

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. 42 of 2011

In the matter of
Petition of M/s. Abhijeet MADC Nagpur Energy Pvt. Ltd. regarding request for
adoption of tariff and approval of power purchase agreement for 55 MW of power
under Case 1 bidding with Reliance Infrastructure Limited

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

ORDER

Dated: May 31, 2011

Abhijeet MADC Nagpur Energy Pvt. Ltd. (AMNEPL) submitted a Petition under affidavit before the Commission on March 29, 2011 under Section 63, Section 86 (1) (b) and Section 86 (1) (f) of the Electricity Act, 2003 (EA, 2003) read with Competitive Bidding Guidelines issued by Ministry of Power, Government of India and the Commission's Order dated July 21, 2009 in Case No. 94 of 2008.

2. The prayers in AMNEPL's Petition are as under:

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- a. *That this Hon'ble Commission may be pleased to direct the Respondent to place all the requisite documents, information and details necessary for adoption of tariff under Section 63 of the Act read with clause 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 04.08.2010;

- b. *That this Hon'ble Commission may be pleased to hold/ declare that the Respondent is estopped from contending that it is unable to proceed further under the PPA on the ground that its petition for renewal of its license beyond 15.08.2011 is pending for disposal;*
- c. *That this Hon'ble Commission may be pleased to direct the Respondent to forthwith perform its obligations under the PPA dated 04.08.2010;*
- d. *That this Hon'ble Commission may be pleased to adopt the tariff more particularly specified in the PPA dated 04.08.2010 which has been determined in terms of the Bidding Guidelines ;*
- e. *Pending the hearing and final disposal of the present petition, this Hon'ble Commission be pleased to direct the Respondent to commence procuring power from the Petitioner as per the terms of the PPA dated 04.08.2010;*
- f. *Pending the hearing and final disposal of the present petition, this Hon'ble Commission be pleased to restrain the Respondent from procuring any further power in breach of the order dated 21.07.2009 and/or breach of the terms of the PPA dated 04.08.2010;*
- g. *ad interim reliefs in terms of prayer clause (e) and (f) and*
- h. *Pass such other and further order or orders as this Hon'ble Commission deems appropriate under the facts and circumstance of the present case."*

3. The interim prayers in AMNEPL's Petition are as under:

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- a. *Pending the hearing and final disposal of the present petition, this Hon'ble Commission be pleased to direct the Respondent to commence*

procuring power from the Petitioner as per the terms of the PPA dated 04.08.2010;

b. Pending the hearing and final disposal of the present petition, this Hon'ble Commission be pleased to restrain the Respondent from procuring any further power in breach of the order dated 21.07.2009 and/or breach of the terms of the PPA dated 04.08.2010;”

4. The Petitioner, in its Petition, submitted as under:
- a) Petitioner is a power generation Company within the meaning of Section 2 (28) of the Electricity Act, 2003 having its registered office in Nagpur and is setting up a 246 MW Coal based Power Plant near Khaire (Khurd),Tehsil Hingana, Nagpur District, Maharashtra.
 - b) Reliance Infrastructure Limited (Respondent) is a vertically integrated utility carrying out the functions of generation, transmission; wheeling and retail supply of electricity in the suburbs of Mumbai, and is Distribution Licensee within the meaning of Section 2 (27) of the EA, 2003, in the State of Maharashtra having defined license area for distribution of power.
 - c) In accordance with the Competitive Bidding Guidelines, Reliance Infrastructure Limited the procurer herein initiated Competitive Bidding process through issue of Request for Proposal (RFP) for procurement of power for medium term under Case 1 bidding procedure for meeting its own base load power requirements.
 - d) Pursuant to the bidding process, AMNEPL has been selected as a seller for sale and supply of electricity in bulk to the Reliance Infrastructure Limited the procurer for the aggregate offered capacity of 55 MW.
 - e) AMNEPL seeks to invoke the jurisdiction of the Commission to resolve the disputes which have arisen due to the deliberate and wilful failure/refusal by RInfra to apply for adoption of tariff in line with the PPA dated August 4, 2010 from the Commission.
 - f) Section 86 (1) of the EA, 2003 vests jurisdiction on the Commission to adjudicate upon disputes between Licensees and the Generating Company (is).
 - g) The Commission in its Order dated July 21, 2009 in Case No. 94 of 2008 had granted approval to bid documents and also directed two separate bid documents

be issued one for base load and the other for peak load requirements of the Respondent.

- h) RInfra issued a RFP on July 30, 2009 for supply of power on a tariff based bidding process for Mumbai distribution area of the Respondent on medium term basis (2 to 5 years) in four supply periods as provided in the RFP. The RFP also mentioned that the procurer shall seek to qualify and select a successful bidder on the basis of non-financial and financial bids submitted simultaneously in a single stage bidding process as per the timelines specified in the RFP.
- i) RFP identified four different supply periods which could be chosen by the bidders, and bidding process was under Case 1 in which location, technology and the choice of the fuel was left to the discretion of the bidders.
- j) AMNEPL participated in the bidding process by placing an offer vide its letter dated September 9, 2009 to supply 55 MW of power on medium term basis, containing the non-financial and financial bids respectively..
- k) RInfra vide its letter dated September 22, 2009 called upon the Petitioner to submit certain clarifications/additional documents, which were promptly provided by AMNEPL on September 25, 2009.
- l) RInfra vide letter dated January 7, 2010 requested a meeting with the Petitioner on 11.01.2010 for discussion on financial bid submitted by the Petitioner and accordingly AMNEPL, vide their letter dated January 9, 2010 extended the bid validity till January 17, 2010 from the earlier valid date of 10.01.2010.
- m) AMNEPL vide its letter dated January 14, 2010 submitted the revised financial bid for supply period 3 stating that instead of supplying power at original levelled tariff of Rs. 5.476 per kWh quoted, they were willing to supply power at a lower levelled tariff of Rs. 4.80 per kWh.
- n) RInfra did not issue the Letter of Intent (LoI) and sought further several extensions of the bid from time to time. AMNEPL vide its letter dated 10.05.2010 submitted its revised financial bid. On May 10, 2010 the respondent finally issued a Letter of Intent for procurement of 55 MW at levelized tariff of Rs 4.80 per kWh from the Petitioner's MIHAN Coal based Power Plant pursuant to the bid submitted by the AMNEPL as extended and revised from time to time. RInfra issued LOI on 10.05.2010 and asked AMNEPL to confirm unconditional acceptance. The LOI issued was unconditionally accepted by AMNEPL as

required by RInfra. Pursuant to the issuance of the acceptance of Letter of Intent dated 10.05.2010, the Petitioner and the Respondent executed the PPA on August 4, 2010.

- o) The conditions subsequent to be complied with by the Petitioner were set out in Article 3.1.1, whereas the conditions subsequent to be complied with by the Respondent were set out in 3.2.1. The relevant Articles are reproduced below:

“Effective date” means ...

“2.1.1. This Agreement shall come into effect from the date it is executed and delivered by the last of all the Parties and such date shall be referred to as the Effective Date.”

“3.1 Satisfaction of the conditions subsequent by the seller

3.1.1 The seller agrees and undertakes to duly perform and complete the following activities at the seller’s own cost and risk within six (6) months from the Effective date, unless such completion is affected by any force majeure event or due to the procurers failure to comply with their obligations under article 3.2.1 of this agreement, or if any of the activities is specifically waived in writing by the procurer:

a. The seller shall have executed the fuel supply agreement and have provided a copy of the same to the procurer “

d. The seller shall have sent a written notice to the procurer indicating the Aggregated contracted capacity and total installed capacity for each unit and for the power stations as a whole expressed in MW”

“3.2 Satisfaction of conditions subsequent by the procurer

3.2.1 The procurer agree(s) and undertake(s) to duly perform and complete the following activities at the procurer’s own cost and risk within six (6) months from the Effective Date, unless such completion is affected by any Force Majeure event or due to the seller’s failure to comply with their obligations under article 3.1.1 of this Agreement, or if any of the activities is specifically waived in writing by the seller:

a. Deleted

.....

c. The procurer shall have obtained the order of the Maharashtra Electricity Regulatory Commission for adoption of the tariff under section 63 of the Electricity Act 2003 and a given copy of the same to the seller.”

Article 3.4

“3.4 Consequences of non-fulfilment of conditions subsequent

3.4.5. In case of inability of the procurer to perform the activities specified in Article 3.2 within the time period specified therein, otherwise than for the reasons directly attributable to the seller or Force Majeure event ,the time period for the fulfilment of conditions subsequent by the procurer as mentioned in Article 3.2 would be extended for an additional time period which may be required by the procurer to complete the activities mentioned in Article 3.2 ,subject to maximum additional time period of three(3) months .Thereafter ,this agreement may be terminated by the seller at its option ,by giving a Termination Notice of at least seven (7) days ,in writing to the procurer. If the seller elects to terminate this Agreement, the Procurer shall within a period of thirty (30) days of termination by the Seller, release the Contract Performance Guarantee of the seller forthwith. In addition, the Procurer shall pay to the Seller as liquidated damages, a sum equivalent to ten percent (10%) of the value of the Contract Performance Guarantee.

3.4.6. No tariff adjustment shall be allowed on account of any extension of time arising under any of the sub-articles of Article 3.4;

“4.1 Commencement of supply of power to procurer

4.1.1 The Seller shall be responsible to commence supply of power up to the Aggregate Contracted Capacity by the Scheduled Delivery date in accordance with the

provisions of this Agreement, which is 1st April 2011. However, the seller and the procurer may mutually agree for commencement of supply of power in a phased manner from the Revised Scheduled Delivery Date(s) as specified in Article 3.3 of this Agreement.

4.1.2 *The Seller shall give the Procurer and the concerned RLDC at least sixty (60) days advance preliminary written notice and at least thirty (30) days advance final written notice, of the date on which it intends to commence supply of power. “*

p) RInfra by its letter dated December 21, 2010 informed that they were not in a position to comply with their obligations under Clause 3.2 of the PPA and stated the following reasons for non-compliance as

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- i. Their distribution license was expiring on 15.08.2011*
- ii. They have made an application for the renewal of their license vide petition 78 of 2010 before the Commission and that the same was pending and*
- iii. That the Commission has by publication dated 6.10.2010 invited expression of interest under section 86(1) (d) read with section 14 of the Electricity Act, 2003, from the prospective applicants with expertise in electricity distribution to indicate their interest in undertaking distribution of electricity in the licensed area.*

”

q) AMNEPL on January 29, 2011, issued a letter to RInfra, extending the validity period of six months under Clause 3.2 by a further period of 3 months and requested RInfra to approach the Commission for adoption of their tariff under the PPA to enable AMNEPL to commence supply.

r) Immediately thereafter and in compliance with the Clause 3.1.1.(d) of the PPA, AMNEPL, vide letter dated February 1, 2011, issued a notice to RInfra, informing him of the Aggregate Contracted Capacity and total installed capacity for each unit and for the power station as a whole expressed in MW. In the said

letter it also assured that the generating station of AMNEPL is already synchronised with the State Grid and it will be in a position to meet committed scheduled delivery date as per PPA, i.e., April 1, 2011.

- s) RInfra submitted petitions bearing Nos. 12 of 2011 and 13 of 2011 to the Commission in relation to two separate PPAs entered into by the Respondent with Vidarbha Industries Power Limited (VIPL) and Chitrangi Power Private Limited seeking adoption of tariffs there under as per the provisions of the Section 63 of the EA, 2003 and other reliefs relating to the implementation of and giving effect to such PPAs. AMNEPL submitted that the conduct of RInfra in the aforementioned petition is contradictory to the stand taken by them in the letter dated December 21, 2010 addressed to AMNEPL.
- t) AMNEPL issued a letter dated February 26, 2011 to the Respondents once again calling upon them to comply with their obligations under Clause 3.2 of the PPA and also issued a notice in terms of Clause 4.1.2 and requested the Respondent to communicate within 7 days of the receipt of the said letter whether the requisite application for adoption of tariff under the PPA has been made to the Commission in pursuance of the conditions subsequent envisaged under the Article 3.2.1(c). The Petitioner received a response from RInfra dated 10.3.2011 to the aforesaid letter dated 26.02.2011 once again stating that RInfra is unable to comply with the conditions subsequent in Clause 3.2 due to the same reasons stated earlier vide letter dated 21st December 2010.

5. The Commission, vide its Notice dated March 29, 2011, scheduled a hearing in the matter on March 30, 2011, and directed AMNEPL to serve a copy of its Petition along with its accompaniments to the authorised Consumer Representatives.

6. During the hearing held on March 30, 2011, Shri. Dinyar Madan, Senior Advocate along with Ms Deepa Chawan, Advocate appeared on the behalf of AMNEPL. Shri. J J Bhatt, Senior Advocate and Ms. Anjali Chandurkar, Advocate appeared on behalf of RInfra.

7. During the hearing Counsels appearing for the Petitioner stated that despite the fact that the LoI (Letter of Intent) is in place as well as the Power Purchase Agreement between the parties still exists however the Petitioner has received a letter– from RInfra-D dated December 21, 2010 stating that they are not in a position to comply with their obligations under Clause 3.2 of the PPA as their Distribution License is expiring on August 15, 2011 and the Commission has by publication dated October 6, 2010 invited Expression of Interest under Section 86(1)(d) read with Section 14 of the Electricity Act, 2003, from the prospective applicants with expertise in electricity distribution to indicate their interest in undertaking distribution of electricity in the licensed area.

8. Counsels appearing for the Petitioner stated that the Petitioner has submitted petition Nos.12 of 2011 and 13 of 2011 before this Commission in relation to two separate PPAs entered into by the Respondent with Vidarbha Industries Power Limited (VIPL) and Chitrangi Power Limited seeking adoption of tariffs there under as per the provisions of the Section 63 of the Electricity Act, 2003, despite the stand taken by RInfra for the present Petitioner that their Distribution License is expiring on August 15, 2011. This situation also applies to the PPAs entered into by the Respondent with Vidarbha Industries Power Limited (VIPL) and Chitrangi Power Limited however; petition Nos.12 of 2011 and 13 of 2011 have been filed by RInfra.

9. AMNEPL stated that the levelised tariff rate of Rs.4.80 per kWh for a period of 3 years was decided in line with the PPA dated August 4, 2010. AMNEPL further stated that the RInfra is liable for liquidated damages under Article 3.4.5 of the PPA for non-fulfilment of conditions subsequent to the extent the RInfra has yet not approached this Commission for adoption of tariffs, which is a liability of a sum equivalent to 10% of the value of the Contract Performance Guarantee to be paid by RInfra to the Petitioner.

10. AMNEPL in its Petition dated 26th March 2011 submitted that it is ready and willing to commence supply of the power up to the aggregated contracted capacity of 55 MW to RInfra-D from the Scheduled Delivery Date i.e. April 1, 2011 subject to the conditions set out in the Power Purchase Agreement (PPA) dated August 4, 2010.

11. RInfra vide its letter dated April 11, 2011 submitted its details of Short Term and Medium Term Power procurement plan.

12. AMNEPL also submitted that it has already synchronized three units of 61.5 MW and 4th Unit is likely to get synchronized in second week of April of 2011, and only one unit of the plant has achieved COD on January 6, 2011 and is currently supplying 54 MW to MSEDCL from 6.00 hrs. to 18.00 hrs. Up to June 30, 2011.

13. It transpired that as per the information of AMNEPL, only one of its unit has achieved COD and rest of two units have synchronized and is injecting infirm power in the grid. Therefore, it will take time to achieve COD of the unit of AMNEPL. AMNEPL had entered into a contract with RInfra-D on April 1, 2011 for a period of April 2, 2011 to May 31, 2011 on Round the Clock (RTC) basis for infirm power at a rate of Rs.2.70/kWh.

14. RInfra-D vide its letter dated 11th April 2011 made following submissions:

- a) Insofar as the issue of the Specific Relief Act 1963 is concerned two decisions relied upon by the counsel of AMNEPL related to specific performance of immovable property are clearly not applicable in the present case.
- b) It had written a letter dated December 21, 2010 to AMNEPL stating that the Commission has invited EOI inviting new applicants for its area of supply and particularly when its licence was due to expire , RInfra was unable to proceed further with the conditions subsequent to be satisfied. Thus, on the said date itself RInfra had made its position clear, and AMNEPL replied on January 29, 2011 that RInfra has shown its inability to proceed with the conditions subsequent under Article 3.2 of the PPA and the reasons stated by RInfra, AMNEPL waives compliance of Clause 3.2 for further period of 3 months to fulfil the Conditions subsequent, and this period shall come into effect after the end of 6 months period originally envisaged under Article 3.2.1 of the PPA. AMNEPL submitted that the Petition for adoption of tariff under Section 63 of the Electricity Act, 2003 and validation of the PPA is not dependent on the decision of the Commission to extend the Distribution License beyond August 15, 2011. Further, AMNEPL approached the Commission as late as on March 26, 2011. This itself disentitles AMNEPL to any interim/ad-interim reliefs on account of delay and laches.

- c) AMNEPL in one of its arguments submitted that RInfra was aware that its licence was “up to 15th August 2011” even at the time of issuance of the RFP. RInfra submitted that AMNEPL has misunderstood the issue as the EOI is a subsequent independent event and was not anticipated by RInfra.
- d) RInfra submitted that the reliance on the Commission’ Order dated July 21, 2009 in Case No. 94 of 2008 is misconceived. The above mentioned paragraph is reproduced as under:

“The Commission is of the view that to provide clarity and to incorporate such conditions for assignment of PPA on account of change in the Licensee, the clause should be modified as under:

“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 not be withheld if the Procurer seeks to transfer to any transferee all of its rights and obligations under this Agreement; and

(a) Such transferee is either the owner or operator of all or substantially all of the distribution system of such Procurer and /or such transferee is a 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, in case the Procurer opts out of the Licence 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”.

15. RInfra submitted that the proviso to the said Clause is unworkable and contemplates only one scenario that is, if RInfra opts out of the license or any new entity becomes the licensee in its place as an assignee. After the issuance of the EOI it has so transpired that

there may be not only two, but three licensees in an area of supply, RInfra' s area of supply may or may not be restricted and accordingly several other factors including the aforesaid factors would have a bearing on the power procurement by RInfra and on its consumers.

16. The respondent RInfra in its reply dated 21st April 2011 submitted;
- i. That the Petitioner is not entitled to Specific performance for PPA dated 4th August 2010 entered between AMNEPL and RInfra for supply of 55 MW power as per relevant provisions of the Specific Relief Act,1963 and therefore, the aforesaid Petition is liable to be dismissed.
 - ii. That furthermore, AMNEPL is not ready to supply the quantum agreed under the PPA as no interim relief was given in the interim order dated 15th April 2011.
 - iii. That only one unit of AMNEPL has achieved COD out of which 54 MW is being supplied to MSEDCL.
 - iv. That its license is about to expire on 15th August 2011 , which would have a bearing on its power procurement and on its consumers.
 - v. That it has informed through letter dated December 21, 2010 to AMNEPL that in view of EOI issued by the Hon'ble Commission it is unable to proceed further due to condition subsequent.
 - vi. That it has submitted there are no provisions in the EA 2003 under which a bidder can approach a Regulatory Commission for a direction that a distribution licensee, RInfra, ought to place the documents etc., before the Commission for adoption of the tariff set out in LOI dated 10th May 2011 and the PPA dated 4th August 2011. There are also no provisions in the EA 2003 for a supplier to approach this Hon'ble Commission for taking on record the PPA.

17. After hearing the parties, the Commission, in exercise of powers vested under Section 94 (2) of the EA, 2003, by Order dated April 15, 2011 inter alia directed as under:

“f) As regards AMNEPL, the plant is currently supplying 54 MW from Unit 1 to MSEDCL and other units have not yet achieved the CoD.

AMNEPL is not presently in position to supply power to RInfra-D as per the PPA. However, since the PPA that has been executed is for a period of three (3) years, the legal validity thereof is subject to the outcome of the proceedings and final disposal thereof, the Commission directs that till the final outcome of the proceedings RInfra-D shall not terminate the PPA dated August 4, 2010, and maintain status quo till further Orders of the Commission.”

18. The Commission held further hearings in this matter on 8th April, 2011, 13th April, 2011, May 16th and 17th 2011. Petitioners AMNEPL were represented by Advocates Shri. Nishad Nadkarni, Shri. Suhas Tuljapurkar and Shri. Sandesh Shukla and Respondents RInfra were represented by Shri. Ramji Shrinivasan, Senior Advocate and Shri. R.R. Mehta. The submissions of the Respondent, are briefly stated as follows-

- (a) Respondent submitted that without prejudice to the Respondent’s contention that the Petitioner is not entitled to specific performance of the PPA under the relevant provisions of the Specific Relief Act, 1963 (“SR Act”) ,the present petition is liable to be dismissed on the short ground that the petitioner is not ready to supply the quantum agreed under the PPA as is clear from the Interim Order dated April 15, 2011, and for aforesaid reason, the petitioner was not given interim relief as prayed for.
- (b) Respondent also added that only unit 1 of 61.5 MW of the petitioner has achieved Commercial Operation Date (COD) and out of which 54 MW is being supplied to MSEDCL and thus the present petition is liable to be dismissed on this short ground alone.
- (c) Respondent also submitted that the petition has been filed after great delay and latches. The Petitioner was informed by the Respondent earlier on December 21, 2010, that in view of the Expression of interest (EOI) for Distribution Licence issued by the Commission in the Respondent’s area of supply, however, the present petition has been filed on March 29, 2011, when the supply was to commence from April 1, 2011, which the petitioner is unable to comply.
- (d) Respondent further submitted that, there is no provision in Electricity Act, 2003 , for supplier to approach the Commission for a direction that a Distribution

Licensee, RInfra ought to place documents, information, details ,etc. necessary for adoption of tariff under Section 63 read, with Clause 6 of the Competitive Bidding Guidelines, 2005 and thereafter adopt the tariff set out in the Letter of Intent dated May 10, 2010 and the PPA dated August 4, 2010 between supplier and the Distribution Licensee.

- (e) Respondent submitted that the contention of the Petitioner that it has the capacity to generate and dispatch 55 MW capacity is misconceived in as much as the Petitioner has failed to disclose its contract with MSEDCL or the terms and conditions thereof. The paragraph under AMNEPL reply clearly admits that the rest of the units of the Petitioner are still under commissioning.
- (f) It is denied that the Respondent's licence is valid till August 15, 2011. The validity of the license has been considered by the Commission in Case No. 78 of 2010 and the Respondent are in the process of filing an appeal against the Order dated April 1, 2011 passed in said case.
- (g) After issuance of EOI it has been transpired that there may be not only two, but three licensees in an area of supply, thus the Respondents area of supply may or may not be restricted. It is submitted that the extension of the bid validity was sought for from all the bidders and not only the petitioner in any event the Petitioner complied with the request and extended the bid validity thus, the submissions made in this regard in the paragraph under reply are irrelevant.
- (h) The Petitioner vide its letter dated 17th May 2011 informed that RInfra has not agreed to any of the amendments to the PPA suggested by the Petitioner at the meeting held on 17th May, 2011 which was held as per suggestion of the Commission.
- (i) The Petitioner has failed to advert to the issuance of EOI by the Commission which has admittedly resulted in regulatory uncertainty.
- (j) That short term power is available in market at prices as low as Rs.3.5 /kWh, thus avoidance of PPA will be beneficial for consumers of the Respondent.
- (k) It is denied that the Respondent has delayed the process or acted deliberately or wilfully.

19. The Petitioner vide its letter dated May 13, 2011 filed an interim application along with an affidavit in support in the above Petition, in view of certain events that had

occurred subsequent to the filing of Petition and passing of the Order dated April 15th, 2011 and ad –interim /interim reliefs as prayed for therein.

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(a). *Pending the hearing and final disposal of the present petition, this Hon'ble Commission be pleased to direct the Respondent to commence procuring power from the Petitioner as per the terms of the PPA dated August 4, 2010, subject to such conditions as Hon'ble Commission deemed fit and proper in the facts and circumstances of the case;*

(b) *Pending the hearing and final disposal of the present petition, this Hon'ble Commission be pleased to restrain the respondent from procuring any further power in breach of the terms of the PPA dated August 4, 2010”*

The Petitioner submitted that subsequent to the Interim Order dated April 15, 2011 the second and third units of the Petitioner having capacity of 61.5 MW each have also achieved COD. Applications have been addressed to the State Load Despatch Centre (SLDC), Kalwa setting out the said fact and requesting the declaration of COD in respect of the said units. Thus, out of 4 Units of 61.5 MW each, three units are now fully in operation.

The Petitioner submitted that it has entered into another arrangement for supply of 54 MW power on round the clock basis from 00:00 hrs. to 24:00 hrs. to MSEDCL through the trader Reliance Energy Trading Ltd. (RETL) for the period from May 15, 2011 to June 30, 2011. This arrangement is pursuant to a letter of intent dated January 5, 2011 issued by MSEDCL to RETL, which has been revised from time to time, and power requirement shall be met from the third unit of the power plant. The request for scheduling of power from third unit was submitted to SLDC and approval has been received on May 11, 2011. The Petitioner's submissions are;

- i. The Petitioner submitted that the obligations under the arrangement and infirm power to the Respondent through the units which have not achieved COD do not in any manner conflict with the Petitioners' obligations under the PPA dated August 4, 2010.

- ii. The Petitioner submitted that it is in a position to supply the required quantum of 55 MW of power to the Respondent under the PPA and thus the Commission be pleased to grant the reliefs, as prayed for in the present application.
- iii. Both the Petitioner and the Respondent met to settle the disputes with a variation in Clause 4.5.3 in the PPA to protect the interest of the Respondents in the event that their distribution license was not renewed or renewed with the variations in the distribution area. The Petitioner vide letter dated May 17, 2011 informed the Commission that the Respondents have refused to accept the requests for applying to the SLDC for scheduling of supply on May 18, 2011 and upon scheduling by SLDC procure supplies from the Petitioners as per the PPA from May 19, 2011. Thus, the parties are not ad idem on this issue and that the Commission needs to pass appropriate orders in the matter.

20. After hearing the parties and after considering the materials placed on record, the Commission has the following views:

- (i) The Commission is not able to sustain the stand of the Respondent that its inability to perform the PPA is on the two accounts of its licence which is due to expire on 15th August 2011 and the expression of interest (EOI) invited by this Commission inviting applicants to distribute electricity in the area of supply of the Respondent. The reasons are as follows. It is a matter of fact that the Commission notified '*the Maharashtra Electricity Regulatory Commission (Specific conditions of Distribution Licence applicable to Reliance Energy Limited) Regulations, 2008*' that provides the term of distribution licence of the Respondent as follows –

“5. Term of Licence

Subject to the provisions of the Act, the Licence shall remain in force till 15th August 2011, i.e., the remaining period for which REL shall be deemed to be a Distribution Licensee under the Act.”

- (ii) So obviously, the Respondent cannot say that due to the EOI, its date of expiry of licence has become so critical that it should stop honouring PPAs signed by it after undertaking competitive bidding under Section 63. The Respondent should have been aware of the *term of its licence to be in force till 15th August 2011 as specified in the Maharashtra Electricity Regulatory Commission (Specific conditions of Distribution*

Licence applicable to Reliance Energy Limited) Regulations, 2008 which was issued on 20th August, 2008.

(iii) RInfra submitted that AMNEPL has misunderstood the issue as the EOI is a subsequent independent event and was not anticipated by RInfra. The Commission is not able to sustain this contention for the reason that the term of its licence to be in force till 15th August 2011 as specified in the aforesaid Regulations was not a subsequent independent event. RInfra was expected to know about the term of its distribution licence at the time and even before it initiated the Competitive Bidding process through issue of Request for Proposal (RFP) for procurement of power for medium term under Case 1 bidding procedure for meeting its base load power requirements. The Commission is of the view that the Respondent ought not to create an unprecedented/uncertain situation on grounds that simply cannot be accepted or sustained.

(iv) Although, the term of licence was specified in the aforesaid Specific conditions Regulations, 2008 that was issued on 20th August, 2008, RInfra filed a Petition for approval of proposed quantum of power through medium term power procurement on 23rd October, 2008, with inter alia the following prayers:

Examine and approve the proposed quantum of power procurement under Medium Term, for both Round The Clock (RTC) and Peak requirement, for three supply periods.

Examine and approve the draft bidding documents for medium term power procurement.

(v) The aforesaid Petition was numbered as Case No. 94 of 2008 in the matter of R-Infra's petition for approval of proposed quantum of power for Medium-Term Power Procurement through Competitive Bidding route via Case-I and approval of Bid Documents. The said petition was disposed of by Order dated July 21, 2009. Therefore, prior to seeking approval of power procurement under Medium Term and on the draft

bidding documents for medium term power procurement, RInfra was aware that its licence was due to expire on 15th August 2011.

(vi) The stand of the Respondent in the present matter arising out of the factum of issuance of the expression of interest (EOI) by the Commission inviting applicants to distribute electricity in the area of supply of the Respondent, in effect implies that if the Commission exercises its power under the sixth proviso to Section 14 of the Electricity Act, 2003 to “*grant a licence to two or more persons for distribution of electricity through their own distribution system within the same area*” which happens to be an area served by RInfra, the PPAs that have been signed by RInfra consequent to Competitive Bidding Guideline Process should be abandoned. In view of the submissions, written and oral, in the present matter, this aforesaid stand is clearly emanating from the Respondent. This stand ought not to be countenanced as it is contrary to safeguarding of consumers' interest/ protecting interest of consumers. It would also be contrary to and infringe upon the “transparent” process of bidding, which is supposed to be in accordance with the guidelines issued by the Central Government. To accept RInfra’s contentions would mean that the credibility of the procedure of bidding would be lost. RInfra was bound to adopt a procedure which is 'fair play in action'. Moreover, the Request for Proposal Notification for Supply of Power through tariff is based on competitive bidding process (as per bidding guidelines, issued by the Government of India, for determination of tariff by bidding process for procurement of power by distribution licensees). The reasons given by the Respondent for not being able to perform as per the executed PPA, are dismissed in view of the aforesaid findings.

(vii) AMNEPL has submitted that at the time of filing the petition first unit of the plant had achieved COD and the same has been supplying 54 MW to MSEDCL. AMNEPL further submitted that subsequent to the Order dated April 15, 2011, the second unit of the Petitioner having capacity of 61.5 MW has also achieved the requirements of COD. AMNEPL by an application dated May 4, 2011 has addressed to the SLDC for deceleration of COD from May 7, 2011. As regards the PPA of RInfra and AMNEPL is concerned, the second unit is in the position to supply power to RInfra.

(viii) Accordingly, the Commission directs AMNEPL to complete the formalities of scheduling and start supply of 55 MW Power to RInfra from July 1, 2011 as per PPA dated August 4, 2010.

21. The Commission directs the Respondent RInfra to immediately file an appropriate petition / application under Section 63 of the Electricity Act, 2003 along with 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. RInfra shall comply with the above direction within two weeks from the date of this Order.

With the above observations, AMNEPL's Petition in Case No. 42 of 2011 and interim application stands disposed of.

Sd/-
(Vijay L. Sonavane)
Member

Sd/-
(V. P. Raja)
Chairman