

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case Nos. 54 and 59 of 2007

In the matter of
Petition filed by (i) M/s Purti Sakhar Karkhana Ltd. for intra-State Transmission
Open Access on a short-term basis and (ii) MSEDCL seeking directives to restrain
M/s Purti Sakhar Karkhana Ltd. from selling the Energy to a third party without
the consent of MSEDCL.

Dr. Pramod Deo, Chairman
Shri A. Velayutham, Member
Shri S. B. Kulkarni, Member

Dated: December 17, 2007

Case No. 54 of 2007

**Purti Sakhar Karkhana Ltd
2nd Floor, Khadi Gramudyog Building
Gandhi Sagar, Mahal, Nagpur.**

..... Petitioner

Versus

- (1) **The Tata Power Company Ltd
Bombay House
24, Homi Modi Street
Fort, Mumbai 400 001**
- (2) **Reliance Energy Ltd
Reliance Energy Centre
Santa Cruz (E), Mumbai 400 055**
- (3) **Reliance Energy Trading Company Ltd
Reliance Energy Centre
Santa Cruz (E), Mumbai 400 055**
- (4) **Maharashtra State Electricity Transmission Company Ltd
Prakash Ganga, E-Block
Bandra Kurla Complex
Bandra (E), Mumbai 400 051**



(5) Maharashtra State Electricity Distribution Company Ltd
Prakashgad, Bandra (E),
Mumbai 400 051.

..... Respondents

Case No. 59 of 2007

Maharashtra State Electricity Distribution Company Ltd
Prakashgad, Bandra (E),
Mumbai 400 051.

..... Petitioner

Versus

(1) Purti Sakhar Karkhana Ltd
2nd Floor, Khadi Gramudyog Building
Gandhi Sagar, Mahal, Nagpur.

(2) State Load Despatch Centre
Maharashtra State Electricity Transmission Company Ltd
Kalwa, Navi Mumbai

..... Respondents

For the Petitioner:

Shri. S.P. Dharmadhikari, Shri. Pradeep Sancheti,
along with Shri. P.K. Kukde.

For the Respondents:

Shri. Vikas Singh, Additional Solicitor General of
India, for MSEDCL (Respondent No. 5).
Shri. M.R. Khadgi (Chief Engineer) and Shri.
Jayant R. Kulkarni (Executive Engineer), Shri.
Amitabh Saha (Consultant) for Maharashtra State
Load Despatch Centre ("SLDC") operated by
MSETCL (Respondent No. 4).
Shri. Mahendra Kumar (Chief Executive Officer)
for RETCL (Respondent No. 3).
None for Respondent Nos 1 and 2.

ORDER

Purti Sakhar Karkhana Limited ("PSKL") filed a Petition on September 18, 2007 seeking, inter alia, adjudication of a dispute concerning transmission open access, billing process and for grant of appropriate directions.



2. PSKL states that their industrial unit which is situated at Village Bela, Tehsil Umred, District Nagpur, produces sugar with by-products such as industrial alcohol and power generation. PSKL also states that the erstwhile MSEB has granted them consent to construct and commission a 22.50 MW co-generation power plant, using bagasse and coal, at their sugar plant in the said Village Bela. The electricity generated at the said power plant was to be used for PSKL's own consumption and it was also proposed that MSEB would purchase the surplus power. The main contention of PSKL is with reference to Clause 7.4 of the Energy Purchase Agreement ("EPA") dated September 2, 2002, as executed between PSKL and MSEB which allows PSKL to sell the energy generated to third parties from the beginning itself at their own option. Clause 7.4 of the EPA reads as under:

" 7.4 Third party sale:

The developer of the co-generation projects can be allowed to sell the energy generated by the co-generation project, to third parties from the beginning itself, if they choose to do so. However, in such a situation, there will be no liability on the part of the MSEB to compulsorily off-take the energy generated by the project."

It is averred in the Petition that, having commissioned the plant on March 18, 2007, PSKL started commercial sale of power to Reliance Energy Trading Company Limited ("RETCL", Respondent No. 3 herein) in accordance with its rights as per the said Clause 7.4 of the EPA. PSKL has annexed to its Petition a copy of a power purchase agreement ("PPA") as executed between RETCL and PSKL dated January 30, 2007. PSKL has pointed out that the said EPA vests in Maharashtra State Electricity Distribution Company Limited ("MSEDCL", Respondent No. 5 herein) pursuant to the trifurcation of MSEB. PSKL states that the fact of execution of the said PPA between RETCL and PSKL had been brought to the notice of MSEDCL, vide letter dated February 23, 2007. In the said letter, PSKL had requested MSEDCL to provide and commission 220 kV metering at 220 kV switchyard, which was required in view of the said PPA between PSKL and RETCL. It was requested that MSEDCL provides ABT-type meter at the energy delivery point at the interconnection of 220 kV switchyard of PSKL at Village Bela.

3. It is PSKL's case that the plant, having been commissioned on March 18, 2007, commenced sale of power through RETCL, to Noida, Uttar Pradesh, through inter-State transmission open access on a short-term basis. The said transaction of sale of power to Noida continued till the end of August 2007, without any interruption. However, MSETCL, Respondent No. 4 herein, rejected transmission open access to PSKL/RETCL for the months of September 2007 and October 2007 onwards on the basis of an objection raised by MSEDCL on the third-party sale by PSKL to RETCL.

4. PSKL states that it is severely aggrieved with the refusal on the part of MSEDCL to grant open access to PSKL including raising objections. PSKL states that it is entitled to open access as a matter of right under Section 40 of the Electricity Act, 2003 ("EA 2003"). Furthermore, it has been submitted that both MSETCL and MSEDCL are refusing to give no-objection certificate to WREB for transmission open access. It is the



case of PSKL that besides the obstruction created by MSEDCL for the grant of open access to PSKL, The Tata Power Company Ltd. ("TPC", Respondent No. 1 herein) is also deliberately creating mischief by not co-operating in giving concurrence for the implementation of the PPA between PSKL and RETCL.

5. The other grievance of PSKL is with reference to Clause 6.5 of the aforesaid EPA dated September 2, 2002 executed between MSEB and PSKL. Clause 6.5 of the EPA reads as under:

"6.5 Standby Charges

10% of the additional demand charges shall be levied on the portion of the installed capacity of co-generation plant permitted for self use and total capacity of stand-by generating set (MVA= MW +0.8 P.F.). These demand charges will be payable as per HT industrial tariff in force irrespective of whether the applicant draws any energy from the MSEB grid or not."

PSKL states that the aforesaid Clause 6.5 is not applicable to PSKL as they have been drawing power from Vadgaon Sub-station on 33 kV HT supply for start-up and auxiliary consumption for which a separate 33 kV line has been established by PSKL exclusively for the said purpose. PSKL is a regular industrial HT consumer. It is PSKL's case that as there was no provision at 220 kV level, either for start-up or auxiliary power which is existent at 33 kV, PSKL is not responsible to pay any charges referred to in the aforesaid Clause 6.5. PSKL states that they had kept MSEDCL informed of the same. Despite that, MSEDCL has from time to time included the said additional charges in the bills though PSKL was not liable to pay the same. The rationale provided is that since no power has been drawn, there is no inflow or arrangement of supply from the 220 kV switchyard to the industrial unit, there is no question of imposing any charges in that regard. PSKL further states that as the regular consumption charges for power drawn at 33kV voltage is billed by MSEDCL and paid by PSKL, any additional charge for non-supply from 220 kV by MSETCL or MSEDCL, amounts to double charging.

6. With the above background, the prayers made by PSKL are as under:

"(i) Pass appropriate Orders and/or direction to the Respondent No. 4 and Respondent No. 5 not to deny the Open Transmission Access to the petitioner for transmission of energy generated at their co-generation unit, in the matter of implementation of the agreement between petitioner and Respondent No. 3.

(ii) Also pass appropriate Orders and /or direction to the Respondent No. 1, Respondent No. 4 and Respondent No. 5 not to create hurdles for transmission and sale of energy by the petitioner and Respondent No. 3.

(iii) Also pass appropriate Orders and / or direction to the Respondent No. 4 and Respondent No. 5 not to demand for double charges and to avoid double charging thereby making demand order 220 KV side, in addition to the supply on 33 KV for auxiliary consumption and standby at the generation unit of the petitioner.



(iv) The petitioner also prayed for direction against the Respondent No. 4 that no separate levy can be demanded by Respondent No. 4, as the transmission charges and wheeling charges are now paid by the petitioner.

.....”

However, subsequently, Notes of Argument dated November 21, 2007 have been filed wherein PSKL has sought to press only prayer clauses (i) and (ii).

7. Subsequently, PSKL filed a Petition seeking ad-interim directions upon MSEDCL and MSETCL for granting transmission open access to PSKL, in the absence of which it has been submitted by PSKL that they will suffer irreparable loss, which cannot be computed in terms of money.

8. A hearing was held on November 6, 2007. PSKL referred to the order passed by the Chief Engineer, Maharashtra State Load Despatch Centre, (“SLDC”) dated November 3, 2007 which allowed Short Term Open Access (“STOA”) to PSKL from November 4, 2007 to November 6, 2007. However, the SLDC under its letter dated November 6, 2007, cancelled the earlier STOA precisely with effect from 10.00 hrs on November 6, 2007. It was submitted that SLDC in its letter has taken the position that STOA shall resume as per the orders/ directions of the Commission. It was submitted on behalf of SLDC that the initial permission for STOA vide order dated November 3, 2007 was given on the consent of the buyer (TPC/RETCL) and PSKL, the seller. The said permission has been revoked vide order dated November 6, 2007, on receipt of a written letter from MSEDCL citing various reasons in terms of an existing agreement, as mentioned there under, seeking the discontinuance of STOA to PSKL. It was strongly contended on behalf of MSEDCL that they had no role to play in the issuance of the said letters by SLDC, however, on July 21, 2007, MSEDCL had sent a letter to SLDC informing that PSKL have executed an Energy Purchase Agreement (“EPA”) for a period of 13 years with MSEB. It was submitted that accordingly, supply from the generation unit of PSKL could not, in the first place, be given to RETCL, as that would violate the terms and conditions of the said EPA.

9. Although, SLDC filed certain data/energy flow statements which were extracted from records denoting incidence of STOA from April 1, 2007, whether for synchronizing or testing purposes, MSEDCL has doubted the veracity of the same. MSEDCL has referred to a letter dated August 17, 2007 issued by the Superintending Engineer, Nagpur Rural Circle-MSEDCL to the Chief Engineer (Commercial)-MSEDCL. The said letter documents the internal information of MSEDCL that “*power supply bill for the period 06-04-07 onward*” has not been submitted by PSKL till August 17, 2007. PSKL submitted that as per their records, their generation unit was commissioned on March 18, 2007 and power was supplied to MSEDCL from March 18, 2007 to March 31, 2007 as ‘*testing and commissioning energy*’. It was submitted that MSETCL was kept informed of a power purchase agreement (“PPA”) that PSKL has executed with RETCL (copies of the said PPA was already deposited with MSETCL and MSEDCL). It was submitted that from April 1, 2007 to April 10, 2007, PSKL failed to supply surplus power to Noida Power Transmission Company Limited as the meters installed by MSETCL were not



ABT meters but ToD meters. Thus, during the said 10 days during which period ABT metering was not put in place by MSETCL, PSKL supplied power to MSEDCL (inspite of the PPA that PSKL entered into with RETCL, to supply power to Noida Power).

10. Per contra, MSEDCL contended that PSKL has suppressed the fact that PSKL supplied power to MSEDCL from March 17, 2007 to April 10, 2007. Secondly, considering that an EPA has been executed by PSKL with MSEDCL in the year 2002, it would be absolutely incorrect to describe the flow of energy from March 18, 2007 to March 31, 2007 as '*testing and commissioning energy*'.

11. SLDC admitted during the hearing that it has no data on the flow of power from PSKL to MSEDCL from March 2007 onwards as readily available. It was therefore unclear at the stage of the hearing as to how were MSEDCL billed for the generation of energy from PSKL, considering that such generation of power was not appropriately accounted for. SLDC was directed to submit full data/energy accounting statements that have recorded incidences of sale of generated power from generating units to distribution licensees, or sale of power intra-distribution licensees, from March 2007 onwards. SLDC also admitted during the hearing that the permission to PSKL to transmit power to RETCL was provided by SLDC as per the oral consent given by Shri. A.D. Palamwar, Director (Operations), MSEDCL.

12. PSKL has relied on Clause 7.4 of the EPA dated September 2, 2002 executed between PSKL and MSEB. PSKL submitted that they were entitled to sell energy to third parties and MSEB was relieved from the obligation to off-take energy from PSKL. PSKL also submitted that the said EPA was entered into in pursuance of the Commission's Order dated July 15, 2002 passed in Case Nos 8/9/10/15/17/18/19/20 and 21 of 2001. PSKL referred to paragraphs 25, 26, 27.1, 27.2, 27.3.4, 27.3.13, 27.4.3 of the said Order dated July 15, 2002, and submitted that as per the specific directions contained under the cited paragraphs (especially paragraph 27.4.3), PSKL's right to sell power to third-parties was agreed upon under the EPA. PSKL referred to the letter dated February 23, 2007 as sent to MSEDCL (Annexure D to the main Petition) whereby the intention of PSKL to sell energy to RETCL has been communicated (with copy of power sale agreement enclosed) even before actual sale to RETCL took place. PSKL submitted that even if it is to be assumed that third-party sale caused a breach of contract, MSEDCL should have initiated appropriate proceedings at the relevant point of time, considering that third-party sale is being conducted by PSKL ever since April 2007. PSKL further submitted that the basis of filing of an interim application under the present proceedings lies in the letter dated October 31, 2007 received from MSETCL (Annexure A to the interim application). Vide the said letter, MSETCL has sought PSKL to obtain specific directions from the Commission for sale of energy to RETCL.

13. PSKL has referred to Sections 39 and 40 of the EA 2003 which requires MSETCL to provide "non-discriminatory open access" to generators. PSKL further referred to Section 60 of the EA 2003 and submitted that the action of MSEDCL in restraining third-party generation through the office of MSETCL is reflective of abuse of the rule of law, and abuse of dominant position. PSKL submitted that neither the principles of equity, nor urgency, nor the plain reading of the EPA dated September 2,



2002 read with the Order dated July 15, 2002 can disallow or create a fetter on PSKL from causing third-party sale of energy.

14. Per contra, MSEDCL submitted that the EPA was entered into by MSEB with PSKL on the issuance of an NOC dated September 14, 2001 under Section 44 of the Electricity (Supply) Act, 1948 (Page 56 in the compilation filed by MSEDCL). It is provided under Clause 5 therein, that surplus power shall not be sold by PSKL to any third-party, except when MSEB declines to buy power or defaults in making payment of bills. Referring to Clause 7.4 of the EPA, it was submitted that as contained therein, so far as third-party sale is concerned, *'there will be no liability on the part of the MSEB to compulsorily off-take the energy generated'*. It was submitted that the said paragraph has clarity on certain issues. Firstly, the Petitioners *"can"* sell to a third party on taking the permission of MSEB and not *"shall"* / *"should"* sell to a third party, as stipulated under the Commission's Order dated July 15, 2002. Secondly, the intention of the parties should not be interpreted from the said Order but rather from the said EPA which has been entered into by and between both parties. Thirdly, the EPA stipulates that once permission is obtained from MSEB for third-party sale, MSEB shall not be obligated to compulsorily off-take the energy. Referring to Clause 8.4 of the said EPA, MSEDCL submitted that PSKL were *'entitled'* to third-party sale only on account of any default on the part of MSEB in terms of the EPA, and not otherwise. MSEDCL referred to a notice dated July 26, 2007 whereby PSKL were directed not to sell power to RETCL. It has been submitted that as MSEDCL was not aware of any actual third-party sale by PSKL no proceedings were thus initiated by MSEDCL on that account.

15. It has been contended on behalf of MSEDCL that if relief as sought under the present Petition and the interim application are allowed, an undesirable precedent will be established whereby any developer of bagasse based co-generation projects shall be free to sell power to any third-party and flout terms and conditions entered into with distribution licensees under PPAs. Such an act would have the effect of requiring MSEDCL to procure electricity from expensive sources and thereby increase tariff and would thus fail to safeguard the interests of consumers.

16. Whereas, PSKL contends that the NOC dated September 14, 2001 granted by MSEB under Section 44 of the Electricity (Supply) Act, 1948 is not needed for third-party sale after the expiry of two years thereof, as stipulated in the said NOC. It was submitted that no such NOC is required under the EA 2003 regime. On the interpretation of the wordings contained in the Order dated July 15, 2002 vis-a-vis the provisions of the EPA, PSKL contends that the said order of the Commission cast an obligation on MSEB to execute only such EPA as would be compliant with the said Order. No EPA executed by MSEB could therefore dislodge the right conferred on the developer of a co-generation project. Clause 7.4 of the EPA is, therefore, necessarily required to be read in the context of the Order dated July 15, 2002, and when so read, it will have to be interpreted to mean that it confirms unqualified right on the developer to make third party sale. The verb *'can'* appearing in the EPA has to be necessarily read as *'shall'* or *'should'* (as it would appear in the Order dated July 15, 2002). Not doing so would be permitting MSEB to commit blatant breach of the Commission's Order dated July 15, 2002 which is impermissible in law. PSKL has stressed that paragraph 27.4.3 of the said Order stipulates that co-generation projects should be allowed to sell the energy generated to



third-parties from the beginning itself, if they choose to do so. This entitlement of the co-generation project, as per PSKL, has been mirrored in Clause 7.4 of the EPA. Therefore, the PPA which PSKL executed with RETCL for a period of one year operative from April 1, 2007 is firstly in consonance with the aforesaid order dated July 15, 2002 and secondly, not restricted by Clause 7.4 of the EPA. PSKL has contended that MSEDCL was therefore, relieved of its obligation to purchase power from PSKL except that generated during the period of testing and commissioning, which period was, in the circumstance, then prevailing, expected to end on March 31, 2007. It is submitted that the connectivity of the project was accomplished on March 18, 2007, whereupon the testing phase of the project started. During this testing period, various quantities of energy were intermittently supplied by PSKL in terms of Clause 5(b) of the EPA.

17. PSKL submitted that Clauses 7.4 and 8.4 of the EPA are mutually exclusive. The said clauses operate in different parameters. Clause 8.4 provides that should MSEB default on the terms and conditions of the EPA, MSEB shall facilitate an energy wheeling agreement that PSKL may enter into with a third-party purchaser. Clause 7.4 on the other hand operates in the event PSKL desires to supply to a third-party.

18. PSKL has argued that there is no restriction on a generator to sell electricity under Section 10(2) of the EA 2003 and to avail non-discriminatory open access under Section 39(2) and Section 40 of the EA 2003. PSKL's case is also to be viewed from the statutory duty cast on the Commission to promote co-generation under Section 86(1)(e). PSKL has further argued that the EPA with MSEB that was executed under the repealed laws would only be valid so long as it is not inconsistent with the EA 2003, as provided under Section 185(2). PSKL has submitted that in another case before the Commission, the restrictions on small hydro power generators to offer generated energy to MSEDCL before they could sell the same to any other person, has recently been reviewed. In this regard, PSKL has placed reliance on the Commission's Order dated November 7, 2007 passed in Case No. 85 of 2006 where such a right of first refusal in favour of MSEDCL was reviewed and removed as the same was found contrary to the EA 2003. PSKL has also referred to the Judgement dated June 2, 2006 passed by the Appellate Tribunal for Electricity in the case of *Small Hydro Power Developers Association & Ors. Vs. Andhra Pradesh Electricity Regulatory Commission & Ors.* in Appeal Nos.1, 2, 5, 6, 7, 8, 9, 10, 12, 15, 16, 17, 18, 19, 20, 21, 22, 34, 46, 47, 48, 49, 50, 52, 58, 67 and 80 of 2005, wherein it was held that a generating company cannot be forced to execute a PPA, which has been substantially modified by a State Electricity Regulatory Commission in exercise of Section 86(1)(b) and applicable regulations thereof, which modifications are not agreed upon by the generating company.

19. PSKL has also stated that on SLDC's advise to install ABT meter for effecting third party sale, PSKL had requested MSETCL to provide such a meter, which was done on April 5, 2007. Therefore, PSKL's generation plant attained the commercial operability on April 5, 2007 on which day the tenure of the EPA with MSEB/MSEDCL commenced. However, neither on April 6, 2007 nor anytime thereafter, PSKL has made any supply of energy to MSEDCL save and except the generation of electricity by PSKL and putting it into the grid in pursuance of the Order of the High Court dated November 13, 2007 (as discussed below). PSKL has further contended that clause 7.4 of the EPA provides for sale by the developer to the third party from the '*beginning itself*'. The expression



21. PSKL further states that during the period from 18.3.2007 to 5.4.2007, PSKL had raised two bills for energy supplied to MSEDCL (annexed as Document No. IX & X in the Additional Affidavit filed on November 26, 2007). It is stated that the said Bills were for the supply of energy generated in testing phase and not contractual commercial energy supply no matter that the same were raised at the rate of Rs. 3.05 per unit. PSKL could not have the knowledge about MSEDCL's average realization rate for the previous financial year so as to raise the Bill at the rate of 90% of MSEDCL's average realization rate for the previous financial year, as stipulated in Clause 5(a)(b)(ii) of the EPA for supply of energy during testing phase. Therefore, it was for MSEDCL to calculate the exact rate and pay the difference if any. Bills were to be raised strictly as per Clause 8.2 of the EPA and such bills were never raised as contemplated under the said clause. This, therefore, establishes the fact that PSKL had opted for third party sale from beginning itself.

22. Per contra, MSEDCL submitted that the initial supply from the generation units of PSKL have been done by PSKL to none other than MSEDCL. MSEDCL referred to the letter dated August 17, 2007 issued by the Superintending Engineer, Nagpur Rural Circle-MSEDCL to the Chief Engineer (Commercial)-MSEDCL. The said letter records that MSEDCL has been billed by PSKL for the first course of generation from the generation units of PSKL.

23. During the hearing on November 6, 2007, the Commission took the view that generation should not be stopped under any circumstances and that it needs to be ensured that generation from said cogeneration project is injected into the Grid, the accounting of the same to the credit of appropriate party could be determined subsequently, pursuant to the outcome of the Petition. All the Respondents and SLDC were directed to file written reply.

24. Subsequently, MSEDCL filed a Petition on November 5, 2007 seeking the following directions with respect to Case No. 59 of 2007:

- (i) PSKL and SLDC, jointly and severally, be ordered and injunctioned from selling energy to any utility / entity other than MSEDCL;
- (ii) That the energy from PSKL be supplied only to MSEDCL and not to any third party as sought by PSKL;
- (iii) PSKL and SLDC should jointly and severally be made liable for the losses suffered by MSEDCL and the said losses be made good through the bills that will become payable to PSKL;
- (iv) Direct SLDC to take appropriate actions strictly in accordance with Section 32(2)(a) of the EA 2003 and also direct them to deny open access to PSKL and ensure that the EPA between MSEDCL and PSKL is honoured.

25. The issues raised in the Petition filed by MSEDCL are connected with the Petition filed by PSKL. Both these Petitions raise common points, and MSEDCL's Petition further impinges directly on the issues raised by PSKL. Therefore, it would not have been appropriate to deal with these cases separately and in isolation. In the circumstances, MSEDCL's Petition was heard together with PSKL's Petition in the common hearing held on November 21, 2007. MSEDCL apprised the Commission that subsequent to the



hearing of November 6, 2007, PSKL had filed a Writ Petition before the High Court, Bombay (Nagpur Bench). A copy of the order dated November 13, 2007 as passed in the said Writ Petition was filed in this regard. It was submitted that despite the clear direction given by the Commission on November 6, 2007 for injection of power from the co-generation unit of PSKL to the Grid, PSKL, as recorded in the said order dated November 13, 2007, had not injected power in the Grid as on November 13, 2007. MSEDCL submitted that SLDC should be directed to submit necessary details on the current status. Referring to the arguments advanced by PSKL on the interpretation of Clause 7.4 of the EPA, as advanced on November 6, 2007, MSEDCL submitted that the data that SLDC has been directed to submit on November 6, 2007, would ascertain as to whether the first course of commercially generated power from PSKL through transmission open access has been transmitted to RETCL or MSEDCL. In this regard, SLDC should be directed to submit necessary data at least within two days hereof, and the hearing in the matters may therefore be adjourned.

26. It was submitted by PSKL that the said Writ Petition was initiated by PSKL seeking, *inter alia*, the destination point/exit point for transmitting the power injected into the grid by PSKL. The said Writ Petition had been subsequently withdrawn, as recorded in the order dated November 13, 2007. It was also submitted that the Petition filed by PSKL under Case No. 54 of 2007 might be considered as a reply to the Petition filed by MSEDCL under Case No. 59 of 2007. It was submitted that if any adjournment is being granted to the hearing in the present matters, PSKL should be permitted to sell power from its cogeneration unit to RETCL, to whom PSKL is contractually bound to supply power, in terms of a PPA dated January 30, 2007.

27. SLDC submitted an affidavit on November 26, 2007, where under a chronology of events have been provided, and it has been submitted that MSEDCL informed SLDC that PSKL has billed MSEDCL at commercial rate and moreover, MSEDCL paid such Bills at the rate of Rs. 3.05 per unit. Thus, SLDC is of the opinion that the first generated power went to MSEDCL. SLDC submitted that on and from November 14, 2007, PSKL has been generating power, which is being injected into the State Grid. The allocation of this generated power to any entity has not yet been made by SLDC. It was further submitted that SLDC has allowed PSKL to inject power into the Grid under Section 32(2)(a) of the EA 2003, as per the directions of the Commission issued during the hearing held on November 6, 2007 in Case No. 54 of 2007. Referring to the transmission open access procedure that has been drafted by SLDC, it was submitted that parties to an open access arrangement are required to submit all existing documents and agreements for the grant of allocation of power. Allocation of power has not been made in favour of RETCL due to the existence of EPA that PSKL has already entered into with MSEDCL, which is contrary to the PPA between PSKL and RETCL. On being informed by MSEDCL of the existence of EPA that PSKL has entered into with MSEDCL and further, a Deed of Tri-party Agreement dated May 25, 2006 that PSKL has entered into with MSETCL and MSEDCL, SLDC had directed PSKL to obtain a written no objection from MSEDCL in the matter of allocation of generated power in favour of RETCL. It was submitted that till date, PSKL has not submitted any such written non-objection. It was submitted that based on the information received from MSEDCL, SLDC had never directed PSKL to shut down generation but had only cancelled the STOA transaction with RETCL. The Commission is in receipt of a letter from the SLDC dated November 8,



2007 *inter alia* contending that SLDC had permitted short-term open access (“STOA”) to the transmission of power from PSKL to RETCL for sale of 18 MW, based on an application from RETCL for STOA during the period April 1, 2007 to June 31, 2007 and supported by PPAs between RETCL and PSKL and RETCL and Noida Power Limited. However, MSEDCL vide its letter dated July 21, 2007 to SLDC had objected to the STOA transaction of RETCL and informed of its existing EPA with PSKL dated September 2, 2002. SLDC was forced to suspend the STOA transaction of RETCL granted for the period 04.11.2007 to 06.11.2007 by giving effect to Clause 10 of the Deed of Tri-party Agreement between MSETCL, PSKL and MSEDCL which reads as under:

“ The Party No. 2 shall sell all the energy generated to party No. 3 (Mahavitaran). In case Party No. 2 fails to pay any installment amount of interest as per agreement, the party no. 1 shall recover the amount of interest plus the penal interest charges from the price of energy generated and sold to Party No. 3 (Mahavitaran).”

It is on the basis of the above, SLDC has taken a stand that all energy generated by PSKL belongs to MSEDCL.

28. PSKL submitted that the rate at which supply was agreed during testing period [as per Para 5(b)(ii) in the EPA] was 90% of the rate of MSEDCL’s average realization rate for previous financial year. As per the EPA, testing supply and commercial supply have been distinguished through applicability of rates. PSKL referred to the letter dated February 23, 2007 whereby MSEDCL was informed that the first course of commercial supply will start with RETCL. This letter is a candid declaration from PSKL that PSKL is not intending to make any commercial supply to MSEDCL from day one of its commercial operations. On the issue of the manner in billing, PSKL submitted that where the intention and conduct of the parties (PSKL and MSEDCL) reveal that the said supply was for testing purposes, the manner of billing do not merit consideration inasmuch as to alter the character of the said supply. The kind of invoices that have been raised cannot change the character of the supply, and have no relevance at all in this regard. Assuming the existence of such relevance for argument’s sake, the exact rate that should accurately coincide with 90% of the MSEDCL’s average realization rate for previous financial year, was not within the knowledge of PSKL. If the applicability of the rate of Rs. 3.05/- per unit is not correct, as per the said agreed rate in the EPA, MSEDCL would be well within its right to revert back and request PSKL to charge the correct rate. Thus, the rate of Rs. 3.05/- per unit as charged by PSKL is purely of no significance to determine the character of the supply provided.

29. Per contra, MSEDCL submitted that once PSKL has charged Rs. 3.05/- per unit (which is the Commercial Rate), has accordingly acted upon, it is thereafter barred under the doctrine of estoppels to prefer a stand that supply to MSEDCL was for testing and commissioning. MSEDCL referred to the invoices dated April 6, 2007 and April 8, 2007 raised by PSKL on MSEDCL, whereby the applicable rate, as mentioned is Rs. 3.05/- per unit. MSEDCL further referred to the letter dated August 17, 2007 sent by the MSEDCL-Nagpur Circle Office to MSEDCL-Head Office. At the bottom of the said letter a comment has been made by the MSEDCL-Nagpur Circle Office on the bills raised by PSKL. [{"**Payment:** Paid Rs. 1275796/- on dated 02-06-2007, after deducting



Rs. 3,96,000/- against interest burden.”}Page 7 - Compilation submitted by MSEDCL on November 6, 2007 during the hearing of Case No. 54 of 2007]. It was submitted that the rate of Rs. 3.05/- is the Commercial Rate, as agreed between parties. The interest burden is on account of PSKL’s obligations in terms of the Deed of Tri-party Agreement with MSETCL and MSEDCL.

30. An Intervention Application was received from Shri. D.R. Murthy espousing the cause of PSKL on the basis of the non-discriminatory provisions to grant open access under Sections 39 and 40 of the EA 2003, as also to further the market in generation of electricity.

31. Having heard the parties and after considering the materials placed on the record, the Commission is of the view that these two cases are to be dealt with in a narrow compass. The essential issue to be decided is whether or not PSKL supplied electricity from its plant and billed the same for delivery to MSEDCL at the delivery point during testing and commissioning of the generation facility. Therefore, it would be required to ascertain whether the billing of electricity by PSKL for purchase by MSEDCL during the testing and commissioning period, was at the rate of 90% of MSEDCL’s average realization rate for previous financial year. The EPA under clause 1.1 provides a definition as under:

“Commercial Operation of the Generation Facility will be deemed to occur on the date Generator delivers to MSEDCL a certificate stating that the Generation Facility is operating in accordance with Operating Procedures set forth in Schedule II”.

Therefore, the Commercial Operation date is to be declared by the seller, i.e., PSKL, which is the date on which the unit(s) is available for commercial operation. However, PSKL has not intimated MSEDCL that commercial operation has been achieved.

Moreover, PSKL has itself submitted before the Commission copies of two bills for energy supplied to MSEDCL (annexed as Document No. IX & X to the Additional Affidavit filed on November 26, 2007), at the rate of Rs. 3.05 per unit. One Bill carries an Invoice No. Power/07-08/001 dated 6.4.07 for charges towards supply of energy from 24.45 MW co-generation plant at PSKL Bela for the month of March 2007. The second Bill carries an Invoice No. Power/07-08/002 dated 8.4.07 for supply from 1.4.2007 to 5.04.2007. Both the Bills have been raised at the rate of Rs. 3.05 per unit. MSEDCL’s letter dated 17th August 2007 addressed by the Superintending Engineer to the Chief Engineer, MSEDCL, records the particulars of the amounts paid towards energy supplied by PSKL and records thereunder, as against the aforesaid Bills raised by PSKL, amounts paid at the rate of Rs. 3.05 per unit for the electricity supplied by PSKL for the period 17.3.2007 to 31.3.2007 and then 1.4.2007 to 5.4.2007. MSEDCL deducted Rs. 3,96,000/- against interest burden from the total amount payable of Rs. 16,71,796/-. The remarks contained therein reads as follows: *“Remarks: - The power supply bill for the period dated 6.04.07 onward has not been submitted by PSKL Ltd till this date.”* Therefore, PSKL admittedly supplied energy to MSEDCL during 17.3.07 till 5.4.07 at the rate determined by the Commission under its Order dated 15th July 2002, i.e., Rs. 3.05 per unit. The EPA between PSKL and MSEDCL clearly states on the first page itself that it is based on MERC Order dated 15th July 2002. The said Order dated 15th July 2002



determines the power purchase and procurement process including the price for procurement of power by MSEB from the co-generation stations using non-fossil fuel and provides as under:

“27.1 Tariff Rate and Tariff Structure

*The Tariff for the purchase of electricity by the MSEB from the co-generation project based on any non-fossil fuel (such as bagasse, biomass, biogas, agriculture waste such as rice husk, groundnut shells etc.) shall be **Rs.3.05 (Rupees three and paise five only) per kWh** for the first year of operation of the Co-generation project and the tariff shall be escalated at the rate of 2% per annum on compounded basis.*

27.1.1 The above Tariff Rate of Rs 3.05 (Rupees three and paise five only) per kWh for the first year of operation and Tariff Structure thereof, is valid for the co-generation projects commissioned before the end of the tenth five-year plan (2002-2007) i.e. 31st March 2007. The Commission will review the Tariff Rate and the Tariff Structure for the Co-generation projects based on non-fossil fuels either after 31st March, 2007 or on attaining the addition of 300 MW of additional Capacity commissioned after 1st April 2001 based on such fuels in the State, which ever is earlier. The Tariff rate is linked to the year of operation of the Co-generation Project and not to the fiscal year.

27.1.2 The ‘Tariff rate and the Tariff Structure’ for the sale of electricity to the MSEB as approved by the Commission by this Order is firm and the same will not be modified on any count such as exchange rate variation, additional cost on account of conventional fuel etc. In addition, the Tariff will not be modified on account of change in law, change in tax without the prior approval of the Commission.”

The said Order dated 15th July 2002 provides at paragraph 27.6 thereof that ‘the detailed order will follow.’ Subsequently, the Commission issued a detailed Order dated August 16, 2002. The detailed order confirms the Order dated 15th July 2002 and provides reasons for the same. Subsequently, by the Order dated 18th August 2006 in the matter of Long term Development of Renewable Energy Sources and associated Regulatory (RPS) Framework in Case No. 6 of 2006, the Commission extended the applicability of its Orders dated 15th July 2002 read with August 16, 2002, as under:

“2.3.21 In view of above, the Commission rules that the tariff rates and tariff structure as approved under respective Tariff Orders in case of (a) non-fossil fuel based (qualifying) co-generation projects; (b) non-fossil fuel based (non-qualifying) cogeneration projects; (c) wind energy projects, (d) municipal solid waste to energy projects, and (e) small hydro projects, shall be extended for further period upto 31st March 2010 under RPS Policy Framework as formulated under this Order.”

Therefore, it is clear that the rate at which MSEB would purchase power from PSKL would be **Rs.3.05 (Rupees three and paise five only)**.



32. It is contended by PSKL that the said Bills were for the supply of energy generated in testing phase and not for contractual commercial energy. It has been submitted that PSKL could not have the knowledge about MSEDCL's average realization rate for the previous financial year so as to raise the Bill at the rate of 90% of MSEDCL's average realization rate for the previous financial year, as stipulated in Clause 5(a)(b)(ii) of the EPA for supply of energy during testing phase. Therefore, it was for MSEDCL to calculate the exact rate and pay the difference if any. Bills for commercial supply were to be raised strictly as per Clause 8.2 of the EPA and such bills were never raised as contemplated under the said clause. This, therefore, establishes the fact that PSKL had opted for third party sale from beginning itself. These contentions have been raised to be rejected, as the same is completely contrary to the actions of PSKL. But firstly, it is to be noted that PSKL never wrote to MSEB that in the absence of PSKL's knowledge of MSEDCL's average realization rate for the previous financial year, in order to raise the bill at the rate of 90%, as aforesaid, the bills raised by PSKL are at the rate of Rs. 3.05 per unit. This cannot be assumed on the basis of the oral submissions made by PSKL before the Commission. This submission is not sustainable. On one hand PSKL raises the aforesaid two Bills at the rate of Rs. 3.05 per unit in accordance with Clause 7 of the EPA, knowing fully well the provisions thereof provide that the tariff for purchase of electricity by MSEB shall be Rs. 3.05 per kWh for the first year of operation. This tariff rate was to be valid till 31st March 2007 as per the said order dated 15th July 2002 read with detailed order dated August 16, 2002. The said tariff rate was extended subsequently, by the aforesaid Order dated 18th August 2006. As such PSKL cannot plead that they had no knowledge of the law.

33. In the background of the set of facts, as stated above, the Commission is of the view that the applicability and enforcement of Clause 7.4 of the EPA cannot come to the rescue of PSKL, as PSKL has by its own volition chosen on one hand to sell power from "the beginning itself" to MSEB, and on the other hand billed MSEB at the rate determined by the Commission for the purchase of power as reflected in Clause 7 of the EPA. In fact, PSKL's actions of raising the bills at the rate of Rs. 3.05 per unit make it clear that PSKL wanted to supply to MSEB/MSEDCL from the beginning itself. PSKL submitted that it switched over to the third party and the defence put forward is that the supply to MSEB/MSEDCL was as testing and commissioning power. This argument is unsustainable and is hereby rejected. The argument that the EPA comes into force for a period 13 years from the date the generation facility begins commercial operation and not from any other date, deserves to be rejected in view of the language used in Clause 2 which reads thus: "*This agreement shall be effective when it has been signed by Parties and shall remain in full force for a period of thirteen (13) years determined from the date the Generation Facility begins Commercial Operation, subject only to termination*". As per this clause the EPA shall be effective when it has been signed by Parties. The supply of electricity by PSKL to MSEB and invoicing of the same at the rate of Rs. 3.05 per unit is the act of PSKL to commence the operation of the EPA. As stated above, the Commercial Operation date was to be declared by PSKL, which date MSEDCL would not know by itself, and have therefore acted upon the EPA by purchasing energy transmitted by PSKL to the grid and by making payment of bills raised by PSKL. It has not been disputed that the conditions precedent under the EPA has not been achieved by PSKL so as to render the EPA inoperative. The EPA has not been terminated by the parties. The contention raised by PSKL that billing has not been done by PSKL in



accordance with Clause 8.2, also deserves to be rejected. In fact, the aforesaid Bills raised by PSKL sufficiently records the initial meter reading, the final meter reading and the difference. Also, clause 8.4 which allows third party sale by PSKL on account of default of MSEB, does not come into force as MSEB is not in default. No default notice has been raised by PSKL so as to trigger the provisions of Clause 8.4. PSKL states that the fact of execution of the said PPA between RETCL and PSKL had been brought to the notice of MSEDCL, vide letter dated February 23, 2007. PSKL has not stated in the said letter that due to any default on the part of MSEDCL, PSKL has invoked clause 8.4 to sell power to RETCL. Moreover, in order to invoke clause 8.4 to be able to sell power to third party, PSKL was required to act in accordance with the Termination Clause 10.2 of the EPA which is dependant on the occurrence of an Event of Default on the part of MSEB giving PSKL the right to issue a default notice. PSKL has issued no such default notice. PSKL cannot arbitrarily invoke clause 8.4 to be able to sell power to RETCL. PSKL was required to act in accordance with the EPA provisions as aforesaid, in the absence of which it cannot be held that the EPA stands terminated or that the contract to supply to MSEB by PSKL stands terminated or rescinded.

34. PSKL has also contended that should MSEB/MSEDCL have been genuinely aggrieved by the third party sale to RETCL by PSKL, they should have initiated appropriate legal proceedings forthwith on the cessation of sale of electricity by PSKL to MSEDCL, i.e., after 5.4.07. This argument also does not help PSKL for the reason that Clause 17.3 of the EPA provides as under:

“Neither the failure by either party to insist on any occasion upon the performance of the terms, conditions and provisions of this Agreement nor time or indulgence granted by one party to the other shall act as waiver of such breach or acceptance of any variation or the relinquishment of any such right or any other right hereunder, which shall remain in full force and effect”.

35. The validity, legality or enforceability of Clause 8.4 has not been called into question. This clause, in the view of the Commission, substantially allows PSKL to sell electricity to third party only in case of any default by the MSEB/MSEDCL. In such an event of default by MSEB, and consequent sale by PSKL to third party, the EPA envisages that MSEB shall facilitate such third party sale and enter into an Energy Wheeling Agreement with PSKL to enable such third party sale. Both clauses 7.4 and 8.4 sufficiently entitled PSKL to sell electricity to RETCL. However, PSKL was required to act in accordance with the said clauses in order to entitle itself to the opportunity. Once, having sold electricity to MSEB, billed MSEB at the rate of Rs. 3.05 per unit, realized the said rate, and the act of not raising a termination notice thereby keeping the EPA alive, cannot give the right to PSKL to resile from the contractual obligations under the EPA. In order to hold that the electricity supplied was for testing and commissioning purpose and therefore on that basis PSKL was entitled to invoke clause 7.4, PSKL should have billed MSEB at the rate of 90% of MSEB’s average realization rate for previous financial year, which admittedly they did not choose to do. The contentions that ABT-type meter at the energy delivery point at the interconnection of 220kV switchyard of PSKL was not put in place by MSETCL, as was required, does not hold water either, as ABT-type meter is



required not only for sale to third party but also for sale to any other party, including MSEDCL itself.

36. Furthermore, the Deed of Tri-Party Agreement dated 25th May 2006 executed between MSETCL, PSKL and MSEDCL was, in terms of the second recital thereto, on account of deviations to the EPA dated 2nd September 2002 and was supplemental to the said EPA. Therefore, PSKL's contention that as the supply was towards testing and commissioning the EPA was rendered inoperative so far as the obligation to supply to MSEDCL was concerned, and consequently, the Tri-party Agreement dated 25th May 2006 cannot be said to have any effect, cannot be sustained. This contention is also unsustainable as the EPA was not rescinded and also that PSKL billed MSEDCL at the rate of Rs. 3.05 per unit. Under the said Deed of Tri-Party Agreement dated 25th May 2006, PSKL had agreed and unequivocally undertaken to pay certain amounts towards the building of transmission lines and infrastructure by MSETCL. Clause 4 reads as under:

"...Repayment will start after the commercial operation of the plant of Party No. 2 (PSKL) or the commissioning of infrastructure of Party No. 1 (Maha Transco) for evacuation of power, whichever is earlier. Party No. 2 (PSKL) shall deposit monthly installments as referred above or otherwise Party No. 3 (MAHAVITARAN) will deduct the above interest every month from the energy bill payable to Party No. 2 (PSKL) from the price of energy generated and sold to Party No. 3 (MAHAVITARAN) and deposit the same with Party No. 1 (Maha Transco)".

Under Clause 9 of the Deed of Tri-Party Agreement dated 25th May 2006, it is provided that *"Party No.2 (PSKL) hereby state that the Chairman and Directors of Party No. 2 (PSKL) have approved the execution of this agreement and assured that they would arrange to pay the amounts that would become due under the present agreement or under the agreement dated 2nd September 2002"*.

Clause 10 provides that *"The Party No. 2 shall sell all the energy generated to Party No. 3 (Maha Vitaran). In case Party No. 2 fails to pay any installment amount of interest as per agreement, the Party No. 1 shall recover the entire amount of interest plus the penal interest charges from the price of energy generated and sold to Party No. 3 (Mahavitrان).."*

The above clauses and Clause 12 makes PSKL's Petition and contentions raised therein, totally unsustainable as the same works against them. Clause 12 reads as under:

"The Party No. 2 (PSKL) hereby state that in the event failure of Party No. 2 (PSKL) to pay the amount due under the present agreement dated 2nd September 2002, Party No. 1 (Maha Transco) shall have absolute power and discretion to recover the said amount by adopting such proceedings as permitted under law. It would also be within the power of Party No. 1 (Maha Transco) to takeover the generation project installed at the site and carry out the generation either, departmentally or appointing such other agencies as would be felt appropriate by Party No. 1 (Maha Transco). Party No. 2 (PSKL) shall have no right whatsoever either to obstruct or interfere with such activities



of Party No. 1 (Maha Transco). Party No. 1 (Maha Transco) shall also have power to act, serve and consume entire electricity produced by them in the aforesaid contingency and appropriate the amounts”.

37. In view of the unequivocal contractual commitments made by PSKL under the Deed of Tri-Party Agreement dated 25th May 2006, PSKL cannot resile from either the EPA or the said Tri-Party Agreement. None of the judgments cited by PSKL are of any relevance to the present set of facts and circumstances and are therefore of no help to PSKL. In Case No. 85 of 2006 – M/s Dodson Lindblom Hydro Power Ltd. vs. MSEDCL, the issues were (i) whether the Government of Maharashtra Policy dated September 15, 2005 was a direction to the Commission under Section 108 of the EA 2003; (ii) whether the aforesaid policy was formulated under Section 11; and (iii) whether the right of first refusal to MSEDCL for sale of power by small hydel power projects contained in the Order dated November 9, 2005, was consistent with the EA 2003. By its Order dated November 7, 2007, the Commission answered the first two issues in the negative and further held that the right of first refusal to MSEDCL was not consistent with the EA 2003 and, therefore, removed the said condition by reviewing the said Order dated November 9, 2005. As regards the Judgment dated June 2, 2006 passed by the Appellate Tribunal in the case of *Small Hydro Power Developers Association & Ors. Vs. Andhra Pradesh Electricity Regulatory Commission & Ors*, the same was passed in certain specific circumstances and cannot have general applicability to all other cases. The said Judgment only applies to the “Developers” (appellants therein) for sale by the appellants only to AP TRANSCO or DISCOM as per the provisions of the Andhra Pradesh Electricity Reform Act 1998. The Hon’ble Appellate Tribunal has in the said Judgment held that the direction issued by the Andhra Pradesh Electricity Regulatory Commission (“APERC”) to all Developers to sell Power generated only to APTRANSCO/DISCOM is without authority and jurisdiction. The factual background of the case as appears from the said Judgment dated June 2, 2006, is as follows:

The APERC had by resorting to tariff fixation, changed the price that had been agreed upon, between parties, in terms of policy direction issued by the State, and such rate was being paid to the Developers for a considerable period. It was held that such an action is without jurisdiction as it interferes with statutory contract, which is binding on the parties, and such interference is not permissible in law. APERC has neither the authority to reopen the concluded contract or PPA, nor it could try to over reach the policy directions already issued by state and binding on both sides. APERC cannot either nullify or modify the concluded contracts in purported exercise of its alleged regulatory powers vested in it. APERC had ignored the national policy underlying the establishment of such non-conventional energy generation, contrary to the earlier assurances and representation given by the Government and its agencies, and at the instance of the APTRANSCO, APERC sought to slash down the rates fixed in terms of the Government’s policy. It was also held that when once APERC regulates the purchase price by giving consent to agreement / arrangement entered, it is not open to APERC to go back and invoke the power of tariff fixation in respect of NCE Developers whose generation simpliciter is not subject to tariff fixation. The decision therein that the direction issued by APERC to all Developers to sell Power generated only to APTRANSCO/ DISCOM is without authority and jurisdiction, is not applicable to the



present case as PSKL is bound by the Energy Purchase Agreement dated September 2, 2002, and Tri-party Agreement dated 25th May 2006 to sell power to MSEDCL.

38. PSKL has also relied on the Commission's Order dated January 20, 2006 passed in Case No. 17 of 2005. This case relates to a direction sought by MSEDCL and MSETCL for the excessive drawal of power by The Tata Power Company and connected disputes and differences. The point put forward by PSKL is that the Commission observed in the said case that it was required to examine whether the agreement between TPC and MSEDCL of 1964 or any further revised agreement, was in consonance with the EA 2003. Reference or reliance to the said Order dated January 20, 2006 would have been relevant if the Commission was in any doubt about its powers to declare the EPA or any of its provisions inconsistent with the EA 2003. However, that is not the case here. Neither is the Commission unclear about its powers nor is the Commission exercising such of its powers qua the EPA. As the facts show, PSKL acted in terms of the EPA, transmitted energy into the grid, and billed MSEDCL at the rate of Rs. 3.05 per unit. In light of these facts, there is no question for the Commission to re-open the EPA to declare the provisions thereof, illegal.

39. The above-referred Orders have been delivered in entirely different set of facts and circumstances of the cases dealt with by them. Orders are passed in cases in certain specific circumstances and cannot have general applicability to all other cases. In "**State of Orissa v. Md. Illiyas**" AIR 2006 SUPREME COURT 258, the Hon'ble Supreme Court held as follows:

"13. Reliance on the decision without looking into the factual background of the case before it is clearly impermissible. A decision is a precedent on its own facts. Each case presents its own features. It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedents, every decision contains three basic postulates - (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment. The enunciation of the reason or principle on which a question before a Court has been decided is alone binding as a precedent. (See: State of Orissa v. Sudhansu Sekhar Misra and Ors., (AIR 1968 SC 647) and Union of India and Ors. v. Dhanwanti Devi and Ors., (1996) (6) SCC 44). A case is a precedent and binding for what it explicitly decides and no more. The words used by Judges in their judgments are not to be read as if they are words in Act of Parliament. In Quinen v. Leathem, (1901) AC 495 (HL), Earl of Halsbury LC observed that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which are found there are not intended to be exposition of the whole law but governed and



qualified by the particular facts of the case in which such expressions are found and a case is only an authority for what it actually decides.”

40. In view of the above, no relief prayed for by PSKL can be granted. All contentions raised by PSKL are hereby rejected as not sustainable in the light of the facts evident from the documents submitted and oral submissions made. Further, as aforesaid, PSKL has filed its Notes of Argument dated November 21, 2007 whereunder it has sought not to press prayer clauses (iii) and (iv) and, therefore, there is no need for the Commission to deal with the same.

41. With reference to MSEDCL's Petition, the following directions are made:

- (i) PSKL is ordered to sell energy to MSEDCL in accordance with the Energy Purchase Agreement dated September 2, 2002, and Tri-party Agreement dated 25th May 2006;
- (ii) SLDC is directed to take appropriate actions strictly in accordance with Section 32(2)(a) of the EA 2003 and act in accordance with the Energy Purchase Agreement dated September 2, 2002, and Tri-party Agreement dated 25th May 2006.

As for the prayer made by MSEDCL that the defaulting party be made liable for the losses suffered by MSEDCL and the said losses be made good through the bills that will become payable to PSKL, no quantification whatsoever has been submitted by MSEDCL for the same. In the circumstances and in the absence of specific and exact loss figures, the Commission holds that MSEDCL shall be free to initiate appropriate claims for the same.

42. It is necessary to hold that SLDC, which has a statutory mandate under Section 32 of the EA 2003 to, inter alia, be responsible for optimum scheduling and despatch of electricity; (b) monitor grid operations; (c) keep accounts of the quantity of electricity transmitted through the State grid; has not performed its functions as desired, as is evident from the admissions made during the hearings in the present matters. SLDC did not have any proper sub-station records, or any records for the testing and trial period, commercial operation date of PSKL, and other vital data and details. The only justification given is that SLDC had not started functioning in that relevant period. The Commission observes that while State-wide energy accounting is the statutory responsibility of SLDC, the installation of meters and availability of meter reading for all interface points (G<>T and T<>D) over intra-State transmission system is a pre-condition to enable SLDC to discharge its statutory function. While MSETCL has embarked on comprehensive metering programme for installation of over 9000 meters over intra-State transmission system (InSTS), the timely completion of the same is far from satisfactory. Thus, performance of SLDC as well as MSETCL remains far from desirable. The Commission expresses its dis-satisfaction in the matter and directs SLDC/MSETCL to conduct its duties and functions as required under the statutory provisions, in future.



With the above observations and directions, both Case Nos. 54 and 59 of 2007 stand disposed of by this common order.

Sd/-
(S.B. Kulkarni)
Member

Sd/-
(A. Velayutham)
Member

Sd/-
(Dr. Pramod Deo)
Chairman



(P.B. Patil)
Secretary, MERC