

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.org.in
Website: www.mercindia.org.in

Case No. 39 of 2007

In the matter of
MSEDCL Petition for Approval of Power Purchase Agreement between MSEDCL
and MSPGCL

Shri A. Velayutham, Member
Shri S.B.Kulkarni, Member

ORDER

Dated: July 28, 2008

The Maharashtra State Electricity Distribution Company Limited (MSEDCL), vide its Petition dated July 30, 2007 submitted the Draft Power Purchase Agreement to be executed between MSEDCL and Maharashtra State Power Generation Company Limited (MSPGCL) for the Commission's approval under Section 86 of the Electricity Act, 2003.

2. MSEDCL, in its Petition, submitted that the erstwhile Maharashtra State Electricity Board (MSEB), a Board constituted under the Electricity (Supply) Act, 1948, was the integrated Electricity Board in the State of Maharashtra undertaking the activities of electricity generation, transmission, distribution and supply in the State. The erstwhile MSEB has been unbundled into separate entities, viz., MSPGCL, MSETCL and MSEDCL, for undertaking the generation, transmission and distribution of electricity, respectively, with effect from June 6, 2005.

3. MSEDCL submitted that MSPGCL and MSEDCL, being separate entities, are required to enter into a Power Purchase Agreement (PPA) for sale of power by MSPGCL to MSEDCL. MSEDCL further mentioned that a draft PPA has been finalized and the initialed copy of draft PPA has been submitted to the Commission for its approval.

4. MSEDCL, in its Petition, mentioned that the Parties (MSEDCL and MSPGCL) have not been able to agree upon certain clauses of the Agreement and submitted the viewpoints of MSPGCL and MSEDCL on these clauses. MSEDCL requested the Commission to give its ruling on the unresolved issues.



5. The Technical Validation Session (TVS) in the matter was held on September 18, 2007. During the TVS, MSEDCL made a presentation on the salient features of the Draft PPA. During the TVS, the Commission made the following observations on the Draft PPA:

- i. On the issue of term of PPA, the Commission opined that the PPA cannot cover the renovation and modernization and the PPA should address the issues in a more focussed manner. The Commission further opined that a single PPA should be entered for several generating units and each Unit should be clearly identified in the PPA. The PPA should analyse all contractual and technical parameters and should bring out the issues Unit-wise. Further, MSPGCL should seek its approval for capex on Renovation and Modernisation. The Commission directed MSEDCL and MSPGCL to include the term of expected life of different Units of each power station in the PPA.
- ii. The PPA should be firm, and should address the scenario, wherein more DISCOMs are created.
- iii. As regards the issue of right to electrical output, the Commission enquired whether both the parties have agreed for the clause mentioned in the PPA regarding MSPGCL's right to sell power directly to third parties, in case of default by MSEDCL, and opined that the clause may need to be modified considering the uncertainties arising in the span of 25 years, as well as the serious implications of the same. Further, MSPGCL should take intermediate steps after expiry of 30 days instead of directly starting sale of power to other parties and MSPGCL could include further 2/3 layers of payment security mechanism in PPA to protect their own commercial interest. The Commission opined that the consumer should not suffer if MSEDCL fails to make payment to MSPGCL within the stipulated period, as the consumer would have to pay higher tariff if the cheaper power of MSPGCL is not available. The Commission directed both the Utilities to analyse the issue and modify the said clause in the PPA.
- iv. On the issue of Operation & Maintenance, metering and Energy Accounting, the Commission emphasized that even if MSPGCL generates more than the scheduled energy, MSEDCL would not be able to draw more power owing to transmission corridor constraint. The Commission also enquired as to how the PPA addresses the issue of scheduling and dispatch of Koyna hydro station. The Commission opined that the issues relating to interconnection, evacuation and transmission facilities and co-ordination with grid system, should be similar to the provisions of MERC (State Grid Code) Regulations, 2006. The Commission added that it would recognize the scheduled generation/drawal and actual generation/drawal, and would not recognize unscheduled interchange (UI) charges indicated under ABT definition, as mentioned in the Petition for approval of PPA. The Commission opined that the PPA should not include clauses that are inconsistent with the Commission's Orders and Regulations.
- v. As regards the issue of Applicable Tariff, the Commission directed MSEDCL not to include the clause of delay in tariff determination.
- vi. With reference to the issue of Billing and Payment, the Commission stated that it is constrained to determine the fixed cost Station-wise, since the Unit-wise



accounting data is not available with MSPGCL, however, the Commission's objective is to determine the fixed cost Unit wise, which would also be advantageous for MSEDCL to determine the billing amount in case of failure of any generating Unit. As regards the clause of Rebate on early payment, the Commission opined that provisions of rebate should be in accordance with the Tariff Regulations.

- vii. On the issue of Payment Security Mechanism, the Commission observed that the clause of Escrow Account included in the PPA is very vague and the same should be modified with proper commercial approach. On the clause related to third party sale, the Commission enquired whether the same is acceptable to MSEDCL, as the same may cause double penalty to MSEDCL. The Commission also observed that the escrow cover should be clearly identified separately for ongoing projects and existing projects, if major investment is undertaken. Further, the term 'major investment' has to be clearly defined in the PPA, to prevent future disputes. The Commission further observed that the option of third party sale by MSPGCL in case of default by MSEDCL has to be mirrored by a penalty clause, in case MSPGCL fails to generate as committed. Also, the treatment of the over-recovery/under-recovery of revenue due to third party sale and sharing of capacity charge needs to be addressed in the PPA.
 - viii. As regards the issue of Termination on Event of Default and Dispute Resolution and Arbitration, the Commission observed that the term 'persistent failure' has to be defined clearly, and directed both the parties to include all the consequences of default and penalty in the PPA. The Commission further opined that the arbitration should be carried out as per the Indian Arbitration and Conciliation Act, 1996, and the PPA should not specify the arbitrator at this stage.
 - ix. As regards the points of disagreement between MSEDCL and MSPGCL, on disincentive for reduced generation, escrow provisions, and timing of payment of FCA, the Commission observed that the parties have to resolve all the issues and initial the PPA before approaching the Commission, and the Commission could not be expected to resolve the issues in the absence of an Agreement.
 - x. The Commission directed MSEDCL to include the clauses regarding delivery point for each Station, standard of meters, etc., as well as the treatment of transmission risk and the site diagram in the PPA.
 - xi. The Commission directed the Petitioners to prepare and submit the Executive Summary of the PPA.
6. MSEDCL, vide its submission dated January 23, 2008, submitted the revised PPA for purchase of power from existing and ongoing power stations of MSPGCL initialled by both the Parties. MSEDCL also submitted the Executive Summary of the PPA.

7. The Petition was admitted by the Commission for regulatory process on February 13, 2008 and the Commission directed MSEDCL to publish the Public Notice for inviting comments on the PPA from the stakeholders. The Public Notice inviting objections and suggestions/comments till March 6, 2008 was issued in Sakal (Marathi-All Editions), Lokmat (Marathi-All Editions) on February 15, 2008 and in The Times of India (Mumbai



Edition), Nav Bharat (Mumbai Edition), Business Standard (Mumbai Edition) on February 16, 2008.

8. The Public Hearing in the matter was held on March 11, 2008. During the Public Hearing, Shri. R B Agrawal submitted that the PPA and Executive Summary of PPA was not made available at the Divisional Offices of MSEDCL and without getting critical documents it is not possible to give comments on the Petition filed by MSEDCL. Shri. R B Agrawal made certain submissions in the context of the Tariff Petition filed separately by MSEDCL, on issues which are not germane to the present petition.

9. BEST queried MSEDCL regarding the basis on which the entire capacity of MSPGCL's stations is being allocated to MSEDCL. MSEDCL replied that the same is being done as per the State Government allocation.

10. On the issue of non-availability of the Petition, the Commission directed MSEDCL to make available the documents at its Divisional Offices. The Commission also granted additional time of one week for submission of comments/objections on MSEDCL's Petition and three days time thereafter to MSEDCL to submit the replies on comments/objections received. However, no objections were received by the Commission after the Public Hearing.

11. As discussed in an earlier paragraph, the Commission made certain observations on the draft PPA during the TVS. Based on the Commission's observations and suggestions, MSEDCL and MSPGCL modified the draft PPA and re-submitted the same to the Commission on January 23, 2008 for approval. The modifications made by the Parties to the PPA in accordance with the Commission's observations are elaborated below:

- i. As regards the Commission's observation that the PPA should not cover the renovation and modernisation, the revised draft PPA does not include renovation, refurbishment and modernization work as a part of conditions for extension of Agreement.
- ii. As regards the Commission's observation on having a single PPA for all the generating Units, the revised draft PPA covers all the existing thermal and hydel power generating stations and the ongoing thermal projects, i.e., 250 MW New Parli station and 250 MW New Paras station of MSPGCL.
- iii. The revised draft PPA specifies the expected life of thermal power generating stations (including gas turbine based generating station) and hydel generating stations.
- iv. MSEDCL, in the revised draft PPA, has included a clause in the PPA for approval of capital expenditure related expenses from the Commission, as reproduced below:



“The capital expenditure incurred or to be incurred for the Renovation Refurbishing and Modernisation (R&M) would be pass through to Mahavitaran subject to approval of the Commission.”

- v. MSEDCL, in the revised draft PPA, has included details of Unit-wise technical information of thermal power stations for FY 2005-06 and also included details of the proposed and approved performance parameters for each Station for the first Control Period from FY 2007-08 to FY 2009-10.
- vi. As regards intermediate steps to be taken by MSPGCL after expiry of 30 days from due date of payment instead of directly starting sale of power to third party and including two-three layers of payment security mechanism in PPA to protect MSPGCL’s commercial interest, the revised draft PPA has modified and included Clause 10.3.1, 10.3.2 and 10.3.3 providing the requisite three layers of payment security mechanism, as reproduced below:

“10.3.1 If MAHAVITRAN fails to pay a monthly bill or part thereof within and including the due date, then subject to article 9.2.4, MAHAGENCO may draw upon the Letter of credit, and accordingly the bank shall pay without any reference or instructions from MAHAVITRAN, an amount equal to such Monthly bill or part thereof plus Late payment surcharge, if applicable, in accordance with Article 9.3.b, by presenting to the bank issuing the letter of credit, the documents mentioned in article 10.1.e. MAHAVITRAN shall reinstate the LC within 30 days from the date of encashment by MAHAGENCO..

10.3.2 If MAHAVITRAN fails to make payments of consecutive two months bills and also is unable to maintain the Payment Security Mechanism specified in Article 10.1, for any reason whatsoever, the MAHAGENCO shall have the right (but not obligation) after giving 15 days notice to MAHAVITRAN to sell such power to

(a) any consumer, subject to applicable law; and

(b) any licensee or trader under the Electricity Act, 2003.

10.3.3 In the event that payments are not made within the 15 days notice period as specified in clause no.10.3.2 above, the supply of electricity to MAHAVITRAN shall be reduced forthwith by 25% of the available capacity as on the last day of the notice period. The reduction of 25% in supply shall be increased to 40% and 50% after 30 & 45 days from the date of issue of the notice. This shall continue up to 60 days from the date of issue of the notice as mentioned in Article 10.3.2.”

- vii. On the issues related to interconnection, evacuation and transmission facility and coordination with the grid system, the revised draft PPA has included Clause 5.1.3, which stipulates as follows:

“MAHAGENCO shall comply with all the existing provisions of State Grid Code 2006 and any further amendments to the same, from time to time.”



- viii. On the issue of scheduling and dispatch of Koyna hydro station, MSEDCL has included Clause 5.2.3 in the revised draft PPA, which stipulates as follows:

“The scheduling and despatch as regards to Koyna Hydro Station shall be followed by MSPGCL & MSEDCL as per instructions of SLDC. The schedule finalized by the concerned Load Despatch Centre for the hydro-electric generating station shall normally be such that the scheduled energy for a day equals the total energy (ex-bus) expected to be available on that day, as declared by the generating station based on foreseen/planned water availability/release. It is also expected that the total net energy actually supplied by the generating station on that day would equal the declared total energy, in order that the water release requirement is met.

However the declaration will be made specifying the generation allocated for the peak hours and for the non peak hours. If the Generation during the non peak period is more than the allocated power required to be generated for non peak period, the difference of power generated during the non peak period shall be paid with the Tariff applicable for the peak period unless such Generation is necessitated for stabilizing the Grid condition.”

- ix. In the revised draft PPA, the definition of Availability Based Tariff has been modified as follows:

“Availability Based Tariff” means the tariff structure based on the availability of generating units and having three components which is Capacity Charges (CC), Energy Charge (EC) or Variable Charges (VC) and charges for Unscheduled Interchange (UI); which refers to the commission's order dated 17th May 2007 on 'Introduction of Availability Based Tariff Regime at State level within Maharashtra and other related issues;

- x. On the issue of removing the reference to delay in tariff determination in the context of Applicable Tariff, the revised draft PPA under Clause 8.1.2 stipulates as follows:

“MAHAVITARAN shall continue to pay to MAHAGENCO as per tariffs last determined by the Commission on provisional basis till the Tariff for the next financial year is determined by the Commission. Similarly the adjustment on rate of Energy charges on account of the variation in fuel cost etc raised by MAHAGENCO through supplementary Bills also is to be paid by MAHAVITRAN. After finalisation of tariff by Commission for such period, where provisional rates have been used, MAHAGENCO shall issue supplementary bill(s) under Article 9 towards the difference amount between provisional rate and tariff approved by the Commission.”

- xi. As regards the provisions of rebate in accordance with Tariff Regulations, MSDECL, in the revised draft PPA, has revised Clause 9.3.a and accordingly has provided a mechanism of rebate for prompt payment till the due date of the payment of the bill, as reproduced below:



“The rebate for prompt payment shall be governed as per Schedule-7 of this PPA. For payment of bills through a letter of credit on presentation a rebate of 2% (two percent) of amount paid shall be admissible. If the payments are made by MAHAVITARAN within seven days of presentation of the bill a rebate of 1.25% (one and quarter percent) of amount paid shall be admissible, and thereafter rebate shall be reduced gradually till the 59th day as per Schedule 7.”

- xii. As regards the issue of clear identification of escrow cover for ongoing projects and existing projects if major investment is undertaken and the definition of the term ‘major investment’ to prevent future disputes, MSEDCL, in the revised draft PPA, has defined the term ‘major investment’ as follows:

“Major investments” means any expenditure incurred for the betterment of the Power Generating unit(s) of MAHAGENCO which involves an amount of more than or equal to Rupees ten (10) Crore is considered as Major investment

- xiii. On the issue of treatment of over-recovery/under-recovery of revenue due to third party sale and sharing of capacity charge in case of payment event of default by MSEDCL, the revised draft PPA stipulates as follows:

“If the condition mentioned in Article 10.3.2 above prevails, MAHAGENCO shall be entitled to sell the reduced/curtailed Electricity as mentioned in clause 10.3.3, to the third party (s) at the cost and risk of MAHAVITARAN without losing claim on the Capacity Charges due from the MAHAVITARAN. On expiry of the time period mentioned in Article 10.3.3, Mahagenco shall be entitled to sell the entire capacity to third party without losing the claim on the capacity charge liability of Mahavitaran. The surplus over energy charges recovered from sale to such other party shall be adjusted against the capacity charge liability of the MAHAVITARAN for the month(s) for which such sale has been affected, subject to MAHAVITRAN clears their all dues. In case the surplus over energy charges is higher than the capacity charge liability of the MAHAVITARAN, such excess over the capacity charge liability shall be retained by the MAHAGENCO”

- xiv. As regards the issue of Termination on Event of Default and Dispute Resolution and Arbitration, MSEDCL, in the revised draft PPA has specified the period of period of failure of 90 days vide Clause 12.1 of the PPA as shown below:

“This agreement may be terminated as provided hereunder in the event of failure of MahaGenco continuously for 90 days of its obligations under Article 5.2 relating to Scheduling & Dispatch.”

- xv. On the issue of arbitration, MSEDCL, in the revised draft PPA, has modified the relevant clause of the PPA and included the provisions of arbitration as per the Arbitration and Conciliation Act, 1996, as reproduced below:



“15.2 All disputes/differences between the parties arising out of or in connection with this Agreement shall be resolved by reconciliation through mutual discussions by Senior Officers not below the rank of Executive Directors of respective companies.

15.3 If the parties failed to resolve dispute mutually amongst them then such dispute shall be referred to an Arbitrator to be appointed by mutual consent. In the event of such differences or disputes, any party may send written notice of 30 (thirty) days to the other party. The arbitration proceedings shall be in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and any statutory modifications thereto. The decision of the Arbitrator shall be final and binding on the parties. The venue of the arbitration shall be Mumbai. The Courts at Mumbai shall have the exclusive jurisdiction in all matters arising under this Agreement.”

xvi. On the issue of points of disagreement between MSEDCL and MSPGCL, viz., disincentive to MSPGCL for reduced generation, escrow provisions, and timing of payment of FCA, the revised PPA does not contain any disincentive clause, either for reduced generation by MSPGCL or for reduced drawal by MSEDCL. As regards the issue of timing of payment of FCA, the Parties have agreed to the payment mechanism and the draft PPA stipulates as follows:

“8.5.2 MAHAGENCO shall raise supplementary bill(s) on MAHAVITARAN on monthly basis for payment of variation in the energy charges on account of change in gross calorific value of coal/lignite or gas or liquid fuel received and burnt and landed cost incurred by the Generating Company for procurement of coal/lignite, oil, or gas or liquid fuel, as the case may be from the values considered in computation of energy charges in the main bill for the corresponding period. The supplementary bill(s) for fuel cost adjustment in the energy charges shall be accompanied with necessary supporting documents of quantities, price and gross calorific values of coal/lignite/gas/ liquid fuel used for the relevant period. This is in line with the MERC directives stipulated under clause No.13 of chapter 7 of Tariff order for MSPGCL for 2006-07 dated 07.12.2006.”

8.5.3 If the variation in Rate of Energy Charge (Fuel Cost Adjustment-FCA), on account of variation in price or heat value of fuel as mentioned in article 8.5.2, is less than or equal to 10% of the previous months' Energy Charges, MAHAVITARAN shall make the payment of the full amount of such variation in the Rate of Energy Charges claimed by MAHAGENCO through the supplementary bill on monthly basis as mentioned in clause 9.1.d. & 8.5.2. This is in line with the pass through arrangement approved by MERC.

8.5.4 If the variation in Rate of Energy Charge is greater than 10% of the previous Month's Energy Charges, MAHAVITRAN shall make the payment limited to 10% of the previous month's Energy Charges on monthly basis as mentioned in clause.8.5.3 and the remaining amount shall be paid after getting the approval of the Commission. For this, MAHAVITARAN at monthly interval shall submit to the Commission for approval for amount of fuel cost adjustment against claim raised by MAHAGENCO”.



xvii. On the issue of inclusion of the details regarding delivery point for each Station, standard of meters, etc., as well as the treatment of transmission risk in the PPA, the revised draft of the PPA provides the list of inter-connection points between generating stations and the intra-State transmission system and list of inter-connection points between generating stations embedded in distribution system, and list of interface meters installed at generating stations for recording export and import of energy. On the treatment of transmission risk, a separate Clause 6.2.3 has been included as part of the PPA, which stipulates:

“MAHAGENCO shall make separate connection Agreement(s) with MAHATRANSCO including provisions of metering code for intra state transmission system approved by the Commission and Mahavitaran shall make respective power transmission agreements for the evacuation of the power generated from these power stations prior to approval of MERC”

12. Having heard the parties and after considering the material placed on record, the Commission is of the view as under:

13. The Commission, in its Order dated July 7, 2006 in Case No. 27 of 2005 opined that:

“though the Tariff Regulations provides for the approval of the Power Purchase Agreement, the Commission is of the view that the scope of the approval does not extend to cover approval of all the provisions of the Power Purchase Agreement. The approval of the Commission is restricted to financial implications thereof and on ARR as and when these proposals are submitted to the Commission for approval. The Commission opined that for example, aspects such as whether Force Majeure clause is addressed in detail and/or adequately or not, whether there is balanced allocation of risk, responsibilities are segregated between contracting parties clearly or not, etc., are managerial, commercial and techno-commercial matters and should be left to be deliberated and accepted by the parties to the agreement and the Commission’s approval does not cover such and other matters. The Commission opined that therefore, the Commission will not get into the detailed PPA provisions but will only look at submissions made to the extent of its implication on the consumers and revenue requirement in the ARR”.

Accordingly, the Commission has restricted its analysis with the objective of ensuring that the terms of the PPA are in accordance with Commission’s Tariff Regulations and various other Orders issued from time to time, as discussed below.

Compliance with MERC (Terms and Conditions of Tariff) Regulations, 2005

14. Regulation 24.2 of MERC (Terms and Conditions of Tariff) Regulations, 2005 stipulates as follows:

“The Commission shall review an application for approval of power purchase agreement/arrangement having regard to the approved long-term power procurement plan of the Distribution Licensee and the following factors:

(a) Requirement for Power Procurement under approved long-term power procurement plan;



- (b) Adherence to transparent process of bidding in accordance with guidelines issued by the Central Government;
- (c) Adherence to the terms and conditions for determination of tariff specified under part (E) of these regulations where the process specified in part(b) above has not been adopted;
- (d) Availability (or expected availability) of capacity in intra-state transmission system for evacuation and supply of power procured under the agreement/arrangement;
- (e) Need to promote cogeneration and generation of electricity from renewable sources of energy.”

As this Power Purchase Agreement is an agreement between two successor entities of the erstwhile MSEB, i.e., MSPGCL and MSEDCL to formalize the existing arrangement, the issue of Long Term Power Procurement Plan and Availability of capacity in intra-State transmission system are not relevant as MSEDCL is procuring the entire power available from MSPGCL’s generating stations.

Adherence to Bidding Process or Terms and Conditions for Tariff under Part E of Tariff Regulations

15. MSEDCL, in its Petition, submitted that as the PPA provides that the tariff shall be determined by the Commission, it adheres to the MERC (Terms and Conditions of Tariff) Regulations. MSEDCL further submitted that MSPGCL and MSEDCL would abide by the tariffs and power purchase rates approved by the Commission from time to time.

16. MSEDCL and MSPGCL have modified the PPA based on observations raised by the Commission during the TVS and resolved the outstanding issues in the PPA. **Accordingly, the Commission hereby accords its approval to the PPA between MSEDCL and MSPGCL, subject to the PPA being modified with respect to the following provisions:**

i. Definition of Auxiliary (Energy) Consumption in Article 1: Definition & Interpretations, as reproduced below:

“Auxiliary (Energy) Consumption” in relation to a period, means the quantum of energy consumed by auxiliary equipment of the generating station and shall be expressed as a percentage of the sum of gross energy generated at the generator terminals of all the unit(s) of the generating station. And, for the purpose of these Regulations, the auxiliary consumption for a thermal generating station shall include transformer losses within the generating station;

The words “these Regulations” shall be substituted with the words “this Agreement”.

ii. Definition of Declared Capacity requires modification in accordance with the definition specified under the MERC Tariff Regulations for thermal generating stations, gas based generating station and hydro power generating stations.



iii. As regards sale to third party on short term basis, Clause 4.2.2 of the PPA stipulates as follows:

“.....In such a case, the sale realization in excess of Energy Charges shall be equally shared by MAHAGENCO with MAHAVITARAN. In case the surplus over energy charges is higher than the capacity charge liability of MAHAVITARAN, such excess over the capacity charge liability shall be retained by MAHAGENCO.”

The Commission is of the view that it will be appropriate to have a two-stage sharing of revenue in excess of energy charges, on account of sale of power to third party, as follows:

- Two-Third (2/3) of the Revenue in excess of energy charges shall be passed on to MSEDCL and balance One-Third (1/3) of Revenue in excess of energy charges shall be retained by MSPGCL till the capacity charges payable by MSEDCL are equivalent to the revenue shared with MSEDCL
- Once the revenue shared with MSEDCL in excess of energy charges is equivalent to capacity charges payable by MSEDCL, any additional revenue shall be shared between MSPGCL and MSEDCL in equal proportion.

The two stage mechanism for sharing of revenue in excess of energy charges as mentioned above will ensure that there will always be some incentive for MSPGCL to make efforts to sell the power to third parties in case MSEDCL does not avail the power and at the same time, it will reduce the loss that MSEDCL will incur, if it does not avail power and hence, will protect the interests of the consumers.

The Commission directs MSEDCL to modify the Clause 4.2.2 of PPA accordingly.

iv. As regards definition of Availability Based Tariff, the Commission is of the view that the definition included in the revised draft PPA is not in accordance with the Commission's Order on 'Introduction of Availability Based Tariff Regime at State level within Maharashtra and other related issues' as the said Order does not stipulate the Un-scheduled Interchange (UI) charges for generating stations located in the State of Maharashtra. **The Commission directs MSEDCL to modify the provisions of PPA with respect to Availability Based Tariff in accordance with the above-said Commission's Order.**

v. On the issue of delay in tariff determination for the next financial year, the revised draft PPA stipulates that the tariff last determined by the Commission will continue on provisional basis till the tariff for next financial year is determined by the Commission. The PPA further provides that after finalisation of tariff by the Commission for next financial year, where provisional rates have been used, MSPGCL will issue supplementary bill(s) towards the difference between provisional rate and tariff approved by the Commission. The Commission clarifies that these provisions of PPA will be applicable only in case the tariff for next financial year is specified to have retrospective effect. However, if the



Commission approves the tariff for next financial year from prospective effect, the issue of supplementary bill(s) for the past period towards difference between provisional rate and tariff approved by the Commission will not arise at all. **Accordingly Clause 8.1.2 of PPA requires modification and further, the PPA should also specify that the tariffs for next financial year will be effective from the date as approved by the Commission.**

- vi. Regarding definition of major investment for triggering escrow payment security mechanism, the 'Major Investment' has been defined as investment of Rs 10 Crore or above. The Commission is of the view that for a Generating Company of the size of MSPGCL, Rs 10 Crore is a very low amount for consideration as major investment and it implies that for every investment of Rs 10 Crore, new escrow payment mechanism will have to be created, which will be difficult to operate. **Therefore, the Commission directs the MSPGCL and MSEDCL to specify a reasonable level of investment to be treated as Major Investment.**
- vii. As regards cap on monthly FAC to be billed by MSPGCL to MSEDCL, the Commission would like to clarify that as per MERC Tariff Regulations, there is no cap on monthly FAC to be recovered by the Generating Company from the Distribution Licensee. However, in this case, both the Parties have agreed to include a cap on monthly FAC to be billed by MSPGCL to MSEDCL, which is beneficial to the consumers, hence, the Commission approves the same.
- viii. As regards dispute resolution and arbitration, Clause 15.3 of the revised PPA stipulates,

"If the parties failed to resolve dispute mutually amongst them then such dispute shall be referred to an Arbitrator to be appointed by mutual consent. In the event of such differences or disputes, any party may send written notice of 30 (thirty) days to the other party. The arbitration proceedings shall be in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and any statutory modifications thereto. The decision of the Arbitrator shall be final and binding on the parties. The venue of the arbitration shall be Mumbai. The Courts at Mumbai shall have the exclusive jurisdiction in all matters arising under this Agreement."

The Commission is of the view that any dispute related to tariff should be referred to the Commission for adjudication of disputes under the provisions of Section 86 (1)(f) of the Electricity Act, 2003. For disputes regarding other provisions of PPA, the provisions of Arbitration in the revised PPA are appropriate. The Commission directs MSEDCL to modify this provision in the PPA suitably.

- ix. As regards the applicability of peak tariff for excess power generated during non peak period due to requirement of MSEDCL, the Commission is of the view that **this is a tariff related issue, which needs to be addressed in the Tariff Order.** As mentioned in the Commission's Order dated May 31, 2008 on MSPGCL's APR Petition for FY 2007-08 and tariff determination for FY 2008-09, the Commission will separately deal with the issue of modifying the hydel tariff mechanism during peak and non peak tariff along with truing up for FY 2005-06



and FY 2006-07. **Accordingly, the Commission directs the MSEDCL and MSPGCL to modify this clause suitably.**

17. The Commission directs MSEDCL to submit a copy of amended PPA complying with the directions given in this Order to the Commission, within one month from the date of this Order.

With this Order, the Commission disposes off MSEDCL's Petition in Case No. 39 of 2007.

Sd/-
(S.B. Kulkarni)
Member

Sd/-
(A.Velayutham)
Member



(P. B. Patil)
Secretary, MERC