission on October 6, 2010, issued a notice inviting EoI in relation to the supply of power in the licensed area of RInfra. In view of the notice, eight parties expressed their interest in the said matter.

The power procurement process was initiated by RInfra after assessment of the power requirement of the consumers in RInfra's licensed area. The Petitioner referred to Article 13 of the PPA which provides for assignment of the PPA. The said Article is reproduced below:

*“13.1.1 This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and permitted assigns. This Agreement shall not be assigned by any Party other than by mutual consent between the Parties to be evidenced in writing:*

*Provided that, such consent shall shall not be withheld if the Procurer seeks to transfer to any transferee all of its right and obligations under this Agreement, and*

*(a) such transferee is either a owner or operator of all or substaintially all of the distribution system of Procurer and/or such transferee is successor entity of the Procurer, and*

*(b) this Agreement and the other RFP documents shall continue to remain valid and binding on such successor.*

*Provided that, incase the Procurer opts out of the license or any new entity becomes the licensee in its place, the Procurer shall ensure that it transfers all of its rights and obligations under this Agreement to such successor entity and that such successor entity executes this Agreement on identical terms and conditions for the balance term.”*

**b. Fuel Supply Agreement (FSA):**

M/s. Western Coal Fields Ltd. vide their letter dated November 29, 2010 confirmed that all the milestones under the Letter of Assurance had been achieved except submitting ratification from MIDC Warora regarding change of name (administrative formality). M/s. Western Coal fields Ltd. is awaiting an approval from the Ministry of Coal, which is likely to be received well before the date of supply. Moreover, the risk of the fuel according to the Case I bidding procedure is with the seller and not with the buyer. The Petitioner submitted that FSA cannot be a reason for procurer not to fulfil obligations under PPA. The ground is clearly frivolous and motivated.

**c. Deviation in the default Escrow agreement:**

Under Article 8.4.11 of the PPA, the Petitioner sought certain deviations in the standard draft default Escrow Agreement and Deed of hypothecation. According to RInfra, the approval of the Commission is required for this particular issue. However, RInfra did not approach the Commission for the same.

**D. Grounds for approaching the Commission:**

- a. In view of the above mentioned issues, RInfra vide its letter dated December 10, 2010 informed the Petitioner that it is unable to proceed further with the PPA as per conditions subsequent to be satisfied by the procurer as stipulated in Article 3.2 of the PPA. Therefore, the Petitioner vide its letter dated December 15, 2010 enquired RInfra about the grounds for non-fulfilment of obligations/conditions. RInfra vide letter dated December 21, 2010 in response to the aforesaid letter informed the Petitioner that due to the uncertainty of fuel, it is not proceeding further in the matter.

- b. Since, RInfra was not taking any steps for adoption of tariff and approval of PPA, in order to enable supply of power from April 1, 2011 the Petitioner once again reminded RInfra about the same vide its letter dated December 27, 2010. However, the Petitioner has not received any response to the letter.
- c. The Petitioner has already commissioned its third Unit of 135 MW capacity on January 14, 2011 and is capable of meeting its contractual obligations.
- d. Therefore, due to the negligence of RInfra and on the basis of the above mentioned grounds, the Petitioner approached the Commission under Section 63 of the Electricity Act, 2003 (herein after referred as EA 2003).

4. Along with the Petition, the Petitioner also submitted an application for interim relief and the prayers to the Commission in the interim application are as under:

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- a. *directing the Respondent to purchase power to the extent of 260 MW from the Petitioner from 01.04.2011, on the terms and conditions contained in the Power Purchase Agreement dated 04.06.2010 being Annexeure P-11 to the Petition so as to ensure that the capacity reserved under the Power Purchase Agreement stands utilized; and*
- b. *restraining the Respondent from purchasing power (either in the short term, medium term or long term) from any third party/parties to the extent contracted with the Petitioner under the Power Purchase Agreement dated 04.06.2010 for the period beginning on 01.04.2011; and*
- c. *granting such other relief(s) to the Petitioner as this Hon'ble Commission may deem fit and proper in the facts and circumstances of the case.*
- d. *to pass other and further order or orders as this Hon'ble Commission deems fit and proper under the facts and circumstances of the present case.”*

5. The Commission vide its Notice dated February 4, 2011 scheduled a hearing in the matter on February 17, 2011 at 14.30 hrs in the presence of authorized Consumer Representatives under Section 94(3) of the EA 2003. During the hearing, Shri. Rana S. Biswas and Shri. Hemant Singh, Counsels and Shri. Ramesh Kumar, Director, WPCL appeared on behalf of the Petitioner. Shri. JJ Bhatt, Senior Advocate, Shri. Lalit Jalan, CEO, and Shri. Kapil Sharma, Head Regulatory, were present on behalf of RInfra-D.

- a. Shri. Lalit Jalan submitted that Vidharbha Industries Power Ltd. (VIPL) has emerged as the lowest bidder after negotiation of price and agreed to supply power of 404 MW at a levellised tariff of Rs. 4.24/kWh. The Commission invited EoI for Distribution License in RInfra's license area. Shri. Jalan submitted that in view of EoI, RInfra wrote letters to all the three Bidders that RInfra is ready to procure power subject to the outcome of the EoI. Shri. Jalan further submitted that only VIPL agreed to sign PPA subject to outcome of EoI.
  - b. Shri. Lalit Jalan further stated that in case WPCL agrees to supply power at the rate of VIPL and subject to outcome of EoI, then RInfra-D is ready to sign a PPA with WPCL. Shri. Ramesh Kumar, Director, WPCL submitted that they had gone through the bidding process and after various rounds of negotiations, the levellised tariff rate was brought down from Rs. 5.248/kWh to Rs. 4.850/kWh. Shri. Ramesh Kumar submitted that the L1 bidder is the one who quotes the lowest price during bidding process and there is no where mentioned in the Guidelines that L1 bidder will be changed after negotiation of tariff rates.
  - c. Shri. Rana S. Biswas submitted that the RInfra-D has already issued a Letter of Intent. Therefore, now at this point of time, no other procurer will be ready to procure power from WPCL as they have already signed a PPA. Shri. Bhatt raised the issue of EoI, due to which, if the Respondent's part of License is taken over by other Licensee, then the cost of the surplus power will be loaded on the rest of the consumers.
6. RInfra vide its letter to MERC dated February 28, 2011 submitted as follows :
- a. The Commission vide its notice dated October 6, 2010 issued EoI from prospective applicants to indicate their interest in undertaking distribution of electricity in RInfra's licensed area. Consequently, RInfra sought clarification vide its letter dated October 16, 2010 and October 25, 2010 from the Commission regarding the object of the said notice. Pending a reply from the Commission it filed a Writ Petition (W.P. No. 2347 of 2010) in the High Court at Bombay on November 12, 2010 on the same.
  - b. A meeting was held at the Commission's office on November 29, 2010 to discuss various issues and provide clarifications in the matter of grant of distribution of license in the area of supply served by RInfra. RInfra submitted the fact that the levellised tariff quoted by all the suppliers is with exorbitant fixed cost. In the eventuality of RInfra's area getting delimited or in the alternative multiple players

being granted license in RInfra's Distribution area, the fixed cost of power purchase will be passed on to the consumers of RInfra. Accordingly, keeping into view the consumer interest RInfra vide its letters dated December 10, 2010 and December 21, 2010 informed the qualified bidders WPCL, Abhijeet and VIPL of the recent developments w.r.t the EoI and its inability to proceed further.

- c. Further, VIPL vide its letter dated December 18, 2010 offered to unilaterally waive its rights to claim compensation whatsoever on account of the developments in RInfra's licensed area of business.
- d. Due to the above reasons, RInfra has not approached the Commission for adoption of tariff pursuant to the execution of PPA with WPCL.

7. The Commission vide its Notice scheduled a hearing in the matter on March 17, 2011 at 14.30 hrs. in the presence of the authorized Consumer Representatives under Section 94(3) of EA 2003.

8. The Petitioner, vide its letter dated March 15, 2011 submitted following:

- a. RInfra vide its letter dated March 7, 2011, informed the Petitioner about the termination of the PPA.
- b. Regarding the FSA, the Petitioner has made arrangements for procurement of coal from a private party i.e. M/s Videsh Coal Services Ltd. for supply of 15 Lakh MT of coal per year from April 2011. Moreover, the risk of fuel is completely borne by the Petitioner hence; there are no such circumstances for terminating the PPA on the ground of non-availability of fuel.
- c. It is also noted that RInfra has tied up for supply of power from other suppliers who also do not have the FSA in existence. Thus it is clear that RInfra is discriminating the Petitioner.
- d. Finally the Petitioner requested the Commission that till the final Order is not issued in the matter, the Commission may issue an interim Order based on the interim prayers made by the Petitioner.
- e. The interim prayers are as under:

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*a. take on record the Respondent's letter dated 07.03.2011 (being Annexure P/20 hereto) and other documents filed along with the present application (being Annexure P/21 to P/23);*



*b. direct the Respondent not to give effect to the letter dated 07.03.2011 (being Annexure P/20) till the disposal of Petition No. 11 of 2011*

*c. after taking on record the Respondent's letter dated 7.03.2011, quash the said letter dated 7.3.2011 (being Annexure P/20 hereto) on grounds that the same is illegal and as such cannot be sustained in law; and*

*d. to pass such other and further order or orders as this Hon'ble Commission deems fit and proper under the facts and circumstances of the present case."*

9. During the hearing on March 17, 2011, Shri. Sanjay Sen, Shri. Hemant Singh and Ms. Shikha Ohri Advocates appeared on behalf of Wardha Power Co. Ltd. (WPCL). Shri. JJ Bhatt, Ms. Anjali Chandurkar Advocates and Shri. Kapil Sharma appeared on behalf of RInfra.

- a. Shri. Sanjay Sen submitted that the PPA between WPCL and RInfra for procurement of 260 MW power for 3 years has been terminated by RInfra vide their letter dated March 7, 2011. Further, Shri. Sen submitted that there are two obligations w.r.t. the PPA. The first obligation of the bidder .i.e. WPCL is to sign the FSA and the obligation of the procurer .i.e. RInfra is to file a Petition to the Commission for adoption of tariff. Shri. Sen submitted that WPCL has not yet signed the FSA. However; it has made alternate arrangement from the Vendors for supply of coal.
- b. Therefore, considering all the issues, WPCL filed an interim application dated March 15, 2011 with interim prayers. WPCL raised the dispute of supply of the 260 MW power, which has arisen because RInfra has issued a letter of termination dated March 7, 2011. Further, Shri. Sen submitted that WPCL has fulfilled all other conditions and hence, there lies no question of termination of PPA by RInfra.
- c. Shri. Bhatt, Counsel for RInfra referred to Section 10 of the Specific Relief Act, 1963 and contended that contracts need not be specifically enforced for which compensation in money for its non-performance is an adequate relief.
- d. Shri. Bhatt raised a question that whether the bidder, WPCL has made any effort to sell his power outside and if yes, then at what costs. In case, if any attempt is not made by the Petitioner then the Petitioner is not entitled for interim relief.
- e. With respect to the fuel arrangement, Shri. Bhatt submitted that the Petitioner has not intimated to RInfra about the alternate arrangement of fuel. Further, Shri. Bhatt

submitted that the validity of the termination of the PPA will be analyzed by the Commission.

- f. Consumer Representative, Shri. Ashok Pendse submitted that the power supply from WPCL would start from April 1, 2011. Considering the purchase of 260 MW power from WPCL, RInfra would have to procure additional 600 MW from bilateral sources whereas, if WPCL's power is not considered then the gap would rise to about 860 MW. Therefore, the Commission should take a decision, which would ultimately benefit the consumers.
- g. The Commission is of the view that the PPA termination cannot be considered at this stage as the bidder, WPCL has gone through a detailed procedure of Competitive Bidding.

Further, the Commission opined that the prayers (a) and (b) of the interim application dated March 15, 2011 submitted by the Petitioner are accepted by the Commission. The accepted prayers of the interim application are as under:

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- a. *take on record the Respondent's letter dated 07.03.2011 (being Annexure P/20 hereto) and other documents filed along with the present application (being Annexure P/21 to P/23);*
- b. *direct the Respondent not to give effect to the letter dated 07.03.2011 (being Annexure P/20) till the disposal of Petition No. 11 of 2011”*

10. RInfra through its letter dated March 24, 2011 submitted its replies as follows:

- a. Section 63 deals with adoption of tariff and there is no provision either for approval of the PPA and there is no question of consequential directions to be issued to a Distribution Licensee as is purportedly sought to be done by the Petitioner.
- b. The application filed by the Petitioner only prays for taking on record the said notice of termination. However, no amendment to the main Petition purportedly seeking relief in this regard has been moved by them.
- c. RInfra denied that the Petitioner proceeded to comply with the terms and conditions of the PPA in the manner as requested by RInfra.
- d. FSA:
  - (i) In case of FSA, the Petitioner's letter dated December 15, 2010 states that the Petitioner is in the process of finalization of the FSA with the Western Coalfield Ltd. alone, contrary to the stand now taken by them that they have another arrangement with a private party (Videsh Coal Services Pvt. Ltd.) which was not contemplated during the RFP process and finalization of the PPA.

- (ii) Therefore, RInfra was constrained to issue a termination notice dated March 7, 2011. Moreover, Article 3.4 gives right to RInfra to terminate the PPA.
- (iii) Besides, the Petitioner itself is in breach of the condition as contemplated under Article 3.1.1(a) of the PPA by not executing the FSA.
- e. Further, in case of EoI, if there is reduction in the area of supply there would be no question of assignment of PPA to new entity. In such circumstances, there would be successor or other licensees introduced in RInfra' s area of supply who would have their own arrangement of power and would not be interested in honoring the existing PPA.
- f. Short Term Market Prices:
- (i) The price at which the power is available in short term is much lower than the price at which the PPA has been entered into. In case of the long term contracts, the Petitioner clearly expressed its inability to supply power to RInfra and has not honored the LOI issued by RInfra.
- (ii) The short term market prices from April 2010 to February 2011

(Rs. /kWh)

Sr. No.	Month	IEX*	Bilateral**
1	April 2010	7.84	5.68
2	May 2010	4.56	6.26
3	June 2010	3.36	5.57
4	July 2010	3.44	4.97
5	Aug 2010	3.35	4.86
6	September 2010	2.32	4.71
7	October 2010	2.52	3.90
8	November 2010	1.91	3.92
9	December 2010	2.31	4.12
10	January 2011	3.34	4.12
11	February 2011	3.69	
	Average	3.51	4.81

\*Source: IEX Website-Area price for W2

\*\*Source: CERC Market Monitoring Report

- g. With all the above facts, it is clear that the Petitioner has failed to comply its obligation and there is no question of RInfra approaching the Commission for adoption of tariff as alleged by the Petitioner.

11. Further, the Petitioner vide its letter dated March 24, 2011, addressed to the advocates of RInfra with a copy marked to the Commission and SLDC, informed that the termination of the PPA is stayed by the Commission and hence PPA is still alive and had to be implemented. The Petitioner filed an application for grant of short term open access on March 21, 2011. However, RInfra informed SLDC stating that the PPA has been terminated. This position is not correct and RInfra should inform SLDC about the grant of stay on the PPA termination by the Commission.

12. During the combined hearing held on March 30, 2011 at 11.00 hrs., pertaining to Cases 11, 12, 13, 17 and 42 of 2011, Shri. Sanjay Sen and Shri. Hemant Singh appeared on behalf of Wardha Power Co. Ltd. (WPCL). Shri. Bhatt and Ms. Anjali Chandurkar Advocates appeared on behalf of RInfra. The Commission directed the Petitioner and the Respondent to explore the possibility of addressing the core issues through mutual discussions.

Shri. Kaushik Trivedi, Project Head, appeared on behalf of Vidrabha Industries Power Ltd. Shri Trivedi made a presentation on the status of the Butibori Project. The presentation included the detailed status of implementation of the project including statutory various clearances and approvals required for the Project. During the hearing, the Commission directed VIPL to submit the detailed chronology of the Unit-wise Milestones of the Butibori Project to ensure RInfra shall be in position to get power from scheduled delivery date.

13. The Petitioner vide its letter dated April 1, 2011 filed its written submissions. The points raised by the Petitioner are as under:

- a. The Petitioner submitted certain documents on affidavit in order to bring on record its inability to negotiate terms of the PPA dated June 4, 2010.
- b. The agenda of RInfra is to promote the interest of its sister company i.e. VIPL by a systematic process of subverting a concluded bid process and deliberately misleading the Commission on various factual issues.
- c. The Commission has not disposed the application for interim prayer. The purpose of the said prayers are as under:

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*a) to ensure there is no need to back down generating stations in Maharashtra when there is a concluded contract for supply of power to a State Discom,*

*b) that RInfra does not create any third party interest by purchasing power from 1.4.2011 from persons who have not been selected through the medium term process.”*

Meanwhile RInfra, in order to legalize a patently illegal action of buying Power from a trader, filed a separate Petition for 'in-principle' approval of the LoI dated December 18, 2010 entered between RInfra and Global Energy Ltd.

- d. VIPL has originally offered 134 MW (under Medium Term beginning on April 1, 2012) and executed a PPA to that effect on June 16, 2010. However, on January 21, 2011 VIPL executed an amendment to the PPA and now allegedly agreed to supply 404 MW power at the rate of Rs. 4.24/kWh.
- e. FSA:
  - (i) Like WPCL, VIPL too does not have a FSA at the time of executing the PPA. Therefore, WPCL cannot be discriminated on the ground of non-execution of FSA.
  - (ii) Moreover, unlike VIPL; WPCL has a FSA with a coal trader and which was placed on record during the proceeding of the case.
  - (iii) The time period of execution of FSA by VIPL expired on March 18, 2011. However, contrary to the timelines allegedly contained in the PPA dated June 16, 2010, a submission was made before the Commission that the timeline for executing the FSA has not arisen, as the power supply will be starting from January 2011.
- f. During the period of contracting Power with GEL and VIPL, the PPA with WPCL was valid and existing. Therefore, there was no need to contract such additional quantity when already the PPA was in place.
- g. Thus, the RInfra's intention to terminate the PPA or not to buy power from WPCL and instead to buy power from GEL and VIPL existed much prior to the alleged termination of the PPA.
- h. Therefore, the entire allegation regarding FSA needs to be discarded and parties to the bid have to be on same pedestal in terms of comparison of the purposes of satisfaction of the conditions subsequent in terms of the Article 3 of the PPA.
- i. Hence, the objectives of RInfra are as under:
  - (i) To promote the interest of VIPL (sister company of RInfra)
  - (ii) Avoid regulatory scrutiny for purchase of power without a bid process
  - (iii) Create a situation that will enable RInfra to deal with or defend issues in the license case.
- j. The Petitioner requested the Commission to guide them that whether negotiations can take place on ground that it is legally impermissible for the parties to change the essential terms of RFP documents approved by the Commission in accordance to the guidelines of competitive bidding issued by the Central Government.

- k. The Petitioner requested the Commission with reference to Section 63 of EA 2003 to rework the PPA to the extent it is required to address the uncertainty of the license period.
- l. The Petitioner submitted that the Commission should exercise its power to dispose off the batch Petitions on merits, after hearing counsels appearing on behalf of the parties. Further, the Petitioner is of the view that unless the matter is adjudicated on merits, there is a possibility of loss of generation as the generators have to be backed down.

14. The Commission vide its Notice dated April 1, 2011 scheduled further hearing in the matter on April 8, 2011 at 11.00 hrs. in the presence of authorized Consumer Representatives under Section 94(3) of EA 2003.

15. Meanwhile, the Petitioner vide its letter dated April 6, 2011, submitted an amended copy of the Petition to the Commission. The amended Petition reiterated the issues as raised in its original Petition. Hence, the amendment made to the Petition was allowed during the hearing. In addition to it, the submissions/ amendments made in the Petition are as under:

- a. The Petitioner submitted that on March 7, 2011, RInfra issued a notice to the Petitioner that the PPA dated June 4, 2010 is terminated in accordance with the Article 3.4.2. To this, the Petitioner, vide its letter dated March 11, 2011 replied to RInfra stating the following points as under:
  - i. In view of the pending proceedings (before MERC) RInfra does not have the ability to unilaterally terminate the PPA. RInfra has acted contumaciously in attempting to overreach the jurisdiction of the Commission.
  - ii. The Petitioner denied and disputed that it is in breach of any term of the PPA which enables RInfra to terminate the PPA under Article 3.4.2.
  - iii. Regarding FSA, the Petitioner informed RInfra that it has arranged a FSA with M/s. Videsh Coal Services Pvt. Ltd. for supply of 15,00,000 tonnes of coal per year from April 2011 and therefore, ensures that it is able to supply the said quantum of power in the PPA. Hence, the allegation made by RInfra for non-existence of FSA is factually incorrect.
  - iv. Therefore, the Petitioner advised RInfra to withdraw the termination letter dated March 7, 2011.

- b. WPCL submitted that unrelentingly, RInfra issued another illegal and arbitrary termination letter on March 16, 2011, in reply to the Petitioner on the aforesaid letter of the Petitioner (letter dated March 11, 2011). RInfra reiterated its submissions from the letter dated March 7, 2011. In addition, RInfra submitted that there was no interim prayer made by the Petitioner which would restrain RInfra from terminating the PPA. RInfra denied that it has no right to terminate the PPA. Moreover, the copy of the FSA is not submitted to RInfra.
- c. The Petitioner submitted that the Commission has jurisdiction to grant relief. As the matter is critical and keeping in view the present status of the case, the Petitioner prayed for the following prayers in addition to the original prayers:

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- a. *direct the Respondent to place all the requisite documents, information and details necessary for adoption of tariff under Section 63 of the Electricity Act, 2003 read with Clauses 6 of the Bidding Guidelines, 2005 and thereafter adopt the Petitioner's tariff as confirmed and accepted in the Letter of Intent dated 10.05.2010 and PPA dated 04.06.2010;*
- b. *to take on record the Power Purchase Agreement dated 04.06.2010 being Annexure P-11 of this Petition and approve the same and issue such consequential directions as may be necessary to ensure that the Respondent fulfills its obligations under the said PPA;*
- c. ***quash the respondent's letter dated 7.3.2011 and 16.03.2011 on grounds that the same is illegal and as such cannot be sustained in law***
- d. *to pass such other and further order or orders as this Hon'ble Commission deems appropriate under the facts and circumstances of the present case.” (Emphasis added)*

16. The Petitioner vide its letter dated April 7, 2011 filed rejoinder to the Commission. The submissions are summarized as under:

- a. The Petitioner denied that there is no provision for a supplier to approach the Commission for taking on record the PPA or to approve the same. As there are cases earlier where it is well proven that the Regulatory Commission has the jurisdiction to examine bidding processes and to order consequential reliefs. Moreover Section 63 read with Section 86 of the EA 2003, gives the Commission the powers to deal with any disputes between the generating company and a Distribution Licensee.

- b. The Petitioner was L1 Bidder and RInfra accordingly issued a LoI and further executed a PPA with the Petitioner. Further, RInfra approached the Commission for approval of the PPA with VIPL for supply of 404 MW of power which includes 270 MW of excess power, as it was an addendum to the original PPA of 134 MW even though the 404 MW quantity was not quoted by VIPL in the Case-I bidding process.
- c. Moreover, the timelines specified in the PPA executed by RInfra with VIPL for execution of FSA has expired and RInfra is obliged to terminate the said PPA with VIPL as there cannot be different yardsticks to deal with the Petitioner on one hand and its sister company on the other hand.
- d. RInfra has also approached the Commission in Case No. 29 of 2011 for approval of the LoI dated December 18, 2010 entered between GEPL where RInfra and GEPL entered through a Memorandum of Understanding (MoU) route rather than by following a Competitive Bidding process. Therefore, the relief claimed by RInfra directly affects the Petitioner.
- e. The termination letter dated March 7, 2011, issued by RInfra was subsequent to an FSA entered by the Petitioner on February 24, 2011. Thus, the ground for termination of the PPA is baseless.
- f. The issue of inviting of EoI in RInfra's area raised by RInfra is for collateral purposes as the same issue does not act as an issue in case of its sister company VIPL.
- g. The Petitioner denied the allegation that there was any default in the Article 8.4.11 of the PPA regarding the execution of the Default Escrow Agreement and Hypothecation Agreement. The Petitioner submitted that the Petition pointed out that they were ready to execute the same as per the standard RFP document provided at the time of the bidding.

17. During the hearing held on April 8, 2011, Shri. Sanjay Sen and Shri. Hemant Singh Advocates appeared on behalf of Wardha Power Co. Ltd. (WPCL). Shri. Bhatt and Ms. Anjali Chandurkar Advocates appeared on behalf of RInfra.

After hearing both the parties, the Commission directed RInfra-D to submit the details of short term and medium term power procurement contracts entered by RInfra-D latest by April 11, 2011. The Commission scheduled the matter on April 13, 2011 at 10.00 hrs. in Case No. 11 of 2011 and Case No. 42 of 2011 only limited to Interim prayers of the Petitioners.

18. Accordingly, R-Infra-D vide its letter dated April 11, 2011 submitted the details of short term and medium term power procurement plans to the Commission.



19. During the hearing on April 13, 2011, Shri. Sanjay Sen Advocate appeared on behalf of Wardha Power Co. Ltd. (WPCL). Shri. Bhatt and Ms. Anjali Chandurkar Advocates appeared on behalf of RInfra.

- a. The Commission enquired the following information regarding of power plant of WPCL:
  - i. Total capacity of the plant.
  - ii. Number of units which have achieved Commercial Operation Date (CoD) along with dates of CoD of respective units
  - iii. Present PLF of the units
  - iv. The details of the contacts entered by WPCL for sale of power till June 30, 2011 with various utilities
  - v. Whether WPCL has FSA in place?
- b. Shri. Ramesh Kumar, Director, WPCL submitted that it is setting up a 540 MW (4\*135 MW) coal based generating station at Warora MIDC. WPCL has already achieved CoD for three units of 135 MW and the Unit 4 is likely to get synchronized in the second week of April, 2011. Shri. Kumar also submitted that present Plant Load Factor (PLF) of the station is 65% due to non-availability of buyer for the power. Further, Shri. Kumar submitted that WPCL has operated the plant at 90% PLF for a period of two months when there were substantial contracts in place for procurement of power. Shri. Sen submitted that WPCL has informed the Commission regarding their coal stock availability to operate the plant.
- c. Further, Shri Sen sought interim relief from the Commission as per the interim application submitted on January 24, 2011. Shri. Sen informed the Commission that WPCL is not willing to negotiate the price as the price is discovered after the Competitive Bidding process.
- d. Shri Bhatt submitted that WPCL has submitted that its plant is running at 65% PLF, it means that 263 MW it is generating from the three units. Therefore, in the larger public interest, no interim relief should be granted to WPCL.
- e. After hearing both the parties, the Commission directed WPCL to submit the information about the contracts entered by it up to June 30, 2011 to the Commission latest by 17.00 hrs. and serve the copy to RInfra-D. The Commission scheduled further hearing on April 15, 2011 for interim relief at 12.30 hrs.

20. On April 11, 2011, RInfra filed its written submission to the Commission. The submissions are as under:

- a. RInfra submitted that the Commission cannot grant interim relief to the Petitioner as the Petitioner cannot seek specific performance of the PPA.
- b. Referring to the Section 41(e) of the Specific Relief Act, 1963 RInfra stated that it provides, that an injunction cannot be granted to prevent breach of a contract, the performance of which would not be specifically enforced.
- c. RInfra stated that electricity is a tradable commodity in the market and it is up to the Petitioner to prove that they have suffered any damages. Moreover, there are provisions in the PPA relating to liquidated damages, which itself proves that compensation in money would be adequate relief, if the Petitioner succeeds in establishing its losses.
- d. With respect to the tariff rates, RInfra submitted that prior to April 8, 2011, RInfra offered to make the PPA workable with the Petitioner at the same tariff rate as quoted by VIPL. However, the Petitioner rejected the offer. Therefore, the Petitioner is acting contrary to public interest and not even agreeing to renegotiate the terms of the PPA primarily to consider the impact of the EoI. RInfra denied that the addendum is illegal as it covers eventualities of regulatory uncertainties
- e. With regard to the termination letter, RInfra stated that the present matter was heard on February 17, 2011, where there were no specific orders or interim orders of the Commission restraining RInfra from terminating the PPA. Therefore, RInfra was free to terminate the PPA as per Article 3 of the PPA.
- f. Regarding the allegations made on the fuel feasibility of GEPL, RInfra submitted that GEPL is a trading licensee and it would be procuring power from Jindal, which is the owner of an operative captive mine.
- g. With the above submissions, RInfra submitted that the Petition is liable to be dismissed with costs and the Petitioner is not entitled to any relief.

21. As directed by the Commission, the Petitioner vide its letter dated April 13, 2011 submitted the details of capacity available for RInfra. The Petitioner submitted that it has commissioned three Units of 135 MW each for which commercial operation has been declared and power is being the scheduled. The Unit four of 135 MW is in the process of being synchronized and is likely to achieve commercial operation date shortly. From the data, the Petitioner states that post April 30, 2011, it will be in a position of supplying 240 MW of power on RTC basis from the three Units.

Moreover, the existing contracts are only short term contracts and it provides leverage to comply with 260 MW of power supply to RInfra from May 1, 2011. The Petitioner submitted that all the contracts except MSEDCL were tied up after April 1, 2011 on short term basis in order to mitigate the hardship and avoidance of reducing the generation.

22. On April 15, 2011, the Commission issued an Interim Order in the matter. The relevant paragraph of the Interim Order is reproduced under:

*“i) The Commission directs RInfra to procure power from WPCL as detailed below:*

<i>Sr. No.</i>	<i>Period of Supply</i>	<i>Timing (hrs)</i>		<i>Quantum</i>
<i>1</i>	<i>Starting from April 20, 2011 to April 30, 2011</i>	<i>Round the Clock</i>		<i>120 MW</i>
<i>2</i>	<i>Starting from April 20, 2011 to April 30, 2011</i>	<i>0.00</i>	<i>12.00</i>	<i>Additional 120 MW</i>
<i>3</i>	<i>Starting from May 1, 2011</i>	<i>Round the Clock</i>		<i>260 MW</i>

i. *j) WPCL is directed to provide schedule of power supply to RInfra immediately.”*

23. RInfra vide its letter dated April 21, 2011, filed the submissions in reply to the affidavit dated April 1, 2011 and the rejoinder dated April 7, 2011 filed by the Petitioner. The submissions are as under:

a. RInfra in its affidavit dated April 21, 2011 submitted a reply to the application for amendment of the Petition dated April 6, 2011. RInfra submitted that it is not aware whether the amendment has been allowed by the Commission as it is not reflected in any of the Record of Proceedings. It also denied that the termination letter is illegal in nature.

Further, RInfra declared that prior to the issuance of LoI to GEPL as well as the execution of the addendum to the PPA with VIPL, RInfra has in correspondence categorically stated that it would not go ahead with the PPA inter alia for the reason that the EoI was issued and there is no FSA between the Petitioner and Western Coal Fields Ltd.

b. RInfra submitted that there is no bar from negotiating in consumer interest. It denied the allegation that the interest of VIPL is being promoted. Moreover, it is clarified that the power from the Petitioner is substituted by issuing a LoI to GEPL.

- c. The Commission granted interim relief to the Petitioner vide its Order dated April 15, 2011. However, the said matter is now a subject of an Appeal filed before the Hon'ble Appellate Tribunal for Electricity (ATE).
- d. RInfra denied that the Order of the Commission during the hearing held on March 17, 2011 has the effect of making the PPA effective and there was no question of WPCL of not scheduling the power due to denial or any withholding of consent unrecognized or otherwise by WPCL.
- e. VIPL executed an Addendum to the PPA dated January 21, 2011, which inter alia protects RInfra from any possible repercussions arising due to the outcome of the EoI, which admittedly WPCL failed to execute.
- f. Regarding the FSA, the contract with Videsh Coal Services Pvt. Ltd. (VCSPL) was disclosed for the first time on March 15, 2011. Moreover, VCSPL is a company which was incorporated only a year ago and gets its supply of coal from e-auction. It is merely a trader, thus there is no question of contract with VCSPL. It is denied that the FSA with VCSPL ought to be considered as compliance of condition subsequent.

24. After hearing the submissions of both parties, further hearing was scheduled on May 16 and 17 of 2011. The hearing was attended by Shri. Ramji Srinivasan Advocate, Shri. R.R. Mehta and Kapil Sharma from RInfra and Shri.Sanjay Sen, Shri Hemant Singh advocates, Ramesh Kumar Director from WIPL .

- a) Both the Parties restated their respective positions.

Shri. Ramji Srinivasan, Advocate for the Respondents submitted that:

- 1) RFP is start of the Process and a PPA with Commission's approval is the end of the bidding process. The goal post can be changed only in public interest caused by subsequent developments.
- 2) Respondents stated that the FSA of WPCL is not bonafide as VPCPL itself buys from E auction, which is not a reliable source.
- 3) As regards restoration of PPA, relief can come only if contract is maintainable. Respondents submitted that FSA being not available, the Contract was not maintainable.

- b) Shri Sanjay Sen, Advocate for the Petitioners submitted in response that

- 1) All the points raised by respondents have been addressed many a times and the WPCL has firm commitments for fuel supply and all the four units are fully operational. Hence, there is no case of termination of PPA.
- 2) Shri Sen prayed that the Commission may be pleased to pass orders accepting the prayers and they have no further submissions.

25. WPCL vide their submission dated May 24, 2011 submitted that written note is limited to the additional submissions made on behalf of Respondent (RInfra).

The broad submissions of the Respondent (RInfra) and the Petitioner reply are as follows:

(a) The Pleadings of the Petitioner are inadequate

**Petitioner Reply:**

- (i) The aforesaid allegation is factually inaccurate. The Original Petition was filed keeping in view the jurisdiction available with the Commission under Section 63, Section 81(1)(b) and Section 86(1)(f) of the Electricity Act, 2003. Since, the Respondent Licensee failed and neglected to seek adoption of tariff under Section 63 of EA 2003 read with Clause 6.4 of the Central Government Guidelines on Competitive Bidding, the Petitioner was compelled to invoke the jurisdiction of the Commission for adoption of tariff.
- (ii) Under section 86(1) (b) of EA 2003, the Commission has the power to regulate the power purchase and the power procurement process of a distribution licensee. The word “*regulate*” has been widely defined by the Hon’ble Supreme Court of India in several Judgments. The word regulate includes the power to modify, alter, etc. The terms of the PPA, to make it suitable for purposes of implementation. In this context, reliance was placed on the Judgments of the Hon’ble Supreme Court in Cellular Operators Association of India and Ors. Vs. Union of India and Ors. Reported in (2003) 3 SCC186 in paragraph nos. 33 and 34, and by the Appellate Tribunal for Electricity in Appeal No. 70 of 2009 titled as GVK (Goindwal sahib) Ltd. Vs. Punjab State Electricity Regulatory Commission and Punjab State Electricity Board the Mall in paragraph nos. 14, 15 and 16.
- (iii) WPCL submitted that apart from making a prayer for adoption of tariff under Section 63 the original Petition filed by the Petitioner include the prayer for implementation of the PPA making such consequential directions as may be necessary. Therefore, the pleadings and prayer in the original Petition were adequate and the jurisdictional facts were appropriately pleaded. There is no deficiency in this respect.
- (iv) The Petitioner in view of the dispute and differences that had arisen between the Petitioner and the Respondent Licensee, also relied upon Section 86 (1) (f) of the Electricity Act, 2003. In any event, without prejudice to the aforesaid submissions, it is additionally submitted that the jurisdiction of a statutory Commission is not circumscribed on the basis of pleadings as in case of a civil dispute before a Civil Court. The Commission has wide statutory powers and can exercise the same in terms of the Statute, de hors the pleadings. WPCL

submitted that the matter was admitted on February 17, 2011, the Commission directed that there is need to investigate the deformities in the bid process and the matter was pending adjudication, both for purposes of Interim relief and final determination of issues, the Respondent illegally and with an object to overreach the Orders of the Commission sought to terminate the PPA dated June 4, 2010 by issuing a letter of termination dated March 7, 2011. When a matter is pending before the Commission and same is under investigation by an Order dated February 12, 2011, there was no reason to terminate the PPA

- (v) After a detailed hearing on March 17, 2011, the Commission passed an Order staying the termination letter dated March 7, 2011 and the Order was agreed by the Respondent. The effect of such stay was that the PPA was valid and had to be implemented pending final resolution of disputes. WPCL submitted that Respondent (RInfra) failed to implement the PPA and tried to overreach orders of the Commission and once again by executing letters of Intent dated March 19, 2011 with Global Energy Limited for short term supply beginning on April 1, 2011.
- (vi) Thereafter, arguments were addressed on March 30, 2011, April 4, 2011 and April 15, 2011 and after taking record of factual position regarding contracts executed by both the parties and Interim Order dated April 15, 2011 was passed, and in appeal to ATE, this Interim Order had been confirmed.
- (vii) In the meantime, WPCL moved an application for amendment of pleadings on April 1, 2011. Through the said application for amendment the Petitioner introduced the following prayers in its Amended Petition:

*“c. Quash the Respondent’s letters dated 7.3.2011 and 16.03.2011 on grounds that the same is illegal and a such cannot be sustained in law; and”*

In support of the aforesaid prayer, the Petitioner introduced pleadings and Respondent has not objected to the said amendment and instead filed a response on the merits of the case.

On May 16, 2011, the Respondent expressly stated before the Commission that they do not wish to file any other pleadings and wish to proceed to the matter on the basis of the existing pleading. The amendment application was allowed and the matter was heard on May 16, 2011 and May 17, 2011. WPCL submitted that the Respondent has not given any explanation to the following aspects of the pending dispute.

- (i) Why it cannot buy power when admittedly the Petitioner is ready and willing to supply power in terms of the PPA dated June 4, 2010?

- (ii) Since, the Petitioner has made arrangement for fuel from alternated sources pending operationlisation of the Letter of Assurance given by WCL, how is the Respondent affected by non-execution of a formal FSA with WCL?
- (iii) Why has the Respondent not terminated the agreement with Vidarbha Industries Power Ltd. (VIPL) which also does not have an FSA? In the case of VIPL, the Respondent has on the contrary, increased the quantum of supply from 134 MW to 404 MW allegedly owing to a reduction in price.
- (iv) How is the Respondent better placed by buying power from an electricity trader when it can directly source the power from a generator who has been selected through a Competitive Bidding Route and there is a detailed mechanism to deal with default of the generator in the event of failure to supply?
- (v) The Petitioner has placed before the Respondent as well as the Commission the fact that coal is a nationalised subject and as such, securing an FSA is subject to the dynamics of the Central Government policy on coal. In this context, the Petitioner has stated on affidavit as part of its amendment application that since March 31, 2009, Coal India and its subsidiaries have not been executing FSAs. The Power generating companies that have been commissioned after March 31, 2009 have obtained coal through adhoc allocations (MOU) with Coal India /CIL Subsidiaries, through e-auction and private traders.

(b) The Petitioner is defaulter have breached the terms of the Power Purchase Agreement dated June 4, 2010

**Petitioner Reply:** WPCL submitted that it is not a defaulter and under terms of the bid the Petitioner had to disclose existence of a fuel linkage, and admittedly the Petitioner has the fuel linkage with WCL. Subsequently, after placing the bid on April 4, 2010 WCL issued a letter of Assurance for supply of 2.26 MTPA of coal. The LoA is adequate comfort that the Petitioner will finally get coal in terms of the present Government of India Policy.

Even after the Petitioner has explained the position and expressly declared its ability and willingness to supply power in terms of the PPA, the Respondent did not take any steps to ensure implementation of the PPA by discharging its obligations which are provided under Article 3.2.1 of the PPA. The Commission after going through the material was pleased to stay the termination /no steps were taken for scheduling of power till the Commission passed its Order April 15, 2011. In the aforesaid sequence, it cannot be said that the Petitioner is in breach of the terms of PPA

(c) The Petitioner did not produce a copy of the FSA on terms of the Power Purchase Agreement dated June 4, 2010 prior to the termination of the same.

**Petitioner Reply:** WPCL reiterated the submission regarding LoA and MoU , and further submitted that a LoA has been received from WCL and all facts relating to availability of coal has been given to Respondent and the Commission. WPCL submitted that case of the Petitioner is on a stronger footing than that of VIPL, which has not even reached this stage. In any event, all these issues were pending before the Commission and as such, subject to regulatory view. Therefore, there was no obligation to separately provide information to the Respondent.

(d) One the letter of Termination has been issued, the event of termination takes place automatically after expiry of seven (7) days and the same cannot be reversed. Under the provisions of the Specific Relief Act the Petitioner cannot seek enforcement of the PPA and that the Petitioner at the highest can claim damages.

**Petitioner Reply:** This argument is also incorrect as the very purpose of notice is to provide for possible cure of alleged default. A PPA is an agreement which is executed between a generating company and a Public Utility. There is substantial public interest involved. This aspect has been considered by the Appellate Tribunal in the Lanco Judgment, where it had held as follows:

*“ 52. Before parting with this case we deem it appropriate to refer to one other aspect which has been pointed out by the learned senior Counsel for Respondent No. 2 .According to him it is the settled law that the contracts for generating and supply of electricity are governed by the statue and have an overarching public law and public interest which needs to be safeguard in the balancing of equity in all circumstances. On the basis of this concept, it is contended by the learned senior Counsel for the Respondent No. 2 that the act of Appellant suddenly going back from his obligation to perform the contract would highly affect the public interest as well as public law He cited the following authority to substantiate this plea. (1991) a SCC 492 in the matter of Raunaq International Ltd. v I.V.R Construction Ltd and Ors.*

*The relevant Observation are as follows:*

*...Even when the state or a public body enters into a commercial transaction, consideration which would prevail in its decision to award the contract to a given party would be the same. However, because the state or a public body or an agency of the state enters into such a contract, there could be in a given case, an element of public law or public interest involved even in such a commercial transaction.*

*10. What are these element of public interest ? (1) Public money would be expended for the purpose of the contract. (2) The goods or services which are being commissioned*



*could be for a public purpose , such as, construction of roads ,public buildings, power plants or other public utilities.(3) The public would be directly interested in the timely fulfillment of the contract so that the services become available to the public expeditiously.(4) The public would also be interested in the quality of the work undertaken or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistake or in rectifying defect or even at times in redoing the entire work- thus involving larger outlays of public money and delaying the availability of services ,facilities or goods . e.g a delay in commissioning a power project , as in the present case , could lead to power shortages , retardation of industrial development , hardship to the general public and substantial cost escalation.*

*53. In the submission made by the learned senior Counsel for the Respondent No. 2 on the strength of the above decision rendered by the Hon'ble Supreme Court, we find force. Under those circumstances we are to conclude that the Appellant cannot be allowed to make a plea that too in the form a fresh plea before this Tribunal just to escape from its obligation to sign the PPA and supply power as agreed by the Appellants as a generating company.”*

Therefore, contracts such as the present PPA have to be viewed and interpreted differently keeping in mind the substantial public interest that is involved and as such, all attempts have been made to ensure that such contracts are implemented. The argument of the Respondent of automatic termination is made for collateral reasons to avoid giving answer to the facts that before the event of termination could take place on March 14, 2011, the Petitioner had informed the Respondent about formalisation of an alternate arrangement for supply of fuel from Videsh Coal Pvt. Ltd. In its reply dated March 16, 2011 to the Petitioners letter dated March 11, 2001, the Respondent remained silent on the issue of alternate arrangement for supply of fuel and persisted with its original agenda of terminating the PPA.

WPCL further submitted that the interpretation, which is purported to be given by the Respondent, of the Order date March 17, 2011 of the Commission, that the said Order does not stay the termination of the PPA dated June 4, 2010, and only mandates not to give effect to any consequential action on the part of the Respondent. Such an interpretation by the Respondent is another example of a blatant attempt to overreach and circumvent the judicial proceeding pending before the Commission. The Petitioner in the course of the hearings, has all along pleaded that while the matters were seized before the Commission there was no bonafide reason for termination of the PPA.

(e) For a dispute Section 86 (1) (f) of the EA 2003, the Commission should refer the matter of arbitration as this is purely a contractual dispute.

This argument is an afterthought and made without any supporting pleadings. This arguments was made for the first time in final leg of hearings of the present matter. This argument is not available to the Respondent who had filed its objections and replies to the Petition on merits and also argued the same. In fact, in the Appellate proceeding against the Interim Order dated April 15, 2011, the Respondent made categorical submission that it was keen to seek early disposal of the matter on merits and the Commission should fix time lines for disposal of the case. ATE was led to believe that the matter should be disposed of on merits since the Respondent is suffering prejudice. In the Appellate forum, it was never argued that the matter should be referred to arbitration and the Commission should dispose of the case only on this preliminary ground.

26. Having heard both the Petitioners and the Respondents, the Commission holds as follows:

(A) As regards the FSA, WPCL in the hearing held on May 17, 2011 submitted the letter dated May 16, 2011 from Ministry of Coal, Government of India referring to the minutes of the Standing Linkage Committee (Long-Term) for power to review the status of existing linkages/Letter of Assurances held on April 18, 2011. Further, WPCL has submitted that para (xii) of the minutes of the said letter states about the supply of coal to M/s. Wardha Power Co.Ltd. The para (xii) is reproduced below:

*“ A representation dated 22<sup>nd</sup> February, 2011 was received from M/s Wardha Power Company regarding commencement of coal supply to their power plant at Warora, Maharashtra from a coal source other than cost plus coal block of WCL as the dedicated mines for this project have not come into production. The IIP was sanctioned “ tapering linkage” initially by the SLC (LT), which was subsequently converted to “normal Linkage” from the cost plus mines of WCL by SLC (LT). The applicant has informed that all 4 units have been commissioned but as the “ cost plus” mines have not commenced production, they are not getting any supply, CEA vide their letters dated 7<sup>th</sup> January, 2011 and 3<sup>rd</sup> February 2011 recommended supply of coal to three units, which were reportedly commissioned by then, pending conclusion of FSA with WPCL.*

***The Committee deliberated on this issues. After discussions, it was recommended that within the overall agreed quantity of 347 MTs to be supplied by CIL to power utilities during 2011-12, CEA would recommend the coal allocation for these 4 units, based on commission status. CIL would meet the coal requirements, based on MOU to be valid for a period of one year. The source/coal company and the price for such coal supplies will be decided by CIL. During this period, If the production***

*from the cost plus mines commences, part of the requirement may be met from such production as per the guidelines issued vide Ministry of Coal letter No. 23022/14/2008-CPD dated 7.10. 2008.”*

(B) Further, WPCL vide their letter dated April 6, 2011 has submitted that it had informed RInfra that it has arranged a FSA with M/s. Videsh Coal Services Pvt. Ltd. for supply of 15,00,000 tonnes of coal per year from April 2011 and therefore, as regards the procurement from Videsh Coal Service Pvt. Ltd., the Commission observes that WPCL has ensured that it is able to supply the said quantum of power in the PPA to RInfra in the absence of pending allocation of Mines by Coal India Ltd. as per the LoA. The Commission acknowledges the efforts by WPCL and considers the interim arrangement of coal from Videsh Coal Service Pvt. Ltd. to meet its obligation to supply the power.

(C) As regards, the purchase of coal by Videsh Coal Services Pvt.Ltd. from E-Auction from Coal India is concerned, it is observed that the E-Auctions scheme was started by Coal India Limited in year 2007 for sale of coal mined by various coal companies through MSTC on regular basis. Therefore, the Commission considers procurement of coal through E-Auction from Coal India Ltd. or its Subsidiaries as a reliable source.

(D) As regards the respondent's letter dated 7.3.2011, the said letter cannot be sustained on the basis that a competitive bidding is undertaken under Section 63 of the EA 2003 so that power is procured from lowest / best available source for supplying to the public. The parties who bid in the tender / competitive bidding will lose their reputation if despite being selected through competitive bidding process in accordance with the Guidelines of the Central Government, the procurer Distribution Licensee terminates the Power Purchase Agreements executed after completion of the competitive bidding process. There will be no credibility in the competitive bidding processes.

Certainly, such knee jerk reaction to terminate the PPAs involved in a competitive bidding process cannot be allowed. Overwhelming aspect of public interest and safeguarding of consumer interest is also involved in the matter. After all, competitive bidding process is undertaken so that power is available to the public at cheaper cost for a longer duration on sustained basis. Termination of PPAs would deprive the benefit of competitive bidding to the public at large. The Commission does not sustain the contention of the Respondent that even if PPAs are executed after initiation of competitive Bidding processes these PPAs could be terminated and such termination ought not to be interfered with because monetary compensation is adequate relief. The Commission is of the view that to accept the Respondent's contentions would have the effect of the competitive bidding

processes lose its credibility as every other licensee would be tempted to break PPAs even though they had executed PPAs after selecting parties on the basis of competitive bidding. That being so, considering the background facts tested on the anvil of the principles formulated above, the inevitable conclusion is that the contention of the Respondent deserves to be dismissed. RInfra was bound to adopt a procedure which is 'fairplay in action'.

Moreover, the Request For Proposal Notification for Supply of Power through tariff based competitive bidding process is as per bidding guidelines, issued by the Government Of India, for determination of tariff by bidding process for procurement of power by distribution licensees. When tested on the twin anvil of credibility of competitive bidding and protection of consumer / public interest, respondent's letter dated 7.3.2011 cannot stand and ought to be quashed and set aside, and accordingly are hereby set aside.

Respondent is directed to give effect to the Letter of Intent dated 10.05.2010 and PPA dated 04.06.2010. Respondent shall not purchase power (either in the short term, medium term or long term) from any third party/parties to the extent contracted with the Petitioner under the Power Purchase Agreement dated 04.06.2010.

27. In view of the above, the Commission directs the Respondent RInfra to file an appropriate Petition/application under Section 63 of the EA 2003 alongwith requisite documents, information and details for adoption of the tariff discovered through transparent bidding process as per Competitive Bidding guidelines of Ministry of Power, Government of India, and apply for taking on record the Power Purchase Agreement dated 04.06.2010. RInfra shall comply with the above direction within two weeks from the date of this Order.

With the above, the present Petition and Interim Applications stand disposed of. There shall be no orders as to costs.

Sd/-  
(Vijay L. Sonavane)  
Member

Sd/-  
(V. P. Raja)  
Chairman