

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION

World Trade Centre, Centre No.1, 13th Floor, Cuffe Parade, Mumbai 400 005

Tel. No. 022 22163964/65/69 – Fax 022 22163976

E-mail mercindia@mercindia.com

Website: www.mercindia.com

Case No. 29 of 2011

In the matter of

**Reliance Infrastructure Limited's (RInfra) Petition for "in principle" approval for
Medium Term Power Procurement under Section 86 (1) (b) of the Electricity Act, 2003**

Shri V.P. Raja, Chairman

Shri Vijay L. Sonavane, Member

ORDER

Dated: September 23, 2011

Reliance Infrastructure Limited (RInfra) filed a Petition under affidavit before the Commission on March 1, 2011, seeking "in principle" approval for Medium Term Power Procurement (MTPP) under Section 86 (1) (b) of the Electricity Act, 2003 ("EA, 2003").

2. The main prayer in the Petition is as follows:

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This Hon'ble Commission may be pleased to grant "in principle" approval to the LOI dated 18th December 2010 being Annexure "E" hereto entered into between RInfra and GEPL pursuant to which RInfra would enter into a PPA on the terms and conditions mentioned in the said LOI.”

3. RInfra, in its Petition, submitted as under:
- a) On January 25, 2011, RInfra has filed Petition in Case No.12 of 2011 before the Commission for adoption of tariff under the provisions of Section 63 of the EA, 2003 in respect of Power Purchase Agreement (PPA) entered into between Reliance Infrastructure Limited and Vidarbha Industries Power Limited (VIPL) with extra Prayers in relation to the Letter of Intent (LoI) issued to Global Energy Pvt. Ltd. (GEPL)
- b) On February 18, 2011, a meeting was held between Officer's of the Commission with RInfra-D officials in the matter of Case Nos. 11, 12, 13 and 17 of 2011 and in the same meeting RInfra was directed to file a separate Petition in relation to the LoI issued to GEPL for 300 MW. Accordingly, on March 1, 2011 in respect of a LoI, RInfra filed Petition.
- c) On October 23, 2008, RInfra filed a Petition in Case No. 94 of 2008 for approval of proposed quantum of power Procurement under Medium Term for different supply periods. Subsequently, the Commission vide its Order dated July 21, 2009 in Case No. 94 of 2008 approved the proposed quantum of RInfra for FY 2010-11 to FY 2013-14 through Competitive Bidding process under Case I Bidding as follows:

Supply Period	Scheduled Delivery date	RTC Quantum (MW)	Peak Quantum (MW)
Supply Period I	October 1, 2009 to March 31, 2010	850	300
Supply Period II	April 1, 2010 to March 31,2011	1000	300
Supply Period III	April 1,2011 to March 31, 2012	1000	300
Supply Period IV	April 1, 2012 to March 31, 2013	1200	300
Supply Period V	April 1, 2013 to March 31, 2014	1200	500

d) RInfra submitted that due to migration of consumers, around 400 MW load of RInfra-D has already shifted to The Tata Power Company Ltd., Distribution Business (TPC-D) and the process is still continuing. In view of the aforesaid, the earlier approved quantum by the Commission for Medium Term Power Procurement (MTPP) (for FY 2010-11 to FY 2013-14) has been changed. RInfra submitted that since, the Cross Subsidy Surcharge would be applicable by 31st March 2011, no migration is envisaged thereafter. Accordingly, estimated demand projection at G<>T interface submitted by the RInfra is as follows:

Period	FY 2011-12	FY 2012-13	FY 2013-14
RInfra Peak Demand (MW)	1389	1489	1567

e) The forecast for the Base load (Average demand for the year) and peak load are as follows:

RInfra Availability/Gap	FY 2011-12	FY 2012-13	FY 2013-14
Base Load (MW)	1050	1129	1180
Peak Load (MW)	339	360	387

f) RInfra-D has tied up 500 MW with its own Generating Station at Dahanu. After considering the said 500 MW, the Base Load requirement submitted by the RInfra are as follows:

(All in MW)

RInfra Availability/Gap	FY 2011-12	FY 2012-13	FY 2013-14
Base Load	1050	1129	1180
DTPS-Availability (Ex-Bus)	460	460	460
Gap	590	669	720
To meet its Base Load Gap, RInfra has tied up with the following:			
VIPL	-	400	400
GEPL	140	-	-
Banking (From 1 st April 2011 to 30 th September 2011)	300	-	-
GEPL	280	280	280

g) RInfra further submitted that it would meet its additional Peak Load requirement through short-term purchases from the Bilateral Market or Power Exchange for specific peak load hours of the day.

4. The facts relating to the procurement of power through Competitive Bidding process under Case I Bidding are as follows:

- a) After getting the approval from the Commission for MTPP (for FY 2010-11 to FY 2013-14), RInfra-D has issued a Request For Proposal (RFP) on July 30, 2009
- b) Pursuant to the approval of Medium Term quantum for FY 2011-12 to FY 2013-14, RInfra issued LoI to the following parties:
 - i. RInfra has issued LoI on 10th May, 2010 to M/s. Wardha Power Company Limited (WPCL) for 260 MW (levellised tariff of Rs.4.85/kWh)
 - ii. Issued LoI on 10th May, 2010 to M/s. Abhijeet MADC Nagpur Energy Private Limited (AMNEPL) for 55 MW (at levellised tariff of Rs. 4.80/kWh)

- iii. Issued LoI on 17th May 2010 to Reliance Power Limited (RPower) for 134 MW (at levellised tariff of Rs. 4.80/kWh).
- c) On June 4, 2010 RInfra signed PPA with WPCL; with VIPL (an associated Company of RPower to whom LoI dated May 17, 2010 was issued) on June 16, 2010 and with AMNEPL on August 4, 2010.
- d) RInfra craves leave to refer to the said LoI's and PPAs executed with the aforesaid parties and the Petition in Case No.12 of 2011 filed before the Commission.
- e) Subsequently on October 6, 2010, during the MTPP process, the Commission issued a Public Notice for Expression of Interest (EoI) from the prospective applicants for distribution licenses in the RInfra's area of supply.
- f) On December 10, 2010 RInfra informed WPCL and VIPL, about EoI invited by the Commission and their inability to proceed with conditions to be satisfied as per the PPA. However, WPCL insisted RInfra to comply with the said conditions. While, VIPL vide its reply dated December 18, 2010 decided to waive off the Conditions. Subsequently, RInfra has also informed AMNEPL regarding EoI and their inability to proceed with conditions to be satisfied as per the PPA. However, AMNEPL vide its reply requested to proceed with adoption of tariff under Section 63 of Electricity Act, 2003 and to fulfill the conditions subsequently.
- g) WPCL has filed Case No.11 of 2011 before the Commission purporting to seek a direction to RInfra for adoption of tariff under Section 63 of EA, 2003 relating to the PPA dated June 4, 2010 between WPCL and RInfra.
5. RInfra submitted that since, the levellised tariff of the WPCL and AMNEPL had a front loaded tariff with very high fixed cost and the regulatory uncertainty result in such costs being borne by the consumers of RInfra to their detriment, in view of the above RInfra has not approached the Commission for adoption of tariff.

6. Therefore, to bridge the aforesaid gap RInfra has approached other parties.

Sr. No.	Date	Offer received	FY 2011-12	FY 2012-13	FY 2013-14	Tariff Rate (Rs./kWh)
1	November	JSWEL IPP in	270 MW	270 MW	270 MW	4.38

Sr. No.	Date	Offer received	FY 2011-12	FY 2012-13	FY 2013-14	Tariff Rate (Rs./kWh)
	15, 2010	Maharashtra				
2	December 15, 2010	Global Energy Pvt. Ltd. (Source: JPL Plant)	300 MW	300 MW	300 MW	3.98

7. Subsequently, GEPL vide its email dated December 17, 2010 informed RInfra about its revised rate and offered the same quantum of power, 300 MW on firm basis (from April 1, 2011 to March 31, 2014) at the rate of Rs. 3.90/kWh.

8. On December 18, 2010, RInfra issued LoI to M/s. Global Energy Pvt. Ltd. (GEPL) for 300 MW at Rs. 3.90/ kWh for supply period (from April 1, 2011 to March 31, 2014) as a trader of Jindal Power Limited and the Delivery point was 400 kV PG CIA System in the Western Regional Grid, that is entry into Western Region System. GEPL vide its letter dated December 29, 2010 accepted the terms and condition of the LoI.

9. RInfra submitted that after considering all issues including the regulatory uncertainty, the offer made by GEPL was a favorable offer. RInfra further submitted that Section 63 is an optional route for procurement of power by a Distribution Licensee. In fact Section 63 is one of the process by which tariff is determined under EA, 2003 apart from the provisions of Section 62 (1) which empowers the Appropriate Commission to determine tariff.

10. The Commission, vide its Notice dated March 4, 2011, scheduled a hearing in the matter on March 17, 2011 at 14.30 hrs. and directed RInfra to serve a copy of its Petition along with its accompaniments to the four authorized Consumer Representatives.

11. During the hearing, Shri. J.J. Bhatt, Sr. Advocate along with Shri. R.R. Mehta and Shri. Kapil Sharma appeared on behalf of RInfra. Shri. Sanjay Sen, Shri. Hemant Singh and Ms. Shikha Ohri Advocates appeared on behalf of Wardha Power Co. Ltd. (WPCL).

12. Shri. Bhatt, Counsel for RInfra submitted that, since contract term of PPA is more than one year, it has approached the Commission for approval. While, the Commission brought to the notice of RInfra that, Tariff Policy, 2006 mandates that, from 6th January 2011 onwards, all power procurement should be through Competitive Bidding.

13. After hearing RInfra, the Commission directed RInfra to submit justification for considering its proposal for approval of Medium Term Power Procurement through MoU route instead of Competitive Bidding route.

14. M/s. Wardha Power Company Limited filed its intervention application on March 25, 2011 with the following prayers:

- “ a) *Allow the Applicant/Intervener to intervene in the present case namely Case No. 29 of 2011;*
b) *Stay the present proceeding till the final disposal of Case No. 11 of 2011;*
c) *Pass such other and further Order or Orders as this Hon'ble Commission deems fit and proper under the facts and circumstances of the present case.*”

15. WPCL made the following submissions: -

- a) RInfra issued a notice and invited bid and RFP for procurement of power through Competitive Bidding process on July 30, 2009.
- b) In pursuance of the aforesaid notice, the Intervener (WPCL) on September 10, 2009 placed a bid for supply of 260 MW power on medium term basis. The Bid was placed in two parts: Non-financial bid and Financial bid (as per format 4.10 of the RFP).

A Bank Guarantee was issued on September 9, 2009 by UCO Bank in favor of RInfra.

- c) WPCL submitted that at the request of RInfra, it has extended the bid validity on various occasions. The original bid was for 260 MW on medium term basis for 2 years at a levellised tariff of Rs. 5.248/kWh.
- d) After intervening negotiations and at the request of the RInfra, WPCL on January 15, 2010, confirmed the supply of 260 MW on medium term basis for 3 years instead of 2 years at a levellised tariff of Rs.4.945/kWh.
- e) WPCL vide its letter dated March 5, 2010 extended the bid validity till April 30, 2010. On the same day, the WPCL confirmed that the bid bond of Rs.7.80 crore was extended till May 28, 2010 with additional claim period of 30 days i.e., till June 27, 2010, and it was also confirmed by UCO Bank to RInfra by a letter dated March 8, 2010.
- f) On May 5, 2010, a meeting was held between two parties to negotiate the tariff. WPCL through its letter dated May 10, 2010 offered power for 3 year, from April 2011 till March 2014 at a levellised tariff of Rs. 4.85/kWh.
- g) WPCL submitted that for 2-year supply period, the original bid (levellised tariff Rs. 5.248 per kWh) even though for 3-year supply period the WPCL through its letter dated May 10, 2010 reduced the levellised tariff to Rs. 4.85 per kWh.
- h) On May 10, 2010 RInfra issued LoI to WPCL for 260 MW at Rs. 4.85/kWh. While WPCL vide its letter dated May 12, 2010 accepted the LoI and executed the PPA on June 4, 2010.
- i) Further, WPCL vide its letter dated December 2, 2010 sought confirmation from the RInfra regarding the status of Open Access transmission linkage and for the adoption of tariff under Section 63 of the EA, 2003.
- j) However, the RInfra vide its letter dated December 10, 2010 sought to terminate the PPA on the following grounds:
 - i. Fuel Supply Agreement not executed by the WPCL as per Article 3.1.1 of the PPA.
 - ii. WPCL sought deviations in the draft Default Escrow Agreement and in the draft deed of Hypothecation and the same requires approval from the Commission.

- iii. On October 6, 2010, the Commission issued a public notice and invited EoI for supply of power in the RInfra's Distribution License area.
- k) WPCL filed its reply on December 15, 2010 as follows:
 - i. FSA - As per Clause 3.4.1 of the PPA, additional 3 months are provided for execution of the FSA and if in case of non execution of the FSA, Clause 3.4.1 of the PPA Contemplates a backup procedure in the form of additional Contract Performance Guarantee till Scheduled Delivery Date. Hence, this cannot be considered as an impediment for taking further steps as per the PPA.
 - ii. Regarding Article 8.4.11 of the PPA relating to the execution of the Default Escrow Agreement and the Draft deed of Hypothecation, since WPCL had showed willingness to execute the said agreements as per the standard RFP documents. The conditions would be complied within the timeframe contemplated in the PPA.
- l) WPCL further submitted that for implementation of the PPA, renewals of Distribution License and EoI for supply of power in the RInfra's Distribution License area are extraneous factors. Hence, WPCL requested RInfra to comply as per the contractual obligations under the PPA.
- m) RInfra vide its letter dated December 21, 2010 stated that since, it perceives uncertainty in availability of fuel they cannot proceed further under Clause 3.2 of the PPA.
- n) Being aggrieved, on January 24, 2011, WPCL filed a Petition in Case No.11 of 2011, to seek adoption of tariff by the Commission for supply of 260 MW of power for 3 years commencing from April 1, 2010 and the PPA dated June 4, 2010 executed pursuant to the Petitioner being selected under Case-I bidding process.
- o) WPCL prayed for the following relief:
 - “
 - i. *Direct the Respondent to place all the requisite documents, information and details necessary for adoption of tariff under Section 63 of the Electricity Act, 2003 read with Clauses 6 of the Bidding Guidelines, 2005 and thereafter adopt the Petitioner's*

tariff as confirmed and accepted in the Letter of Intent dated 10.05.2010 and PPA dated 04.06.2010;

ii. To take on record the Power Purchase Agreement dated 04.06.2010 being Annexure P-11 of this Petition and approve the same and issue such consequential directions as may be necessary to ensure that the Respondent fulfills its obligations under the said PPA.”

p) Along with the original Petition, the Petitioner submitted interim prayers to the Commission as under:

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

q) A preliminary hearing was held on February 17, 2011 in Case No. 11 of 2011, wherein the Commission was of the view that there are certain deficiencies in the Medium Term Power Procurement and therefore directed RInfra and Officer's of the Commission to resolve the infirmity, through a meeting.

- r) WPCL further submitted that during the pendency of these proceedings RInfra vide its letter dated March 7, 2011 sought to terminate the PPA on the pretext of non-execution of the FSA. WPCL filed its reply on March 11, 2011. In its reply, WPCL submitted that since the above matter is pending before the Commission, RInfra has not been able to terminate the PPA. It further stated that under FSA it has an existing arrangement of fuel with M/s. Videsh Coal Services Pvt. Ltd.
- s) WPCL further submitted that a case of intervention is made out in its favour because of the following reasons:
 - i. WPCL has entered into PPA with RInfra for power supply of 260 MW for 3 years. Even though, RInfra has been trying to purchase power from other parties.
 - ii. WPCL stated that the Petition is not maintainable under the provisions of the EA 2003, Tariff Policy. The provisions of the EA 2003 and tariff policy mandate that the Distribution Licensee have an obligation to purchase power through bidding process. However, RInfra had sought to buy power from multiple sources in medium term and long term till the Generation Capacity of its sister companies are not ready.

16. The Commission vide its Notice dated March 18, 2011 scheduled a hearing in the matter on March 30, 2011 at 11.00 hrs. In the presence of authorised Consumer Representatives.

17. A combined hearing was held in three Case Nos.13 of 2011, 17 of 2011 and 29 of 2011 on April 25, 2011. During the hearing Shri. Bhatt, Sr. Advocate appeared on behalf of Reliance Infrastructure Ltd. and Shri Hemant Singh Advocate appeared on behalf of Wardha Power Company Limited.

18. Shri Bhatt submitted that in Case No.11 of 2011, regarding Medium Term PPA, the Commission has issued the Interim Order and against this Order RInfra has filed an appeal before the Hon'able APTEL. This matter should therefore be kept pending before the

Commission. The Commission decided that further hearing in this case will be held on 16th May 2011 at 11.00 hrs.

19. M/s. WPCL filed objections to the Petition filed by the RInfra on April 26, 2011, wherein the following submissions have been made:

- a) WPCL submitted that, RInfra has challenged the Interim Order of the MERC dated April 15, 2011(in Case No. 11 of 2011), by filing Appeal before the Hon'ble Appellate Tribunal for Electricity (ATE).
- b) If the relief prayed by RInfra is granted then it will make the proceedings of Case No. 11 of 2011 infructuous.
- c) WPCL further submitted that the relief prayed by the RInfra directly, prejudicially and substantially affects the rights and interests of the WPCL.
- d) WPCL was also filed an intervention application in Case No. 12 of 2011 and has been allowed by the Commission vide its Order dated April 1, 2011
- e) WPCL is a generating Company, setting up a 540 MW (4 * 135 MW) Coal based power-generating plant at Worora MIDC, Chandrapur District, Maharashtra. The first three units of the said generating station have already been commissioned and the fourth unit of 135 MW was synchronized on April 16, 2011 and is ready for commercial operation on or around May 10, 2011.
- f) WPCL submitted that there is no provision for an "in principle" approval of power purchase from a trader in the Medium Term without the participation in a Case 1 Bid under the Competitive Bidding Guidelines issued by the Central Government.
- g) RInfra vide its letter dated March 7, 2011 issued notice to WPCL for termination of the PPA dated June 4, 2010. The said letter of termination has been stayed by the Commission vide its Interim Order dated March 17, 2011 since, the matter of Case No. 11 of 2011 is pending before the Commission.
- h) WPCL submitted that the above act of termination of the PPA was planned and RInfra has started negotiations with the trader, M/s. GEPL/JSWPTCL and the said negotiations were for a quantum of electricity, which was already tied up with the WPCL through the PPA dated June 4, 2010.

- i) WPCL submitted that M/s. JSWPTCL participated in the medium term bidding process for supply of power. However, it could not qualify in the same and thereafter was trying to supply the power by getting into a MoU with RInfra through backdoor.
- j) WPCL submitted that RInfra and its sister company secretly created an illegal addendum, to an already existing PPA dated June 16, 2010, for supply of an additional 270 MWs of power, and thereafter the RInfra modified the above mentioned LoI issued to M/s. GEPL dated December 18, 2010 by issuing letter dated March 19, 2011. Such an action of the RInfra is against the spirit of the EA, 2003.
- k) The statutory provisions i.e. Section 63 of the Electricity Act, 2003 mandate the Commission to approve the PPA of the WPCL dated June 4, 2010, which has been executed through a transparent process of bidding. WPCL further submitted that once an evaluation committee approves the bidding procedure and the Distribution licensee executes PPAs, the same are required to be mandatorily as per the provision of Section 63. If in case the Distribution Licensee has any doubts over the price arrived at through a bidding procedure, the same should be dealt with at the stage of evaluation committee.
- l) WPCL submitted that RInfra was aware that M/s. VIPL (its sister Company) was not in a position to deliver power from April 1, 2011 in terms of the bid, for four supply periods and in order to purchase power from M/s. VIPL of a quantum more (i.e., 404 MW) than what was provided in the bid, the PPA dated June 4, 2010 with WPCL had to be terminated.
- m) Even when there was a binding PPA with WPCL, RInfra entered into negotiations for purchase of power of 300 MW from JSWPTCL/Global Energy for the medium term. WPCL submitted that the said ground of non-execution of FSA by the sister company of RInfra herein, M/s. VIPL, does not merit termination of the PPA dated June 16, 2010. This shows that RInfra was acting in a malafide manner to oust WPCL despite a PPA dated June 4, 2010 was legally valid and subsisting.

WPCL submitted that for determination of tariff the EA, 2003 envisages only two provisions i.e., provision of Section 62 and Section 63. However, RInfra

has approached the Commission under the provision of Section 86(1) (b) therefore WPCL has requested to reject the present Petition. WPCL submitted that even under Sections 62 and 63, RInfra cannot approach this Commission for approval of tariff for supply of electricity from a trader.

- n) WPCL submitted that in the present case M/s. GEPL couldn't come out with a tariff for approval by the Commission. Since, under Section 62 of the EA, 2003 a licensee has to come out with a tariff by a cost plus method and it is generator and not a trader.

RInfra has relied on a Judgment of the Hon'ble ATE in Appeal Nos. 106 and 107 of 2009 (BSES Rajdhani Power Ltd. Vs Delhi Electricity Regulatory Commission) claiming that under Section 86 (1) (b), the Commission can grant its approval for agreements for purchase of power by a distribution licensee. The said judgment does not authorize a licensee to come out with a tariff, which is neither Cost Plus nor through a Bidding Process, and approach this Commission under Section 86 (1)(b) for approval of the same. The determination of tariff can only be under Sections 62 or 63.

- o) After issuing LoI to the trader, GEPL on December 12, 2010, RInfra realized that the Commission under Section 86 (1)(b) couldn't approve the same. Hence, RInfra issued another LoI dated March 19, 2011 in two parts. The first motive of this is for short term supply of power (from April 4, 2011 to March 31, 2010) as there appeared to be some difficulty in getting approval from the Commission and the second motive is to create third party rights and to keep WPCL at bay, for a quantum of power already tied up by a PPA dated June 4, 2010, so that VIPL, can easily fit in April 4, 2012, that too for a capacity of 404 MW, which is far in excess of the successful bid of 134 MW capacity.
- p) WPCL submitted that the Commission has not found any ambiguity in the bidding procedure. Thus, RInfra cannot be allowed to nullify a certified PPA of the Intervener by bringing a trader of electricity through backdoor, whose price cannot be even determined/ assessed by the Commission as the same has not been determined through either Section 62 or 63 of the EA, 2003.

- q) WPCL in the aforesaid facts and circumstances prayed that the Commission may be pleased to reject the present Petition and quash the LoI dated December 12, 2010 for supply of 300 MW of power.

20. RInfra filed an affidavit to the Objections filed by WPCL on May 20, 2011, wherein the following submissions have been made:

- a) With reference to paragraph 3 of the Objections, RInfra denied that the Addendum dated January 21, 2011 is illegal as alleged or is an attempt to bring power through the back door.
- b) With reference to paragraph 6 (I) of the Objections, it is denied that the termination of the PPA with WPCL was on flimsy or frivolous ground and further submitted that WPCL had breached the condition subsequent. In this regard, RInfra craved leave to refer to its submissions filed in Case No.11 of 2011 and it further submitted that there is no question of promoting the interest of its sister company, VIPL as alleged or at all. RInfra also denied that the letter of termination is pre-meditated.
- c) RInfra submitted that the offer from Jindal was received on November 15, 2010 and from GEPL was received on December 2, 2010; the Commission only after WPCL refused to acknowledge, the regulatory uncertainty created inter alia, by the EOI issued.
- d) RInfra also denied that the PPA with WPCL was valid or existing as alleged or at all and the allegations with regard to JSWPTCL are irrelevant inasmuch as no LoI has been issued to them.
- e) WPCL admitted that GEPL was to supply power for the quantum of electricity tied up with the Intervener thus acknowledging that it was this power which was to replace the power to be procured from GEPL and the allegations with regard to the entry of VIPL is misconceived on the basis of WPCL's own pleadings.
- f) The negotiations that took place between GEPL and the Petitioner substantially reduced the price earlier offered by GEPL by its letter dated December 2, 2010 which was at the rate of Rs.3.98 per kWh and subsequently reduced to Rs.3.90 per kWh.

- g) The contents of sub-paragraph (f) of the paragraph under reply are contradictory to what is stated by WPCL in sub-paragraph (d). RInfra also denied that the Addendum was clandestinely created as alleged and further submitted that the Addendum is in consumer interest and it protects RInfra from the regulatory uncertainty.
- h) The PPAs with VIPL and GEPL are for procurement of Medium Term power and there is no substitution in so far as the aforesaid two companies are concerned and the supply by VIPL under its PPA is for the same period as by GEPL from FY 2012-2013.
- i) The PPA with WPCL was validly terminated for reasons set out in Case No.11 of 2010 and the contention relating to development of generation plants, their sustainability etc. are irrelevant as admittedly WPCL has committed breach of the PPA.
- j) RInfra further submitted that the power conferred on this Commission under section 86(1)(b) has not been taken away by the provisions of Section 62 or Section 63. The aforesaid sections including Section 86(1)(b) operates in different spheres and the tariff specified in Section 62 relates to the power of the Commission exercisable in performing its functions under Section 86(1) (a) and hence, it is denied that the EA, 2003 envisages only two modes for determination of tariff and further, there is no bar in approaching the Commission under Section 86(1)(b). The question of determination of tariff under Section 62 does not arise. The approval sought relates to the price, which is clearly provided for in Section 86(1)(b).
- k) RInfra relied on the Hon'ble ATE Judgment *Supra* that it is not always necessary to follow Competitive Bidding procedure and the finding that nowhere in the order of the Central Commission has it been observed that Clause 5.1 of the Tariff Policy will be binding on the State Commission while exercising powers under Section 86(1)(b) to approve all future procurement of power by distribution licensee.

- l) The contents of sub-paragraph (d) are denied and submitted that the bifurcation of the contract for one year and two years respectively during the medium term was to ensure supply of power to the consumers of RInfra. It is also denied that there was any malafide, ulterior motive as alleged in the paragraph under reply.
- m) With reference to paragraph 6 (III) of the Objections, RInfra denied the correctness of the contents of the paragraph under reply. The substitution of power to be procured from GEPL as against WPCL has resulted in a saving to the consumers of Rs. 395 Crore. Despite being given an opportunity to negotiate the per unit price by this Commission WPCL has not only failed but has refused to even negotiate the price. There is no explanation forthcoming in this regard in the paragraph under reply. Further, as stated above, the source of fuel is an assured captive source insofar as the LoI with GEPL is concerned as mentioned hereinabove. In contrast, there is no FSA between WPCL and its supplier WCL, thus breaching the term of the contract.

21. RInfra filed its written submissions on May 19, 2011, wherein the following have been stated:

- a) RInfra has sought approval for procurement of power as provided in Section 86(1) (b) of the EA 2003.

Section 86 (1)(b): “Functions of State Commission” –

(1) The State Commission shall discharge the following functions, namely: -

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail as the case may be within the State.

(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State.”

- b) Thus, RInfra submitted that under Section 86 the Commission has the power to determine the tariff for supply in retail as well as to regulate electricity purchase and procurement process of a distribution licensee which includes the price at which electricity is to be procured by licensees through agreements for purchase of power.
- c) If the Commission can determine tariff under Section 86(1)(b) it has the power to regulate Power Purchase Agreements including the price which a distribution licensee enters into with a supplier. The said two powers are separate and distinct and the Determination of tariff is as per the provision of Section 62 of EA, 2003.
- d) RInfra further submitted that, if competitive bidding process is adopted by a licensee the Commission is required to adopt the tariff so discovered in the competitive bidding process under Section 63 of EA, 2003 which *inter alia* provides that notwithstanding anything contained in Section 62, the Commission may adopt the tariff determined through the process of bidding. While the aforesaid two provisions relate to tariff determination by the Appropriate Commission and by bidding process, independently, the Commission can regulate the price agreed between the parties in a Power Purchase Agreement entered into between the distribution licensee and a supplier who may be a generating company or a trader. Thus, power is specifically conferred under Section 86 (1)(b) to the Commission to regulate the electricity purchased through agreements which provides for the price at which the same is required to be sold. The Commission thus can give “in principle” approval to the LoI issued by the Petitioner to GEPL dated December 18, 2010.
- e) As per the LoI dated December 18, 2010 at the rate of Rs.3.90 per kWh the GEPL has agreed to supply power to the RInfra for the period April 1, 2011 to March 31, 2011
- f) RInfra further submitted that the Commission has the power, authority and jurisdiction to regulate the said price and in the exercise of such power the Commission can go into the issue as to whether the price at which power is

proposed to be procured under the agreement is reasonable and in consumer interest.

- g) In the present case, the price discovered through competitive bidding is Rs. 4.84 per kWh levellised, while in the present case the LoI would benefit the consumers by Rs.395 Crore which correspondingly is a savings of 12% p.a. in power cost compared to the weighted average rate of Wardha Power Company Limited (WPCL) and Abhijeet MADC Nagpur Energy Private Ltd (Abhijeet Group) of Rs. 4.84/kWh as per the PPA.
- h) It is further submitted that the Hon'ble Appellate Tribunal for Electricity as well as the Delhi Electricity Regulatory Commission have both held that it is not necessary to follow competitive bidding process alone. In the light of the aforesaid it is submitted that the RInfra is entitled to approval of the letter of intent issued to GEPL
- i) RInfra submitted that the price at which the LoI had been issued is lower as compared to the market-discovered price. Further, insofar as GEPL is concerned, GEPL has tied up the said power with Jindal Power Limited, which sources its fuel/raw material from its captive resources. Apart from the savings in the price there is also an assured power supply of 300 MW.
- m) RInfra submitted that WPCL have breached the terms of the PPA by failing to execute an FSA within the stipulated period. In this regard RInfra repeated and reiterated what is stated in the Written Submissions filed by the Petitioner in Case No.11 of 2011.

22. The Commission vide Notice dated July 14, 2011 scheduled a hearing in the matter on August 4, 2011 at 11.00 hrs in the presence of authorised Consumer Representatives.

23. During the hearing Ms. Anjali Chandulkar, Advocate along with Shri. G.J. Thakkar, Sr. Manager appeared on behalf of Reliance Infrastructure Ltd. (RInfra) and Shri. Sanjay Sen and Shri. Hemant Singh, Advocate, appeared on behalf of the intervener M/s Wardha Power Co. Ltd.

24. The Advocate for the Petitioner submitted that she has to take instructions from her clients. The Advocate for the Intervener Wardha Power Company submitted that Intervener has certain objections since the Petitioner, RInfra, has filed an Appeal in Case No. 11 of 2011.

25. The Commission vide Notice dated August 10, 2011 scheduled a hearing in the matter on August 17, 2011 at 10.30 hrs.

26. During the hearing, Ms. Anjali Chandulkar, Advocate along with Shri G.J. Thakkar, Senior Manager, RInfra, appeared on behalf of Reliance Infrastructure Ltd. (RInfra). Shri Sanjay Sen and Shri Hemant Singh, Advocates appeared on behalf of the Intervener M/s. Wardha Power Co Ltd. Ms. Anjali Tendulkar, Advocate submitted that RInfra has submitted its submission and the Commission may issue the Order on the pleadings and submissions made by RInfra in the matter.

27. After considering the aforesaid factual matrix, the Commission needs to take a view as to whether “in-principle” approval should be granted to the Letter of Intent dated December 18, 2010 between RInfra and GEPL for procurement of power. The Commission notes that on an earlier occasion RInfra had approached the Commission for seeking approval of their proposed quantum of power procurement under medium term for different supply periods.

28. By Order dated July 21, 2009 in Case No.94 of 2008, the approval was granted by the Commission on the quantum to be procured through competitive bidding process under Case-I bidding for FY 2010-11 to FY 2013-14. Thereafter, a request for proposal document was issued by RInfra on July 30, 2009. A total quantum of 260 MW + 55 MW + 134 MW = 449 MW was contracted for by RInfra with WPCL, AMNEPL and R-Power (VIPL) respectively. These parties were selected through the competitive bidding process. Thereafter, the aforesaid quantum contracted with the aforesaid parties also came to be upheld by the Commission in its various Orders. As against its total quantum requirement vis-à-vis 449 MW as contracted with different parties, there remained a gap of around 550 MW. To bridge

this gap RInfra directly approached GEPL as well as JSWEL for additional quantum. This petition, however, is only concerned with procurement from GEPL.

29. Admittedly, the offer from GEPL did not come through competitive bidding process despite the total quantum requirement having been approved by the Commission on an earlier occasion on a petition filed by RInfra for procurement through competitive bidding process. A question would, therefore, arise as to whether a direct bilateral off-take contract could be permitted, particularly when the overall quantum to be procured under medium term through competitive bidding process in accordance with the guidelines issued by the Central Government, has been approved by the Commission vide Order dated July 21, 2009 in Case No. 94 of 2008? In these circumstances, an approval under section 86 (1) (b) cannot be granted in isolation. There has to be a fair play in action. If a gap arises, vis-à-vis the total power procurement quantum approved by the Commission to be contracted through competitive bidding, the gap must be met through competitive bidding only. The efforts to procure power through competitive bidding cannot be a sham. There is no question of granting in-principle approval as sought for under the present petition in the aforesaid circumstances. It is not only a question of procuring power at negotiated lower rates for the benefit for consumers, but it is also a question of upholding the sanctity of Section 63 of the 2003 Act which lays down the requirement of transparent process of bidding in accordance with the guidelines issued by the Central Government.

30. Relevant portions of RFP of RInfra (relating to quantum of Medium Term Power to be procured through Competitive Bidding as per Central Government guidelines), which was approved through Order in Case No. 94 of 2008, are follows:

The Original Procurement Schedule

“Page 3 of RFP item (c) “procurer intends to procure power at the generator bus bar (delivery point) on ‘Round the Clock (RTC)’ basis and/or on ‘Time of Day (ToD)’ basis for a period of 2 to 6 years for different Supply Periods as shown in the Table below:

Supply Period	<i>Scheduled delivery date</i>	<i>Scheduled expiry date</i>	<i>Time of Day</i>	
			<i>Round the Clock</i>	<i>Peak (0800-2300)</i>

1	1 04 2009 to 31 03 2010	31 03 2015	350 MW	100 MW
2	1 04 2010 to 31 03 2012	31 03 2015	500 MW	300 MW
3	1 04 2012 to 31 03 2014	31 03 2015	700 MW	500 MW

REVISED PROCUREMENT SCHEDULE

Item 1.4 of RInfra letter dt 07 07 2009 (in case #94 of 2008) submitted under affidavit dt 08 07 2009, states: “ the supply periods **shall be modified** as under, with the revised quantum after inclusion of additional 500 MW under Medium Term Procurement (due to latest development in respect to TPC capacity). These changes shall be carried out in RFP documents:”

Supply Period	Scheduled delivery date	Time of Day	
		Round the Clock	Peak (0800-2300)
1	1 04 2009 to 31 03 2010	850 MW	300 MW
2	1 04 2010 to 31 03 2011	1000 MW	300 MW
3	1 04 2011 to 31 03 2012	1000 MW	300 MW
4	1 04 2011 to 31 03 2013	1200 MW	300 MW
5	1 04 2011 to 31 03 2014	1200 MW	500 MW

31. Having originally approached the Commission for approval to procure 500 / 700 MW Power for periods 2 to 6 years and finally for 1000 /1200 MW with modified supply periods ending March 2014, and having sought approval for Procurement of 1000/1200 MW Power (Case No. 94 of 2008) and after completing procurement of 449 MW on Medium Term basis, RInfra-D cannot be allowed to bypass the bidding process for procuring the balance quantity of Power.

32. The Commission therefore directs RInfra to undertake competitive bidding for procurement of balance power in order to bridge the gap vis-à-vis the quantum contracted with WPCL, AMNEPL and VIPL as against the total quantum approved by the Commission under medium term in its Order in Case No. 94 of 2008.

With the above directions, the present case stands disposed of.

(Vijay L. Sonavane)
Member
Sd/-

(V.P. Raja)
Chairman
Sd/-