

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
World Trade Centre, Centre No.1, 13th Floor, Cuffe Parade, Mumbai – 400 005
Tel. 022 22163964/65/69 Fax 22163976
Email: mercindia@mercindia.org.in
Website: www.mercindia.org.in

Case No. 71 of 2011

In the matter of

Petition for Review of an Order dated 30th March 2011 (Case No. 103 of 2010) in the matter of approval of the Addendum to the Power Purchase Agreement dated 1st April 2009 signed between MSPGCL & MSEDCL.

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

Maharashtra State Power Generation Company Limited.	Petitioner
Maharashtra State Electricity Distribution Company Limited	...	Respondent

ORDER

Dated: 30th November, 2011

Maharashtra State Power Generation Company Limited (MSPGCL) submitted a review Petition under affidavit before the Commission on 16th May 2011, for review of the Order dated 30th March 2011 (Case No. 103 of 2010) issued by the Commission in the matter of “approval of the Addendum to the Power Purchase Agreement dated 1st April 2009 signed between MSPGCL & MSEDCL”. The following are the prayers of the Petitioner:-

“

- a. *review the findings in relation to the denial of inclusion of Paras 5, Nashik 6 and Uran Unit 9 and Unit 10 projects in the schedule/addendum to the existing Power Purchase Agreement (PPA) dated 01.04.2009 and direct that the said projects be included in the addendum to the PPA and approved accordingly;*
- b. *review the observation with regards to the execution of PPA with separate project entities for being implemented under JV route and direct inclusion of such projects in addendum to the PPA, along with suitable clause that enable assignment of such PPAs to the project vehicle at future date if necessary; and*
- c. *review and recall the direction to incorporate back to back penalty clauses in relation to projects for which contracts have been placed.*
- d. *Pass such further Order(s) as it deems just, fit and proper in the facts and circumstances of the case.”*

2. The Commission observed that Maharashtra State Electricity Distribution Company Ltd. (MSEDCL) was the Original Petitioner in Case No. 103 of 2010. The Commission further noticed that the present Petitioner (MSPGCL) had not impleaded MSEDCL as a party to the said Petition in the present matter. The Commission, therefore, instructed the Petitioner vide letter dated 23rd May 2011 to implead MSEDCL as a necessary Party to the Petition.

In response to the Commission’s letter, the Petitioner, vide its letter dated 6th June 2011 informed the Commission that it had no objection towards impleading MSEDCL as a necessary party to the Petition and also requested the Commission to issue notice to MSEDCL .

3. In its Petition, the Petitioner made the following submissions:

3.1 The Petitioner submitted that there are errors relating to legal provisions which have been applied by the Commission while passing the Order in Case 103 of 2011. It is further submitted that the Commission has failed to correctly appreciate the records/material available to support inclusion of all projects of the Petitioner in the

addendum to the PPA dated 1st April 2009 and therefore, the Petitioner has sought review and re consideration of the following issues, :

- a. Non inclusion of certain projects in the schedule / addendum to the existing PPA
- b. Requirement of creation of a separate corporate entity and executing PPAs with such entities for projects purportedly being implemented under JV route and
- c. Direction of the Commission to incorporate back-to-back penalty clause in relation to projects for which contracts have been placed with BHEL.

3.2 The Petitioner further submitted that, Paras Unit 5, Nasik Unit 6 and Uran Unit 9-Unit 10 projects of the Petitioner were earlier not considered eligible by the Commission for inclusion in the PPA after applying the eligibility criteria of paragraphs 13(a) and 13(b) of the said Order. The Petitioner, reproduced the said paragraphs of the Commission's Order in Case 103 of 2010 elaborating the said criteria, viz., adequate progress regarding site identification and land acquisition, environmental clearance for the power plant, forest clearance (if applicable), fuel linkage and water linkage; and further submitted that, while the Commission had formed a joint committee comprised of members representing MSEDCL and MSPGCL along with the members representing the Commission, the report did not take into account the opinion / views of MSPGCL's representatives and only reflected the stand of the members representing the Commission.

The Petitioner further submitted that the eligibility criteria set out in the said Order in Case 103 of 2010 by the Commission to exercise regulatory jurisdiction for approval of PPA are neither based on any provisions of the Electricity Act 2003 nor any Regulations framed by the Commission. The Petitioner further submitted that the Commission, for the first time has set out the said rules for approval and applied the same.

The Petitioner further submitted that there were several other instances where PPA has been executed prior to acquisition / possession of land area. These projects have been approved both by the State Commission as well as the Central Commission. The Petitioner submitted that land acquisition was typically a condition subsequent to financial closure and it is a pre-disbursement condition. The Petitioner, in its submission went ahead

to explain the status of availability of land for its projects covered under the Petition, which has been covered in detail in later part.

The Petitioner also presented the status regarding the Environmental clearance for the said projects and stated that for the expansion projects covered under the said Petition, the issue of environmental clearance was less significant and with fewer uncertainties. The Petitioner further submitted that it has taken steps to secure approval from various authorities under the existing laws /regulations. The Petitioner further submitted that in the light of the said documents, which are material facts and circumstances of the present case and not presented before the Commission during pendency of Case 103 of 2010, being subsequent development, the findings of the Commission need to be revisited.

3.3 The Petitioner further submitted that the purported reliance of the Commission on clause 5.1 of the National Tariff Policy (NTP) , with regards to the expansion plans of the Petitioner, was unreasonable and did not apply to projects that are being implemented under the cost-plus route. The Petitioner further submitted that the said clause of the NTP was applicable to the private developers who were engaged in development of projects under the bidding route and did not apply to projects being developed in the present case.

3.4 The Petitioner submitted that in the present case the action of the Commission, of excluding the projects under reference, has resulted in regulatory uncertainty, and is likely to affect the implementation of the PPA. The Petitioner submitted that by retaining the projects as a part of schedule/ addendum for approval, there is no risk or financial burden either on the procurer i.e. MSEDCL or the consumers at large. Hence, it is prayed that based on the information that has now been made available to the Commission, the Order dated 30th March 2011 in Case 103 of 2010 may be reviewed for inclusion of the projects in the present addendum without the requirement of filing a separate addendum ..

3.5 The Petitioner further submitted that the documents filed along with the present petition could not be produced before the Hon'ble Commission during the pendency

of Case No. 103 of 2010, as in some cases the same were located in field areas and secondly there are certain documents which were non-existent earlier, thus could not be collated. The Petitioner prayed that the Commission may take on record the said documents and proceed towards revisiting its earlier findings, which, in the opinion of the Petitioner, are clearly an error apparent on the face of record, in the impugned Order.

3.6 As regards the second issue regarding projects coming up from the JV-Public Private Participation route, the Petitioner submitted that, as on date there is no final decision on implementing these projects on joint venture basis, which involves selection of strategic partner etc. The Petitioner submitted that the projects are to be primarily developed by the Petitioner on the basis of financial strength and technical expertise as a Generation company. The decision whether or not to implement these project on Joint venture basis is a policy issue which is subject to the final approval of the State Government and also subject to the provisions of the Companies Act, 1956. The Petitioner submitted that, this in no case affects the regulatory jurisdiction of the Commission to approve Power Purchase Agreement executed between the Petitioner and MSEDCL. The Petitioner further reasoned that the Commission cannot base its findings on a condition which is subsequent and not in control of the Petitioner.

The Petitioner submitted that an appropriate assignment clause can be incorporated in Order to ensure that the Power Purchase Agreement is capable of being assigned to the Special Purpose Vehicle (SPV) for project implementation at a future date, subject to Government approval. The Petitioner further submitted that, in case of demerger or carving out any project/ unit from the Petitioner Company, appropriate steps would be taken under provisions of Section 391 to 394 of the Companies Act, 1956. The Petitioner submitted that the Hon'ble High Court has to approve the scheme of demerger, which will include the manner in which all assets, contracts, employees etc. will be transferred. The Petitioner submitted that this is a separate procedure under Corporate laws and as such, cannot be the reason for withholding consent for projects which are presently envisaged in the books of the Petitioner. The Petitioner submitted that, in its opinion, and as reasoned above, the Commission clearly misapplied the legal provisions and came to a wrong conclusion in this context. The Petitioner submitted that in its opinion, the said findings, in Paragraph 15 of the impugned Order dated 30.03.2011, are thus, an error apparent on the face of record.

The Petitioner further submitted that the Petitioner Company has already taken steps to initiate land acquisition process and preliminary discussions with the land owners were held on 15.11.2010. The Petitioner submitted that, it has already submitted its proposal to the Ministry of Environment & Forest regarding the TOR/EC for its Joint Venture Project (Dondaicha) in Sindhkheda Taluka in Dhule District. The Petitioner further submitted that for the JV projects, it has taken substantial steps towards Environmental and other clearances and for acquisition of land, copies of relevant documents regarding which, are annexed along with the said Petition.

3.7 The Petitioner submitted that as regards the issue of back to back penalty clause pertaining to the projects for which contracts have been executed, it was not possible to reopen such contracts for allocation of risks in the event of delays. The Petitioner submitted that a back to back clause would mean that the risk of delay has to be borne solely by the Petitioner without the ability of the Petitioner to transfer such risk to the EPC contractor. The Petitioner submitted that the Commission has failed to recognize this practical difficulty in allocation of risks at this late stage, for projects which are under implementation. The Petitioner further submitted that in EPC contracts already negotiated and / or executed, the owner is only entitled to claim liquidated damages, which amount is always capped. The Petitioner reasoned that, the generator cannot take any risks of penalty arising as a result of the contractor's delay beyond the liquidated damages specified in the contract. The Petitioner submitted that, in its recent judgment dated 27th April 2011, in Appeal No. 72 of 2010 and judgment dated 27th April 2011 in Appeal No. 99 of 2010, the Hon'ble ATE has taken a more practical view which involves appreciation of facts and ground realities. The Petitioner submitted that the Hon'ble ATE has created a matrix for allocating the risks based on the factual position and not based on a back to back penalty, which will only burden the Generator. The Petitioner submitted, that as reasoned above, the Commission may reconsider/ review the direction, of the impugned Order, regarding incorporation of back to back penalty clause in the PPA, for projects under implementation and for which penalty cannot be allocated / transferred to the contractor since the contracts have already been executed and cannot be reopened. The Petitioner submitted that in its opinion, the said direction of the Hon'ble Commission was burdensome, unreasonable and an error which is apparent on the face of record and cannot be implemented retrospectively for projects under implementation, and thus, the same requires re-appreciation.

4. Hearing:

4.1 The Commission scheduled hearing in the matter on 28th July, 2011 at 11.00 hrs. Notices were accordingly sent to the Petitioner MSPGCL, the respondent MSEDCL and the four Consumer representatives authorized under Section 94(3) of the Act. During the said hearing , Shri G.J. Girase, Director (Finance) of MSPGCL , Shri Sanjay Sen, Advocate and Shri Ramandeep Singh, Consultant, appeared on behalf of the Petitioner (MSPGCL). Shri.A.S Chavan, CE (PP) of MSEDCL, and Ms Deepa Chavan, Advocate, appeared on behalf of MSEDCL. Dr.Ashok Pendse and Shri. S L Patil were present as Consumer Representatives.

The Petitioner stated that exclusion of MSPGCL's projects Paras unit 5, Nashik unit 6 and Uran gas Unit 9 and Unit 10 from the PPA (through MoU route) would affect MSPGCL severely. Since MSPGCL is a State owned existing generating company it would be exempted from competitive bidding route. Further, MSPGCL submitted that the penalty clause cannot be inserted in existing PPA whereas it can be inserted in the contracts for the projects for which the Orders are yet to be finalized. Also, MSPGCL stated that there are 3 projects with JV route but execution of these projects depends upon the approval of the Government of Maharashtra. MSPGCL submitted a power point presentation on preparedness of the upcoming projects for the approval of PPA.

Consumer Representative Dr. Ashok Pendse stated that the Judgment is left with the Commission whether to allow MSPGCL to adopt MoU route or Competitive Bidding route and expressed the concern over the increasing project cost of MSPGCL units and the increasing tariffs.

The Commission directed MSPGCL to provide the Project wise Project Management Schedule or PERT chart of the projects which were excluded from approval accorded by the Commission for the said PPA. The Commission further directed MSPGCL to submit the Prospective paper and Policy Road map. The Commission also asked the Committee formed earlier in Case 103 of 2010 to take a progress review of the said projects

The next hearing in the matter was scheduled on 12th August, 2011 at 16:00 hrs

4.2 As per the direction of the Commission, the earlier Committee formed in Case 103 of 2010 held a meeting on 3rd August 2011 with MSPGCL officials to review the progress of projects. As agreed in the said review meeting, MSPGCL submitted the required supporting documents and Project Management Schedules charts for these projects.

4.3 During the hearing in the matter held on 12th August, 2011 at 16:00 hrs. Shri G.J. Girase, Director (Finance) of MSPGCL, Shri Sanjay Sen, Advocate, and Shri Ramandeep Singh, Consultant, appeared on behalf of the Petitioner (MSPGCL). Shri.A.S Chavan, CE (PP), MSEDCL appeared on behalf of the Respondent, MSEDCL. The Petitioner stated that substantial progress has been achieved, and the guidelines for approval of PPA in Case 103 of 2010 should be applied while considering these projects, as well. The Petitioner further stated that the Ministry of Coal has allotted Coal mines and allocation letter for the same states that, the coal from these mines should be used to generate the electricity for Maharashtra State. The Commission directed the Petitioner to submit documents of Ministry of Coal supporting its statement regarding the Coal allotment and its use in the Maharashtra state.

4.4 During the hearing in the matter held on 25th August, 2011 at 15.00 hrs. Shri G.J. Girase, Director (Finance) of MSPGCL, Shri Sanjay Sen, Advocate, and Shri Ramandeep Singh, Consultant, appeared on behalf of the Petitioner (MSPGCL). Shri.A.S Chavan, CE (PP), MSEDCL appeared on behalf of the Respondent. The Petitioner stated that it would require time to submit the said documents pertaining to the Coal allotment and its use in the Maharashtra state and proposed to file an appropriate affidavit in this matter subsequently.

4.5 Next hearing in the above matter was held on 19th September, 2011 at 17:00 hrs. Shri J.K Srinivasan, ED (Finance) of MSPGCL, Shri C.S Thotawe, Director Projects MSPGCL and Shri Hemant Singh, Advocate, appeared on behalf MSPGCL. Representatives of the Respondent, MSEDCL were not present. The Petitioner submitted that the documents to be submitted as proof of allocation of Coal supply for the proposed thermal projects and those regarding approved policy of the State Government for implementation of projects under JV route, were not ready and that, further period of about

2 weeks would be required to submit these documents. The Commission observed that the Petitioner had made no progress in the matter in spite of the period of about 4 weeks that was granted after the earlier hearing held on August 25, 2011. The Commission granted further time of 2 weeks as requested by the Petitioner. The next hearing in the matter was scheduled to 4th October 2011.

4.5 On October 4, 2011, on request of Advocate for the Petitioner, the hearing was further re-scheduled, to November 11, 2011 at 12:30 hrs.

4.6 At the hearing held on 11th November 2011, Shri J. K Srinivasan (E D Finance, MSPGCL), Shri Sanjay Sen, Advocate, and Shri Ramandeep Singh, Consultant, appeared on behalf of the Petitioner (MSPGCL). Shri.A.S Chavan, CE (PP) of MSEDCL appeared on behalf of MSEDCL. None of the Consumer Representatives authorized under Section 94(3) of the Act were present. The Commission enquired whether there was any progress in any of the projects under reference. MSPGCL made a detailed presentation regarding the present status of various projects covered in the present Petition. The details brought out in the said presentation and discussions with MSPGCL, are as follows

4.6.1 Uran Block I and II, Natural Gas based Combined Cycle Project : The said project is proposed to be located adjacent to MSPGCL's existing Gas Turbine based generation plants at Uran. Block I will be of 406 MW and Block II will be of 814 MW. The land required for the project is already in possession of MSPGCL. Environmental clearance for the project has already been obtained from MoEF, based on Rapid Environmental Impact Assessment prepared by M/s. NEERI, Nagpur. Forest clearance is not applicable.. NIT has been issued for procurement of gas from open market . Technical bid evaluation is under progress and simultaneously an application has been made to the Govt of India for allocation of Gas through the Administered Price Mechanism (APM). The Government of Maharashtra has granted approval and total Equity infusion of Rs 915 Crores has also been sanctioned . Regarding the 80% Debt funding , sanction has been received from PFC, REC and HUDCO. EPC Bids were received on 08.07.2011 and technical bids were opened on the same day. LoA (letter of Acceptance) will be issued simultaneously for EPC and gas. Block I is expected to be completed in 30 Months from the date of LoI and Block II in 33 months from the date of LoI.

4.6.2 Nashik 1 X 660 MW project. : 2 old units of 125 MW de-rated capacity each, at Nashik have been retired and the proposed 660 MW unit will replace the retired capacity of MSPGCL. The new unit will be located close to the existing thermal generating units of MSPGCL, beyond the Railway siding, where presently, old housing quarters are located. The said housing quarters will be demolished to create adequate free place for erection of the new 660 MW unit. Coal handling plant and all other facilities will be separately created at the said site. MoEF has issued the TOR (No. J-13012/40/2011-IA. II(T) dated 15th June 2011 and, M/s. Mitcon Ltd., Pune has been appointed as Consultant for conducting Rapid Environmental Impact Assessment studies . One season data monitoring is in process and it is expected to be completed by December 2011. Coal linkage is available from Mahanadi block as per M/s Mahaguj .(Letter No. ED/Mahaguj /031 dtd.18th May 2011), which is expected to be ready by 2015. The requirement of about 17 MCM /per annum of water for the new thermal plant is expected to be met from Gangapur dam. Water Resource Department (WRD) of GoM has issued its letter dated 12th Jan 2011. The State Cabinet has accorded its approval for the said plant on 9th November 2011. Financial provisions for equity infusion are to be made. These will be followed up by Debt arrangement and financial closure. The plant is expected to be commissioned in 51 months from the date of LOI, which can be issued only after financial closure.

4.6.3 Paras TPS Unit 5 (1 X 660 MW): Paras is located in Akola District. The land has been generally identified but not in hand . Regarding site identification and land acquisition it is submitted that District Collector, Akola has given final decision in Land acquisition File No.7/47/2006-07 on 16th June 2011. Payment to 79 (out of total 86) landowners has already been disbursed. Regarding Environment Clearance for Power Station and Rapid Environment Impact Assessment studies (EIA), it is submitted that Environment Clearance matter is yet to be taken up ,and the process of Appointment of consultant is in progress. The Coal requirement for the proposed plant is approximately 3.4 Million T per annum and for meeting the same, Coal linkage is available from Mahanadi block as per M/s Mahaguj .(Letter No. ED/Mahaguj /031 dtd.18th May 2011). Adequate water linkage for the plant is not available. Water is available to the extent of 10 MM3 from existing sources. For Balance requirement (8 MM3), approval process is underway with WRD. Steps for financial arrangements such as approval of the State Cabinet, Provision for equity infusion and loan arrangements leading to financial closure are yet to be initiated.

4.6.4 Dondaicha Thermal Power Station, Unit no.1 to 5 (5 X 660 MW) : This is a green field project in Dhule distt . MSPGCL proposes to take up the project by making Joint Venture with another Public Sector or Private sector strategic partner /organisation . The site has been identified and land Acquisition is in progress. Taking Consent from farmers for required land, making Payments of Compensation and taking possession is under process. Regarding Enviromental clearance, initial proposal for Environment Clearance has been submitted to MoEF in Jan 2011. ToR were received from MoEF on 05/05/2011. For Rapid Environmental Impact Assessment studies, M/s.Desein Ltd., New Delhi has been appointed as Consultant . One season data monitoring is in process up to Dec-2011

M/s Mahaguj has confirmed the coal linkage from Chendipada (for Unit 1 & 2) and Macchhakata (for Unit 3 to 5) coal blocks in Orissa .(Letter No. ED/Mahaguj /031 dated 18th May ,2011). The proposed location is approx 60 km from Dhule town . Railways have been intimated regarding extension of Railway line for transportation of Fuel etc.

JV partner has not been finalised. Government of Maharashtra has not accorded its consent for the proposal nor it has notified any rules for JV partnership. Steps for financial arrangements such as approval of the State Cabinet, Provision for equity infusion and loan arrangements leading to financial closure are yet to be initiated.

4.6.5 Dhopawe Thermal Power Station, (3X660 MW) Unit no. 1 to 3 : The proposed plant will be loacted in Ratnagiri district and is a green field project. MSPGCL proposes to take up the project by making Joint Venture with another Public Sector or Private sector Strategic partner / organisation . Joint measurement process for acquisition of the required land is in progress. MoEF, has issued ToR vide letter dated 12th October 2010. For Rapid Environmental Impact Assessment studies, M/s.GREEN-C Ltd., Ghaziabad has been appointed as the Consultant . The draft EIA report has been prepared. Another consultant M/s National Institute of Oceanography Mumbai, is engaged to study the ToR points related to marine environment impact. Draft report will be completed by January-2012. Draft report on social impact assessment has been prepared by M/s Power Age Engineering Corporation Mumbai. Regarding water linkage, WRD, vide letter dated 26th December , 2005 had in principal , agreed to supply 40 MCM/ Y from Koyna Tailrace for earlier proposed 2 X 800 MW units. As the capacity of plant in the present proposal has increased

to 1980 MW from original 1600 MW, the matter has been taken up with WRD vide letter. dated 9th July 2010/ 20th Sept 2010 for supply of additional 40 MCM/Y of water. Approval of the Government of Maharashtra is awaited. It has also not yet notified any policy for JV partnership. Steps for financial arrangements such as approval of the State Cabinet, Provision for equity infusion and loan arrangements leading to financial closure are yet to be initiated.

4.6.6 Latur (Gas based 1500 MW Combined Cycle Project): This is a gas based project, and is proposed to be taken up through JV partnership, preferably with BHEL. Regarding Land acquisition, it is submitted that the negotiations with existing Land owners have been completed. Land has not yet been acquired. Environment clearance process has not been initiated . BHEL (the proposed JV partner) has been asked to take up the Gas linkage issue with Ministry of Petroleum & Natural Gas / MoP. On Feb 8, 2011- WRD has allocated 24 MCM of water per year for this project. Approval of Government of Maharashtra is awaited .It has also not yet a notified any policy for JV partnership. Steps for financial arrangements such as approval of the State Cabinet, Provision for equity infusion and loan arrangements leading to financial closure are yet to be initiated.

5. Observations of the Commission:

1. Issues :

On scrutiny of the Petition submitted by the Petitioner, the Commission has observed that the basic intention of this Petition, submitted by MSPGCL, is to request for review of the Order issued by the Commission in Case 103 of 2010, wherein, some of the Power projects, requested for inclusion by MSEDCL in amendment of its PPA dated 1st April, 2009 with MSPGCL were disallowed by the Commission due to various uncertainties involved in implementation of those projects. The Petitioner has framed the following issues pertaining to the directives of the Commission in its said Order in Case 103 of 2010.

- a. The criteria for approval of the proposed power projects for their inclusion in the PPA between MSPGCL and MSEDCL are incorrect. By applying these criteria, the Commission has made an error apparent on the face of record,

- b. Para 5.1 of the National Tariff Policy did not apply to projects that are being implemented by the Petitioner under the cost-plus route. The Petitioner further submitted that the said clause of the NTP was applicable to private developers who were engaged in development of projects under the bidding route and did not apply to projects being developed in the present case.
- c. Certain additional details regarding the said projects have emerged since the Order was issued in Case 103 of 2011 and the documentary evidence regarding the same has been attached with the present Petition, so that the Commission may review its decision of exclusion of these projects from the purview of PPA between MSPGCL and MSEDCL
- d. The Petitioner is not in a position to include back-to-back guarantee clause regarding timely completion of the projects and the Commission may review its directive, insisting upon the same.
- e. The Commission may review the decision regarding exclusion of projects proposed to be taken through JV route as the policies and conditions of JV are not under control of the Petitioner

6. Analysis

During the Public hearing held in October 2011 at various cities in the State, regarding the APR/ARR Petitions made by MSPGCL /MSEDCL, the Commission observed that the members of the public as well as the Consumer representatives had voiced their sentiments, anxieties and expectations regarding power supply for Industrial, Commercial, Residential and Agricultural use. These also represented the voices of many other silently suffering consumers. On the basis of the audio visual as well as documentary evidence of these presentations, the Commission observed that the consumers get severely affected by pursuit of incorrect policies or delayed implementation of projects and plans by both the Generation company and Distribution utility. The consumers have indicated that they would like to have reliable and good quality supply of power at economical rates. It was also apparent that the consumers do not wish to be selective regarding the source from which the power is made available to them by the Distribution utilities. The consumers came down heavily on these issues and urged the Power utilities and the Commission to devise the action plans to ensure the same.

With the above background and based on the mandate accorded to the Commission by the Electricity Act, it is the duty of the Commission to oversee that the policies followed by the Utilities and the Generating companies are aligned to meet the expectations of the Consumers at large.

The Commission observes that entering into a Power Purchase Agreement is an important step for a Distribution Company in its quests to fulfill its obligations to its consumers. Any aspects of uncertainty or commercial restrictions arising due to any reason need critical examination. The Commission is aware that setting up a Power Plant, be it an extension project or a green field project, is a complex task with multiple activities woven through series or/and parallel paths. The Commission, through the reports of the expert committees formed for the purpose, and guidance available from the Central Authorities and after examining the details made available by the Petitioner, has analysed the proposal of the Petitioner and has arrived at the decisions as given below. :

6.1 Criteria adopted for approval for including proposed projects in the PPA:

In its Order issued in **Case No. 103 of 2010**, in the matter of Petition seeking approval of the Addendum to the Power Purchase Agreements dated 01st April. 2009 , signed between MSEDCL and MSPGCL, the directives of the Commission were based on a well charted out and logical methodology, which is elaborated below.

“ 11. The Commission observed that it is necessary to examine PPA’s considering the technical and legal aspects of the respective projects. The Commission observed that out of the 26 projects, Parli-7 & 8, Paras-4, Khaperkheda-5, Bhusawal-4 & 5 appear to be eligible for inclusion in the addendum to existing PPA. While Chandrapur-8 & 9 and Koradi-8, 9 &10 and Uran GTPS-9 Block (I) & 10 Block (II) may be considered for inclusion, this would be subject to further detailed prior analysis / examination. Therefore, the Commission formed a Committee comprising of its officers; MSPGCL and MSEDCL’s Officials to study and provide recommendations in the said matter and directed the said Committee to submit the same before the next hearing in the matter.

.....

.....

13. During the hearing held on February 23, 2011, the Commission enquired about the recommendations and findings by the said committee. In response, the Committee submitted its findings as elaborated below:

(a) It was informed that for the evaluation of the eligibility of the proposed projects/units the major criterion short listed were, Land acquisition, Environmental Clearance, Forest Clearance (if applicable), Fuel linkage and Water linkage.

(b) Hence the Committee concluded that in Order to ensure serious participation and timely completion of supply of power from a station to be set-up, the supplier cum owner of the project should have initiated/completed specific actions for project preparatory activities, which are listed below.

i. Site identification and land acquisition:

Should have acquired and taken possession of at least 50% of the area of land.

In case of land to be acquired under the Land Acquisition Act 1894, the notification under Section-4 of the Land Acquisition Act 1894 should have been issued.

In all other cases documentary evidence in the form certificate by concerned and competent revenue / registration authority for acquisition / ownership / vesting of land is required.

ii. Environmental clearance for the power station:

Submission of the requisite proposal, for the environmental clearance, to concerned administrative authority responsible for according final approval in the central/state govt. as the case may be.

iii. Forest Clearance (if applicable):

Submission of the requisite proposal, for the forest clearance, to the concerned administrative authority responsible for according final approval in the central/state govt. as the case may be.

iv. Fuel Arrangements:

Fuel arrangements shall have to be made for the quantity of fuel required to generate power from the power station for the total installed capacity of the project/unit for the term of the PPA.

In case of domestic coal, supplier shall have made firm arrangements for fuel tie up either by way of coal block / mine allocation or fuel linkage.

In case of imported coal, the supplier shall have either acquired mines having proven reserves for at least 50% of the quantity of coal required for a term of at least five years or the term of the PPA, whichever is less.

In case of domestic gas, the supplier shall have made firm arrangements for fuel tie up by way of long term fuel supply agreement.

In case of RLNG/gas fuel, the supplier shall have made firm arrangements for fuel tie up by way of fuel supply agreement for at least 50% of the quantity of fuel required for a term of at least five years or the term of the PPA, whichever is less.

v. Water linkage:

Should have acquired approval from the concerned state irrigation department or any other relevant authority for the quantity of water required for the power station. If part water arrangement is done then for the remaining water, project developer /owner should propose the source or arrangement, ensuring that the complete quantity of water requirement will be met. Hence the Committee concluded that the project which meets the above said criteria may be considered as a viable project i.e. the project has reached a stage, where risk of uncertainty is negligible. In addition to this, the supplier should declare the scheduled COD for the project and have ensured firm power evacuation arrangements before entering into PPA.

15..... With regard to the projects coming up from JV Public-Private route, since the PPA will have to be signed by a different company (new company carved out of JV), hence such projects have to be treated differently as per guidelines of Govt. of India. Lastly, it was noted that so far the Petitioners have not included the penalty clause in the said PPA.

16. The Commission observes that in the present scenario there are no specific guidelines available for defining pre-requisites needed to enter into PPA through MoU route. Hence, there was need to carry out the study by the MERC committee including representatives from the Petitioners to analyse this issue in the light of reforms envisaged in the power sector through National Tariff Policy post 6th January, 2011 to promote competition in the power sector. Further, the Commission is of the view that regarding the prerequisites as described in paragraph -13 of this Order, the major consideration is to ensure that the viability of the projects should be examined based on the actual project preparatory activities completed. If project is at a preliminary stage then there lies the uncertainty about the project, which will lead to delay or non-supply of power, in turn will result in procurement of short term costly power i.e. cost burden on the consumer.

The Commission observes that the criteria applied to the Generation Projects as above, are the basic requirements, valid for plants both in private and public sector, alike, which cannot be bypassed. The Commission has observed that depending upon individual case, there could be additional criteria applicable to the respective projects, however those criteria cannot be alternative criteria to the basic requirements emphasized upon, in the previous Order in the matter of case 103 of 2010, and hence the question of revisiting these criteria is ruled out.

6.2 Compliance with stipulations in the National Tariff Policy :

Para 5.1 of the National Tariff Policy reads as follows:

“5.1 Introducing competition in different segments of the electricity industry is one of the key features of the Electricity Act, 2003. Competition will lead to significant

benefits to consumers through reduction in capital costs and also efficiency of operations. It will also facilitate the price to be determined competitively. The Central Government has already issued detailed guidelines for tariff based bidding process for procurement of electricity by distribution licensees for medium or long-term period vide gazette notification dated 19th January, 2005.

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. 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.”

The Commission observes that all the Generating Projects proposed in the said petition submitted by the Petitioner under the present case, are for setting up **new power generating units**. Those projects, where absolutely no infrastructure exists today, are truly green field projects. Some of these projects are located close to the existing generating plants of the Petitioner, but the land for these projects is required to be newly acquired, the technology used would be the state of the art modern technology and these would require common auxiliaries on a much different scale and existing common auxiliaries would not be used. The Electrical Power Evacuation Systems (EHV sub stations and transmission lines) would also need to be explicitly designed after very deep Power System Stability Studies of load flow etc., for these new plants. Well-trained staff will be required to handle these plants, who would understand the latest technologies and operating systems employed there. New working systems, appropriate Work culture, processes and procedures etc will have to be initiated, adopted and internalised for efficiently running these plants.

The Commission is aware that the Generating Company such as MSPGCL, and Distribution Utility such as MSEDCL formed as a result of unbundling of State utilities under Section 131 of the Act may require some time to change the work culture and operation methodology. However, it is also true that these Companies are now registered under Companies Act 1956, (1 of 1956) and as such should have flexibility and dexterity to operate in competitive environment and on well established commercial principles. The Commission is of the opinion that a reasonable time period of 5 years had been allowed by the above para in the National Tariff Policy for introduction of competitiveness in the interest of the Consumers, as mandated by the Electricity Act 2003. Hence the Commission observes that it will be great disservice to consumers to permit the Petitioner to claim exemption from the directions clearly spelt out in the National Tariff Policy.

6.3 Scrutiny of the proposed Generation Projects of MSPGCL:

The Commission observes that except for the Uran Unit 9 & Unit 10 (Block I and II) CCPP , all other proposed projects are thermal generating plants of standard 660 MW size. The Commission has also noted that the scheduled commissioning period, counting from the date of issue of Letter of Intent (or issue of letter of acceptance), for first unit of 660 MW size, is 51 months. The Commission is also aware that the recently commissioned 4 X 250 MW units, (Paras 3 & 4 and Parli 6 & 7) which were scheduled to be commissioned in 33 months, were each commissioned by MSPGCL in approximately 44 months and beyond. In each case, the Petitioner had pleaded that it was the “circumstances beyond its control” which had caused these delays.

Further, the Commission has observed that, the Petitioner, in its present Petition, has expressed its total inability to wield any control on its suppliers/ contractors and is reluctant to introduce any back-to-back guarantee clause to protect itself and its customers against project delays. Based on the above experience of delays in project commissioning, in the present case it may require approximately 5 years’ period from the date of LoI, for commissioning first of the said 660 MW projects. In addition, since the basic requirements such as land, Environmental clearances, Finances etc are not in place, the fear of further delays in commissioning of the said plants may not be totally ruled out.

It is known that project delays add huge interest burden on actual project costs besides cost increase in plant equipment and services. The Commission observes that nowhere in its submission, the Petitioner has elaborated the steps being taken by the Petitioner to keep costs in control as required in the interest of consumers. The Commission has noticed that in spite of making provision in contracts, the Petitioner finds it difficult to impose penalties and recover liquidated damages. The reason put forth is that BHEL is a Government company and is not easily amenable. It is the ability of the Project Owner to keep proper documentation of fulfillments of obligations of Owner and Supplier/Contractor and take all resources methodically. This only would enable it to wield control on the contractors and reduce delays and project costs in the interest of the consumers. It is also imperative for Owner to fulfill its financial and technical obligations to Supplier/ contractor and avoid its own defaults so that its control on Project progress is tight. As the Petitioner is not willing to bear the costs of delays nor is in a position to recover the same from contractors and suppliers, it is inevitable that the affected parties would be its the consumers who will bear the brunt of these delays and pay heavily through higher tariffs. The Customer MSEDCL may have to frantically look for other power sources and short-term contracts at much higher costs. The Commission therefore feels that MSEDCL needs to consider all these possibilities and may not go ahead with entering into PPA with the Petitioner, regarding such projects which do not satisfy these basic progress criteria. In this context the Commission is clueless as to why MSEDCL does not include a penalty clause in PPA with MSPGCL covering eventualities of delays in commencement of supplies / having less than 80% of supplies, etc., (which will cover the risk and additional cost of its spot/short term purchase of power), as against its insistence of including such a clause in its PPAs with all private Power Producers in all its Power Purchase Contracts.

Based on the details brought out by the Petitioner regarding present status of these plants in the last hearing held on 11 November 2011, the Commission has observed as follows :

6.3.1 Uran Block I and II, Natural Gas based Combined cycle project :

The said project is located at Uran. Block I will be of 406 MW and Block II will be of 814 MW, The project is proposed to be located adjacent to MSPGCL's existing Gas Turbine Power plants at Uran. The land required for the project is already in possession

of MSPGCL. Environmental clearance for the project has already been obtained from MoEF, based on Rapid Environmental Impact Assessment prepared by M/s. NEERI, Nagpur. Forest clearance is not applicable. NIT has been issued for procurement of gas from open market. Technical bid evaluation is under progress. Application has been made to Govt of India for allocation of Gas through the Administered Price Mechanism (APM). Government of Maharashtra has approved the project and sanctioned total Equity infusion of Rs 915 Crores from State. Regarding the 80% Debt portion, sanction has been received from PFC, REC and HUDCO. As regards status of EPC contracts, Bids have been received on 08 July 2011 and Technical bids were opened on the same day. LoA (letter of Acceptance) will be issued simultaneously for EPC and gas. Block I is expected to be completed in 30 Months from the date of LoI and Block II in 33 months from the date of LoI. The Commission observes that most of the basic criteria have been satisfied and the essential preliminaries of the project are in place.

The major hurdle is the Gas fuel, for which application for allocation through the APM has been made, but the result is awaited. The Commission is aware that the Central Authorities follow a grading system for prioritising the projects for allocation of Gas through the APM mechanism. During the hearing, the Petitioner could not explain the status of the proposed plant in the priority listing for allocation of gas under APM. The Commission is aware that it would be that cost of electricity produced by a Combined Cycle Power Plant functioning only on Gas fuel acquired at open market prices, would not be at competitive rates and will not be in the interest of consumers, it is therefore imperative that gas allocation from APM mechanism is expedited and obtained. The Petitioner has assured that it will make all possible efforts to get the necessary allocation of Gas through the APM mechanism and will ensure that the proposed CCPP operates at competitive prices. The Commission also observes that CCPP has its own merit by virtue of its inherent ability to supply peaking power to supplement the hydro power and also supply power to the grid in dire emergency by using its black start features.

With due consideration as above, the Commission approves inclusion of the Uran CCPP Block I and II project in the PPA.

6.3.2 Nashik 1X 660 MW project. :

The land required for the proposed 660 MW unit is located close to the existing thermal generating units of MSPGCL, beyond the Railway siding, where presently, old housing quarters are located. The land is in possession of the Petitioner and the Petitioner proposes to demolish the said unoccupied old housing quarters to create adequate free place for erection of the new 660 MW unit. MoEF has issued the TOR (No. J-13012/40/2011-IA. II(T) dtd.15th June 2011) and, M/s. Mitcon Ltd., Pune has been appointed as Consultant for conducting Rapid Environmental Impact Assessment studies. Accordingly. One season data monitoring is in process and it is expected to be completed by December 2011. Coal linkage is available from Mahanadi block as per M/s Mahaguj .(Letter No. ED/Mahaguj /031 dtd.18th May 2011) which is expected to be ready by 2015. The requirement of about 17 MCM /year of water for the new thermal plant is expected to be met from Gangapur dam. WRD has issued its allotment letter dated 12th January 2011. The State Cabinet has accorded its approval for the said plant on 9th November 2011. Financial provisions for equity infusion are to be made, which will be followed up by Debt arrangement and Financial closure. The plant is expected to be commissioned in 51 months from the date of LOI, which can be issued only after completing financial arrangements.

The Commission observes that the Government has accorded approval to the said proposal. The land is available and it is in possession of MSPGCL. Such being the case, the plant can be considered for inclusion in PPA between MSPGCL and MSEDCL. The Commission therefore, grants approval to the said project for inclusion in the PPA.

6.3.3 Paras TPS 1 X 660 MW Unit 5:

Paras is located in Akola District. The land has been generally identified but not in hand. Matter regarding Environmental clearance is yet to be taken up. While Coal linkage is available from Mahanadi block as per M/s Mahaguj .(Letter No. ED/Mahaguj /031 dtd.18th May 2011). Adequate water linkage for the plant is not available. Water is available to the extent of 10 MCM/year from existing sources. For Balance requirement (8 MCM/year), approval process is underway with WRD. Process of financial arrangements such as approval of the State Cabinet, Provision for equity infusion and loan arrangements are yet to be initiated. With these uncertainties, the Commission does not wish to grant approval of the said project for inclusion in the PPA

7. Scrutiny of projects under Joint Venture Route.

The Commission observes that regarding the projects proposed under JV route, the Petitioner has submitted as follows :

“.....as regards the second issue regarding projects coming up from the JV-Public Private route, as on date there is no final decision on implementing these projects on joint venture basis, which involves selection of strategic partner etc. The Petitioner submitted that the projects are to be primarily developed by the Petitioner on the basis of financial strength and technical experience as a Generation company. The decision whether or not to implement these project on Joint venture basis is a policy issue which is subject to the final approval of the State Government and also subject to the provisions of the Companies Act, 1956. The Petitioner submitted that, this in no case affects the regulatory jurisdiction of the Commission to approve Power Purchase Agreement executed between the Petitioner and MSEDCL. The Petitioner further reasoned that the Commission cannot base its findings on a condition which is subsequent and not in control of the Petitioner.”

The Commission observes that Govt of Maharashtra is yet to announce its policy on PPP joint ventures in Power Sector and associated terms and conditions regarding JV ..This will greatly affect the cost of electricity generated by these projects. In its submissions, the Petitioner has accepted that it cannot reply to the queries raised by the Commission as these are beyond its control. The Commission observes that in the days of competitive pricing of electric power, it is going to be extremely difficult for a power generating company or a power distribution utility to survive, if the basic parameters of pricing are not identified and controlled.

Further, based on scrutiny of the submission made by the Petitioner, elaborated in the earlier sections of the Order above, the Commission observes that basic criteria set out by the Commission have not been fulfilled and these projects are just in conceptual stage.

Such being the case, the Commission does not approve inclusion of the following JV route projects in the said PPA.

- a. Dondaicha Thermal Power Station, Unit no.1 to 5 (5 X 660 MW) :
- b. Dhopawe Thermal Power Station, Unit no. 1 to 3
- c. Latur (Gas based (1500 MW):

8. Project Guarantees :

The Commission has observed that the Petitioner has reiterated its earlier stand regarding inability of providing back-to-back project completion guarantees. The Commission also notes that MSEDCL does not insist for inclusion of supply guarantee clause in the PPA as against its insistence of inclusion of such a clause in Power Supply Contracts with private generating companies.

The Commission is not satisfied with the contentions of the Petitioner in this regard. The Commission believes that both the procurer of Electric power (the Distribution utility) and Generators need to safeguard their interests. This in turn safeguards consumer interests, as otherwise, non-inclusion of penalty clauses expose both the generators and distribution utilities to unforeseen financial risks. In case of delays by Generating Company, the Distribution Company will have to procure power on short term basis at higher prices and will make all attempts to pass on the same to consumers. The Commission, therefore directs both the Petitioner and MSEDCL to include penalty clause in the amendment to PPA to minimize financial risk. The Commission would like to advise the Petitioner to make strong attempts to strengthen its project implementation skill, keep meticulous and legally acceptable records regarding deviations from the accepted conditions, lodge the claims with the suppliers, take recourse to legal actions as necessary, and assure the consumers that the cost of failures and delays on the part of supplier will not be loaded on them.

9. Approvals

In view of the fact that the conditions specified at paragraph-13 of the Order dated 30th March 2011 are substantially met, as evident from production of various documents, and the fact that these documents were not within the Petitioner's knowledge or could not be produced by it at the time when the impugned Order was passed, the Order

dated 30th March 2011 in Case No. 103 of 2010 stands reviewed to the extent discussed above, and hence the Commission hereby accords its approval to the Petitioner to include the following projects in amendment to its PPA dated 1st April 2009 with MSEDCL.

- a) Uran Block I and II Gas Turbine (CCPP) project
- b) Nashik 1 X 660 MW Thermal project

The Commission deems it fit to advise the respondent MSEDCL, to thoroughly examine the competitiveness of the electrical power to be procured on Long term basis from those projects which have not been approved in this Order for inclusion in the PPA with MSPGCL in the interest of its consumers, and explore the Case I bidding route in relation thereto, in Order to safeguard its interest and for ensuring supply of adequate amount of power at competitive rates in the future periods.

With the above approvals and observations, Case 71 of 2011 stands disposed of.

Sd/-
(Vijay L. Sonavane)
Member

Sd/-
(V. P. Raja)
Chairman