

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 11 of 2011

In the matter of Petition filed by M/s. Wardha Power Company Ltd. seeking for adoption of Tariff and approval of Power Purchase Agreement dated June 4, 2010 for 260 MW of power under Section 63, 86 (1) (b) and 86 (1) (f) of the Electricity Act, 2003 pursuant to Case – 1 Bidding Procedure through Tariff Based Competitive Bidding process initiated by M/s. Reliance Infrastructure Limited in terms of Request of Proposal for Medium Term issued on July 30, 2009 and Dispute between a Generating Company and Distribution Licensee as a result of the deliberate and willful failure of the Distribution Licensee to seek statutory adoption of tariff and approval of Power Purchase Agreement within a reasonable timeframe so as to enable supply of power from April 1, 2011 in terms of the Power Purchase Agreement dated June 4, 2010

M/s. Wardha Power Company Ltd.Petitioner

M/s. Reliance Infrastructure Ltd.Respondent

AND

Case No. 42 of 2011

In the matter of M/s. Abhijeet MADC Nagpur Energy Pvt. Ltd. Petition for the adoption of Tariff and approval of Power Purchase Agreement dated 04.08.2010 for 55 MW of Power under Sec 63 and 86 (1) (b) of the Electricity Act, 2003 pursuant to Case 1 Bidding Procedure through Tariff Based Competitive Bidding



Process initiated by Reliance Infrastructure Limited in terms of Request for Proposal for Medium Term issued on July 30, 2009 and Dispute between a generating Company and the distribution Licensee as a result of the deliberate and willful failure to comply with the terms and conditions of the PPA by Reliance Infrastructure Limited.

M/s. Abhijeet MADC Nagpur Energy Pvt. Ltd.

.....Petitioner

M/s. Reliance Infrastructure Ltd.

..Respondent

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

INTERIM ORDER

Dated: April 15, 2011

Wardha Power Company Limited (WPCL) submitted a Petition under affidavit on January 24, 2011 under Sections 63 and 86 (1) (b) and 86 (1) (f) of the Electricity Act, 2003 (“the 2003 Act”) read with Central Govt “Guidelines for determination of tariff by bidding process for procurement of power by Distribution Licenses, 2005”.

2. The main prayers of WPCL are as under:

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- a. *Direct the Respondent to place all the requisite documents, information and details necessary for adoption of tariff under Section 63 of the Electricity Act, 2003 read with Clauses 6 of the Bidding Guidelines, 2005 and thereafter adopt the Petitioner’s tariff as confirmed and accepted in the Letter of Intent dated 10.05.2010 and PPA dated 04.06.2010;*
- b. *To take on record the Power Purchase Agreement dated 04.06.2010 being Annexure P-11 of this Petition and approve the same and issue such consequential directions as may be necessary to ensure that the Respondent fulfills its obligations under the said PPA.”*



3. WPCL filed an interim application dated March 15, 2011 with interim prayers. Interim prayers as under:

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

4. WPCL's submissions in the application for interim relief submitted along with the Petition are as under:

- a. The Petitioner has filed the Petition to seek adoption of tariff by the Commission for supply of 260 MW of power for 3 years commencing from April 1, 2011 and the Power Purchase Agreement (PPA) dated June 4, 2010 executed between the Petitioner and Respondent pursuant to the Petitioner being selected under Case-I bidding process.
- b. Though, the Petitioner is ready to supply power from April 1, 2011 as per the PPA, the Respondent (Reliance Infrastructure Ltd./RInfra) failed to fulfill its obligations under the PPA and the Guidelines for determination of tariff by Competitive Bidding process for procurement of power by Distribution Licensees.



- c. Around July 30, 2009 the Respondent issued a RFP for supply of power in Mumbai on medium term basis (2-5 years) in 4 supply period as provided in the Request for Proposal (RFP) under Case-I, Competitive bidding process.
- d. The Petitioner participated in the bid by placing an offer to supply 260 MW on medium term basis for 2 years at a levelised tariff of Rs. 5.248/kWh.
- e. The Respondent proceeded to have several rounds of negotiations in the intervening period. After intervening negotiations and at the request of the Respondent the Petitioner on January 15, 2010, confirmed the supply of 260 MW on medium term basis for 3 years instead of 2 years at a levelised tariff of Rs. 4.945/kWh.
- f. Finally on March 11, 2010, the Petitioner offered the power supply of 260 MW from April 2011 till March 2014 to the Respondent on medium term basis (3 years) at a levelised tariff of Rs. 4.850/kWh.
- g. On May 10, 2010, letter of Intent (LoI) was issued in terms of Clause 3.5.8 of the RFP confirming the same by the Respondent.
- h. After accepting the LoI, the PPA was executed on June 4, 2010. Further, the Petitioner vide its letters dated December 2, 2010, sought confirmation from RInfra regarding the status of transmission linkage for Open Access and to approach the Commission for the adoption of tariff under Section 63 of the EA 2003.
- i. However, the Respondent vide its letter dated December 10, 2010 sought to terminate the PPA on the following grounds:
 - i. Fuel Supply Agreement (FSA) not executed by the Petitioner as per Article 3.1.1 of the PPA
 - ii. Deviations sought by the Petitioner in the Draft Default Escrow Agreement and deed of hypothecation, requires approval from the Commission
 - iii. Commission's Expression of Interest (EoI) for supply of power in the Respondent's Distribution Licensee area.

5. The Commission vide its Notice dated February 4, 2011 scheduled a hearing in the matter on February 17, 2011 at 14.30 hrs in the presence of authorised Consumer Representatives under Section 94(3) of the Electricity Act, 2003. After hearing both the parties the Commission fixed further hearing in the matter on March 17, 2011 at 14.30 hrs.



6. During the hearing on March 17, 2011, Shri. Sanjay Sen, Shri. Hemant Singh and Ms. Shikha Ohri Advocates appeared on behalf of Wardha Power Co. Ltd. (WPCL). Shri. Bhatt, Ms. Anjali Chandurkar Advocates and Shri. Kapil Sharma appeared on behalf of RInfra. The following submissions were made:-

- a. Shri. Sanjay Sen, Advocate for WPCL submitted that the PPA between WPCL and RInfra for procurement of 260 MW power for 3 years has been terminated by RInfra vide their letter dated March 7, 2011. Further, Shri. Sen submitted that there are two obligations w.r.t. the PPA. The first obligation of the bidder .i.e. WPCL is to sign the FSA and the obligation of the procurer .i.e. RInfra is to file a Petition to the Commission for adoption of tariff. Shri. Sen submitted that WPCL has not yet signed the FSA. However; it has made alternate arrangement from the Vendors for supply of coal
- b. Considering all the issues, WPCL filed an interim application dated March 15, 2011 with interim prayers. WPCL raised the intricacy of supply of the 260 MW power which has arisen because RInfra has issued a letter of termination dated March 7, 2011. Further, Shri. Sen submitted that WPCL has fulfilled all the conditions and hence, there lies no question of termination of PPA by RInfra.
- c. Shri. JJ Bhatt, Senior Advocate appearing for RInfra referred to Sections 10 and 14 of the Specific Relief Act, 1963 in terms whereof contracts need not be enforced when compensation in money could be ascertained or granted. Similarly, in the present PPAs compensation in money can be ascertained or granted so performance thereof need not be enforced.
- d. Shri. JJ Bhatt raised a question that whether the bidder, WPCL has made any effort to sell his power outside and if yes, then at what costs? In case, if any attempt is not made by the Petitioner then the Petitioner is not entitled for interim relief.
- e. With respect to the fuel arrangement, Shri. Bhatt submitted that the Petitioner has not intimated to RInfra about the alternate arrangement of fuel. Further, Shri. Bhatt submitted that the validity of the termination of the PPA will be analyzed by the Commission.
- f. Consumer Representative, Shri. Ashok Pendse submitted that the power supply from WPCL would start from April 1, 2011. Considering the power from WPCL, RInfra would have to procure additional 600 MW from bilateral whereas, if WPCL's power is not considered then the gap would rise to about 860 MW. The Commission should take a decision, which would ultimately benefit the consumers.



g. After hearing both the parties, the Commission directed RInfra to file submissions on the issues raised by the Petitioner.

7. The Commission vide its Notice dated March 18, 2011 scheduled a hearing in the matter on March 30, 2011 at 11.00 hrs in the presence of authorized Consumer Representatives under Section 94(3) of EA 2003.

8. In the meantime, Abhijeet MADC Nagpur Energy Pvt. Ltd. (AMNEPL) submitted a Petition under affidavit before the Commission on March 29, 2011 under Section 63, Section 86 (1) (b) and Section 86 (1) (f) of the EA 2003 read with the “Guidelines for determination of tariff by bidding process for procurement of power by Distribution Licensees, 2005” and the Order dated July 21, 2009 passed by this Commission in Case No. 94 of 2008.

9. The prayers in AMNEPL’s Petition are as under:

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- a. *That this Hon’ble Commission may be pleased to direct the Respondent to place all the requisite documents, information and details necessary for adoption of tariff under Section 63 of the Act read with clause 6 of the Bidding Guidelines, 2005 and thereafter adopt the Petitioner’s tariff as confirmed and accepted in the Letter of intent dated 10.05.2010 and PPA dated 04.08.2010;*
- b. *That this Hon’ble Commission may be pleased to hold/ declare that the Respondent is estopped from contending that it is unable to proceed further under the PPA on the ground that its petition for renewal of its license beyond 15.08.2011 is pending for disposal;*
- c. *That this Hon’ble Commission may be pleased to direct the Respondent to forthwith perform its obligations under the PPA dated 04.08.2010;*
- d. *That this Hon’ble Commission may be pleased to adopt the tariff more particularly specified in the PPA dated 04.08.2011 which has been determined in terms of the Bidding Guidelines ;*



- e. *Pending the hearing and final disposal of the present petition, this Hon'ble Commission be pleased to direct the Respondent to commence procuring power from the Petitioner as per the terms of the PPA dated 04.08.2011;*
- f. *Pending the hearing and final disposal of the present petition, this Hon'ble Commission be pleased to restrain the Respondent from procuring any further power in breach of the order dated 21.07.2009 and/or breach of the terms of the PPA dated 04.08.2011;*
 - a. *ad interim reliefs in terms of prayer clause (e) and (f) and*
 - b. *pass such other and further order or orders as this Hon'ble Commission deems appropriate under the facts and circumstance of the present case."*

10. The interim prayers in AMNEPL's Petition are as under:

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- g. *Pending the hearing and final disposal of the present petition, this Hon'ble Commission be pleased to direct the Respondent to commence procuring power from the Petitioner as per the terms of the PPA dated 04.08.2011;*
- h. *Pending the hearing and final disposal of the present petition, this Hon'ble Commission be pleased to restrain the Respondent from procuring any further power in breach of the order dated 21.07.2009 and/or breach of the terms of the PPA dated 04.08.2011;”*

11. AMNEPL in its petition submitted that it is ready and willing to commence supply of the power up to the aggregated contracted capacity of 55 MW to Reliance Infrastructure Ltd., Distribution Business (RInfra-D) from the Scheduled Delivery Date i.e. April 1, 2011 subject to the conditions set out in the Power Purchase Agreement (PPA) dated August 4, 2010.

12. The Commission vide Notice dated March 29, 2011 scheduled a hearing in the matter on March 30, 2011 at 11.00 hrs along with Case No.11 of 2011 in the presence of authorized Consumer Representatives under Section 94(3) of the EA 2003.



13. During the hearing on March 30, 2011, Shri. Sanjay Sen and Shri. Hemant Singh Advocates appeared on behalf of Wardha Power Co. Ltd. (WPCL). Shri. Dinyar Madon and Ms. Deepa Chawan appeared on the behalf of AMNEPL and Shri. Bhatt and Ms. Anjali Chandurkar Advocates appeared on behalf of RInfra.

14. After hearing the parties, the Commission observed that the Petitioner and the Respondent may explore the possibility of addressing the core issues through mutual discussions, and scheduled the matter on April 8, 2011.

15. During the hearing on April 8, 2011, Shri. Sanjay Sen and Shri. Hemant Singh Advocates appeared on behalf of Wardha Power Co. Ltd. (WPCL). Shri. Nishad Nadkarni appeared on the behalf of AMNEPL and Shri. Bhatt and Ms. Anjali Chandurkar Advocates appeared on behalf of RInfra.

16. Shri. Nishad Nadkarni on the behalf of AMNEPL requested the Commission to grant interim reliefs in terms of the prayer Clauses (e) and (f) of the Petition. The Commission directed RInfra-D not to initiate process of termination of PPA till April 13, 2010. The Commission also directed RInfra-D to submit the details of short term and medium term power procurement contracts entered by RInfra-D latest by April 11, 2011.

17. As both the petitions raise common issues, the Commission scheduled a common hearing in the matter on April 13, 2011 at 10.00 hrs in Case No. 11 of 2011 and Case No. 42 of 2011 to consider only the Interim prayers of both the Petitioners.

18. R- Infra vide its letter dated April 11, 2011 submitted the details of short term and medium term power procurement plan.

19. During the hearing on April 13, 2011, Shri. Sanjay Sen Advocate appeared on behalf of Wardha Power Co. Ltd. (WPCL). Ms. Deepa Chawan appeared on the behalf of AMNEPL and Shri. Bhatt and Ms. Anjali Chandurkar Advocates appeared on behalf of RInfra.



20. The Commission enquired of the following information regarding the power plant of WPCL:

- a. Total capacity of the plant.
- b. Number of units which have achieved Commercial Operation Date (CoD) along with dates of CoD of respective units
- c. Present PLF of the units
- d. The details of the contacts entered by WPCL for sale of power till June 30, 2011 with various utilities
- e. Whether WPCL has FSA in place?

21. Similarly, the Commission enquired the following from AMNEPL:

- a. Total capacity of the plant?
- b. Number of units which have achieved CoD with details of dates

22. Shri. Ramesh Kumar, Director, WPCL submitted that it is setting up a 540 MW (4*135 MW) coal based generating station at Warora MIDC. WPCL has already achieved CoD for three units of 135 MW and 4th Unit is likely to get synchronized in second week of April of this year. Shri. Kumar also submitted that present PLF of the station is 65% due to non-availability of buyer for the power. Further, Shri. Kumar submitted that WPCL has operated the plant at 90% PLF for a period of two months when there was substantial contracts in place for procurement of power. Shri. Sen submitted that it has informed the Commission regarding their coal stock availability to operate the plant. Further, Shri Sen sought interim relief from the Commission in regard to the interim application submitted on January 24, 2011. Shri. Sen also informed the Commission that WPCL is not willing to negotiate the price as the price is discovered after the Competitive Bidding process.

23. Representative of AMNEPL submitted that it is setting up a 246 MW (4*61.5 MW) coal based generating station. AMNEPL has already synchronized three units of 61.5 MW and 4th Unit is likely to get synchronized in second week of April of this year, and only one unit of the plant has achieved CoD in January 6, 2011 and is currently supplying 54 MW to MSEDCL from 6.00 hrs. to 18.00 hrs. upto June 30, 2011.

24. It transpired that as per the information of AMNEPL, only one of its unit has achieved CoD and rest of two units have synchronized and is injecting infirm power in the grid. Therefore, it will take time to achieve CoD of the unit of AMNEPL. The



Commission also observed that AMNEPL has entered into a contract with RInfra-D on April 1, 2011 for a period of April 2, 2011 to May 31, 2011 on Round the Clock (RTC) basis for infirm power at a rate of Rs.2.70/kWh.

25. Ms. Deepa Chawan submitted that interim relief is subject to non-termination of PPA and relief could be granted in case any of the unit achieves its CoD till the Commission decides the matter finally.

26. Shri Bhatt submitted that WPCL has submitted that its plant is running at 65% PLF, it means that 263 MW it is generating from the three units. Therefore, in the larger Public interest, no interim relief should be granted to WPCL.

27. The Commission directed WPCL to submit the contract entered into by WPCL upto June 30, 2011 to the Commission latest by 17.00 hrs. and serve the copy to RInfra-D. The Commission scheduled the next hearing for considering the prayers pertaining to interim relief at 12.30 hrs on April 15, 2011.

28. WPCL through its letter dated April 13, 2010 submitted the details of Capacity available for RInfra.

29. After hearing the parties, the Commission, in exercise of powers vested under Section 94 (2) of the EA 2003 holds as under:

- a) After hearing the parties, the Commission is not satisfied with the Respondent's apprehensions, and is also not satisfied with the contention that Section 10 and/or Section 14 of the Specific Relief Act, 1963 debars enforcement of specific performance of the present PPAs as compensation in money could afford adequate relief. Firstly, the 2003 Act is a consolidating statute and has been held by the Apex Court to be an exhaustive code on all matters concerning electricity. The Commission is also fortified by Section 173 and Section 174 of the 2003 Act which gives an overriding effect to the 2003 Act in case of any conflict.
- b) Secondly, the question here is of protection of consumer interest because the termination of the PPA's would deprive the consumers of the electricity that has been secured by the Respondent at a competitive price after duly



following the Central Government's guidelines on competitive bidding. In any case, the issue of rising costs of power procurement on one hand and the very many directions of the Commission specifically to this Respondent from time to time with regard to prudent procurement have already been an issue of substantial and critical importance.

- c) In the backdrop of the above, the Commission is not inclined to accept the Respondent's contention that if pursuant to the exercise of Expression Of Interest which is underway for grant of license in the Suburban area of Mumbai, and the ultimate outcome thereof, the Respondent may not need to procure power contracted from both the Petitioners, then the Respondent may be liable to contractual penalty for non-procurement. This is for the reason that the Respondent should have been prudent enough to know the status of its license and the entire matrix of risks involved in its business which includes Governmental, Regulatory, Legal, Financial, Contractual risks beforehand prior to undertaking the competitive bidding process and consciously signing and executing the Power Purchase Agreements. To allay the apprehensions of the Respondent, it is necessary to state that the Commission has powers to make inroads into existing contracts should there be a necessity to assign or reassign the contracts on same terms and conditions in the event any party to the contract is unable to fully perform the functions thereunder. If the outcome of the aforesaid EOI is that the Respondent would not be required to off-take the contracted quantum, necessary solutions would be considered at that time. Strangling the PPAs at the moment is not warranted therefore on grounds of apprehensions.
- d) As regards non-execution of fuel supply agreement ("FSA"), the Petitioner WPCL has referred to in its Petition a letter dated 15th December 2010 written by them to the Respondent stating therein *inter alia* as follows –

*"In any event of non execution of FSA clause 3.4.1 contemplates a backup procedure in the form of providing additional Contract Performance Guarantee till Schedule Delivery Date **which we would comply, if required.**"*

Thus, the Petitioner WPCL has undertaken that it will make good the loss, if any, suffered by the Respondent due to inability to supply electricity to the



Respondent due to the non-execution of the fuel supply agreement. There is no force in these contentions raised by the Respondent. These contentions are rejected for consideration of the interim order hereunder.

- e) As regards the issue whether Distribution Licensees could procure power from a source which is cheaper than the price offered pursuant to competitive bidding, such an aspect would have been considered in machinery provided in the Competitive Bidding Process itself as follows:-

“5.15 The bidder who has quoted lowest levelled tariff as per evaluation procedure, shall be considered for the award. The evaluation committee shall have the right to reject all price bids if the rates quoted are not aligned to the prevailing market prices.”

- f) As regards AMNEPL, the plant is currently supplying 54 MW from Unit 1 to MSEDCL and other units have not yet achieved the CoD. AMNEPL is not presently in position to supply power to RInfra-D as per the PPA. However, since the PPA that has been executed is for a period of three (3) years, the legal validity thereof is subject to the outcome of the proceedings and final disposal thereof, the Commission directs that till the final outcome of the proceedings RInfra-D shall not terminate the PPA dated August 4, 2010, and maintain status quo till further Orders of the Commission.
- g) The Commission is of the view that the PPA has been entered between WPCL and RInfra as well as AMNEPL and RInfra and are based on Competitive Bidding process in terms of the Government of India guidelines. There should be a presumption in favour of the validity of the Competitive Bidding process, unless the outcome of the same is set-aside after final hearing and, therefore, termination of PPA vitiating the Competitive Bidding process, at the interim stage, is neither in the interests of justice nor desirable. The Commission accordingly as an interim measures stays the termination letter issued by RInfra to WPCL on March 7, 2011. The PPA shall not be terminated until further order/s.
- h) Keeping in mind all the factors and circumstances in the present cases, as an interim measures, the ends of justice will be met by the following order:-



- i) The Commission directs RInfra to procure power from WPCL as detailed below:

Sr. No.	Period of Supply	Timing (hrs)		Quantum
1	Starting from April 20, 2011 to April 30, 2011	Round the Clock		120 MW
2	Starting from April 20, 2011 to April 30, 2011	0.00	12.00	Additional 120 MW
3	Starting from May 1, 2011	Round the Clock		260 MW

- j) WPCL is directed to provide schedule of power supply to RInfra immediately.

The above is subject to further orders.

Sd/-
(Vijay L. Sonavane)
Member

Sd/-
(V. P. Raja)
Chairman



(P.B.
Patil)
Registrar, MERC

