

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 64 of 2011

In the matter of
Petition for extension of deadline of 5.1.2011 for Procurement of Power through
MoU Route

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

Maharashtra State Electricity Distribution Company (MSEDCL) Petitioner
Vs.

1. Principal Secretary (Energy), Govt of Maharashtra
2. Maharashtra State Power Generation Company Ltd. (MSPGCL)
3. National Thermal Corporation (NTPC)
4. Nuclear Power Corporation of India Ltd.(NPCIL)
5. Association of Power Producers (APP)
6. Independent Power Producer Association of India (APPAI) Respondents

The Tata Power Company Ltd. Intervenor

Present during the hearings

Advocate/ Representative for Petitioner :- Shri .Ajoy Mehta, MD, MSEDCL
Shri. Abijit Deshpande, ED, Commercial
Shri A.S Chavan,CE(PP)
Smt.Deepa Chavan,Advocate MSEDCL

Shri.Ruchir Wani, Advocate
Smt S.P .Vyavahare GM PP,MSEDCL

Advocate/ Representative for Respondent :- Shri G.J .Girase,Director(Finance) MSPGCL
Shri Sanjay Sen Advocate MSPGCL
Shri S.A .Nikalje MSPGCL
Shri Ramandeep Singh ,Consultant
Shri N.J Padalkar
Shri R.N.Pandy NTPC
Shri Sunil Kumar APP
Shri C.K.Jadhav GoM
Shri S.P Patil GoM
Shri Anil Nautiyal NTPC
Shri Abhijeet Dhamdhare IPPAI
Shri.C.S. Thotwe

Advocate/ Representative for Intervener:- Shri V.H.Wagle ,TPC
Shri A.Sharma, TPC

Consumer Representatives:- Dr. Ashok Pendse, TBIA
Shri .S.L,Patil, TBIA

ORDER

Dated: May 21, 2012

Maharashtra State Electricity Distribution Company Limited (hereafter referred to as "MSEDCL") filed a Petition for "Extension of deadline of 5 January 2011 for Procurement of Power through MoU Route" under the provisions of Sections 86(1) (k) and 86(4) of the Electricity Act, 2003. The following are the Prayers of the Petitioner:-

“

- a. *Approve the MoU based power procurement for the future projects of MSPGCL and NTPC and Extend the deadline of 5.1.2011 for power Purchase through MoU route with MSPGCL for a period of another 3 years till the time situation improves for a period of another 3 years till the time situation improves for the introduction of competition in state of Maharashtra .*

- b. NPCIL being a CPSU whose tariff will be determined by CERC ,the Hon'ble Commission may kindly approve the power procurement through MoU route from NPCIL.
- c. Condone any inadvertent omissions/errors /shortcomings and permit MSEDCL to add/change/modify /alter this filing and make further submission as may be required at a future date.
- d. Pass such further and other orders, as the Hon'ble Commission may deem fit and proper keeping in view the facts and circumstances of the case .

1. Submission by the Petitioner:

1.1 The Petitioner submitted that it is a company incorporated under the provisions of the Companies Act, 1956, having its registered office at Prakashgad, Bandra (E) Mumbai. The Petitioner further submitted that the State of Maharashtra has initiated an aggressive process of reforms in the power sector with an aim to achieve “availability” and “affordability” of electricity of high quality and reliability, for all the consumers through high level of efficiencies in operations and consumer satisfaction.

The Petitioner submitted that it is committed to supply quality and uninterrupted power supply to the consumers in Maharashtra. However, in recent times, the state of Maharashtra is facing significant shortage of power. In FY 2011, the state experienced a 19% energy deficit and 23% peak deficit. This shortage of power has affected the power supply situation with interruptions and power cuts becoming daily features. The Petitioner submitted year wise tabulation as given in the following table:

Table

Period	Peak Demand (MW)	Peak Met (MW)	Peak Deficit (%)	Energy Demand (MUs)	Energy Availability (MUs)	Energy Deficit (MUs)	Energy Deficit (%)
2007-08	15689	10412	34%	98172	81656	16516	20%
2008-09	15656	10715	32%	104520	82666	21854	26%
2009-10	16582	12414	25%	107789	88100	19689	22%
2010-11	17150	13268	23%	100774	93404	17370	19%

The Petitioner submitted that due to the burgeoning demand and existing power deficit, the Petitioner has to procure additional power to make the provision for power supply to the

consumers in Maharashtra. The Petitioner stated that it has used both the Competitive Bidding and MoU route for power procurement.

1.2 The Petitioner relied on the Tariff Policy notified on 6 January 2006 as follows

Clause 5.1 of the Tariff Policy notified on 6 January 2006 states:

“...All future requirement of power should be procured competitively by distribution licensees except in cases of existing projects or where there is a State controlled /owned company as an identified developer and where regulator 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.

“Even for the Public Sector projects, tariff of all new generation and transmission projects should be decided on the basis of competitive bidding after a period of five years or when the Regulatory Commission is satisfied that the situation is ripe to introduce such competition.”

Clause 5.2 of the Tariff Policy:

“The real benefits of the competition would be available only with the emergence market conditions. Shortage of power supply will need to be overcome...”

1.3 PPA signed by Petitioner under Competitive Bidding :

The Petitioner submitted that it has successfully completed bidding process of 2000 (-10% +15%) MW in the year 200 (Case 1 Stage 2). And 2000MW (-20% +30%) MW in June 2010 (Case I Stage 2). The Petitioner submitted a list of 7 Nos. PPAs signed with IPPs for projects having expected COD between August 2012 to April 2014 with levellised tariffs ranging between Rs 2.64/kWh to Rs 3.28/kWh.

The Petitioner further provided details of the following Competitive Bid Processes which were in progress:

Medium Term 2000 MW:

Technical Bids opened on 22 December 2010 and financial bid opened on 20 October 2011. Final hearing on the petition filed by Petitioner for 1000MW for tariff adoption was held by MERC on 30.March.2011. MERC gave “in principal approval” to the tariff and advised Petitioner to execute the PPA and submit the same to the Commission for adoption of tariff.

1.4 PPA signed by MSEDCL under MoU Route

The Petitioner submitted that it has signed the PPAs with MSPGCL and NTPC for their upcoming projects as follows:

MSPGCL

The Petitioner submitted that, as directed by the Commission, the Petitioner and MSPGCL have signed the Addendum to their existing PPA for 26 New Upcoming projects and have submitted the petition to the Commission for approval and hearing was held on 19 January 2011. The Petitioner submitted the list as above, of 26 Nos. Thermal as well as Gas fuel based projects of MSPGCL, having various generating capacities.

NTPC:

The Petitioner submitted that it has also signed the PPAs with NTPC through MoU route for their Upcoming Projects. The Petitioner submitted a list of 21 such thermal power generating projects of NTPC, having various Generating capacities

NPCIL:

The Petitioner submitted that it has requested for allocation of 1000 MW from the Units 3 and 4 of NPCIL's proposed 1400 MW Kakrapar Nuclear Power Project. The Petitioner submitted that as per the existing rules, the Tariff for the said Nuclear Power projects would be determined by CEA.

The Petitioner submitted that in conclusion of the above lists, it is seen that it has successfully contracted 5025 MW capacity from IPPs under Competitive Bidding route, and 14870 MW Capacity from MSPGCL and 3679 MW from NTPC under MoU Route.

1.5 The Petitioner submitted that most of the power projects of the State Generating Companies have the coal Linkage or Captive Block allocation. Hence, the tariff of these projects is relatively lower than tariffs quoted by the Bidders in the Competitive bidding Process. The Petitioner submitted that as per the Tariff Policy, to reap the real benefits of competition with the emergence of appropriate market conditions, shortage of power supply should be overcome. Under the situation of electricity shortage, power purchase only through competitive bidding route, does not work economically. As long as electricity supply does not match its demand, there is no incentive for competition.

The Petitioner further submitted that an essential condition for creating competition is that the procurer should have the choice of selecting the supplier to procure power through competitive bidding or through MoU route, so as to purchase power at an economical rate.

During the months of April 2010 and May 2010 wherein the demand-supply gap was more, The Petitioner had to procure short term power through competitive bidding at the highest rate of Rs 7.39 per unit. The Petitioner submitted that this incident goes to indicate that in order to address the shortage, the procurer has very limited options, and at times, has to procure power at very high price to overcome acute shortage of power.

1.6 The Petitioner submitted that the following uncertainties in the power procurement plan could lead to a shortage scenario:

- i) Projects considered are delayed/not materialized and
- ii) The Compounded Annual Growth Rate (CAGR) considered for demand growth shoots up considerably higher than the predicted 8% to 10%.

In the event of the above, the Demand – Supply Gap will increase and if one goes for Competitive bidding, the rates quoted could be much higher. The Petitioner submitted that considering the aforesaid, it will be in the interest of consumers that the Petitioner continues with the MoU based power procurement rather than going for Competitive Bidding.

1.7 Clarification /Amendments of Tariff Policy

The Petitioner submitted that, the Ministry of power has notified clarifications regarding Clauses 5.1 and 7.1 of Tariff Policy. The said clause 3 of the above clarification states as follows:

“...However ,in view of the decision taken in the meeting of the Group of the Minister(s) on Power Sector held on 29.10.2010,it is clarified that the following are exempted from the tariff based competitive bidding route.

(A) Generation (excluding hydro) projects of PSUs / CPSU:

(1)The expansion of already commissioned projects,

(2)Projects for which the PPA(s) have been signed on or before 5.1.2011

1.8 Financial Implications

The Petitioner submitted that it has been able to negotiate better rate under MoU route than under competitive bidding process. The Petitioner further submitted that MSEDCL has experienced that bidders under competitive bid process against Case I stage II have quoted much higher tariffs i.e Rs 2.88/kWh – Rs 3.28 /kWh as against Rs 2.64/kWh – Rs 2.71 in case I Stage II, and furthermore, the tariff quoted in other states by bidders has shown an increasing trend. In support of its argument as above, the Petitioner listed out the levellised tariffs discovered by procurers in Karnataka and Rajasthan which has been in the range of Rs 3.74/kWh to Rs 5.57/kWh.

The Petitioner further submitted that in comparison, its power purchase rate through MoU route from the MSPGCL plants of Paras U-4 (COD dated 31.8.10) and Parli U-7 (COD dated 31.7.10) is Rs 3/ kWh and 3.10/kWh respectively.

1.9 Power to extend MoU Route based Power Procurement

The Petitioner submitted that the Commission has the power to extend the deadline of 5 January 2011 for a period of another 3 years, till the time the situation improves for introduction of competition in the State of Maharashtra. In support of its submission, the Petitioner relied upon clause 5.1 of the Tariff Policy

The Petitioner submitted that it is a State controlled utility and the entire power generated by MSPGCL is sold only to the Petitioner till date. The Petitioner further submitted that NTPC and NPCIL, both are Central Sector Public Utilities. Hence, the Petitioner requested the Commission to treat the MoU route between MSPGCL, NTPC, NPCIL and the Petitioner on similar grounds.

2. Hearing in the matter was scheduled on 19 May 2011 at the Commission's office and the notice was accordingly sent to the Petitioner and the Consumer Representatives authorised by Section 94(3) of the Act.

2.1 At the hearing held as above, on 19 May 2011, Shri. Abhijit Deshpande, ED Commercial, MSEDCL, appeared on behalf of the Petitioner. The Petitioner requested for adjournment of the hearing to a future date as the legal counsels representing the Petitioner in the matter were not available.

2.2 The Commission observed that in its Petition, the Petitioner has made extensive reference to its PPAs with various IPPs in the country, the PPAs signed with MSPGCL which is a State controlled generating utility and the PPAs with NTPC, NPCIL which are Central Sector Power Generating Utilities. The Commission further observed that in view of the above, the issues brought out by the Petitioner in its petition needed to be considered in a comprehensive manner. Hence, the Commission directed MSEDCL to implead the following parties as Respondents:-

- i. Association of Power Producers (APP)
- ii. Independent Power Producers Association of India (IPPAI)
- iii. Maharashtra State Power Generation Company Ltd. (MSPGCL)
- iv. National Thermal Power Corporation (NTPC)
- v. Nuclear Power Corporation of India Ltd.(NPCIL)

The Commission directed Petitioner to serve copies of its petition on the above parties. The hearing stood over to 28 July 2011 on the request of the Petitioner as the legal counsels representing the Petitioner in the matter were not available.

3. The Petitioner filed an additional submission dated 15 July 2011.

3.1 In the said additional submission, the Petitioner confirmed of having impleaded the additional parties as Respondents, as directed by the Commission in the previous hearing, and confirmed that service is complete.

3.2 The Petitioner filed further submissions as follows:

3.2.1 The Petitioner submitted that along with MSPGCL it had submitted a petition in the matter of Case No. 103 of 2010 to the Commission, which was heard by the Commission and an Order was issued on March 30, 2011. The Petitioner submitted that vide the said Order, the Commission has approved 12 projects amounting to 5730 MW capacity, out of 26 Nos projects submitted for approval.

The Petitioner referred to the Judgment of the Hon'ble Appellate Tribunal for Electricity ("APTEL") in Appeal Nos 106 and 107 of 2009 filed by BSES Rajdhani Power Ltd (BRPL) and BSES Yamuna Power Ltd (BYPL) respectively, challenging the Order passed by Delhi Electricity Regulatory Commission (DERC) on 30th April 2009, wherein DERC had allowed the petition filed by North Delhi Power Ltd (NDPL) for the grant of approval to the PPA entered into between NDPL and Maithon Power Ltd (MPL) through MoU route .

3.2.2 The Petitioner submitted that the Commission has the power to decide whether the Petitioner should resort to competitive bidding or MoU route. The Petitioner submitted that the Commission may review the current power scenario as there is volatility due to deficit in the power sector, projects are not being commissioned as per their schedule. The Petitioner submitted that in its opinion, power procurement through competitive bidding route will be successful only when there is a "power surplus scenario" in the market and when the procurer has a choice of multiple sources of power at competitive rates. The Petitioner submitted that on the basis of the above submission, the Commission may allow the "cost plus" tariff mechanism which shall take care of the volatility in the power market.

The Petitioner further referred to Section 62(1)(a) and Section 63 of the Electricity Act 2003 and submitted that it was seeking approval / directions from the Commission under the same.

4. The second hearing in the matter was held at the Commission's office on 28 July 2011. Shri G.J .Girase, Director (Finance), MSPGCL, Shri Sanjay Sen, Advocate, Shri Ramandeep Singh, Consultant, appeared on behalf of the Petitioner (MSPGCL). Shri A.S Chavan, CE (PP), MSEDCL and Smt. Deepa Chavan, Advocate , appeared on behalf MSEDCL. Dr. Ashok Pendse and Shri.S.L Patil were present as Consumer Representatives.

4.1 The Petitioner referred to the Order issued by the Commission on 30 March 2011 in the matter of Case 103 of 2010, vide which, the Commission had approved 12 projects amounting to 5730 MW capacity, out of 26 Nos projects submitted for approval . The Petitioner submitted that exclusion of the projects of MSPGCL's Paras unit 5, Nashik unit 6 and Uran Gas based units 9 and 10 from the PPA (through MoU route) would affect MSPGCL severely. The Petitioner submitted that since MSPGCL is a state-owned existing generating company, it should be exempted from competitive bidding route. The Petitioner further submitted that there are 3 projects which are to be implemented through JV route but their implementation would be dependant on their approval by the Government of Maharashtra.

The Petitioner submitted its presentation on the status of preparedness of the upcoming projects of MSPGCL for approval of the PPA.

Further, the Petitioner submitted that as directed by the Commission, it will not be possible to insert the penalty clause in the existing PPA and that, it can be inserted in the contracts for those projects, for which the Purchase Orders are yet to be finalised.

4.2 The Consumer Representative, Dr. Ashok Pendse stated that, while the Tariff Policy had clearly indicated a cut-off date for adopting the Competitive Bidding route for power procurement, rather than the MoU rote, the decision in the matter as to whether the situation was right for making the change-over to the Competitive Bidding route as above, was left to the Commission. Dr Pendse also expressed the concern over the rising trend of electricity tariffs in the State.

4.3 The Commission directed MSPGCL to provide the Projects-wise scheduled PERT chart of those projects, the PPAs for which were not approved by the Commission in the said Order in the matter of Case 103 of 2010. The Commission also directed the Petitioner to submit its prospective paper and policy road map.

The Commission scheduled the next hearing in the matter on Friday 17 August 2011 at 11:00 hours and notice was accordingly sent to all concerned.

5. Submission by Association of Power Producers (APP):

APP, who had been impleaded as a Respondent, submitted a letter on 9 August 2011 to the Commission. In its letter, giving reference to the Petition submitted by the Petitioner on 6 April 2011 and subsequent additional submission of the Petitioner dated 15 July 2011, APP, *inter alia*, submitted as follows:

5.1 APP submitted that before the expiry of the 5 years period as stipulated in clause 5.1 of the Tariff Policy, the Government of India, Ministry of Power (GoM- MoP) on a request from NTPC for extension of deadline beyond 5 January 2011, sought statutory advice from CERC as to whether the deadline of 5 January 2011 for completing the transition to procurement of power through tariff based competitive bidding, even from State / Central Government entities should be extended. CERC, in its statutory advice vide letter dated 1 June 2010 stated that the deadline should not be extended any further and reiterated its advice to MoP vide its letter dated 16 September 2010, on the basis of project wise study carried out, that computed prices under cost-plus methodology, (even after computing conservatively), are higher than the levelled tariff discovered under competitive bidding in respect of 12 out of 14 projects examined in detail by CERC.

5.2 APP further submitted that it would not be supporting a regime where competitive bidding based tariff determination is adopted selectively in case of private players whereas the Central /State utilities continue on cost-plus basis. In its submission, APP further submitted that the case cited by the Petitioner regarding ATE judgment pertaining to the DERC order on Maithon project is presently before the Supreme Court and hence it would not like to offer any comments regarding the same.

6. The hearing in the above matter was held on 17 August 2011 at 11.00 hrs. Shri.A.S Chavan, CE (PP) of MSEDCL and Ruchir Wani, Advocate appeared on behalf of the Petitioner.

6.1 The Petitioner submitted that in the previous Hearing in the matter held on 28 July 2011, the Commission had directed the Petitioner to submit the project-wise scheduled PERT chart of those projects, the PPAs for which were not approved by the Commission in its Order in the matter of Case 103 of 2010. The Commission had also directed the Petitioner to submit its prospective paper and policy road map. The Petitioner stated that, it needed extension of timeline of four (04) weeks for submission of detailed pleadings and relevant documents.

6.2 The Commission granted the extension of timeline of four (04) weeks and directed that Government of Maharashtra (GoM) through Principal Secretary (Energy) as Respondent, be impleaded along with MSPGCL, NTPC, NPCIL, IPPAI and APP.

The Commission scheduled the next hearing in the matter on Tuesday, September 20, 2011 and issued notice to all concerned accordingly.

7. The hearing in the above matter was held on 20 September, 2011. During the hearing, the Petitioner requested for additional 4-week's time for submitting detailed pleadings and documents.

7.1 The Commission granted extension of 4 week's time and again reminded the Petitioner of the directive issued earlier to implead the Energy Department, GoM as a Respondents along with MSPGCL, NTPC, NPCIL, IPPAI and APP.

7.2 The Commission observed that the representatives of APP, NPCIL, NTPC and the Government of Maharashtra which were directed by the Commission to be impleaded as Respondents in the matter were not present for the hearing. The Commission further observed that, even though, the Commission had directed the Petitioner to implead the Government of Maharashtra (GoM) through the Principal Secretary (Energy) as a Respondent on 17 August 2011, the Petitioner had taken necessary actions only on 19 September 2011.

The Commission scheduled further hearing in the case on Thursday, 3rd November 2011 and accordingly, notice was sent to all concerned.

8. The hearing in the above matter was held on 3 November, 2011. Shri A. S. Chavan, C.E. MSEDCL and Shri Ruchir Wani, Advocate appeared on behalf of the Petitioner. Shri N.J Padalkar of MSPGCL, Shri R.N. Pandey of NTPC, Shri Abhijeet Dhamdhare of IPPAI, Shri Sunil Kumar of APP and Shri C. K Jadhav of Government of Maharashtra (through Principal Secretary, Energy), appeared on behalf of the Respondents in the matter.

8.1 The Petitioner submitted that it was not ready with its detailed pleadings and documents and needed further period of four (4) weeks for submitting the same as its Senior Advocate was out of town. The Petitioner further stated that the draft of its submissions was ready and the same was submitted by the Petitioner to the Commission for its record.

8.2 The Commission observed that CERC vide its letter of 16 September 2010 has stated that, the deadline of 5 January 2011 for completing transition to procurement of power through tariff based competitive bidding, even from State/Central Government owned entities should not be extended any further, except in case of large sized multipurpose storage hydro projects and peaking stations. The Commission further observed that the CERC's statutory advice to the Central Government, Ministry of Power may come in the way of the Petitioner.

8.3 The Commission observed that the Association of Power Producers (APP) has filed a petition with CERC in the matter of conduct of NTPC Ltd during October 2010 and 5 January 2011 in rushing to sign Power Purchase Agreements for supply of 37000 MW of electricity, abusing its dominant position, thereby causing adverse effect on competition in electricity industry” which has been admitted by CERC as Case 125 of 2011. The Commission observed that the said case may need to be examined in relation to the present matter before the Commission. Hence, the Commission directed the Association of Power Producers (APP) to submit to the Commission a copy of the petition in the said Case No. 125 of 2011, filed by APP with CERC, with a copy of the same to the Petitioner. The Commission also directed the Petitioner to file its detailed pleadings, documents and written arguments with copies served on the other parties, by 18 November, 2011.

8.4 The Commission observed that the Petitioner had entered into short term agreements with various power suppliers through Case 1 bidding on the basis that power from the proposed stations of MSPGCL, with whom it intends to make PPAs through MoU route will be available as scheduled. The Commission questioned whether any penalty clauses were in place to safeguard the Petitioner’s interests in case of any project commissioning delays.

8.5 The Commission directed the Petitioner to expedite filing of its pleadings, documents and written arguments. The Commission scheduled the next hearing in the matter on 25 November 2011.

9. As directed by the Commission, APP submitted a copy of the petition pertaining to its Case 125 of 2011 filed with CERC and submitted that a similar set of documents has also been served upon the Petitioner.

10. MSEDCL, (the Petitioner), vide its letter dated 17 November 2012 filed additional submissions in the matter.

10.1 In the said submissions, the Petitioner, *inter alia* submitted its views comparing the Tariffs fixed through Competitive bidding and those fixed through the MoU route, mainly emphasizing upon the “risk fixation” aspect in the two methodologies and concluding that the key difference emerges from the introduction of competition in the selection process which requires Developers to optimize capital and operating parameters to emerge as successful bidder.

10.2 The Petitioner, in its said additional submission, while commenting upon the letter of CERC dated 16 September 2010, to MoP, stated that for the said assessment carried out by CERC, gathering of accurate and reliable data regarding several capital and operating parameters and bidding strategy would indeed be a challenging task. Hence it would be necessary to carry

out a prudence check on the parameters assumed by the developer and it cannot be concluded that tariff under the Competitive Bidding route would be lower than that under MoU route.

The Petitioner further submitted that the critical parameters of all the projects vary from each other to a great extent and hence the costs involved and the tariffs arrived at would not be comparable.

The Petitioner concluded that in the current scenario there is a large supply-demand gap and the situation in Power market is not matured enough, and hence competitive bidding is not preferable. The Petitioner further submitted that, “post bidding alterations in bidding documents”, “following of non transparent procedures”, “all bidders forming a common front to quote high prices”, are some of the strong reasons due to which the tariffs arrived at, through the Competitive bidding method, may not be to the consumers’ benefit. The Petitioner submitted that an appeal has been lodged in the Supreme Court against the ATE order dated 31 March 2010 regarding upholding the decision of DERC, granting approval to PPA between NDPL and MPL for power supply through MoU route, and it is to be noted that the matter has not been “stayed” by the Supreme Court. The Petitioner, hence concluded that in the absence of such stay, the Order passed by ATE in the matter of Appeals 106 and 107 of 2009 is in force.

11. The hearing in the above matter was held on 25 November, 2011. Shri A. S. Chavan, C.E. MSEDCL and Ms Deepa Chavan, Advocate appeared on behalf of the Petitioner, MSEDCL. Shri N.J. Padalkar of MSPGCL, Shri E.P Rao of NTPC, and Dr. S. P. Patil, of Government of Maharashtra (through Principal Secretary, Energy) appeared on behalf of the Respondents in the matter.

11.1 The Petitioner submitted that the provisions under Sections 62 of the Electricity Act 2003 should be considered as substantive provision and those under Section 63 should be considered exceptional provisions, and hence both the routes of power procurement should be considered valid, till, as stated under item 5.2 of National Tariff Policy (NTP), the Commission decides that the conditions are opportune to permit power procurement only through competitive bidding. The Petitioner further pleaded that the NTP is statutory requirement under Section 3 of Electricity Act 2003 and not guiding principle for power procurement. The Petitioner therefore pleaded with the Commission to admit its Petition.

11.2 The Commission observed that several power plants in the private sector are in operation and several of them are under various stages of erection. The Commission cautioned the Petitioner against ignoring these generating capacities in favour of procuring power only under MoU route.

11.4 The Commission admitted the Petition submitted by the Petitioner and directed the Petitioner to submit a comprehensive list of upcoming and recently commissioned power projects in the State and in the neighbouring states as well. The Petitioner requested for 4 to 5 weeks' time to make the above submissions.

The Commission scheduled the next hearing on 12 January 2012 and accordingly, notice was sent to all concerned.

12. The hearing in the above matter was held on 12 January 2012. Ms S.P. Vyavahare GM PP, MSEDCL and Ms Deepa Chawan, Advocate appeared on behalf of the Petitioner, MSEDCL. Shri S.A.Nikalje of MSPGCL, Shri Anil Nautiyal of NTPC, and Shri Abhijeet Dhamdhare of IPPAI appeared on behalf of the Respondent No. 1, 3 and 4 respectively in the matter.

12.1 The Petitioner submitted that it is not the contention of the Petitioner to avoid competitive bidding altogether, but the law permits the procurers to use Competitive bidding methodology as well as MoU route as per Sections 62 and 63 of the Electricity Act, 2003. Therefore, the Petitioner would like to use both these methods which are legally available.

12.2 The Commission observed that many new power plants are coming up in the country, both in private as well as public sector. Therefore, selective approach for entering into PPAs without any consideration to market forces may not be in the interest of the consumers.

12.3 As directed by the Commission, the Petitioner submitted a list of forthcoming power projects within and around the State. The Commission reviewed the list of forthcoming power projects submitted by the Petitioner and directed the Petitioner to indicate the manner in which the generating capacity listed therein has been tied up for sale.

12.4 The Commission also directed the Petitioner to submit a road-map indicating its detailed plan of procurement, quantifying therein the intended quantum of power procurements through MoU route and through Competitive bidding route, separately, indicating clearly the period of such procurements. The Commission also directed the Petitioner to provide the following details, showing (for the next 5 years' period):

- a) The quantum of power required by the Petitioner.
- b) The long term power procurement tie-ups, duration of the same and source thereof.
- c) The Medium term power procurement tie-ups, duration of the same and source thereof.
- d) Petitioner's Road map to mitigate the gap.

12.5 Shri A. Sharma, appearing on behalf of Tata Power Co. Ltd.(TPC) made a submission to implead TPC in the matter. The Commission accorded its consent to the same and TPC was impleaded as an Intervenor.

12.6 With reference to its on-going cases regarding modality of Power procurement, NTPC stated that its Management has taken a decision to follow directions given by the MoP, as NTPC is a Central Government PSU.

The Commission scheduled the next hearing at 11 AM on 13 February 2012 and notice was sent to all concerned accordingly.

13. At the hearing in the above matter held on 13 February 2012 Shri A.S.Chavan CE(PP), MSEDCL appeared on behalf of the Petitioner. Shri S.A.Nikalje appeared on behalf of MSPGCL, Shri Anil Nautiyal appeared on behalf of NTPC, and Shri Abhijeet Dhamdhare appeared on behalf of IPPAI.

13.1 MSEDCL filed its submission vide letter No.: CE/PP/3896 dated 10 February 2012, in part compliance of the directive issued by the Commission in the previous hearing. MSEDCL further submitted that its Advocate was not available and sought time to make its legal submissions and arguments in the matter.

13.2 The Commission observed that the data submitted by the Petitioner was incomplete and all the details as directed needed to be submitted. The Commission further observed that in case the Petitioner relies heavily on making power procurements through PPAs entered into with the suppliers with scant consideration to its price, such practice was not in the interest of the consumers and hence such practice should be avoided, as the prices agreed to in such cases, could be out of alignment with the prevalent fair price of electricity Therefore giving approval to such PPAs without proper prudence check would amount to doing injustice to the Consumers. Therefore, in cases where Commission would come across prices too high without due justification or reason, when the PPAs are submitted to the Commission for Price determination, the Commission may have to carry out a thorough prudence check. Such detailed check, could perhaps prolong the entire price determination process, which would be incorrect . Therefore, it is essential for the Petitioner to take due care right from the beginning and introduce fairness and transparency in every aspect, thereby ensuring that the price agreed to, through MoU and tariff determination process, is in no way higher than the fair market prices.

13.3 The Commission allowed the Petitioner's request for granting time and directed the Petitioner and the Respondents that all pleadings, including affidavits, submissions, written arguments should be completed well before the next date of hearing. No further adjournments would be granted and the next hearing would be the final hearing.

The Commission scheduled the next hearing at 11 AM on 1 March, 2012 and notice was sent to all concerned accordingly.

14. At the hearing in the above matter held on 1 March 2012 Smt Deepa Chavan, Advocate, Shri A.S.Chavan CE(PP) MSEDCL and Shri Ajoy Mehta , MD, MSEDCL appeared on behalf of the Petitioner. Shri C.S .Thotwe MSPGCL and Shri G.J.Girase MSPGCL appeared on behalf of MSPGCL. Shri Anil Nautiyal appeared on behalf of NTPC, Shri Abhijeet Dhamdhare appeared on behalf of IPPAI and Shri V.H.Wagle , TPC appeared on behalf of the Intervenor, TPC.

14.1 The Intervenor, TPC, presented its views regarding the methodologies for procurement of power from new generating plants. The Intervenor stated that the cost of imported coal being higher than that of domestic coal, the competitive bidding methodology would not offer a level playing field for the imported coal projects, against the domestic coal based generating projects.

14.2 The Petitioner expressed that it had no every intention to encourage the process of reforms in the power sector. However, it requested the Commission to clarify whether MoU route was available to it for power procurement. The Petitioner MSEDCL and the Intervenor TPC undertook to make their respective written submissions in the matter in 2 weeks' time.

15. MSPGCL (Respondent No.1), filed its written submissions on affidavit on March 13, 2012.

MSPGCL, the Respondent No.1, in its said submission, referred to the orders of the Commission in the matter of Case 103 of 2010 and Case 71 of 2011. Vide the said Orders the Commission had accorded its approval to only a few of the MoUs signed between MSPGCL and MSEDCL for supply of power generated at MSPGCL's proposed power projects, as against MOUs of around 26 Nos. projects submitted for approval. MSPGCL further submitted that the Commission cannot direct the Petitioner to procure power only through Competitive bidding route based on the provisions of the National tariff Policy; and similarly the Commission cannot deny approval to the projects of MSPGCL for selling power through negotiated or MoU route. In supports of its argument, MSPGCL cited the example of the Hon'ble ATE judgment issued in the matter of Appeal Nos 106 and 107 of 2009, wherein the Hon'ble ATE had ruled that the State Commissions have been given discretionary powers either to choose Section 62, 62(1)(a) to give approval for the PPA or to direct the Distribution Licensee to resort to the Competitive bidding process as per clause 5.1 of the NTP read with Section 63 of the Act .

16. TPC (the Intervenor) vide its letter dated REG/MERC/12/71 dated 16 March, 2012, submitted as follows:

- TPC submitted its views regarding qualifying requirements for the Competitive bidding route and issues related with selection of projects for consideration through the said route.
- TPC further submitted that it was proposing to tie up for sale of around 1000 MW power to MSEDCL from its upcoming Dherand Project in Maharashtra and that GoM in support of the same, vide its letter dated 9 January 2012, had directed MSEDCL to consider procurement from the said Dherand project and present the same for the Commission's approval
- TPC further submitted that in the present Competitive Bidding Framework, considering the price Escalation in national/international markets, the Imported Coal Based Power Plants cannot compete with Domestic Coal based power plants in price, while there is perpetual uncertainty of availability of domestic coal. Further, projects selected through Competitive bidding route for long Term Supply have run through difficult times after being selected.
- The present legal framework permits the Commission to allow the MoU route projects and Competitive Bidding Based projects. The Commission should consider a mix of projects through both, Competitive Bidding Route and MoU Route .
- While granting its approval to the PPA, the Commission should give due weightage to the physical progress made at the site, especially the progress in land acquisition and Statutory Clearances.
- The Commission may consider extension of deadline of NTP by few years.

17. The Petitioner (MSEDCL) submitted its additional submissions on April 4, 2012. The said submission, is accompanied with a copy of a letter from PTC, addressed to the Petitioner, offering power from IPPs on long term basis through PPA and copies of letters from two competent jurists, offering legal opinion to PTC, in the matter of procurement of power by state utility through the MoU route.

17.1 In its submission, the Petitioner submitted that in the case where a PPA is signed through the MoU route,

- a) if the actual expenses are less than the approved tariff, the benefit of the same gets passed on through trueing up /supplementary orders.
- b) On the other hand, if the actual expenses are higher than those approved, then the Commission exercises prudence check to decide what is to be allowed to be recovered from the Consumers.

Therefore, in each case, the entire actual expenses are not allowed to be passed through, to the consumers.

17.2 The Petitioner further submitted that in case the power is procured through the Competitive bidding route,

- a) The profit accruing on the basis of adopted tariff is retained by the bidder /Generator. On the other hand, loss/additional expenses is sought to be recovered through supplementary claims.
- b) The Bidder is under competitive pressure to quote large part of his tariff under non -escalable head to get selected as the least cost supplier.

The Petitioner further referred to the study undertaken by CERC in 2010 wherein it had compared levelled tariffs discovered for 14 competitively bid projects vis-à-vis the cost –plus tariffs computed for the same projects based on CERC tariff regulations.

17.3 The Petitioner submitted that on the basis of the said studies, it was observed that for a particular case, the rates that could be discovered through MoU route were lesser than those discovered through the Competitive bidding route. The Petitioner further submitted that as per CERC, gathering accurate and reliable data regarding several capital and operating parameters for the said assessment and assessing the bidding strategy, was a challenging task, given that most developers would not be willing to share the same. MSEDCL submitted that, it was therefore obvious, that there could be absolutely no prudence check on the computation of tariff arrived at, through the CBG route.

The Petitioner further submitted that even in the tariff under Competitive Bidding process, the actual price the consumer pays depends on the escalation rates of coal cost, etc.

The Petitioner submitted that it cannot, therefore be concluded that Tariff under the competitive bidding route would be lower than that through the MoU route without carrying out a prudence check on the parameters assumed by the developer.

17.4 The Petitioner further submitted that, MSPGCL in the submission to the Commission in the matter, has given reference of the letter dated 17 November 2011 from GoM stating that the power produced with the coal received from captive coal blocks allocated by Central Government to MSPGCL, should be supplied to the Petitioner only, and PPA for the same be executed, and approval of the said PPA be sought from the Commission. The Petitioner submitted that the same essentially means that the power projects of the MSPGCL (Respondent No. 1) using such coal necessarily have to supply power to the Petitioner only, for further distribution to the consumers in the State of Maharashtra. The Petitioner further submitted that the same cannot be achieved if the Petitioner resorts to procure power through Competitive Bidding Route. The Petitioner submitted that MSPGCL, in its said submission, has further submitted that the Commission cannot ignore the said fact, and that, the fact that the MoU route for determination of tariff is always available to the Petitioner and the Respondent No 1.

Commission's Views

18. The Commission is of the view that it will not be appropriate to make any reference to the petition filed before the CERC by the Association of Power Producers (APP) against NTPC (Petition 125/MP/2011) in the matter of "Signing of PPAs by NTPC Ltd. During the period October 2010 to 5 January, 2011 for supply of 37000 MW of electricity, thereby abusing its dominant position and causing adverse effect on competition in Electricity sector" as the said case is sub-judice.

19. Similarly, the Civil Appeal in Supreme Court filed by the Union of India against the judgment of the Hon'ble ATE in the matter of Appeal No.s 106 and 107 of 2009 of BSES Rajdhani Power Ltd and BSES Yamuna Power Ltd is also subjudice. However, since there is no stay order by the Hon'ble Supreme Court on the judgment of the Hon'ble ATE in the matter of Appeal Nos 106 and 107 of 2009, the judgment of the Hon'ble ATE operates. To recapitulate, Hon'ble ATE in its said judgement dated 31 March, 2010 in the matter of Appeal 106 and 107 of 2009 inter alia held as follows:

- a) The Hon'ble ATE upheld the conditional approval given by the State Commission (DERC) vide its order dated 30 April 2009, to the PPA between NDPL and MPL for supply of 300 MW power through MoU route, only as far as the terms and conditions of contract were concerned, as the responsibility of determination of Tariff for the said transaction vested with the CERC in conformity with Rule 8 of the Electricity Rules 2005.
- b) The Hon'ble ATE has further upheld the stand taken by the said State Commission (DERC) in its order, whereby, it has amply been made clear that the said PPA will be effective only after the tariff has been fixed by the Central Commission.
- c) The Hon'ble ATE has held that , "The State Commission has rightly pointed out that Section 62(1)(a) and Section 63 are alternative methods available to the Appropriate Commission to adopt either of the procedures prescribed under Section62(1) and under Section 63 of the Act in relation to the determination of tariff."
- d) Regarding exemption from clause 5.1 of NTP, the Hon'ble ATE has held that:

"In regards to the third aspect it is to be stated that clause 5.1 of the NTP which relates to the power under Section 63 of the Act cannot to be read to debar the State Commission from exercising its statutory power for the determination of the under Section 62(1) of the Act for all future procurement of power...."

"...The State Commissions have been given discretionary powers either to chose Section 62,62(1)(a) to give approval for the PPA or to direct the distribution licensee to

resort to the Competitive Bidding Process as per clause 5.1 of the NTP read with Section 63 of the Act”

“...it is purely a decision of the State Commission to decide whether to approve a negotiated tariff for the NDPL(R-2) under Section 62 or to direct the licensee to adopt the Competitive Bidding Process under Section 63 read with clause 5.1 of the NTP.”

e) The Hon’ble ATE also upheld the directive of CERC given in its Order of 17.01.2007 in the matter, advising MPL to approach the Central Government to seek its views as to whether it was exempted from the applicability of Clause 5.1 of the Tariff Policy of the Government.

20. The Commission, during various hearings in the present matter, has emphasized that it would be guided by the principles of reforms in the power sector as spelt out in the Electricity Act 2003 and the National Tariff Policy. The Commission observes that two distinct methodologies for arriving at the Tariff have been presented vide Sections 62 and 63 of the Electricity Act 2003. The Commission, also however observes, that the spirit of Reforms that has been heralded through the Act, can be implemented only through the subordinate legislations such as Rules, Regulations and the National Policies.

While the intent of the Electricity Act is towards heralding power sector reforms and towards encouragement of investments in power sector and market determination in electricity tariffs, Clauses 5.1 and 5.2 of the Tariff policy indicate the preferred methodologies to be used for the same. The Commission would like to go by the Act, and further, with common law principles.

21. The Commission observes that the Hon’ble ATE in its judgment as above in the matter of Appeal Nos 106 and 107 of 2009, has recognized the fact that the State Commissions have been given discretionary powers either to chose Section 62, 62(1)(a) to give approval for the PPA, or to direct the distribution licensee to resort to the Competitive Bidding Process as per clause 5.1 of the NTP read with Section 63 of the Act. Further, the Hon’ble ATE has also stated that, it is purely a decision of the said State Commission, to decide whether to approve a negotiated tariff for the NDPL(R-2 in the said matter) under Section 62 or to direct the licensee to adopt the Competitive Bidding Process under Section 63 read with clause 5.1 of the NTP.

The Commission accordingly observes that the Electricity Act clearly specifies the two routes namely, the determination of tariff through MoU route as per Section 62 of the Act and the tariff discovery route through competitive bidding through Section 63 of the Act. The Commission however, observes that using the MoU route for procuring power without any consideration to price thereof, does not augur well for the consumers. The policy of entering into

such MoUs has also been questioned by the Consumer Representative during the hearings in the present case. The Commission observes that such PPAs do indeed provide a sense of comfort to the generator (in costing and in implementation of the project) as the market is secured for its product without any consideration to price of the product.

22. Petitioner has submitted that to a limited extent it has been procuring power from the IPPs through the competitive bidding route. However, in its submissions, the Petitioner has brought out the problems experienced in various states while following the process of competitive bidding and has thereby indicated its non-preference to the route of procurement of power through competitive bidding. The Commission observes that such issues need to be addressed in a proactive manner by the utilities.

23. In all cases, where the projects have reached reasonable level of completion as per the criteria that the Commission has already specified in its Order in Case 103 of 2010, the Commission would grant its approval to the said PPAs after due scrutiny. Such approvals would clearly be, to the “Terms and Conditions”, and not to “price” as the Petitioner and the supplier would not have submitted price for approval of the Commission at that stage. For the PPAs as above which have been entered into, on MoU basis, and the cases are filed before the Commission for determination of tariff on Cost plus basis, the Commission would like to apply critical prudence checks while examining such proposals. The Commission is expected to examine the fairness, transparency and competitiveness of the terms, conditions and finally the price, as also the benefits of entering into a PPA, as against, alternatively following Competitive bidding route as recommended by the Electricity policy.

24. During the hearing held on 25 November, 2011 and on 12 January, 2012, the Commission had made a suggestion that the Petitioner should choose a combination of projects through MOU route and through Competitive Bidding route. The Commission had therefore, directed the Petitioner to submit the details as follows:

- a) The quantum of power required by the Petitioner for the next 5 years’ period
- b) a comprehensive list of upcoming and recently commissioned power projects in the State and in the neighbouring states, and to indicate the manner in which the generating capacity listed therein have been tied up for sale, and the quantum and type of tie-ups with MSEDCL
- c) a road-map indicating its detailed plan of procurement, quantifying therein the intended quantum of power procurements through MoU route and through Competitive bidding route, separately, indicating clearly the period of such procurements.
- d) Petitioner’s Road map to mitigate the gap between the demand projections and resourcing projections of the power as above

25. Vide its submissions dated 9 January, 2012 and 10 February, 2012, the Petitioner submitted the list of upcoming and recently commissioned power projects in the State and in the neighboring states, and the quantum and type of tie-ups of the said capacity with the Petitioner. However, the Commission has observed that the Petitioner has not given a detailed road map regarding the quantum of power required by the Petitioner for the next 5 years' period, and a road map indicating therein a balanced approach towards satisfying the demand, and mitigating the gaps through short term, Medium term and long term procurements at competitive rates. The Commission will use its discretionary power to direct the Petitioner to use either the MoU route or the Competitive bidding route as per merit of the case. The Petitioner is advised to make a proper power procurement plan considering its load demand over the future period and ensure that the said long term power procurement plan is balanced in such a manner that the procurements are carried out at the most competitive rates.

26. The Commission is of the view that the prayers made in the present petition are premature at this stage. The Commission will need to take a view, on a case to case basis when the PPAs are submitted for approval. It is obvious that the rate of power purchase would be closely related to all the terms and conditions agreed to and all the costs, prices and escalation formulae for each and every item, which are agreed to. Hence the Petitioner is advised that it would be better to inculcate transparency and fairness in each and every dealing of the project.

Therefore at this stage the question of taking a view that the mandate in the Tariff Policy for distribution licensees to undertake competitive bidding process should or should not be exempted, does not arise

Accordingly, Case No. 64 of 2011 is disposed of.

Sd/-
(Vijay L. Sonavane)
Member

Sd/-
(V. P. Raja)
Chairman