

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 24 of 2013

IN THE MATTER OF
Petition filed by Maharashtra State Electricity Distribution Company Limited seeking
adoption of Tariff for procurement of power under Case 1 Stage-I bid process

Shri V. P. Raja, Chairman
Smt. Chandra Iyengar

Maharashtra State Electricity Distribution Company LimitedPetitioner

Advocates/Representatives of
the Petitioner:

Shri Rahul Chitnis, Advocate
Shri Chirag Balsara, Advocate
Shri Kiran Gandhi, Advocate
Shri Ashok Chavan, MSEDCL

Advocates/Representatives of
the Impleaded Parties – Adani
Power Maharashtra Limited and
Lanco Vidarbha Thermal Power
Limited:

Shri Sanjay Sen, Advocate, APML
Shri Jatin Jallundhwala and Ors., APML
Shri Ramanuj Kumar, Advocate, LVTPL
Shri Gurunath Wadke , LVTPL

Consumer Representatives:

Ms. Ashwini Chitnis , Prayas Energy Group
Dr. Ashok Pendse, Thane Belapur Industries Association

ORDER

Dated: 19 August, 2013

Maharashtra State Electricity Distribution Company Limited (hereinafter referred to as “MSEDCL”) conducted a competitive bid process for procurement of power (hereinafter

referred to as “Case 1 Stage-I bid process”) under the Case 1 route as per the Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees, issued by Ministry of Power, Government of India (hereinafter referred to as “Competitive Bidding Guidelines”). The process commenced in the year 2006 with the issue of the Request for Qualification documents, and the evaluation of financial proposals was concluded in the year 2008. MSEDCL entered into Power Purchase Agreements (PPAs) with Adani Power Maharashtra Limited (hereinafter referred to as “APML”) on 8 September, 2008 and Lanco Mahanadi Power Private Limited (hereinafter referred to as “LMPPL”) on 25 September, 2008 respectively. MSEDCL has filed the present Petition for adoption of Tariff for procurement of power from APML and LMPPL under Section 63 of the Electricity Act, 2003 (herein referred to as “EA-2003”).

2. Prayers made by MSEDCL in the present Petition are as follows:

“1. Note the certificates under Annexure-2 and documents submitted as per the Honorable Commission’s direction.

2. Approval for adoption of the Tariff discovered through the bid process for the purpose of tariff determination as and when the supply from these contracted sources commence.

3. Approval of the Power Purchase Agreements signed with both APML and LMPPL.”

3. The background of the present Petition is outlined in the following paragraphs:

3.1. Pursuant to the Case 1 Stage-I bid process, MSEDCL had submitted a Petition on 2 August, 2008 seeking an amendment to the PPAs to be signed with APML and LMPPL and for adoption of the Tariff discovered under Case 1 Stage-I bid process and negotiated with the Parties. This Petition was processed as Case No. 54 of 2008 by the Commission.

3.2. The Commission, vide its Order dated 14 August, 2008 ,in Case No. 54 of 2008 , approved the deviations in the PPAs as proposed by Petitioner MSEDCL and further ruled as follows, regarding adoption of Tariff:

“The Commission will consider the matter of adoption of tariff for long term procurement of power through Case-1 competitive bidding process in accordance

with the provisions of Section 63 of the Electricity Act, 2003 and Competitive Bidding Guidelines notified by the Ministry of Power, after MSEDCL submits the PPAs signed with the selected bidders, along with other certificates and documents on affidavit, for adoption of the tariff by the Commission.”

- 3.3. Accordingly, MSEDCL signed the amended PPAs with APML on 8 September, 2008 and with LMPPL on 25 September, 2008.
- 3.4. MSEDCL, as directed in the Order of the Commission, dated 14 August, 2008, in Case No. 54 of 2008, submitted a Petition dated 16 October, 2008 for adoption of Tariff along with the signed PPAs with APML and LMPPL and other related documents, which was received by the Commission on 17 October, 2008. However, the office of the Commission could not process the Petition dated 17 October, 2008 due to certain deficiencies in the Petition. MSEDCL also made no further communication after the submission of the Petition.
- 3.5. On 16 February, 2011, APML sent a notice for terminating the PPA signed on 8 September, 2008, invoking the force majeure Clause of the PPA. MSEDCL disputed the termination through its letter dated 5 March, 2011 and sought for additional details. Subsequently, there were various communications between the two parties on the matter. On 17 March, 2012, MSEDCL communicated to APML that APML cannot terminate the PPA by invoking the force majeure Clause of the PPA as MSEDCL did not accept occurrence of Force Majeure.
- 3.6. Aggrieved by MSEDCL's stand on this issue, APML submitted a Petition on 14 July, 2012, requesting the Commission to direct MSEDCL to return the performance guarantee provided by APML in Case 1 Stage-I bid process, since APML has terminated the PPA through notice dated 16 February, 2011. In the Petition, APML has also made an alternative prayer, i.e., to direct MSEDCL to sign a new PPA at a revised Tariff. The said Petition has been numbered as Case No. 68 of 2012 and is being dealt with separately.
- 3.7. During Hearing on 18 January, 2013, the Commission informed that MSEDCL had submitted the Petition dated 16 October, 2008 for adoption of Tariff under Section 63 of EA-2003, which was received in the office of the Commission on 17 October, 2008. The Commission clarified that it has now come to its notice that further action

to process the Petition for adoption of Tariff was inadvertently not undertaken by the office of the Commission.

- 3.8. The Commission further conveyed that, on perusal of the Petition dated 16 October, 2008 submitted by MSEDCL for adoption of Tariff, the Commission noted that, prima facie, the transparent process of competitive bidding has been followed by for procurement of 2000 MW of power through Case 1 route. It further noted that the only thing that remains to be done is the issuance of a formal Order from the Commission regarding adoption of Tariff. The Commission observed that the matter of adoption of Tariff was neither followed up by MSEDCL nor the concerned selected Bidders/ Generating Companies.
- 3.9. To ensure transparency while discharging its functions under Section 86 (3) of EA-2003, a full set of documents submitted by MSEDCL and received by the Commission's Office on 17 October, 2008 for adoption of Tariff, were made available to the Parties in Case No. 68 of 2012 and authorized Consumer Representatives. The Commission directed the Parties and Consumer Representatives to make submissions on these sets of documents as a part of proceedings of Case No. 68 of 2012.
- 3.10. However, in the hearing on 13 February, 2013, it was agreed by APML and MSEDCL, the parties to Case No. 68 of 2012, that the matter of adoption of Tariff needs to be taken up separately, before disposing of the Petition in Case No. 68 of 2012.
- 3.11. In response to a deficiency letter issued by the Commission, MSEDCL resubmitted the Petition (earlier submitted on 16 October, 2008) for adoption of Tariff on 15 February, 2013 under affidavit along with the requisite fees as per MERC (Fees and Charges) Regulations, 2004. This Petition has been numbered as Case No. 24 of 2013 (present case). APML and LMPPL have been impleaded as parties in this Case.
4. Submissions made by MSEDCL in Case No. 24 of 2013 are summarised below:
 - 4.1. MSEDCL is a company incorporated under the provisions of the Companies Act, 1956 and is a deemed licensee under Section 14 of EA-2003 for distribution of electricity in the State of Maharashtra.
 - 4.2. MSEDCL submitted that it had appraised the Commission regarding the Case 1 Stage-I bid process through its Petition dated 2 August, 2008 in Case No. 54 of 2008.

MSEDCL submitted that the following bidders submitted the final bid in Case 1 Stage-I bid process:

Table 1: Financial Bids received in Case 1 Stage-I bid process

Sr. No.	Name of the Bidding Company	Fuel Source	Price Bid No.	Capacity Offered (MW)	Levelling Tariff (Rs/kWh)
1	Adani Power Private Limited	Coal (Captive, Linkage and Imported)	3	660	2.642
2	Adani Power Private Limited	Coal (Captive, Linkage and Imported)	2	660	2.685
3	JSW Energy Limited	Imported	1	300	2.716
4	Lanco Kondapalli Power Limited	Linkage	1	684	2.720
5	Adani Power Private Limited	Majority Captive	1	100	2.735
6	Visa Power Limited	Linkage	1	200	2.787
7	Reliance Power Limited	Imported	1	900	3.085
8	Tata Power Limited	Imported	1	300	3.099
9	Reliance Power Limited	Captive	1	592	3.144
10	KVK Nilanchal Power Limited	Linkage	1	125	3.172
11	Dhariwal Infrastructure Limited	Linkage	1	100	3.180
12	KVK Nilanchal Power Limited	Linkage	2	125	3.447
13	Emco Energy Limited	Linkage	1	100	3.504
14	Finolex Industries Limited	Imported	1	100	4.690

- 4.3. MSEDCL further submitted that in response to discussions with the Negotiation Committee, Adani Power Private Limited (hereinafter referred to as “APPL”; APPL was the parent company of APML, which had bid in Case 1 Stage-I bid process) matched the levelling Tariff of its L2 bid (Rs. 2.685 per kWh) with its L1 bid (Rs. 2.642 per kWh). MSEDCL further submitted that Lanco Kondapalli Power Private Limited (hereinafter referred to as “LKPPL”; LKPPL was the parent company of LMPPL, which had bid in Case 1 Stage-I bid process) has also reduced its levelling

Tariff from Rs. 2.72 per kWh to Rs. 2.70 per kWh. MSEDCL submitted that procurement of power from these two bids meets the power procurement requirement of 2000 MW as approved by the Commission vide Order dated 17 October, 2006.

- 4.4. MSEDCL submitted that Government of Maharashtra (GoM) had, after negotiations, communicated its consent for the rates offered by APPL and LKPPL, subject to amendment of Article 3.3.2 of the PPA. MSEDCL further submitted that it issued Letter of Intent (LoIs) on 29 July, 2008 to APPL for supply of 1320 MW at a levellised Tariff of Rs. 2.642 per kWh; and to LKPPL for supply of 680 MW at a levellised Tariff of Rs. 2.70 per kWh.
- 4.5. MSEDCL further submitted that after receiving the Commission's approval on the amendment to the PPA vide Order in Case No. 54 of 2008, the modified PPA was circulated to the APPL and LKPPL for execution.
- 4.6. MSEDCL further submitted that LKPPL had informed through its letter dated 14 August, 2008 that a Special Purpose Vehicle (SPV), i.e., Lanco Mahanadi Power Private Limited was being formed for execution of PPA and other project documents. LKPPL requested MSEDCL that it would require an additional time of three weeks for executing the documents to be signed pursuant to Case 1 Stage-I bid process, since the formation of the SPV Company will take a minimum of three weeks.
- 4.7. MSEDCL submitted that APML had also informed it vide letter dated 18 August, 2008 that its SPV, named Adani Power Maharashtra Limited shall execute the PPA and other project documents with MSEDCL. APML had also requested an extension of one week for executing the documents.
- 4.8. MSEDCL submitted that considering the above, during its board meeting on 2 September, 2008, the board of MSEDCL resolved to extend the date for execution of PPAs and other documents to be signed for procurement of power from APML and LMPPL till 15 September, 2008. MSEDCL further requested the bidders (i.e., APPL and LKPPL) to submit the Board Resolutions from their Parent and Ultimate Parent Companies undertaking to invest in the equity requirement of the SPVs and the Power of Attorney from the SPV Companies.
- 4.9. MSEDCL submitted that consequently, PPAs were signed with APML on 8 September, 2008 with effective date as 14 August, 2008 and with LMPPL on 25 September, 2008 with effective date as 4 September, 2008.

4.10. MSEDCL submitted that as per the directions of the Commission in Order dated 14 August, 2008 in Case No. 54 of 2008, it submitted the PPAs signed with APML and LMPPL along with the requisite certificates and documents for adoption of Tariff under Section 63 of the EA-2003 on 16 October, 2008.

4.11. **Proceedings in the present case**

5. APML filed an “affidavit for objection” against adoption of Tariff on 28 January, 2013. However, on 11 February, 2013, APML submitted that pursuant to filing the said Affidavit, it had observed that certain submissions had been made which it was not desirous to press upon. Considering the above, APML requested the Commission to allow it to withdraw the said submission with the liberty to file a fresh submission. Since the submissions made in this affidavit were largely repeated in a subsequent submission, the same are not represented here to avoid repetition.

6. APML filed its submission on 11 February, 2013 objecting to the Petition for adoption of Tariff filed by MSEDCL (Petition filed on 17 October, 2008). Since, the matter for adoption of Tariff was taken as a separate Case after the hearing on 13 February, 2013; APML resubmitted the said submission on 1 April, 2013 under Case No. 24 of 2013. The summary of the arguments is outlined hereunder:

6.1. APML submitted that the approval of Tariff is a mandatory process envisaged under the Act, and the failure to adopt the Tariff under Section 63 of EA-2003 goes to the very root of the dispute between MSEDCL and APML under Case No. 68 of 2012. It emphasized that unless the Tariff is formally adopted, the same is not binding on either party.

6.2. APML submitted that the jurisdiction of the Commission under Section 63 of EA-2003 is not merely ministerial in nature. It added that, for exercising its jurisdiction under Section 63 of the EA-2003, the Commission has to ensure that the bid process is compliant to Competitive Bidding Guidelines, and the Tariff discovered under the bid process is consistent with the principles enumerated under Section 61 of the EA-2003. Therefore, while exercising its jurisdiction, the Commission needs to consider facts and circumstances and subsequent events, which have taken place post acceptance of the offer made in the bid process.

- 6.3. APML cited the excerpts of the Judgment of Hon'ble ATE in Appeal No. 82 of 2011 in the matter of Essar Power Limited Vs. Uttar Pradesh Electricity Regulatory Commission (hereinafter referred to as "UPERC"), in support of 6.2 above.
- 6.4. Citing the aforesaid Judgment of Hon'ble ATE, APML further submitted that the Commission needs to ensure transparency, fairness, consumer interest and viability while adopting the Tariff. APML submitted that since in the present case the principles of Section 61 related to recovery of cost of generation are being violated, the Tariff cannot be adopted by the Commission.
- 6.5. APML submitted that it has established during the proceedings in Case No. 68 of 2012 that the termination of PPA on account of force majeure is legal and valid. It added that the Commission itself has directed in its Daily Order dated 18 January, 2013 in Case No. 68 of 2012 that APML and MSEDCL should make efforts to arrive at a feasible Tariff amicably. It submitted that in the background of these circumstances, the Commission cannot adopt the Tariff based on the Petition filed on 17 October, 2008. APML further averred that the fact that there is a dispute regarding the PPA is itself a ground for rejection of Petition for adoption of Tariff.
- 6.6. To support its argument that the Commission is required to follow the procedure for adoption of Tariff as per the Competitive Bidding Guidelines and the Tariff is not legally binding unless the same is approved by the Commission, APML quoted extracts of a Judgment of Hon'ble ATE in Case of Lanco Infratech Vs. Punjab State Electricity Regulatory Commission (PSERC) in Appeal No. 109 of 2009 and the same is reproduced below:

"50. The letter written by the Procurer to the Appellant or the contents of the petition filed before the State Commission referring to the acceptance of the offer cannot be said to be an absolute acceptance. In this context, one more decision of the Supreme Court is quite relevant i.e. 1983 (4) SCC 318 – Excise Commissioner vs. Manminder Singh. The relevant observation is as follows:

"Since the provisional acceptance of the highest bid at the auction already held by the Collector was subject to confirmation by the Excise Commissioner; no vested right had accrued to any one and if the Excise Commissioner on the consideration of the circumstances came to the conclusion that it was in the best interest of the revenue to

order re-auction, it was not for the High Court to interfere with the discretion of the Excise Commissioner in the proceeding under Article 226 of the Constitution."

This observation would apply in all force to the present facts of the case. In this case, even assuming that there is some acceptance letter by the procurer, it cannot be construed to be an absolute acceptance and at the most it can be a provisional acceptance by the procurer and as held by the Supreme Court, unless the said acceptance is confirmed by the State Commission, no vested right would accrue to the bidder. Therefore, the contention that they have got a vested right to get the bid accepted has to fail."

- 6.7. Quoting the Order of the Commission in Case No. 53 of 2012 (Petition of MSEDCL for approval of PPA for additional quantum with Indiabulls Realtech Limited (Nashik) and APML based on competitive bidding process), APML submitted that the Commission does not mechanically adopt the Tariff determined through a competitive bidding process, but also analyses the Tariffs before adopting the same under Section 63 of the EA-2003. APML submitted that the word "shall" used in the Section 63 of EA-2003 is not mandatory in nature but gives ample discretion to the Commission to adopt the Tariff, and in case the Tariff is found unviable, the Commission can reject the same. APML submitted that the Commission is required to analyze the situation based on which the Tariff has been determined and whether it is workable for both the Procurer and the Seller. APML submitted that if the word "shall" in Section 63 of EA-2003 is interpreted as binding, such interpretation will be in contrast to the duties and the powers of the Commission under Section 61 of the EA-2003 and also the overall objective of EA-2003.
- 6.8. APML submitted that it is a settled position that the rules of interpretation permit the interpretation of the word "may" in certain context as "shall" and vice versa, namely, the interpretation of "shall" as "may". The use of the word "shall" in a statutory provision, though generally taken in a mandatory sense, does not always conclusively convey an imperative mandate, especially when no negative words are used as a legislative device to make the provision imperative.
- 6.9. APML submitted that although the word "shall" is mandatory, for the Commission and the Courts, the word "shall" needs to be interpreted as "may", making it discretionary. APML added that the validity of the above mentioned interpretation is

evident from the fact that even after the transparent bidding process, the final authority has been given to the Appropriate Commission for adopting the Tariff and hence, it is the sole discretion of the Commission to either adopt the Tariff or reject the same.

6.10. APML added that the need for the process of adoption of Tariff under Section 63 of EA-2003 is not only to determine whether the bidding process is transparent or not, but also to ensure the fulfillment of the provisions of EA-2003, including Section 61 of EA-2003. APML submitted that the provisions of Section 63 are to be read with provisions of Section 61 of EA-2003, which require the Commission to not only safeguard the interest of consumers, but at the same time, ensure recovery of cost of generation of electricity.

6.11. Further, in the paragraph-wise reply to the Petition filed by MSEDCL on adoption of Tariff in Case No. 24 of 2013, APML made the following additional points:

- With reference to MSEDCL's submission that APPL and LKPPL were discovered as the L1 and L2 bidders and were awarded LoIs after receiving the consent of GoM, APML submitted that the Tariff quoted by APPL in the Case 1 Stage-I bid process was based on procurement of coal from the Lohara captive coal block allocated to APPL. APML submitted that the Ministry of Environment and Forest has revoked the Terms of Reference (ToR) granted for the Lohara coal block. APML added that it has already taken steps to terminate the PPA with MSEDCL since the withdrawal of ToR was a force majeure event which fundamentally affected the performance of obligations of APML under the PPA. APML submitted that the dispute regarding the same is pending for adjudication by the Commission under Case No. 68 of 2012.
- APML further pointed out that the first recital of the PPA requires the Commission to adopt the Tariff and pass an Order under Section 63 of the EA-2003. APML submitted that the same has not been done, which is clearly a non-compliance of a mandatory provision of law. APML submitted that the Tariff discovered in such circumstances is void.
- APML submitted that the PPA dated 8 September, 2008 was based on the standard format and that APML had no occasion to negotiate and/or vary the terms of the PPA.

- APML submitted that it was under the mistaken belief that the Commission has adopted the Tariff under Section 63 of EA-2003 read with the applicable provisions of Competitive Bidding Guidelines. APML submitted that the said mistake is of a fundamental nature and destroys the very foundation of the Tariff on which the parties have proceeded by executing the PPA. APML submitted that in such circumstances, while the PPA has been terminated on the grounds of subsequent force majeure events, its obligations also stand discharged due to a mistake of fact. APML submitted that in the above circumstances, the Tariff discovered under Case 1 Stage-I bid process has become void as such, and cannot be considered unless revised.
- APML added that the requirements under Paragraph 6.2 and 6.3 of the Competitive Bidding Guidelines have also not been complied with in Case 1 Stage-I bid process. APML submitted that statutory procedure for procurement of power prescribed under the Competitive Bidding Guidelines was not followed in Case 1 Stage-I bid process and on that ground also, the Commission should not adopt the Tariff.

6.12. APML submitted that in view of the above arguments, MSEDCL's Petition for adoption of Tariff deserves to be rejected, unless the same is considered with revised Tariff mechanism considering the changed scenario. APML submitted that the proposed mechanism must make an appropriate adjustment in the quoted bid Tariff in such a way that the Tariff is as per the provisions of National Electricity Policy, Tariff Policy and Section 61 of EA-2003.

7. Dr. Ashok Pendse, Thane Belapur Industries Association (hereinafter, referred to as "TBIA") in his submission dated 6 February, 2013 in Case No. 68 of 2012 had expressed his views regarding adoption of Tariff for power purchased from APML and LMPPL. Since the same are related to the present case, i.e., Case No. 24 of 2013, the same are summarised in the following Paragraphs of this Section:

- 7.1. Dr. Pendse submitted that the Competitive Bidding Guidelines outline the following stages for process of power procurement.
- a) Forecasting of demand;
 - b) RfQ (issuance and bid submission);
 - c) RfP (issuance and bid submission);

- d) Evaluation of bids by a Committee comprising of an external member;
- e) Compliance report to be submitted to the Commission; and
- f) Issuance of Order on Adoption of Tariff.

7.2. Dr. Pendse submitted that in Case 1 Stage-I bid process, steps (a) to (e) mentioned above have been followed and only the final stage, i.e., issuance of an Order on adoption of Tariff has not been completed. Dr. Pendse submitted that the delayed issuance of an Order on adoption of Tariff needs to be considered as a deviation from the bid process and the Commission has the jurisdiction to approve this deviation under Paragraph 5.16 of the Competitive Bidding Guidelines. Once this deviation is approved by the Commission, the requirements for adoption of Tariff under Section 63 of the EA-2003 will be met.

8. On 22 March, 2013, APML submitted a reply to the arguments submitted by TBIA on 6 February, 2013 as discussed in the following Paragraphs of this Section:

8.1. Regarding the arguments made by Dr. Pendse as elaborated in Paragraph 7.1, APML submitted that it has been awarded a contract under competitive bidding for supply of power on long-term basis after being declared as a successful bidder and has executed the PPA on 8 September, 2008. APML stated that all the stages related to power procurement through competitive bidding process as mentioned by Dr. Pendse are equally important and so is the adoption of Tariff by the Commission as required under Paragraph 6.4 of the Competitive Bidding Guidelines.

8.2. In reply to Dr. Pendse's argument that the delay in obtaining Order on adoption of Tariff may be considered as a deviation, which can be allowed under Paragraph 5.16 of the Competitive Bidding Guidelines, APML submitted that plain reading of the said Paragraph makes it clear that its scope is to only cover any deviation for the process other than as suggested in the Guidelines. APML submitted that as per Paragraph 6.14 of the Competitive Bidding Guidelines, adoption of Tariff in terms of Section 63 of EA-2003 is mandatory. APML submitted that the adoption of Tariff is required to be done after considering the report of the Evaluation Committee and the Procurer's certificate on conformity of the bid process with the Competitive Bidding Guidelines. APML submitted that the certificates have not been provided in the Petition as per the above requirement. APML submitted that approving the Tariff at this stage will vitiate the very intent of Section 63 of EA-2003, i.e., ensuring the

applicability of principles mentioned in Section 61 of EA-2003. APML submitted that in view of above, PPA with MSEDCL dated 8 September, 2008 is null and void.

9. MSEDCL made a submission on 1 April, 2013, in which it made the following arguments:
 - 9.1. MSEDCL submitted that while it is true that a formal Order adopting the Tariff as required under Section 63 of EA-2003 has not been issued by the Commission, as far as MSEDCL is concerned, it has complied with the requisite procedures and also filed the Petition for adoption of Tariff. MSEDCL submitted that a formal Order on adoption of Tariff should be issued at the earliest as per the requirements under Section 63 of EA-2003.
10. The Commission conducted the first hearing in the present case on 3 April, 2013 in the office of the Commission. Shri Chirag Balsara and Shri Kiran Gandhi Advocates, and Shri A.S. Chavan, C.E. (PP) were present on behalf of MSEDCL. Shri Sanjay Sen, Advocate and Shri Jatin Jullundhwala, APML were present on behalf of APML. Shri Ramanuj Kumar, Advocate and Shri Gurunath Wadke were present on behalf of LMPPL. Authorized Consumer Representatives, i.e., Dr. Ashok Pendse, TBIA and Ms. Ashwini Chitnis, Prayas Energy Group (hereinafter referred as “Prayas”) were also present during the hearing.
 - 10.1. During the hearing, MSEDCL’s Advocate argued that the Case 1 Stage-I bid process was conducted in a transparent manner and elaborated on the mandate of the Commission under Section 63 of EA-2003. APML’s Advocate elaborated the points raised in the Affidavit of objection against the adoption of Tariff discovered in Case 1 Stage-I bid process. The Consumer Representatives also presented their views on this matter.
 - 10.2. The Commission directed MSEDCL to serve the copy of the Petition to APML, Lanco Vidarbha Thermal Power Limited (hereinafter referred to as “LVTPL”) and authorized Consumer Representatives. All the parties were directed to submit their written arguments within two weeks time and rejoinders thereto within 10 days of written submissions with copies served to all the parties. The Commission also directed MSEDCL to make available the expected date of synchronization and expected CoD for long-term and medium-term PPAs under Competitive Bidding Guidelines on MSEDCL’s website.

11. Prayas made a submission in the present case on 15 April, 2013. The summary of the submission are as given below:
 - 11.1. Prayas submitted that the Commission has already approved the PPA and adopted the Tariff for PPA initialed between MSEDCL and JSW Energy Limited, which was the L3 (i.e., third lowest) bidder in Case 1 Stage-I bid process, through its Order dated 27 November, 2009 in Case No. 39 of 2009 after due process.
 - 11.2. Prayas further added that Section 63 of the EA-2003 read along with the Competitive Bidding Guidelines requires the Commission to adopt the discovered Tariff only if it is satisfied that due process as per the Competitive Bidding Guidelines has been followed and if the Tariff discovered is in line with the prevailing market rates. Prayas submitted that it can be inferred from the Order in Case No. 39 of 2009 that the Commission has already undertaken such a detailed process for Tariff adoption for the L3 bidder in the same bidding process, i.e., Case 1 Stage-I bid process, based on which the present Petition has been filed. Prayas submitted that throughout the Order in Case No. 39 of 2009, the Commission has compared the bid of JSW Energy Limited with the bids of APML and LMPPL in Case 1 Stage-I bid process.
 - 11.3. Prayas further pointed out that the Commission has mentioned the PPA between LMPPL and MSEDCL as an “approved PPA” in the said Order. The relevant excerpts of the said Order are reproduced below.

*“The Commission has noted that in compliance with the directive given by the Commission, MSEDCL had sent inspection teams to the proposed power plant sites of all the above three bidders. It is further noted that as stated under Item 6 (c) above, the fact finding team of MSEDCL had visited the Lanco thermal plant site on 20th September 2009, and it has reported that the construction activity of the plant by M/s Lanco has been delayed and that the planned COD of 4.9.2012 of the Lanco plant may not be achieved. The Commission directs MSEDCL to immediately initiate action as per the terms of **approved PPA** to protect the economic interest of its consumers”*
(Emphasis Added)

- 11.4. Prayas submitted that the above mentioned facts imply that there is already a legally valid and binding Order approving Tariff for the L3 bidder under the same bidding process, for which the adoption of Tariff is being sought in Case No. 24 of 2013. It added that the two main criteria for adoption of Tariff under Section 63 of EA-2003,

i.e., (a) compliance with process under Competitive Bidding Guidelines and (b) discovered Tariff to be in line with the market rates, have been met in the Case 1 Stage-I bid process. Prayas submitted that based on the above, the only logical and legally appropriate action ,on part of the Commission, is to adopt the Tariff for L1 and L2 bidder of the same Case 1 Stage-I bid process.

11.5. Prayas further submitted that the other important issue emerging from the present Petition is the governance lapse on part of the Commission ,in not issuing a clear and unambiguous Order ,on adoption of Tariff for L1 and L2 bidder in Case 1 Stage-I bid process at an appropriate point of time. Prayas submitted that it has raised the issue of ambiguity over the Order for adoption of Tariff for power procured from APML and LMPPL through Case 1 Stage-I bid process on two earlier instances, but the Commission had not addressed the same even after the same was pointed out. Prayas submitted that the above incident has raised serious concerns regarding regulatory governance and the Commission should initiate a thorough investigation in this matter.

12. The Commission noted the concerns raised by Prayas regarding regulatory governance issues.

13. APML made a submission in Case No. 24 of 2013 on 23 April, 2013. The submission put forth by APML is summarized in the following paragraphs:

13.1. APML submitted that as per the Judgment of the Hon'ble ATE in Appeal No. 44 of 2010, a Bid Evaluation Committee is required to give suitable recommendations regarding a price negotiated pursuant to a competitive bid process. The relevant extracts of the said Judgment are reproduced below:

“71. Accordingly, the following directions are given:

*The Appellant is directed to finalise the price through negotiation and to place it before the Evaluation Committee, which in turn will consider the same and find out whether it is aligned with the market prices or reasonable or acceptable price and **give suitable recommendations through the certificate”**(Emphasis Added)*

13.2. APML pointed out that the Paragraph 5.15 of the Competitive Bidding Guidelines also states that the Evaluation Committee shall have the right to reject all price bids if the rates quoted in the bid are not aligned to the prevailing market prices.

- 13.3. APML submitted that in the present case for adoption of Tariff for procurement of power by MSEDCL under Case 1 Stage-I process, the certificate issued by the Bid Evaluation Committee does not state whether the Tariffs discovered in the bid process are aligned to the prevalent market prices or not. It submitted that based on the above deficiency, the Commission cannot rely upon the said evaluation certificate for adopting the Tariff under Section 63 of EA-2003. Further APML pointed out that the certificate of Evaluation Committee does not give any recommendations as required under the Competitive Bidding Guidelines and only mentions that there is no deviation in the procurement of 1320 MW from APML and LMPPL. APML submitted that based on the above facts, the certificate from Evaluation Committee neither fulfils the requirements of Competitive Bidding Guidelines, nor does it fulfill the requirements as outlined in the Order of Hon'ble ATE in Appeal No. 44 of 2010.
- 13.4. APML added that even if the evaluation of Tariffs is carried out at this stage, it may be noted that considering the high coal prices, the Tariff is not aligned to prevailing market prices and hence cannot be adopted at this stage.
- 13.5. APML further submitted that the Tariff cannot be adopted at this stage ignoring all intervening events, particularly when the PPA has already been terminated. APML submitted that if the Tariff is adopted at this stage, the principles of Section 61 of EA-2003 would be vitiated considering the gravity of subsequent events.
- 13.6. APML submitted that the adoption of Tariff for procurement of power from JSW Energy Limited in Case No. 39 of 2009 had occurred long ago and the same cannot be the criteria for adopting the Tariff of the other bidders now, especially when there has been a substantial change affecting the ability of the bidders to perform, in the intervening period. APML submitted that it is essential to ensure that the Tariff proposed to be adopted, is in line with the market rates, prevailing at the time of adoption of Tariff, which is not the case in the present matter.
- 13.7. APML submitted that the basis for adoption of Tariff is the existence of a valid contract for sale and purchase of power. Since there is no valid contract in the present case, as APML has already terminated the contract, the Tariff cannot be adopted.
- 13.8. Based on the above arguments, APML requested the Commission not to adopt the Tariff.

14. LVTPL made a submission with respect to the Petition filed by MSEDCL for adoption of Tariff on 8 May, 2013. Through the submissions of MSEDCL, it can be inferred that LMPPL had requested MSEDCL to supply power from their project in Maharashtra being developed by LVTPL instead of the project envisaged to be developed by LMPPL in Chhattisgarh. The Commission observes that MSEDCL has agreed to the above request; vide its letter dated 26 November, 2009. The arguments put forth by LVTPL in the said submission are summarized hereunder:
 - 14.1. LVTPL submitted that MSEDCL has not submitted the certificate of the Bid Evaluation Committee in accordance with Paragraph 6.2 of the Competitive Bidding Guidelines and the Commission should not adopt the Tariff under the present Petition if MSEDCL is unable to produce the same.
 - 14.2. Citing the excerpts of the Judgment of Hon'ble ATE in Appeal No. 82 of 2011 in the matter of Essar Power Limited vs. UPERC, LVTPL highlighted that the Hon'ble ATE has ruled that the bid process must discover competitive Tariff in accordance with market conditions.
 - 14.3. LVTPL submitted that the Hon'ble CERC in its Order dated 2 April, 2013, in Petition No. 155/MP/2012 ,in the matter of Adani Power Limited Vs. Uttar Haryana Bijli Vitran Nigam Limited and Others, has emphasized the need to have due regard to the principles of Section 61 of EA-2003 ,while exercising its jurisdiction under Section 63 of EA-2003. LVTPL further submitted that from the Judgment of Hon'ble ATE and Order of Hon'ble CERC, it can be inferred that the process of adoption under Section 63 of EA-2003, cannot disregard the twin objectives of consumers' interest and protection of investments made by generation companies in setting up the project. If the process of adoption of Tariff is likely to result in commercially unviable Tariff, which is not in line with the prevailing market conditions or leads to loss of investments made by generating companies, such adoption would be contrary to the statutory scheme of EA-2003 and would also defeat one of the objectives of Competitive Bidding Guidelines, i.e., to facilitate development of power markets.
 - 14.4. LVTPL stated that MSEDCL has submitted the Petition after execution of the PPA between LVTPL and MSEDCL and the Commission has not adopted the Tariff till date. LVTPL submitted that in the intervening period till date, there have been significant changes in the circumstances which have rendered Tariff discovered in

2008 unviable and distant from the prevailing market conditions. LVTPL submitted that the following changes have occurred in its power project:

- The Environmental Clearance (EC) granted to its power project has been challenged both in the Hon'ble High Court of Bombay, Nagpur Bench and Hon'ble Supreme Court. Hon'ble High Court has directed that the MoEF would be entitled to review the EC granted to the project in toto or in part, and pending such review, any activity undertaken by LVTPL at the project site would be at its own risk. The continuing uncertainty regarding the status of EC has forced LVTPL to suspend all project activities since June 2012. LVTPL submitted that above circumstances constitutes a force majeure event, as they are entirely out of its control.
- LVTPL submitted that there are concerns over whether CIL will actually supply coal equivalent to the quantity as per the LoAs or that agreed in the FSAs due to the prevailing coal supply situation in the country. It submitted that due to the above, supply of indigenous coal for its project is expected to be limited to 17% of the total requirement. However, the boilers for its project are not designed to run on imported coal and can handle a blend of only 15-20% of imported coal. LVTPL submitted that it did not envisage the usage of imported coal to meet its obligations under the PPA during the bid process. Therefore the shortage or unavailability of domestic coal and unfavorable provisions in the FSA constitute a fundamental change of circumstances that are beyond the control of LVTPL. LVTPL submitted that on account of these circumstances, it has been unable to comply with the conditions subsequent as per the PPA. LVTPL submitted that it has kept MSEDCL informed regarding the above mentioned events which constitute a force majeure as per the PPA. LVTPL submitted that it has sought a waiver/extension of time from MSEDCL for fulfillment of conditions subsequent under Article 3.1.2 of the PPA based on the above events. However, MSEDCL has not granted any extension and has instead sought submission of additional performance guarantee. LVTPL submitted that when it denied the liability to submit additional performance guarantee since it has been affected by force majeure events, MSEDCL invoked the bank guarantee vide its letter dated 11 March, 2013 without giving any prior intimation or discussion with LVTPL. LVTPL submitted that MSEDCL's action of encashing the Bank Guarantee

indicates its intention of not continuing the power purchase arrangement as per the PPA.

- 14.5. LVTPL submitted that MSEDCL insisted on supplying power by the Scheduled Delivery Date, i.e., 4 September, 2012, in spite of the LVTPL's delay in getting the environmental clearance by 15 months, which constitutes a force majeure event. LVTPL submitted that MSEDCL has claimed the delay in achieving commercial operation as per the Scheduled Delivery Date as per the PPA as one of the reasons behind encashment of bank guarantee submitted by LVTPL, which is illegal, arbitrary and contrary to the provisions of the PPA.
- 14.6. LVTPL submitted that the bank guarantee can be invoked only when conditions subsequent are not satisfied. Since MSEDCL has chosen to invoke the bank guarantee, it becomes an admitted fact that the conditions subsequent provided under the PPA have not been satisfied. LVTPL submitted that since the conditions subsequent to the PPA have not been satisfied, the PPA itself can no longer be enforced. LVTPL submitted that once it is an admitted fact between the two parties to the PPA that the conditions subsequent have not been satisfied, the question of adoption of Tariff by the Commission does not arise.
- 14.7. LVTPL submitted that adoption of Tariff at this stage will tantamount to rewarding MSEDCL for its own lapses, which is inappropriate.
- 14.8. LVTPL submitted that the Judgment of Hon'ble ATE in Appeal No. 44 of 2010 and in Appeal No. 64 of 2012 quoted by MSEDCL during the proceedings in Case No. 24 of 2013 are not relevant in the present case. LVTPL submitted that in the Judgment in Appeal No. 44 of 2010, the Hon'ble ATE has compared the jurisdiction of the State Commission under Section 62 and Section 63 of the EA-2003 and ruled that the State Commission has limited jurisdiction under Section 63 as compared to Section 62 of the EA-2003. LVTPL submitted that in the Judgment in Appeal No. 44 of 2010, the argument in question was whether a State Commission has the power to direct the parties to renegotiate the terms of the PPA which has been signed pursuant to a competitive bid process. The Hon'ble ATE observed in the above context that the Commission needs to adopt the Tariff discovered in a competitive bid process and had no power to direct the renegotiation of the terms of the PPA. LVTPL submitted that these inferences have no relevance in the present case.

- 14.9. LVTPL submitted that it is clear from the Competitive Bidding Guidelines that adoption of Tariff should be undertaken contemporaneously with the conclusion of the bidding process or soon after the bid process. LVTPL added that if the same is not done, it will not be possible for the Commission to determine whether the Tariff is in line with the prevailing market conditions.
- 14.10. LVTPL submitted that as per the Competitive Bidding Guidelines, the signed PPA along with the certificates provided by the Evaluation Committee and by the Procurer as provided in Paragraph 6.2 shall be forwarded to the Appropriate Commission for adoption of Tariff. LVTPL submitted that the absence of any prescribed time period for adoption of Tariff can, at best, be read to mean that the adoption ought to be done as soon as reasonably practicable or, within a reasonable time after execution of the PPA. LVTPL submitted that MSEDCL cannot take liberty to seek adoption of Tariff after four and a half years after execution of the PPA, taking advantage of its own lapses, especially when (a) significant changes in the circumstances prevailing at the time of execution of the PPA have occurred and, (b) when the Tariff discovered at that time is not aligned with market anymore.
- 14.11. LVTPL submitted that it disagrees with the arguments made by Prayas that since the Commission has already adopted the Tariff for JSW Energy Limited in its Order in Case No. 39 of 2009, the adoption of Tariff in the present Petition is a mere formality. LVTPL submitted that MSEDCL had not sought the adoption of Tariff during the proceedings of Case No. 39 of 2009 and the Commission had no occasion to examine the compliance of the Tariff quoted by LVTPL for considering adoption of Tariff.
- 14.12. LVTPL submitted that the exercise of powers of the Commission under Section 63 of the EA-2003 is a judicial function of the Commission and not merely a mechanical or an administrative function. Accordingly, an independent assessment of circumstances surrounding each decision of adoption of Tariff is well within the powers of the Commission.
- 14.13. LVTPL referred to the Judgment of the Hon'ble Supreme Court in the Case of Radheshyam Khare Vs. State of Maharashtra [AIR 1959 SC 107] to differentiate between an administrative function and a quasi-judicial function. LVTPL submitted that it can be inferred from the Judgment that the three prerequisites for determining whether the act of a body may be a quasi-judicial act or an administrative act are (a)

must have legal authority; (b) to determine questions affecting the right of the parties; and (c) must have the duty to act judicially.

- 14.14. LVTPL referred to the Judgment of Hon'ble ATE in Appeal No. 82 of 2011 to emphasize its argument that the Commission is not carrying out an administrative function while adopting the Tariff under Section 63 of EA-2003 and needs to consider the principles of Section 61 of EA-2003 while doing the same.
- 14.15. LVTPL also referred to the Judgment of Hon'ble ATE in Case of Aravali Transmission Service Company Limited vs. Rajasthan Electricity Regulatory Commission to emphasize its argument that adoption of Tariff under Section 63 of EA-2003 is a judicial function.
- 14.16. LVTPL submitted that since the matter of environmental clearance of its project is pending before the Hon'ble Bombay High Court, Nagpur Bench, the ability of LVTPL to perform its obligations under the PPA has been affected due to reasons beyond its control. It submitted that in accordance with the same, the PPA signed with MSEDCL on 25 September, 2008 has become unenforceable for as long as the ability of LVTPL to perform its obligations under the PPA continues to remain affected.
- 14.17. Based on the above arguments, LVTPL prayed before the Commission to decline the adoption of Tariff in the present Petition.
15. The Commission conducted the second hearing in this matter on 9 May, 2013. Shri Rahul Chitnis, Advocate, Shri Kiran Gandhi and Shri A.S. Chavan were present on behalf of MSEDCL. Shri Sanjay Sen and Shri Jatin Jallundhwala were present on behalf of APML. Shri Ramanuj Kumar and Shri Ravi E. Keshav, LVTPL were present on behalf of LVTPL. Ms. Ashwini Chitnis was present on behalf of Prayas.
16. The Commission heard the representatives/advocates of MSEDCL, APML and LVTPL and Prayas. The Commission directed all the parties to submit final consolidated written statements in the present case before the next hearing.
17. LVTPL made a submission in the present case on 29 May, 2013. The arguments put forth by LVTPL in the said submission are summarised in the following paragraphs:
 - 17.1. LVTPL submitted that the bid evaluation certificate submitted by the Bid Evaluation Committee in Case 1 Stage-I bid process, in order to comply with Competitive Bidding Guidelines, does not meet the requirements stipulated in the Paragraph 6.2 of

the Competitive Bidding Guidelines. LVTPL submitted that the bid evaluation certificate submitted by MSEDCL only indicates some actions taken by MSEDCL in inviting the bids and the responses thereto and does not contain any evaluation or certification of the Case 1 Stage-I bid process being conducted as per the provisions of Competitive Bidding Guidelines. LVTPL submitted that the certificate only indicates that there was no deviation from the prior bid submitted and same does not amount to certification of adherence to the Competitive Bidding Guidelines. LVTPL further submitted that the bid evaluation certificate also does not indicate that the Bid Evaluation Committee has carried out any analysis to check whether the Tariffs offered are aligned to the prevailing market prices. Based on the above arguments, LVTPL submitted that the certificate of the Bid Evaluation Committee as submitted by MSEDCL does not meet the requirements of the Competitive Bidding Guidelines.

- 17.2. LVTPL reiterated the argument raised by it in an earlier submission that the process for adoption of Tariff is not a mere formality and is a judicial function of the Commission.
- 17.3. LVTPL also submitted that Section 63 of EA-2003 forms part of Chapter VII of EA-2003 which pertains to determination of Tariff. LVTPL added that although Section 63 of EA-2003 provides that principles of Section 62 will not be applicable, it does not in any manner exclude the application of Section 61 of EA-2003. LVTPL submitted that Section 61 of EA-2003 sets out the specific parameters by which the appropriate Commission is guided while determining the Tariff under Chapter VII of the Act, including the adoption of Tariff through Section 63. LVTPL submitted that based on the above arguments, the appropriate Commission would be required to give due regard to the factors for determination of Tariff provided in Section 61 of EA-2003 while adopting Tariff under Section 63 of EA, 2003. LVTPL submitted that Section 61 of the EA-2003 includes, inter-alia, the provision of recovery of the cost of electricity in a reasonable manner.
- 17.4. LVTPL reiterated that Judgment by Hon'ble ATE in Essar Power Limited Vs. UPERC [2012 ELR (APTEL) 182] and Order by Hon'ble CERC in Case of Adani Power Limited Vs. GUVNL and Others have clearly emphasized the need to follow the principles of Section 61 of EA-2003 while adopting the Tariff under Section 63 of the EA-2003.

- 17.5. LVTPVL submitted that the Judgment of Hon'ble ATE in Appeal No. 106 of 2011, cited by MSEDCL during the hearing held on 9 May, 2013, which deals with powers of the appropriate Commission under Section 63 of EA-2003, does not support the arguments put forth by MSEDCL. LVTPPL submitted that MSEDCL relied upon the aforementioned Judgment to state that the scope of Section 63 is limited to adoption of Tariff and that the State Commission is merely required to verify whether the bid process has been done in a transparent manner in accordance with the Competitive Bidding Guidelines; if the same are complied with, the State Commission shall adopt the Tariff recommended by the Bid Evaluation Committee.
- 17.6. LVTPPL submitted that in the aforementioned Judgment, Hon'ble ATE has relied upon its Judgment in Appeal No. 82 of 2011. However, Hon'ble ATE in the Judgment in Appeal No. 82 of 2011 has also ruled that the process under Section 63 must ensure the discovery of competitive Tariff in accordance with market conditions which are consistent with the guiding principles under Section 61 of EA-2003. LVTPPL submitted that based on the above interpretation, evaluation of competitiveness of Tariffs is a prerequisite for adoption of Tariff under Section 63 of EA-2003.
- 17.7. LVTPPL submitted that from the rulings of Hon'ble ATE and Hon'ble CERC in the above mentioned Judgments/Orders, it is clear that the process for adoption of Tariff under Section 63 cannot disregard the twin objectives of protection of Consumers' interests and protection of investments made by the generating companies in setting up the project. LVTPPL submitted that if the adoption of Tariff under Section 63 of EA-2003 results or is likely to result in a commercially unviable Tariff, which is not in line with the prevailing market conditions or leads to loss of investments made by the generating companies, such adoption would be contrary to the statutory scheme of EA-2003. LVTPPL submitted that such adoption would also defeat one of the objectives of the Competitive Bidding Guidelines, which is to facilitate development of power markets.
- 17.8. LVTPPL reiterated its earlier submission that there have been changes of fundamental nature during the four and half years since signing of the PPA with MSEDCL.
- 17.9. LVTPPL re-emphasized its submissions made in its earlier submission that adoption of Tariff in Case No. 39 of 2009 does not result in the process of adoption in the present case becoming mechanical, since adoption of Tariff is a judicial function.

- 17.10. LVTPL submitted that Clause 3.3.3 of the PPA executed between LVTPL and MSEDCL deals with the event of non-fulfillment of conditions subsequent by the Seller due to a force majeure event. LVTPL submitted that as per the said Clause, if LVTPL is unable to fulfill the conditions subsequent due to occurrence of a force majeure events within a period of 18 months from the effective date of the PPA (4 September, 2008), the timeline for fulfillment will be extended by another ten months. If the force majeure event continues during these ten months and LVTPL is unable to meet the conditions subsequent due to the same, either party can terminate the PPA as per the Clause. LVTPL submitted that it has been unable to fulfill the conditions subsequent due to the force majeure events explained by it in its submissions. LVTPL submitted that the force majeure events have continued for a period of more than 10 months from the date on which the conditions subsequent under the PPA were required to have been fulfilled (i.e., 3 March, 2010). LVTPL submitted that it has issued a termination notice dated 29 May, 2013 to MSEDCL in exercise of its right under Clause 3.3.3 of the PPA. LVTPL submitted that since the PPA has already been terminated, the question of adoption of Tariff under a contract which has been terminated does not arise. LVTPL submitted that considering the above, the Tariff should not be adopted in the present case.
- 17.11. LVTPL reiterated that generation of power from its power project is not possible until such time as a valid environmental clearance is granted and construction of the project re-commences. LVTPL submitted that in such circumstances, it is not possible to specifically enforce the performance of obligations under the PPA under the Specific Relief Act, 1963. LVTPL further submitted that the non-availability of a remedy of specific performance of the PPA under the Specific Relief Act, 1963, by itself constitutes grounds for declining adoption of Tariff in the present case.
- 17.12. LVTPL submitted that in view of the above arguments, the Commission should not adopt the Tariff in the present case.
18. On 30 May, 2013, APML submitted a consolidated set of arguments in the present case. APML submitted that the Commission should declare that the PPA stands terminated for want of sanction in relation to Tariff. APML submitted that since MSEDCL has failed to seek adoption of Tariff under Section 63 of EA-2003 read with the provisions of the Competitive Bidding Guidelines, the PPA stands terminated. APML further added that keeping in view the fact that the Tariff (a) is not

based on commercial principles; (b) does not permit recovery of cost of generation in a reasonable manner; and (c) is not aligned to market conditions; the Commission cannot adopt the Tariff at this stage.

19. The Commission conducted another hearing in this matter on 31 May, 2013. Shri Chirag Balsara and Shri Kiran Gandhi were present on behalf of MSEDCL. Shri Sanjay Sen was present on behalf of APML and Shri Ramanuj Kumar was present on behalf of LVTPL. Dr. Ashok Pendse (TBIA), Ms. Ashwini Chitnis (Prayas) and Shri Srihari Dukkupati (Prayas) were also present during the hearing. The Commission heard the representatives/advocates of MSEDCL, impleaded parties and Consumer Representatives.
20. The Commission conducted the next hearings in this matter on 10 June, 2013 and 11 June, 2013. Shri Rahul Chitnis and Shri Kiran Gandhi were present on behalf of MSEDCL. Shri Sanjay Sen was present on behalf of APML and Shri Ramanuj Kumar was present on behalf of LVTPL. Dr. Ashok Pendse (TBIA), Ms. Ashwini Chitnis (Prayas) and Shri Srihari Dukkupati (Prayas) were also present during the hearing.
- 20.1. The Commission heard the representative of the parties and the Consumer Representatives during the hearing. The Consumer Representatives elaborated the points raised in their written submissions made earlier.
21. The final hearing in this matter was held on 3 July, 2013. Shri Rahul Chitnis, Shri Chirag Balsara and Shri Kiran Gandhi were present on behalf of MSEDCL. Shri Sanjay Sen was present on behalf of APML and Shri Ramanuj Kumar was present on behalf of LVTPL. Dr. Ashok Pendse (TBIA) and Ms. Ashwini Chitnis (Prayas) were also present during the hearing. LVTPL's Advocate elaborated the arguments raised in LVTPL's submission dated 29 May, 2013. The parties and the Consumer Representatives concluded their arguments during the hearing.

Commission's analysis and ruling

22. The Commission has analyzed the following aspects while disposing of the present Petition: MSEDCL's compliance with the provisions of EA-2003 and the Competitive Bidding Guidelines for procurement of power in the present case;
 - a) Delay in issuance of Order on adoption of Tariff; and
 - b) Impact of disputes between the parties on the adoption of Tariff.

MSEDCL's compliance with the provisions of EA-2003 and the Competitive Bidding Guidelines for procurement of power in the present case

23. The Commission observes that the approvals required in the process of power procurement as per the Competitive Bidding Guidelines, which are pertinent to the present case (i.e., Case 1 Stage-I bid process), are as follows:
- Approval of the quantum of power by the Commission in certain cases outlined in the Competitive Bidding Guidelines;
 - Approval of the deviation by the Commission, if any, in the RfP documents as compared to the Standard Bidding Documents issued by MoP;
 - Certification from the Evaluation Committee and Procurer ; and
 - Approval of PPA and Adoption of Tariff by the Commission.
24. With regards to the quantum of power to be procured, the Commission observes that MSEDCL initiated the competitive bidding process to meet its long-term power requirement only after obtaining the approval of the Commission vide Order dated 17 October, 2006 in Case No. 22 of 2005. The quantum of procurement was duly approved by the Commission.
25. With regards to the approval of the deviations in the bid documents, the Commission observes as follows:
- 25.1. MSEDCL issued the notice inviting RfQ bids for procurement of 2000 MW on 25 November, 2006 only after the Commission approved the same vide Order dated 17 October, 2006 in Case No. 22 of 2005.
- 25.2. MSEDCL issued the final Request for Proposal document to the shortlisted bidders on 16 February, 2008 after revising the documents as per the directions of the Commission vide Order dated 24 January, 2008 in Case No. 38 of 2007.
26. MSEDCL approached the Commission through its Petition dated 2 August, 2008 for appraising the Commission on the outcome of bid process and requested the Commission for approval and adoption of Tariff discovered through the Case 1 Stage-I bid process. MSEDCL had also sought the approval of the Commission for amendment in one of the Clauses of the PPAs. This case was numbered as Case No. 54 of 2008.

- 26.1. MSEDCL submitted during the proceedings of Case No. 54 of 2008 that a high powered Negotiation Committee, chaired by the Chief Secretary, Government of Maharashtra, negotiated the Tariffs with the shortlisted bidders and outcome of the process was as follows:
- a) APPL, which had offered 660 MW at the levellised Tariff of Rs. 2.642 per kWh and another 660 MW at the levellised Tariff of Rs. 2.685 per kWh during the bid process, has decided to offer the entire 1320 MW at the levellised Tariff of 2.642 per kWh; and
 - b) LKPPL has reduced its levellised tariff in the price bid from Rs. 2.72 per kWh to Rs. 2.70 per kWh.
- 26.2. MSEDCL further informed the Commission that letter of Intents (LoIs) have been issued to the shortlisted bidders at the negotiated Tariffs after obtaining the consent of Government of Maharashtra for the above mentioned Tariffs.
- 26.3. MSEDCL further stated that it has entered into the PPAs after incorporating the amendment approved by the Commission vide its Order in Case No. 54 of 2008 dated 14 August, 2008.
27. It is evident from the Paragraphs 23 to 26 above, that MSEDCL has obtained approvals from the Commission for all the amendments and deviations in the bidding documents and hence complied with the requirements of the Competitive Bidding Guidelines.
28. With respect to the certificates from the Evaluation Committee and the Procurer, the Commission observes the following:
- 28.1. The Commission notes that the bids received in Case 1 Stage-I bid process were evaluated by the Evaluation Committee set up as per the provisions of Competitive Bidding Guidelines.
 - 28.2. The Evaluation Committee also comprised an external member, Prof. Sebastian Morris, IIM Ahmadabad, as per the requirements of Paragraph 5.9 of the Competitive Bidding Guidelines.
 - 28.3. The Commission also notes that MSEDCL has submitted the letter in its Petition confirming that there is no conflict of interest in involving Prof. Sebastian Morris as

the external member in the Evaluation Committee as per the requirements of Paragraph 5.9 of the Competitive Bidding Guidelines.

- 28.4. The Evaluation Committee has submitted its report in accordance with Paragraph 6.2 of Competitive Bidding Guidelines, which is quoted below:

*“After the conclusion of bid process, the Evaluation Committee constituted for evaluation of RFP bids shall provide appropriate certification on conformity of the bid process evaluation according to the provisions of the RFP document. The procurer shall provide a certificate **on the conformity of the bid process to these guidelines.**” (Emphasis Added)*

- 28.5. As regards the certificate of the Procurer, the Commission takes a note of various submissions made by MSEDCL including the covering letter stating the procurement of power as per Competitive Bidding Guidelines.

29. APML and LVTPL have objected in their submissions that the Evaluation Committee has not commented whether the rates discovered in the Case 1 Stage-I bid process are aligned to the prevailing market rates or not, as per the requirements of Competitive Bidding Guidelines. The Paragraph 5.15 of the Competitive Bidding Guidelines is 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.**” (Emphasis Added)*

30. The Commission notes that although the Evaluation Committee has a right to reject all the bids based on the Tariff discovered in a bid process as per Paragraph 5.15 of the Competitive Bidding Guidelines, it has made no such recommendation in the Evaluation Report.

31. Further, the Commission observes from the submissions of MSEDCL that the Board of MSEDCL deliberated on the Tariffs discovered through the Case 1 Stage-I bid process during the Board meeting held on 8 April, 2008. The Board concluded that the bids discovered are higher than that discovered in other states, i.e., Gujarat, Haryana and Madhya Pradesh by 30-40 paisa per kWh and negotiations with the

bidders were necessary to obtain the best commercial prices. The Board also noted that since there are no guidelines as to how to conduct negotiations in such cases, it will be appropriate that negotiations are conducted at the level of Government in the manner as deemed necessary. Accordingly the Board approved the formation of a Committee for negotiation with the bidders.

32. The Commission is of the view that the procurer and the Evaluation Committee have analyzed the issue of alignment of the Tariffs received to the prevailing market rates. Moreover, the Tariffs discovered have been negotiated by a high powered Committee chaired by the Chief Secretary, Government of Maharashtra. It is also confirmed from the fact that the negotiations held by high powered Committee resulted in reduction of Tariff from both the shortlisted bidders as follows:

- a) APML reduced the quoted levellised Tariff from Rs. 2.68 per kWh to Rs. 2.64 per kWh for 660 MW (Price Bid No. 2); and
- b) LVTPL reduced the quoted levellised Tariff from Rs. 2.72 per kWh to Rs. 2.70 per kWh.

33. This confirms that the Negotiation Committee has taken care of the issue of examination of the price in line with market trends. Therefore, the Commission finds no merit in the contention of APML and LVTPL that the tariffs discovered are not aligned with the market and the report of the Evaluation Committee does not meet the requirements of the Competitive Bidding Guidelines.

34. As regards APML's contention regarding the non-compliance of the provisions of Paragraph 6.3 of the Competitive Bidding Guidelines regarding publishing the details of the bids received in the bid process, the Commission notes that MSEDCL has submitted a letter signed by Director (Finance), MSEDCL on the timeline adopted for public display of the successful bids. As per the said letter, MSEDCL has mentioned that the successful bids will be made public, pursuant to signing of the PPAs. However, the information on further action as per the above letter is not available with the Commission. Therefore, the Commission directs MSEDCL to publish the details of bids as per the requirements of Competitive Bidding Guidelines within 7 days from issuance of this Order, if the bids were not made public earlier.

35. The Commission notes that all the requirements under the Section 63 of the EA-2003 and the provisions of the Competitive Bidding Guidelines have been complied with in

carrying out the procurement process and Tariffs discovered in the same process has been adopted after following due regulatory process, for the L3 bidder under Case No. 39 of 2009 dated 27 November, 2009.

36. The Commission notes that MSEDCL submitted the Petition for adoption of Tariff along with the PPAs with APML and LMPPL on 17 October, 2008 (Paragraph 3.4 of this Order). However, the office of the Commission could not, inadvertently, process the said Petition dated 17 October, 2008. MSEDCL also made no further communication after the submission of its Petition. The Commission is, therefore dealing with the issue of adoption in the present Order, against resubmitted Petition filed on 15 February 2013, with all the documents submitted with original petition dated 17 October 2008.

Delay in issuance of Order on adoption of Tariff

37. Both APML and LVTPL have raised concerns over alignment of Tariff discovered to the prevailing market rates and compliance with the provisions of Section 61 of EA-2003 resulting from delay in Order on adoption of Tariff.
38. With regards to the contention that the Tariffs discovered should be in line with market rates at the time of adoption of Tariff, the Commission observes as follows:
- 38.1. The alignment of Tariffs with prevailing market rates needs to be ensured at the time of bid process and the same has been duly evaluated by the Procurer and the Evaluation Committee. The present Petition is a resubmission of a Petition filed in 2008 for adoption of Tariff for bidding process carried out at that point of time. The selected bidders have already signed the PPAs. They have used the PPAs for obtaining fuel linkages and have already obtained various approvals subsequently for putting up of the project including the financing of the project. Hence the Commission notes that even though the Petition for adoption of Tariff has been resubmitted now and is being addressed in the present Order, the original Petition was filed in 2008 after duly completing the required processes and the PPAs so signed have been made use of.
- 38.2. The Commission has already analyzed the Tariffs offered by APML and LKPPL while disposing the Order in the matter of adoption of Tariff for procurement of

power by MSEDCL from JSW Energy Limited in Case No. 39 of 2009 which was part of the same bid process.

- 38.3. The Commission also does not find any merit in the argument of LVTPL that since MSEDCL had not approached the Commission for adoption of Tariff of LVTPL in Case No. 39 of 2009, the diligence conducted by the Commission for Case 1 Stage-I bid process does not hold any relevance in the present case. The Tariff for JSW Energy Limited, which was the L3 bidder in Case 1 Stage-I bid process, was evaluated and adopted after due diligence, considering inter-alia, the Tariffs offered by APMML and LVTPL, which were the L1 and L2 Bidders in the same bid process.
39. With regards to the arguments that the Tariff discovered should meet the principles of Section 61 of EA-2003, the Commission is of the opinion that the same need to be considered in the circumstances prevailing at the time of Bid Submission. The Commission also notes that, selected bidders have also participated in the negotiation process and reduced the levellised Tariff during negotiations and have accepted the LoIs (Letter of Intents) issued by the Procurer and have also subsequently signed the Power Purchase Agreements with the Procurer after the conclusion of the bid process. Hence the Commission is of the opinion that the provisions of the Section 61 with respect to cost recovery have been fully met on the date of signing of PPA. Further the selected bidders have completed significant steps in developing the project and in fact, APMML has already started supply of power from Unit 2 and 3 of Tiroda Thermal Power Station.
40. Therefore the contention, that the Tariff cannot be adopted because the same does not comply with provisions of Section 61 of EA-2003, and is not aligned with prevailing market rates, due to delay in process of adoption, has no merit and is rejected.

Impact of disputes between the parties on the adoption of Tariff

41. APMML and LVTPL have argued that the Tariffs discovered in Case 1 Stage-I bid process conducted earlier cannot be adopted at this stage due to a dispute between the parties to the PPA and the consequent steps taken by APMML and LVTPL to terminate the PPAs with MSEDCL. They further argued that the Tariffs discovered through Case 1 Stage-I bid process cannot be adopted at this stage, as there has been a significant change in circumstances of the development of their power project.

42. The Commission is aware that there is an inter-se dispute between APML and MSEDCL, which is being dealt separately in Case No. 68 of 2012. The Commission further observes that the termination notice sent by APML has been disputed by MSEDCL citing that APML cannot invoke the force majeure Clause in the PPA as the responsibility of arranging fuel is with the bidder.
43. Further, LVTPL has also stated in its submission that certain disputes have emerged between them and MSEDCL regarding invocation of performance bank guarantee by MSEDCL, which was submitted by LVTPL during the Case 1 Stage-I bid process. LVTPL submitted that occurrence of certain force majeure events has prevented them from fulfilling the conditions subsequent as per the PPA dated 25 September, 2008, and as per clause 3.3.3 of the PPA, they are entitled to 10 months' extension to fulfill conditions subsequent. However, MSEDCL has not granted them any extension as per the provisions of the PPA and invoked the performance guarantee provided by LVTPL, thereby indicating his acceptance to the fact that conditions subsequent as per the PPA have not been met. LVTPL has submitted that in accordance with its rights as per Clause 3.3.3 of the PPA, it has terminated the PPA with MSEDCL through its' termination notice dated 29 May, 2012. LVTPL argues, that once it is an admitted fact between the two parties to the PPA, that the conditions subsequent have not been satisfied, and the PPA stands terminated, the question of adoption of Tariff by the Commission does not arise.
44. The Procurer, i.e., MSEDCL in the present case, has approached the Commission under Section 63 of EA-2003. The Commission opines that the inter-se dispute between the parties does not affect the jurisdiction of the Commission under Section 63 of EA-2003. The Commission believes that participation in the bid, negotiating the levellised tariff, acceptance of LoIs and signing the PPA and progressing the project, all indicate that parties fully accepted the PPA and discovered and negotiated levellised Tariffs at that stage. The Commission observes that the intervening events and the resultant dispute between APML and MSEDCL are subsequent developments and do not affect the disposal of the present case. This Order will not vitiate the proceedings in Case No. 68 of 2012 and the case will be decided on its own merits. Similarly, the dispute between LVTPL and MSEDCL subsequent to the signing of the PPA, transfer of the project site from Chhattisgarh to Maharashtra and the termination notice sent by LVTPL to MSEDCL are events which have happened after MSEDCL

has conducted a transparent bid process as per the Competitive Bidding Guidelines. Such events have no relevance to the process for adoption of Tariff. Section 63 of EA-2003 is reproduced below:

“63. Determination of tariff by bidding process – Notwithstanding anything contained in section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government”

45. As can be inferred from Section 63 of EA-2003, the role of the Commission is to evaluate whether Tariff for power procurement has been determined through transparent process of bidding in accordance with the Competitive Bidding Guidelines and the same is aligned with market rates. Had the Order on adoption of Tariff been issued a few years earlier, it could not have been argued at a later date that the Tariff adopted is vitiated as it did not address the inter-se disputes that arose subsequently and much later. Therefore, the Commission does not find any merit in the argument of APML and LVTPL that the Commission cannot adopt the Tariff due to the intervening events between the filing of the Petition for adoption of Tariff by MSEDCL and the issuance of Order on adoption of Tariff. The Commission will separately address the inter-se disputes between APML and MSEDCL in Case No. 68 of 2012 and decide the case on its own merits. However, this Order shall not vitiate the proceedings in Case No. 68 of 2012. Similarly, as regards LVTPL, once, if at all, LVTPL files any Petition before the Commission, the Commission will deal with such a Petition at an appropriate time.
46. Based on the above analysis, the Commission rules that MSEDCL has complied with the provisions of the Section 63 of EA-2003 and the Competitive Bidding Guidelines while procuring power from APML and LMPPL under the Case 1 Stage-I bid process. The Commission, after perusing the documents submitted by the Procurer, is satisfied that the Procurer MSEDCL has followed the bid process with full transparency and the tariff so discovered is aligned with the market rates.
47. The Commission also notes that the PPAs between MSEDCL and the impleaded parties have been amended as per the directions of the Commission in Case No. 54 of 2008. Accordingly, the Commission approves the Power Purchase by MSEDCL and

adopts the Tariff for the power procurement as follows in line with the provisions of Section 63 of the EA-2003:

Table 2: Power Procurement approved under the present case

Bidder	Quantum (MW)	Levelling Tariff (Rs./kWh)
Adani Power Maharashtra Limited	1320	2.642
Lanco Vidarbha Thermal Power Ltd (<i>formerly Lanco Mahanadi Power Private Limited</i>)	680	2.700

48. With adoption of Tariff for Power procurement from APML and LVTPL, the Petition in Case No. 24 of 2013 is disposed of accordingly.

sd/-
(Chandra Iyengar)
Member

sd/-
(V P Raja)
Chairman