

**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. 1 of 2010

Brihan-Mumbai Electric Supply and Transport (BEST) Undertaking's Petition seeking approval of Power Purchase Agreement between BEST and TPC for 100 MW

**Shri V. P. Raja, Chairman
Shri S. B. Kulkarni, Member
Shri V. L. Sonavane, Member**

Date: September 01, 2010

ORDER

The Brihan-Mumbai Electric Supply and Transport Undertaking (BEST) filed a Petition under affidavit before the Commission on March 22, 2010, for approval of the PPA between BEST and TPC-G for additional 100 MW, under Section 86(1) (b) of the Electricity Act, 2003 read with Regulation 24.1 of MERC (Terms and Conditions of Tariff) Regulations, 2005.

2. The prayers made by BEST in the Petition are:

- "a) Approve the Power Purchase Agreement between BEST and TPC for 100 MW signed on 5th February 2010 with effect from 1st April 2010*
- b) Condone any inadvertent omissions/ errors/ shortcomings and permit BEST to add/change/ modify/alter this filing and make further submissions as may be required at a future date."*

3. BEST in its Petition submitted as under:

- a. BEST Undertaking has an existing Power Purchase Agreement (PPA) with Tata Power Company- Generation Business (TPC-G) for 832 MW, which has been approved by the Commission vide its Order dated November 6,



2007, and which is effective for a period of 10 years from April 1, 2008 to April 1, 2018.

- b. BEST had filed a Petition in Case No. 33 of 2009, seeking approval for quantum of power purchase and deviations/references taken vis-a-vis the Standard Bidding Documents for procurement of power on Long Term Basis. In its Order dated August 4, 2009 in Case No. 33 of 2009, the Commission has approved the quantum of 400 MW(+20%) for the next 10 years.
- c. BEST submitted that the capacity available as per the approved PPA with TPC-G is not sufficient to meet peak demand registered by BEST, as given in the Table below:

| Month | Typical Working Day | Peak Demand at T<>D | Grossed up demand at InSTS | TPC-G Allocation | Surplus (+) /Deficit (-ve) |
|--------|---------------------|---------------------|----------------------------|------------------|----------------------------|
| A | B | C | D | E | F=E - D |
| Apr-09 | 2nd April | 848 | 891 | 770 | -121 |
| May-09 | 5th May | 817 | 859 | 759 | -100 |
| Jun-09 | 18th June | 862 | 906 | 745 | -161 |
| Jul-09 | 31st July | 781 | 821 | 702 | -119 |
| Aug-09 | 11th Aug | 786 | 826 | 780 | -46 |
| Sep-09 | 30th Sep | 817 | 859 | 694 | -165 |

- d. BEST submitted that in order to bridge this demand–supply gap, BEST has to purchase power from outside sources at higher prices, failing which, load shedding in the city would be inevitable. The dependence on the outside sources to bridge this gap not only creates uncertainty about the availability of power but also exposes BEST and its consumers to the vagaries of the market.
- e. BEST submitted that in order to ensure reliable power to bridge this gap at a reasonable price, BEST entered into a Power Purchase Agreement with TPC-G for additional 100 MW on February 5, 2010, with effect from April 1, 2010, to meet BEST's immediate requirement. BEST added that BEST had intimated to the Commission regarding the above referred intention, in BEST's APR Petition for FY 2009-10, as reproduced below:

"Power Purchase Projection/or FY 2010-11



As outlined above BEST has total allocated capacity of 832.5MW from TPC-G stations. In addition BEST would like to inform to the Hon'ble Commission that TPC-G has offered additional allocation of 100 MW from its existing stations to BEST starting from April 1, 2010 vide TPC-G letter dated 9/11/2009. BEST has accepted the offer and proceeding to enter into a PPA with TPC-G. In this regard annexed are TPC-G offer letter and BEST acceptance letter as Appendix no. 11. Subsequent to signing of PPA, BEST will submit the PPA before Hon'ble Commission for its kind approval. In the meantime BEST has considered the 100 MW for projection purpose during FY 2010-11."

- f. BEST further submitted that the availability of this 100 MW capacity will allow BEST to tide over the existing peak shortages, thereby reducing the burden of expensive external power purchase on the consumers, and will also ensure uninterrupted power supply to the City of Mumbai.

4. The Commission scheduled a hearing in the matter on May 12, 2010 at 11:00 hours in the Commission's office, in the presence of the Consumer Representatives authorised on a standing basis under Section 94(3) of the Electricity Act, 2003, and directed BEST to immediately serve a copy of its Petition along with its accompaniments, to the Respondents and authorised Consumer Representatives.

5. Reliance Infrastructure Limited (RInfra), vide letter dated May 5, 2010, requested the Commission for permission to participate in the proceedings to be conducted by the Commission on the Petition filed by BEST in Case No. 1 of 2010, and to direct BEST to serve a copy along with its accompaniments to RInfra. The Commission, vide letter dated May 6, 2010, directed RInfra to file an Intervention Application in the prescribed form, inter alia, stating the grounds for such intervention.

6. RInfra filed its Intervention Application dated May 11, 2010, and submitted that it has neither received nor has been served a copy of the Petition along with its accompaniments. RInfra submitted that it has filed the present Intervention Application, inter alia, on grounds more specifically set out in the Application, and would file a further affidavit on receipt of a copy of the Petition. In its Application, RInfra submitted as under:

- a. RInfra requested the Commission to keep the process of the purported PPA between BEST and TPC-G for additional 100 MW capacity dated February 5,



2010, in abeyance inter alia, pending the resolution of the issues raised by RInfrac on TPC-G's Petition for truing up for FY 2008-09 and Annual Performance Review for FY 2009-10 and ARR and Tariff determination for FY 2010-11 (Case No. 96 of 2009). RInfrac submitted that the said power ought to be utilised for the benefit of the consumers of Mumbai in RInfrac's area for reasons set out by RInfrac in its above-said submissions in Case No. 96 of 2009.

- b. RInfrac submitted that in BEST's Tariff Order for approval of Truing Up for FY 2007-08, Annual Performance Review for FY 2008-09 and determination of ARR and Tariff for FY 2009-10, the Commission has approved 4971 MU of total energy input required to be purchased by BEST for FY 2009-10. The approved quantum of energy was 5432.72 MU from TPC-G and 298.75 MU from RPS. After considering the energy available from TPC-G and RPS, the Commission has approved surplus energy of 759.76 MU with BEST. RInfrac submitted that in the aforesaid Order, the Commission has considered that the surplus energy available with BEST will be sold at system marginal price. RInfrac submitted that this surplus power has been utilised by consumers in the Mumbai licensed area where RInfrac supplies power, however, it has been procured by RInfrac at marginal price, which has thus, resulted in reduction of average power purchase cost for BEST, while it has increased the power purchase cost of RInfrac.
- c. RInfrac further submitted that BEST is projected to have surplus energy of more than 1000 MU vis-a-vis its energy requirement for FY 2010-11. In order to substantiate this contention, RInfrac furnished the month-wise typical working day demand of BEST and surplus energy available with respect to TPC-G's allocation, which show that even at peak demand in BEST's area of supply, BEST has surplus power available, whereas RInfrac is procuring power at marginal cost to supply power to the consumers in its area of supply, despite being in Mumbai licensed area. In view of the fact that the consumers of RInfrac's area of supply would be vitally affected and since, BEST does not require 100 MW on round the clock basis for which the approval is being sought, RInfrac submitted that the Commission may be pleased to implead RInfrac as a necessary party to the Petition.

7. In the hearing held on May 12, 2010, Shri. Rajagopal appeared on behalf of BEST, while Shri. Kakalia, Counsel, appeared on behalf of RInfrac, as Intervener. The Commission directed RInfrac to apprise the Commission regarding the likely date by which the competitive bidding process undertaken by RInfrac for procurement of power would be completed, and the



results of the bids, in case finalised before the next hearing. The Commission scheduled the next hearing in the matter on June 24, 2010 and directed BEST to serve a copy of the Petition and its accompaniments to the Intervener.

8. BEST filed its Affidavit-in-reply dated June 23, 2010 and opposed the Intervention Application and the relief claimed therein. BEST submitted that RInfra has no *locus standi* to oppose the PPA between BEST and TPC-G, since the same is in accordance with the directions of the Commission. BEST submitted that approval of PPA between BEST and TPC-G is the absolute prerogative of the Commission, and the Electricity Act, 2003 and the Regulations in this regard do not permit any intervention of third parties. BEST further submitted as under:

- a. BEST submitted that in accordance with the Commission's directions, a copy of the Petition along with its accompaniments have been served on RInfra on May 17, 2010 and receipt of the same has also been acknowledged by RInfra. BEST submitted that RInfra has no cause of action whatsoever for intervention in the process of approval of PPA submitted by BEST. BEST referred to the relevant extracts of the Judgment of the Hon'ble Supreme Court dated May 6, 2009 in Civil Appeal Nos. 3510 - 3511 of 2008 with Civil Appeal No. 4269 of 2008, Civil Appeal No. 3593 of 2008, Civil Appeal No. 6098 of 2008 and Civil Appeal No. 6099 of 2008 , as reproduced below:

“Fairness or otherwise of the supply of electricity to different distribution companies being outside the jurisdiction of the Commission, the same by itself cannot be a ground for bringing back the license raj. This shows that the Petitioner does not have locus standi to intervene in the matter of the PPA between BEST and TPC-G.”

- b. BEST submitted that RInfra has absolutely no *locus standi* to lay a claim on the quantum of electricity contracted by BEST. RInfra has neither entered into any PPA with TPC-G nor any agreement for sale of un-requisitioned capacity to the BEST for any quantum of power and therefore, the demand made by RInfra is completely without any basis or foundation. BEST submitted that RInfra has been in complete breach of MERC Tariff Regulations, which require the distribution licensee to submit its PPA for approval of the Commission. RInfra was directed by the Commission by its Order dated December 9, 2005 in Case No. 4 of 2003, by Order dated October 3, 2006 in Case No. 25 of 2005, by Order dated April 24, 2007 in Case No. 75 of 2006, and by Order dated November 6, 2007 in Case No.



87 & 88 of 2006 to submit a PPA for approval. RInfra has persistently defied the Commission's Regulations and Orders and not submitted any PPA to the Commission except an MOU for 500 MW with its own generating station. The MOU submitted was also valid only for 5 years giving the reason of "in order to have flexibility" and the Commission had to direct RInfra to make this MOU for 10 years. BEST further submitted that RInfra is wholly responsible for the shortfall of power in their area of supply because of its irresponsible behaviour and negligent and recalcitrant attitude by not entering into a PPA to protect the interest of consumers. RInfra, therefore, cannot frustrate, defeat and delay the approval of the PPA submitted by BEST.

The Supreme Court has also observed in its aforesaid Judgment dated May 6, 2009 as under:

"Intendment of Parliament in making statute is clear and unambiguous. Requirements of a licensee and/or sheer number of its consumers, in our opinion would be wholly irrelevant for the purpose of the construction of a statute."

- c. BEST submitted that the proposed PPA is a part of BEST's effort to meet its statutory obligation to make provision for adequate power capacity to meet the requirement of its consumers, for present and future, in accordance with the procedures prescribed by the Regulations notified by the Commission. Further, the Commission has approved the demand estimation and procurement of 400 MW of power on long-term basis. BEST has entered into a PPA for a part of this projected and approved demand, and in fact, the present peak demand of BEST has exceeded the contracted capacity for almost a year.
- d. BEST further submitted that the BEST system has experienced a peak shortage of about 60 MW in May 2010 itself. BEST submitted that RInfra submission is completely misconceived because PPA is always in terms of capacity and not in terms of quantum of consumption. If RInfra's argument were to be accepted, then it would defeat the very purpose of demand estimation by taking into consideration the criteria and the provisions of the Electricity Act, 2003 and Regulations issued by the Commission. BEST submitted that it does not want to expose its consumers to the vagaries of infirm power and market forces by not making adequate provisions in terms of capacity to meet their peak demand. As regards the



contention that RInfra will have to bear the increase in power purchase cost, BEST submitted that it is pertinent to refer to the observations of the Hon'ble Supreme Court in the aforesaid Judgment dated May 6, 2009 as reported in 2009 ELR (SC) 246:-

“for the purpose of interpretation and/or application of a statute, this court cannot base its decision on any hypothesis. Construction of a statute, save and except some exceptional cases, cannot be premises on the hardship of a party which may be suffered by one of the licensee. Enabling provisions are made for entering into a free contract”

- e. BEST denied that for FY 2010-11, BEST will have a surplus energy of more than 1000 MU, considering the projected demand of BEST. BEST submitted that the requirement for BEST for FY 2010-11 has already reached 900 MW at T< >D Interface, which translates to 990 MW at generation terminal. BEST submitted that it will have a peak shortage of about 60 MW even with the PPA for 100 MW. BEST's maximum demand increased by 4.13% and 10.16% in FY 2010-11 over that FY 2009-10, while the energy drawal at T< >D interface has increased by 5.15% and 8.25% in FY 2010-11 as compared to April and May of FY 2009-10, respectively.
- f. BEST submitted that RInfra's argument that BEST does not require 100 MW power on round the clock basis for which the approval is sought, is wholly fallacious and therefore, liable to be rejected. BEST submitted that even with 100 MW, BEST has experienced a peak shortfall of capacity. At present capacity can be contracted only on round the clock basis. BEST submitted that there is also no specific provision in the MERC Tariff Regulations that licensees should not contract for power on round the clock basis. The contention of RInfra will therefore not only be deviation from license condition but also abdication of statutory responsibility as a distribution licensee. In this regard, the following observations of the Hon'ble Supreme Court in the aforesaid Judgment dated May 6, 2009, are reproduced below:

“While exercising its power of Regulation in relation to purchase of electricity and procurement process of distribution, it is not permissible for the Commission to direct licensees keeping in view their own need. Section 86



(1)(b) read with Section 23 if interpreted differently would empower the Commission to issue direction to the generating company to supply electricity to a licensee who had not entered into any PPA with it. We do not think that such a contingency was contemplated by the parliament. A generating company, if the liberalisation and privatisation policy is to be given effect to, must be held to be free to enter into an agreement and in particular long term agreement with the distribution agency. Terms and conditions of such an agreement, however, are not unregulated. Such an agreement is subject to grant of approval by the Commission”

BEST submitted that the above observation of the Hon'ble Supreme Court therefore, makes it abundantly clear that RInfra has absolutely no locus standi to file Intervention Application in respect of approval of PPA between BEST and TPC-G.

- g. BEST further submitted that in the past, RInfra had made an unsuccessful attempt to stall and defeat the approval of PPA between BEST and TPC-G for 800 MW of power. In view of the said Intervention by RInfra, the approval process for PPA of 800 MW of power was unduly delayed and ultimately the Supreme Court allowed the appeal filed by the BEST and TPC-G and the approval of PPA by the Commission was upheld. BEST added that RInfra is making a similar attempt to stall and frustrate the approval of the PPA between BEST and TPC-G for 100 MW of Power with malafide intention and to camouflage this act of defiance of Commission's Orders and also abdication of statutory obligations as a distribution licensee. BEST submitted that while RInfra has not entered into any PPA, it is attempting to torpedo the PPA entered into by another distribution licensee.
- h. BEST further submitted that capacity allocation cannot be done by the Commission and this has been made abundantly clear by the Hon'ble Supreme Court and there cannot be any other basis for such allocation other than the approved PPA. The only basis is the PPA which has been submitted to the Commission for approval. The party who submits the PPA has to justify its requirement of power whereas a party who does not submit the PPA is objecting to the approval of PPA submitted by another distribution licensee. RInfra has failed to comply with the directions and Orders of the Commission, and is seeking to be rewarded in terms of allocation of power, whereas BEST, who has taken all care to protect its consumers and has also



complied with the directions of the Commission, is sought to be deprived by RInfrac of its legitimate requirement of power. BEST submitted that the Commission has rightly observed in the Order dated April 24, 2007 in Case No. 75 of 2006, as under:

“As per Electricity Act, 2003 (terms and Conditions of Tariff) Regulation 2005 the Commission has no power to interfere regarding quantum of power for which licensee needs to enter into a PPA”

- i. BEST submitted that RInfrac is making a desperate attempt to stall the PPA of the BEST. If RInfrac is allowed to intervene in the said application, it would amount to granting premium to a consistent defaulter as against the BEST who has wholly and fully complied with the directions of the Commission and have also justified the PPA. Therefore, BEST prayed that the application for intervention be dismissed with exemplary cost.

9. Shri. N. Ponrathnam, an Authorised Consumer Representative for this matter, vide submission dated June 20, 2010, submitted that the Commission should verify the load growth of 6% per annum projected by BEST and added that BEST should furnish the reason for procurement of power only from TPC-G and not sourcing power from any other generation company, which may lead to a monopoly situation. He added that the migration of consumers from BEST to TPC-G has not been enumerated by the BEST, which indicates collusion between BEST and TPC-G for dishonouring the direction of the Commission's Order in Case No. 60 of 2009. Shri. Ponrathnam further added that the contracted power should be measured at G < > T interface and not at generation terminal, and that auxiliary energy consumption of the generator should not be loaded to distribution licensee. He added that liquidated damages in case of failure of the Generating Company to supply the contracted power should be included in the approved PPA. As regards RInfrac's intervention, Shri. Ponrathnam submitted that RInfrac has no locus to interfere in this issue and the Intervention Application should be rejected outright. He added that the Commission should approve the Power Purchase Agreement between BEST and TPC-G for 100 MW as there is no law that restrains any consumer from entering into an agreement for supply of power from a generator.

10. Shri. Raksh Pal Abrol, an authorised Consumer Representative for this matter, vide submission dated June 20, 2010, submitted that since RInfrac has not entered into any PPA with TPC-G, RInfrac has no *locus-standi* to intervene in the PPA entered into between BEST and TPC-G, in accordance with Section 86(1)(b) of the EA 2003 read with Regulation 24.1 of



MERC Tariff Regulations. Shri. Abrol submitted that the Commission should take stern action under the provisions of Section 142 of the EA 2003 against the Intervener RInfra, for trying to unnecessarily delay the approval of PPA between BEST and TPC-G, though the Supreme Court has already ruled out any relief to RInfra vide Order dated May 8, 2009 as they did not have any signed Power Purchase Agreement with TPC.

11. The second hearing in the matter was held on June 24, 2010 at 11:00 hours at Vista Hall, World Trade Centre, Cuffe Parade, Mumbai 400 005, in the presence of the Consumer Representatives authorised under Section 94(3) of the Electricity Act, 2003.

12. During the hearing, the Commission enquired from BEST regarding the status of power procurement for which the demand estimation and Bidding Documents for procurement of power in accordance with the Competitive Bidding Guidelines issued by Ministry of Power under Case 1 Bidding route had been approved by the Commission. BEST informed the Commission vide letter dated July 5, 2010, that the Commission had approved the draft Competitive Bidding Document vide its Order dated August 4, 2009 for the demand of 400 MW (+20%) estimated by BEST. BEST submitted that the tender for power procurement through Case I bidding was advertised on August 25, 2009. BEST submitted that during the pre-bid meeting with the prospective bidders, it transpired that BEST is likely to receive higher bids on account of the close delivery date, i.e., BEST was likely to get rates equivalent to short-term power purchases for the proposed long-term power procurement. BEST learnt that MSEDCL was also going ahead with their Competitive Bidding Process under Long Term Power Procurement Plan for 2000 MW (-20%, + 30%) and if BEST clubs its requirement with MSEDCL's requirement, BEST will stand to gain due to economies of scale. Moreover, the rates received by MSEDCL were comparable to the rates at which BEST is presently purchasing power. Meanwhile, on February 5, 2010, BEST entered into a PPA with TPC-G for an additional power requirement of 100 MW to meet the present peak hour shortages. BEST submitted that peak demand at T<>D interface was recorded as 900 MW in May 2010, which is above the generation capacity available under agreements considering this 100 MW at G<>T interface. In this context, BEST approached MSEDCL to forward this case to the Government of Maharashtra (GoM). BEST also requested Secretary, Energy, GoM vide letter dated June 24, 2010 to take up BEST's case before the Cabinet Sub-Committee of Energy for purchase of 300 MW surplus power from ongoing tender process of MSEDCL by BEST.



13. Having heard the Parties and after considering the material placed on record, the Commission is of the view that the broad issues for the consideration of the Commission are as under:

- a. Whether the demand profile of BEST justifies the entering of a PPA for 100 MW on RTC basis?
- b. Whether the proposed PPA for additional 100 MW capacity with TPC-G falls within the scope of the approval granted by the Commission for additional procurement of 400 MW ($\pm 20\%$) under the CBG Case I route?
- c. Whether the PPA for additional 100 MW capacity between TPC-G and BEST is being approved by the Commission?

14. As regards the first issue of whether the demand profile of BEST justifies the entering of a PPA for 100 MW on RTC basis, the Commission has already ruled on this matter in the Order dated August 4, 2009 in Case No. 33 of 2009 on BEST's Petition for approval of quantum of power purchase and deviations/references taken in Standard Bidding Documents for procurement of power on Long Term Basis (Case-I), as reproduced below:

"16. The Commission observes that the EPS Report published by CEA provides the demand forecasts for the entire State and not for each Distribution Licensee separately. BEST has a PPA with TPC-G for 833 MW, and because of the timing of its peak power requirement, it also procures certain quantum of power during the peak hours, and increments into the Balancing pool in the State during other hours. The actual peak of BEST during FY 2007-08 was 865 MW. BEST has projected the peak demand of 1022 MW excluding mill land area and 1230 MW including mill land area during FY 2011-12. Given that BEST is witnessing around 4 to 5% annual growth in demand, BEST's proposal to procure additional 400 MW with an option to procure +20% of 400 MW appears reasonable. Accordingly, the Commission approves the quantum as proposed by BEST for procurement through the competitive bidding process."

Further, the Commission has analysed the data submitted by the State Transmission Utility, i.e., Maharashtra State Electricity Transmission Company Limited (MSETCL), in its Petition for approval of APR for FY 2009-10 and determination of ARR for FY 2010-11 (Case No. 103 of 2009) regarding the peak demand met by BEST system over the period from April 2008 to September 2009, when BEST did not have the PPA for the additional 100 MW. The



data clearly shows that on quite a few occasions, the peak demand met by BEST system has exceeded the capacity contracted by BEST, excluding the 100 MW additional capacity for which BEST has sought the Commission's approval under the Petition in the instant matter, i.e., BEST's demand has been higher than 832 MW in the months of April to July 2008, October 2008, April to June 2009, and September 2009. With the demand increasing steadily, from the system demand point of view, BEST is justified in entering into a PPA for additional 100 MW of capacity.

15. As regards the second issue of whether the proposed PPA for additional 100 MW capacity with TPC-G falls within the scope of the approval granted by the Commission for additional procurement of 400 MW ($\pm 20\%$) under the CBG Case I route, it is necessary to study the terms of approval in the Commission's Order and the provisions of the Tariff Policy.

Clause 5.1 of the Tariff Policy notified by the Government of India stipulates:

"All future requirement of power should be procured competitively by distribution licensees except in cases of expansion of existing projects or where there is a State controlled/owned company as an identified developer and where regulators will need to resort to tariff determination based on norms provided that expansion of generating capacity by private developers for this purpose would be restricted to one time addition of not more than 50% of the existing capacity."

Accordingly, BEST submitted its Petition seeking the Commission's approval for procuring 400 MW ($\pm 20\%$) through the competitive bidding process, for a period of 25 years in addition to the already approved PPA with TPC-G for 832 MW. While approving the procurement of 400 MW ($\pm 20\%$) through the competitive bidding process in the above-said Order dated August 4, 2009 in Case No. 33 of 2009, the Commission ruled as under:

"16. ... Given that BEST is witnessing around 4 to 5% annual growth in demand, BEST's proposal to procure additional 400 MW with an option to procure +20% of 400 MW appears reasonable. Accordingly, the Commission approves the quantum as proposed by BEST for procurement through the competitive bidding process."

From the above, it would appear that BEST should have procured this quantum or part of this quantum (100 MW) through a transparent process of competitive bidding route, rather than directly from an identified source, viz., TPC-G. However, at the same time, it needs to be noted that the additional capacity of 100 MW is being offered by TPC-G from its existing generation capacity, and does not fall under any new generation capacity. As a result, it could



be inferred that the procurement of 100 MW from TPC-G is not violative of the aforesaid quoted provisions of the Tariff Policy. This capacity became available on account of TPC-G deciding not to supply 500 MW to RInfra with effect from April 1, 2010. Given the present demand being met by BEST, which has exceeded 832 MW in several months, the Commission is of the view that BEST's move to tie-up the additional capacity of 100 MW from TPC-G with effect from April 1, 2010, will actually help to protect the interest of its consumers in Mumbai Island city, and shields them from the fluctuations of the power exchanges, since this power is being sold by TPC-G to BEST at regulated rates determined by the Commission. Further, had BEST not contracted this additional capacity from TPC-G, then the capacity may have become spare capacity, and may have been contracted by TPC-G to sources outside the State, which would not have been in the best interests of Mumbai city.

16. However, the Commission takes serious note of the fact that though the Commission, vide its Order dated August 4, 2009 in Case No. 33 of 2009, accorded its approval to procure 400 MW of power through the competitive bidding process, BEST had not informed the Commission about its decision for not going ahead with the competitive bidding process and clubbing its requirement with MSEDCL's requirement of procuring the power through competitive bidding. The Distribution Licensee, after taking the approval of the Commission cannot decide to scrap the competitive bidding process of its own, that too without informing the Commission. The Commission directs the BEST to submit the detailed status of Competitive Bidding Process as the competitive bidding process initiated by MSEDCL has already been concluded and the BEST has been able to enter into PPA with TPC-G for only 100 MW as against plans of procuring 400 MW through the competitive bidding process.

18. The Commission has submitted a statutory reference to the Competition Commission of India under the provisions of Section 21 of the Competition Act, 2002 under letter dated 2nd August 2010, wherein the Commission has sought the opinion of the Competition Commission on certain issues, which is pending before the Competition Commission. Amongst other issues that the Commission has raised in the aforesaid reference for the opinion of the Competition Commission, the following two issues are extracted below—

“(i) Is the agreement between TPC and BEST to supply 100MW of electricity an “exclusive supply agreement”? If so, whether such an agreement causes or is likely to cause an appreciable adverse effect on competition keeping in view claims made by RInfra?”



“(j) Is it that BEST, despite having valid contract for procurement of power from TPC for several decades, ought not to have been given any preference for allocation of capacity of the generating stations of TPC keeping in view that RInfra has been procuring power from TPC for the last several decades? Would this constitute “refusal to deal”, causing or is likely to cause an appreciable adverse effect on competition?”

17. As regards the third issue, in accordance with the above analysis of issues (a) and (b), the Commission hereby approves the proposed PPA for additional 100 MW capacity between TPC-G and BEST, the clauses of which are identical to the PPA for 832 MW between TPC-G and BEST approved earlier by the Commission vide its Order dated November 6, 2007 in Case No. 87 of 2006, Case No. 88 of 2006, and Case No. 30 of 2007. This PPA will be valid for a period of 8 years, from April 1, 2010 to March 31, 2018, and will be co-terminus with the PPA of 832 MW approved earlier. This approval is subject to direction(s), if any, that the Commission may give upon receipt of the opinion of the Competition Commission of India having made the aforesaid statutory reference to it. Therefore, the Commission is not inclined at this stage to entertain the intervention of RInfra in the present case.

With the above observations and ruling, the Petition filed by BEST in Case No. 1 of 2010 is disposed of.

Sd/-
(V. L. Sonavane)
Member

Sd/-
(S.B. Kulkarni)
Member

Sd/-
(V.P. Raja)
Chairman



(K. N. Khawarey)
Secretary, MERC