

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
BHOPAL**

Subject : In the matter of review/reconsideration/modification in the Order dated 10th February, 2009 in Suo-Moto Petition No.SMP-28/2008 and in the Order dated 31st January, 2009 in Petition No.29/2008 and 32/2008.

Petition No.14 of 2009

ORDER

(Date of Hearing: 24th November, 2009)

Date of Order: 5th January, 2010

M. P. Power Trading Company Ltd., Jabalpur - Petitioner

**M. P. Paschim Kshetra Vidyut Vitaran Co. Ltd., Indore }
M. P. Madhya Kshetra Vidyut Vitaran Co. Ltd., Bhopal } - Respondents
M. P. Poorv Kshetra Vidyut Vitaran Co. Ltd., Jabalpur }**

Shri A. B. Bajpai, CGM (Comm.) and Shri M. G. Ramchandran, Sr. Advocate appeared on behalf of the Petitioner - M. P. Power Trading Company Ltd. (MP Tradeco), Jabalpur.

Shri S. S. Tripathi, ASE of West Discom, Indore, Shri P. K. Jain, EE (TRAC) of East Discom, Jabalpur and Shri A. R. Verma, S.E. of Central Discom Bhopal appeared on behalf of the respondents.

The Petition is in the matter of reconsideration/review/modification of the orders passed by the Commission dated 10.02.2009 on short term power purchase under SMP No.28/2008, and orders dated 31.01.2009 in Petition No.29/2008 and Petition No.32/2008 in respect of true-up of distribution tariff for FY 2005-06.

2 Motion hearing in the matter was held on 16th April, 2009 when the Commission admitted the review petition in accordance with the provisions of Section 94 of the Electricity Act and Clause 40 of MPERC (Conduct of Business) Regulation, 2004 to afford an opportunity to the Petitioner to explain/justify the process of procurement of power and reasonableness of rates of procurement. The notices were also issued to all the three Distribution Companies of the State and the Petitioner was directed to provide copy of its main Petition and amended cause title to the main Petition to the respondent Distribution Companies. The Petitioner and the respondent Discoms were directed to file their written response by 16th May, 2009.

3 The petitioner and the respondents had filed their written response with the Commission on 23rd June, 2009. Meanwhile, the Commission on 16.04.2009 had received an application from MP Electricity Consumer's Society, Indore requesting that their representative be allowed to be present during the hearing. The Commission vide its Order dated 24.06.2009 allowed MP Electricity Consumer's Society's presence in the next hearing, if they so desire.

4 During the course of hearing held on 24th June, 2009, Shri Vivek Tankha the Learned Senior Counsel appearing for the petitioner stated :-

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- (i) That his arguments would be restricted to short term power purchase during FY 2005-06 only. The State has been facing shortage of power since reorganization of the State. To deal with the growing demand for power from time to time both long term and short term power purchases are made by the Petitioner. The long term power purchase involves higher degree of planning and certainty. But at the same time, long term power procurement does not suffice all the time. Thus, there is a need for short term power purchase also by the Petitioner in which immediacy of the situation is involved. The short term power market was a sellers' market. The situation then also demanded immediate action in a volatile market. In case, acceptance was not given by one buyer, other buyers were ready to buy the electricity offered. This market was an unregulated market prior to capping enforced by CERC on the margin of the traders. Under this situation, when the people of the State were facing power crisis, MP Tradeco made power procurement in a manner that was thought by it to be commercially prudent.
- (ii) He had also cited a communication from M/s Tata Power received by MPSEB on 19th July, 2005. It was mentioned in this communication to issue LOI, if possible within next one hour for scheduling power for Oct., 05. Similarly, a communication from M/s Adani Exports Ltd. received on 24th August, 2005 was cited, in which 40 MW power was offered and the confirmation was sought by return fax. The Commission asked the Petitioner whether these communications were solicited or unsolicited? The Petitioner informed that under the acute shortage scenario, the MPSEB was looking for the short term power purchase and the offers were received based on telephonic discussion in this regard.
- (iii) Looking to the information available on CERC website, MP Tradeco had contacted well known power traders and purchased short term power at an average rate, which was below national weighted average for all quarters during FY 2005-06 barring quarter ending June, 2005. He requested the Commission not to judge it in the matter by only certain non-compliance of the procurement process but to decide the case on the basis of the submissions made by the Petitioner. He emphasized and reemphasized the point time and again that the entire gamut of circumstances under which short term power purchase was resorted to should be duly considered to appreciate the immediacy of need to respond to fast changing situations.
- (iv) He had also cited the Commission's Order dated 12th August, 2005 in the matter in which MPSEB had approached the Commission for approval of the short term power purchase made by it. The Commission in its order had stated that MPSEB was a trading licensee under the transfer scheme and therefore was not supposed to take approval on the power purchases. The distribution licensees were to seek the approval on such power purchases as power was being procured for distribution business.
- (v) He, quoting the Clause 8.2.1 (1) of the Tariff Policy issued on 6th January, 2006, stated that any power purchase should be treated as legitimate unless it was established that either there was any other party offering lower rates than those accepted by MPSEB or the rates were unreasonable. He also stated that looking to the national weighted average price, the rates by which MPSEB procured the power were quite competitive except for one quarter.

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- (vi) He mentioned that their experience in short term power procurement was that the traders and suppliers did not respond much to the short term power purchase tenders. Some traders/parties offered limited quantum of electricity in response to the tender. But subsequently, they offered electricity at higher price.
- (vii) The additional power was also required from October, 05 to March, 06 to meet the demand during the festivals and also irrigation demand during Rabi season. A tender notice was again floated on 22nd June, 2005 with due date as 29th July, 2005 for arranging the requirement of power during October, 2005 to March, 2006. M/s PTC requested for postponement of the date of tender opening to enable it to participate after tying up power from West Bengal and other sources. The extension of tender opening date was not accepted. Only one offer was received from M/s Adani Exports Ltd, against the tender.
- (viii) The rates at which MPSEB procured power from July, 2005 to March, 2006 were below the national weighted average rates, the same should be allowed by the Commission. At the most, for April to June, 2005, rates may be capped at national weighted average rate.
- (ix) He has also mentioned that the Commission in its Order dated 31.01.2009 and 10.02.2009 has used very strong words that the power procurement was not made through transparent and competitive process. During the transition period, everybody was learning and in the learning process for any shortcomings MPSEB/Discoms should not be unduly punished. He has also mentioned that even CERC fixed the trading margin from 1st January, 2006 as it has learned from the past experience. Since at the time of final orders under SMP No.28/2008 and Petition Nos.29/2008 and 32/2008, these additional facts were not put before the Commission, the Commission might have formed the views in the absence of relevant details. The penalty imposed due to allowing DBST rates in place of the actual rates paid is very heavy. As per the judicial principles, the penalty should be imposed only if malaise or mens rea is established on the basis of hard facts.

5 During the course of hearing held on 24th June, 2009, Shri M.G. Ramachandran the Learned Senior Counsel appearing on behalf of the Respondents submitted the following :-

- (i) That there was no conflict of interest between the Petitioner and the Respondents. He informed that under the process of power sector reforms, MP Tradeco succeeded MPSEB so far as trading function is concerned as per a conscious decision taken by the State Government. This conscious decision was taken as it was too early to give power purchase functions to the Discoms. The State Government also adopted uniform tariff for the whole State. As per the Respondents, it was difficult to allocate power purchase agreements permanently to the Discoms as such an intermediary deemed trading licensee was established in the process of power sector reforms. At that point of time, it was an issue with a number of Commissions whether a trading licensee could be created under the reform process? At that time, CERC issued a

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- show cause notice to MP Tradeco. MPERC's order dated 12th August, 2005 was also based on the CERC view prevailing at that time. Subsequently, CERC withdrew the show cause notice and closed the Petition. The sanctity of MP Tradeco was established thereafter.
- (ii) MPSEB invited tenders for short term power purchase on 4th March, 2005 for procurement of power during April to June, 2005. Similarly, another tender was issued for procurement of power from October, 2005 to March, 2006. The response to these tenders was poor as mentioned by the petitioner.
 - (iii) He had also submitted that unless proven otherwise it should not be concluded that MPSEB and Discoms did not follow proper procedures. Unless there is an evidence that some power was available at rates cheaper than the purchase price of MPSEB, the Petitioner and the Discoms should not be considered to be at fault. The Respondents also submitted that the tenders were first issued in March, 2005 and then in June, 2005. However, he had categorically stated that the terms and conditions of the tender document adopted by MPSEB were identical to those adopted by all other States and there was absolutely no deviation. He mentioned that accepting stray offers was an emergency response to a desperate situation where normal practice could not be followed. The rules of competition can be adhered to only in the competitive environment.
 - (iv) Once the quantum of power procured is already approved by the Commission, the only issue remaining for consideration is that of reasonable price. In a desperate situation, then existing, the Senior officials of MPSEB/MP Power Trading Company had to be in contact with the traders/suppliers of electricity. Further, the power had to be procured on short notice otherwise it might go to other purchasers.
 - (v) He had further submitted that the Petitioner/Discoms may be judged on their negligence, if any, but not on the lack of wisdom or on slow learning. If there is any hard fact or evidence to establish that the lower priced electricity though available was not obtained, then only the Petitioner/Respondents may be punished. Before deciding the issue, the status of power shortages and power cuts may be looked at. He submitted that bulk supply tariff is nowhere an indicative rate for the purchase of short term power. The indicative rates can only be the UI rates or the power exchange rates or the national weighted average rates. He submitted that its financial position does not permit to lose nearly Rs.2 per unit. He had however, admitted that at the time of hearing of SMP No.28/2008 and Petition Nos.29/2008 and 32/2008, they could not produce the documents, which are now submitted before the Commission. Based on the submissions now made, the Respondents support the Petition filed by MP Tradeco for review of the orders made in SMP No.28/2008 and Petition Nos.29/2008 and 32/2008.

6 Meanwhile, the Commission received a letter from Honorary Secretary, M. P. Electricity Consumer's Society, Indore mentioning the following :-

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- (i) The society is grateful to Hon'ble Commission to decide in order under reference on 24th June, 2009 as under :-
- (a) The Commission ordered to inform M. P. Electricity Consumer's Society, Indore that they may be present in the next hearing, if they so desire.
 - (b) The Society welcomes this opportunity.
- (ii) The Society may kindly be permitted to make a few comments and suggestions on the order, which are as under :-
- (a) The petitioner and respondent during the course of the arguments have stressed on the reconsideration/modification of the order passed by Hon'ble Commission dated 10th February, 2009 in Suo Moto petition No.SMP-28/2008. The Society submits that the petition is for review and only can be considered as per civil procedure if,
 - (I) There is an apparent error in the order.
 - (II) Some new disclosures have come to notice after the order was issued.

Since both the above issues are not involved, the case may not be considered under review.

- (iii) The society had further submitted that the points raised by the petitioner in the arguments on 24th June, 2009 can be considered in an appeal and not a review.

7 In response to the Commission's Order dated 24th June, 2009, the petitioner filed written submission on affidavit on 15th July, 2009. The next hearing in the matter was held on 1st August, 2009 when Shri Vivek Tankha, the Learned Senior Counsel appearing on behalf of the Petitioner stated that he had nothing further to add to the oral and written submissions made on 24th June, 2009 and 15th July, 2009 and added that he was ready to respond to the issues, if any raised by M. P. Electricity Consumer's Society (MPECS), Indore. A copy of the submission of M. P. Electricity Consumer's Society was made available to the Petitioner and Respondents. The Learned Senior Counsel appearing on behalf of the Petitioner stated that the orders on the original review petitions Nos.29/2008 and 32/2008 were passed without hearing the Petitioner – MP Tradeco in this case. It is under this background that the Petitioner has approached the Commission for review. This is a well settled issue and has repeatedly been held so by the Hon'ble Supreme Court.

8 The Learned Senior Counsel of MP Tradeco also submitted that the quantum of power and the need of power purchase was not in doubt in this matter. He further stated that there perhaps could have been a better mechanism for procurement of power. But the test of soundness of procurement process would be whether the rates at which MPSEB/MP Tradeco procured power were cheaper than those at which other procurers made purchases.

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9 The Commission having gone through the detailed oral and written submissions made by the Petitioner and the respondents on 24th June'2009 & 15th July, 2009 felt need for some more clarity on several issues. The Commission had therefore, raised all such queries with regard to their submissions and directed the petitioner to submit a written response within 15 days from the date of issue of Commission's Order dated 1st August, 2009.

10 In response, the petitioner had filed the reply with the Commission on 9th September, 2009. The response of the petitioner vis-à-vis queries raised by the Commission is given as below:-

(a) Commission's Query: Procurement process

The Commission observed that during FY 2005-06, MPSEB invited tenders only in March and June, 2005 and procurement was made based on the responses to those tenders. However, from the submissions, it is observed that around the same time or thereafter, a large amount of power was procured outside the tendering process. The Commission asked the Petitioner whether all traders were informed that their power procurement process was still on, during the tendering process as also after the tendering process was over. The Commission also sought specific reply from the Petitioner whether such procurement outside the tendering process was done on the same terms and conditions as those of tenders. In case of any deviation, the details of such deviation and reasons thereof and also whether the opportunity for offering short term power at terms and conditions different from those of the tenders was given to all the traders/suppliers while making the purchases through offers must be clarified by the Petitioner.

Response of the Petitioner

It is submitted that first tender notice showing the requirement of power for the period April 2005 to June 2005 was placed on website of MPSEB on 5.3.2005. Copy of the tender notice was sent to all registered traders with the CERC vide letter dated 6.3.2005. The copy of the letter dated 6.3.2005 sent to the traders alongwith a copy of the dispatch register page in evidence of the above dispatch is attached herewith. Moreover, copy of the tender notice was also placed on the tender city.com. Tender notice was also published in National News Papers Economic Times and Hindustan Times, Delhi Edition.

It is submitted that total five traders M/s NTPC, NVVN, M/s Reliance Energy, M/s PTC, M/s Adani and M/s Tata had purchased the tender documents. Only M/s PTC, Adani & M/s Tata participated in the tender which was opened on 29.3.2005. M/s NTPC,

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NVVN and M/s Reliance Energy did not submit their offer. Since the requirement was given wide publicity through national newspapers, information on the website besides letters addressed to number of traders, every trader was aware of the requirement of MPSEB and further as the traders keep a close watch of all activities relevant to their business were also aware that MPSEB did not get response for all the quantum required. The MPSEB was also looking for power procurement immediately after tender opening on 29.3.2005. All the traders were contacted telephonically to offer power looking to MPSEB need. However, all of them stated that they do not have any tie-up immediate from the sources and, therefore, they are not in a position to offer power to MP Tradeco.

It is submitted that out of 2114 MU traded during the quarter April to June 05 the percentage vol. Traded by traders was as under:-

Trader	Vol. Traded (MUs)	%age trading
PTC	1196.8	56.61
Adani	656.89	31.07
Tata	191.1	9.04
Reliance	11.25	0.53
NVVN	57.974	2.74
	2114.014	

The contention that M/s Reliance, NVVN & other traders had possibly no tie-up & therefore they could not offer power is corroborated from the above data.

As mentioned above the petitioner was continuously making efforts to procure power. In this connection, letters from M/s Tata Power Trading Co., a D.O. letter from F.A. to Vice President M/s PTC, D.O. letter from Principal Secretary (Energy) & Chairman, MPSEB to CMD, Delhi Transco are filed herewith.

It is further submitted that when M/s Adani had offered for off-peak power for the month of October to December 2005 @ Rs. **3.55/kwh** the availability of off-peak power from other sources like PTC (Mr. Mehra, President, M/s PTC), Tata Power Limited (Mr. Gupta, GM) and NVVN (Mr. KK Agarwal), was explored by telephonic communication. However, it was informed that no power is available with them. A copy of the note from para 51/N to 56/N submitting efforts made is filed herewith.

In regard to the terms and conditions of the procurement against tender and outside tender, it is submitted that all the commercial terms and conditions in both the cases were identical except in case of tender, the traders were required to furnish earnest money.

It is submitted that the availability of surplus power for trading and the trader offering such power to entities such as MPSEB which required power was not consistent but dynamic and varying from time to time. The entities may be of the view that they do

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not have surplus power to offer when contacted at a particular time but the situation may change depending upon number of uncontrollable factors. This affects the traders' ability to finalize contracts for procuring surplus power.

Accordingly when the tenders were floated by MPSEB, due to absence of tie-up from sources, the traders may not have offered any power. Due to non-availability of power only few traders have offered power to supply.

(b) Commission's Query: National weighted average rate of short term power :

The Commission asked the Petitioner about the source of information submitted by them on quarterly national weighted average rates of electricity traded during FY 2005-06. The Commission also enquired as to how the quarterly national weighted average rates have relevance in establishing reasonableness of rates at which power was procured by the Petitioner as the Petitioner did not have the benefit of this information while deciding about the reasonableness of rates at the time of procurement.

Response of the Petitioner

MPSEB / MP Tradeco was consistently looking for power and in that connection the officers had been talking to various sources on phone. The tendering process having not yielded results to the desired extent, there was no opportunity for writing letters to tenders on a constant basis. There was a need to approach them through oral discussions. As regards contents of para 5.2, it is submitted that "National Weighted Average Rate" during the period 2005-06 has been discussed by the Hon'ble Commission in para 7 (a) of the order dated 07.10.2008 in the SMP No. 28/2008.

The status of average quarterly purchase cost of M.P. Tradeco during 2005-06 has been computed from the information provided by them as given below:-

Period	Weighted average purchase price of M.P. Tradeco (including open access charges	Weighted Average purchase price of MP Tradeco excluding open access charges.
April to June'05	3.46	3.27
July to Sept'05	3.04	2.91
Oct. to Dec'05	3.33	3.26
Jan. to March'06	3.51	3.41

Further para 8 of the order stated as under:-

"The procurement price of MP Tradeco was generally higher than the average sale price of trading companies"

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Thus, in view of methodology utilized by Hon'ble Commission to make analysis of power purchase, the petitioner also collected the data of power purchase by the other trading companies in the year 2005-06 from CERC, New Delhi and submitted in para 32 of the submission made vide affidavit dated 22.06.2009 that the procurement rates of petitioner are comparable.

It is accepted that these rates were not known to the petitioner at the time of procurement. The fact that the petitioner's procurement rate was in line with the National Weighted average price, which was not known to the Petitioners at the time of procurement goes to show that the procurement and price agreed to be paid was in line with the Competitive Environment then prevalent. The petitioner has acted prudently and had taken all steps to procure the power economically. The above clearly shows that the petitioner had not acted mechanically but with exercise of care, caution and reasonableness required. In fact if the petitioner had known the National Weighted Average Price and arranged its procurement in line with the above, the petitioner would be accused of not making efforts but following mechanically the price. Further, rates on which LoIs were being placed by the other State Utilities were known to the petitioner. It is reiterated that LoIs were placed by the petitioner after satisfying that the rates are reasonable. Now that a question has been raised about reasonability of rates, the comparison has been made as per the methodology accepted by the Hon'ble Commission in its order dated 07.10.2008. The submission of the petitioner that the procurement rates are lower in three quarters except that of quarter April to June 2005 is based on authentic data from CERC & methodology agreed to by the Hon'ble Commission in its order dated 07.10.2008 does establish the bonafide from contemporaneous evidence. .

(c) Commission's Query : UI Charges

The Commission observed that UI charges are highly volatile and it is almost impossible to predict these in advance. The Commission further stated that UI charges could not be used as a tool for planning. UI charges have little relevance at the time of placement of awards for procurement of power, which was generally much ahead of the actual period of supply. At the time of power procurement, these rates are hardly known or can hardly be predicted.

Response of the Petitioner

UI rate is tightly linked with the frequency. As the frequency is same all over in an AC system and can be readily seen through a simple frequency meter, it is easily possible to know the prevailing UI rate anywhere in the system without the help of communication system. With this on line knowledge of UI rate it would be possible to know the likely cost for an extra MW overdrawn from Grid. In case it had to overdraw due to compelling reasons and the price is more than the offered rate in bilateral market, it can take decision to reduce its purchase cost.

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While, it is admitted that U.I. charges cannot be predicted in advance, they play a very important role in decision making process of buying or selling power. A utility is aware of overdrawal/ underdrawal by it during the last day. At the time of power procurement, U.I. Rates, in general, are therefore compared with. Further, the concerned office of the petitioner was enjoined to make a decision based on available datas and on commercial perception. Such decision cannot be gone into for adjudication based on hindsight with subsequent facts but need to be considered only from the point of perverseness, malafide, fraud gross negligence etc and not from the point that with all subsequent datas available the Commission would have made a different decisions.

(d) Commission's Query

The Commission observed that even though the response to the tenders was poor, MPSEB procured smaller quantum of power than quoted from individual traders/suppliers. Reasons thereof need to be brought out.

Response of the Petitioner

It is submitted that only in the tender for the period April to June 2005, M/s PTC has offered 200 MW peak power @ Rs. 3.70/kwh. An order for 100 MW peak power for the period April to June 2005 at negotiated rate of Rs.3.67/kwh was placed as recommended by Tender Evaluation Committee. In all other cases, it is submitted that offered quantity has been ordered.

(e) Commission's Query

The Commission asked whether there was any committee/mechanism at any level to oversee the power purchases of MPSEB. The Learned Senior Counsels on behalf of the Petitioner and the respondents submitted that the full Board comprising the Chairman and Members of MPSEB ratified the power purchases and reviewed the power purchases periodically. The Counsels of the Petitioner and the respondents submitted that the documentary evidence in this regard will be produced before the Commission.

Response of the Petitioner

Documentary evidences regarding ratification of the cases by the Board are filed herewith.

(f) Commission's other Queries:

- (i) When it was clear from the first tender floated in March, 2005 that response was poor, why was the default condition retained in the tender floated in June, 2005? It is also

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not clear why short term power purchase tenders were floated for a period as long as 6 months?

Response of the Petitioner

As regards query in para 7(a) it is submitted that in the first tender floated in March 2005 for procurement of power required during April'05 to June'05 "default clause" was incorporated to take care of non-performance by the traders. However, it was noticed that no bidders have accepted the default condition. In such a situation after considering that the supply of power against LoI placed will be made based on the proper tie-up from the source the default clause was decided to be waived to enable the issue of LoI . In addition, it was also enquired from bidders whether they have any additional short term power available with them for supply to us in view of the default condition being waived. As none of the traders was having any additional power except power offered against above tender, no additional purchases matured.

It is however submitted that the default condition was required to be maintained at the time of calling for tender as otherwise the petitioner would have received tenders from a number of non serious players quoting attractive price, edging out serious players and thereafter not performing with no remedy to the petitioner. This situation would have been worst and this Hon'ble Commission could have proceeded against the petitioner for such an imprudent act.

It is submitted that only after ascertaining supply of power against LoIs to be placed, "default condition" was considered for withdrawal as the only tenderer M/s Adani Enterprises did not agree for default clause. Before placing LoIs, bidder was contacted over phone to ascertain availability of power with him i.e. tie up with the generator for supply of power to us against our tender. When it was confirmed that they have tie up with the source, LoI was placed after withdrawal of default condition.

The default clause has been provided in the tender floated in the month of March & also in June 2005 in order to ensure firm supply from serious inter-state traders/ utilities as per need. This clause is necessarily provided by all the electricity utilities for procuring power with the sole intention of ensuring seriousness in the trading business. Electricity contracts are different than the other commodity contracts in as much as electricity cannot be stored and, therefore, back to back arrangement is essential while trading in the electricity. 'Default clause' will encourage only those inter-state traders who had tie up for supply of power from a source. Those traders who do not have tie-up will refrain from participating in these tenders which is the sole objective of the purchaser.

The demand during rabi season is comparatively high and the demand starts building up from 15th October onwards and remains upto February of the next year. In

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rabi season there is always a need for supply in rural areas, as M.P. is basically an agriculture-based state. Therefore, advance planning and arrangement to meet out the load during rabi season is of paramount importance. Since for corridor booking 'first come first serve' is a major consideration therefore advance booking not only for the supplier but also of the transmission corridor is essential for ensuring supply. With this objective in mind and in order to arrange power from October to March a short term tender was floated. Splitting up such tender into two parts would not have given any benefit and might have resulted in non-supply due to corridor congestion. It may not be out of context to submit that initially in the regulation short term open access issued by CERC, reservation of transmission corridor was prescribed 4 months in advance including the month in which the power has to commence.

(ii) Commission's Query

The petitioner should clearly mention the difference in procedure adopted between procurement through tender and stray offers.

Response of the Petitioner

As regards query in para 7(b) it is submitted that for arranging power against tender requirement was assessed 4 months in advance and tenders were invited. All terms and conditions including furnishing EMD are incorporated in the tender. Offers received against the tender were put up before the Tender Evaluation Committee constituted for this purpose and proposal along with recommendation of Tender Evaluation Committee was submitted to the Board for approval of procurement of power. The same procedure was also adopted while deciding purchase against stray offers except submitting case to "tender evaluation committee", as immediate decisions were required to be taken in view of conditions mentioned in the stray offers. It is however reiterated that stray offers were considered only after ensuring reasonability of rates and then the offers were processed for obtaining approval of competent authority.

(iii) Commission's Query

In Para 7 of submission, the PTC rates mentioned do not match with para 6.

Response of the Petitioner

As regards query in para 7 (c), that in the Petitioner's reply dt. 23rd June '09 in para-6 it has been stated that PTC has offered rates for supply of power from April to June '05 as indicated as below:-

<u>Duration</u>	<u>Rate</u>
23.00 to 17.00 hrs	Rs. 3.14/Kwh
17-23 hrs	Rs. 3.70/Kwh

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In para –7 of the reply dtd. on 23rd June, It has been stated that again the LoI no. 982 dt. 4.4.05 placed on M/s. PTC 100MW peak power for the month of April to June '05, the rate is mentioned as Rs. 3.15/Unit. This rate may please be corrected as Rs. 3.67/Unit. Copy of the LoI no. 982 dt. 4.4.05 is filed herewith. It is submitted that rates quoted by M/s. PTC for supply of power during peak hours i.e. 17-23 hrs, were got negotiated and got reduced from Rs. 3.70/Kh to Rs. 3.67/Kwh.

(iv) Commission's Query

It is written in para 8 that subsequently Adani Export offered 55 MW night power, but the LoI No. is 973 which shows that it should be earlier than PTC – 100 MW (982 dtd. 4.4.05 and Adani – 150 MW (983 dtd. 4.4.05) and not subsequent.

Response of the Petitioner

As regards query in para 7(d) it is to clarify here that against the tender M/s. Adani Power vide their offer dt. 25.3.05 offered 150MW night power (2.30 hrs to 8.30 hrs) @ Rs.2.76/Kwh for the month of June '05 only. However, subsequently vide their fax offer dt. 3.4.05 Adani Power have offered to supply 55 MW night power (02 to 8.00 hrs) @ Rs. 2.76/Kwh at delivery point ER periphery for the month of May and June '05. As the LOI for supply of 55 MW power was issued against their subsequent offer dt. 3rd April '05, it was mentioned in the submission dated 23rd June that “subsequently we have placed LoI on M/s. Adani for supply of 55 MW night power (LoI No. 973 dated 4.4.2005)”. It is merely a coincidence that all the three LoIs were placed on the same day i.e. 4th April '05 and the LoI for 55 MW issued vide no. 973 dated 4.4.2005 and there is no other reason whatsoever.

(v) Commission's Query

It is seen from the submission that PTC was given LOI for April to June, 2005 for 100MW against PTC offer for 200MW. When the requirement as per tender was 1200/1000/900 MW for April/May/June respectively, it is not clear why LOI for only 100MW was issued against offer of 200MW. It is also mentioned in the LOI that the power purchase was subject to MPERC approval. How was this pre-condition met?

Response of the Petitioner

As regards query in para 7 (e) it is submitted that the offers received against the tender were opened before the tender evaluation committee consisting of CE (LD), CE(System), CE(S&P), Director (Fin.) and CE (Comml.) After evaluation the committee recommended to purchase only 100MW peak power for the month of April to June '05 from PTC at their offered rate. The power purchase proposal was further discussed by CMD (Transco) and Fin. Advisor with all committee members. In the above meeting,

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looking to the limited financial resources it was felt that only 100MW peak power in April, May and June '05 and 150MW night power in June '05 should be purchased so as to minimize public inconvenience in the summer season. Accordingly LoI no. 05-01/T/03/982 dt. 4.4.05 was placed to M/s. PTC (I) Ltd. for supply of 100MW peak power i.e. 17.00 hrs to 23.00 hrs @ Rs. 3.67/Kw at the delivery point at Rourkela 400 KV PGCIL S/s for the period April '05 to June '05.

It may also be submitted that in the LoI following stipulation was incorporated "above power purchase is subject to approval of Hon'ble MPERC. The petition is being filed with Hon'ble MPERC and the details, if any, desired by the Commission shall be made available by you promptly". Accordingly as per above stipulation petition was filed before the Hon'ble MPERC on 8.6.05 for approval of procurement of power for the period April to June '05. As already submitted, the Hon'ble Commission observed that MPSEB being a trading licensee need not require approval of Commission for procurement of short term power.

(vi) Commission's Query

In Para 13 of submission, LoI No. is not given.

Response of the Petitioner

As regards query in para 7 (f) it is submitted that the LoI placed on M/s. PTC (I) Ltd. for supply of 25 MW RTC power through SR-WR direct corridor for the month of April to June '05 was issued @ 326.5 paise/Unit. Copy of LoI no. 1073 dt. 13.4.05 is filed herewith.

(vii) Commission's Query

The Petitioner has compared PTC rate of Rs 3.265/U with Rs.3.27. It is not clear wherefrom 3.27 was arrived at?

Response of the Petitioner

As regards query in para 7 (g) it is submitted that the PTC offered rate of Rs. 3.14/kWh for off-peak 18 hrs power and Rs.3.70/kwh for peak power. Against this offer we placed LoI for peak power @ Rs. 3.67/kh (negotiated). Based on these rates the computed rate for RTC power works out to Rs. 3.27/Kwh. Therefore the LoI no. 1073 dt. 13.4.05 placed on M/s. PTC for supply of 25 MW RTC power @ 326.5 paise/ Kwh for April to June '05 was considered reasonable.

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(viii) Commission's Query

In Para 16, it is not clear wherefrom the figure of 877 MW as requirement has been arrived. It is also submitted by the petitioner that the offer of Adani Export was quite competitive. The petitioner has not mentioned basis of adjudging the offer as competitive.

Response of the Petitioner

As regards query in para 7 (h) it is submitted that the requirement of power for the month of April to June '05 was intimated by CE (PS), MPSEB. According to CE (PS) the shortages during the peak hours i.e. 18 to 24 hrs for the month of May was 877 MW. Copy of the shortages as indicated by CE(PS) MPSEB is filed herewith.

M/s. Adani Exports had offered 30 MW peak power (17 hrs to 23 hrs) for the period of one month i.e. May '05 @ Rs. 3.90/Kwh at delivery point PGCIL ER periphery in WR.

Reasons for considering rate of Rs. 3.90/kwh in the month of May 2005 were as under:-

- (i) The requirement was crucial as the same was needed for giving supply to the students during examination season.
- (ii) Liquid fuel power from Kawas Gas Power Station was costing Rs. 5.00/kwh and, therefore, this power was not scheduled. The record note in para 96/N to 108/N is filed herewith.

In view of the above constraints, the rates offered by M/s Adani Exports at Rs. 3.90/kwh were considered reasonable as submitted above.

(ix) Commission's Query

It is observed that some of the LOIs (like 1073 and 3333 etc.) are shown as LOI not honoured as well as also in the list of power purchases made. This may be clarified by the petitioner.

Response of the Petitioner

As regards query in para 7 (i) it is submitted that there has been some inadvertent error in the statement filed with submission dated 22.6.2009 which has been revised and the same is filed herewith. Mistake caused is regretted.

Power against LoI no.1073 dt. 13.4.05 and LoI no.3333 dt.18.4.05 was received.

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(x) Commission's Query

The heading before para 18 is “for the month of September, 05”, whereas para 18 deals with the position of July/August and LoI was placed on 18.06.05. How could it be known in June, 05 that there will be scanty rains in July/August, 05?

Response of the Petitioner

As regards query in para 7 (j) it is submitted during last 3-4 years, there has been uncertainty of the monsoon in Madhya Pradesh. In such circumstances, considering weather forecasting, it was apprehended that monsoon might get delayed during this season and therefore in order to overcome the uncertainty of supply availability the LoIs for purchase of power on short term basis were placed. Under CERC Regulation for open access for short term power purchase the corridor could be surrendered by paying 7 days charges. In the circumstances, the LoI could have been cancelled in case of no requirement. As there was no requirement and consequently the corridor against above LoI was surrendered for the month of July. However some power was availed in Sept.'05 to meet the additional demands during festival season.

(xi) Commission's Query

In the Table of para 22, it is not clear as to what is meant by balance quantity required. The requirement in tender minus the LoI quantum does not tally with balance required. In the tender the requirement during 06.00 to 09.00 hrs was shown as 0 in Oct., 05. If that be so, it is not clear why LoI was issued to Adani for 06.00 to 09.00 hrs. to the tune of 150 MW from 1st to 10th Oct., 05 and 100MW from 11th to 31st Oct., 05?

Response of the Petitioner

As regards query in para 7 (k) it is submitted that requirement of power for which tenders were invited is shown in the table of para 20. In table of para 22, quantum of power for which LoIs were placed has been indicated in Column No.2. Therefore, “balance quantity requirement” shown in Column No.3 is requirement indicated in table of para 20 – (minus) quantity for which LoIs placed as indicated in table of para 22.

It may be mentioned that the C.E. (P.S.) vide his U.O. Note No. 550 dated 16.8.2005 had informed that the Board has decided to implement the power regulatory plan in order to ensure supply of power to rural areas for agricultural purpose. Further it was decided that keeping into consideration that in case any additional power becomes available during October to December 2005, same may be availed so as to regulate hydel generation during the above period and utilize the same in the remaining irrigation season, summer months of April to June when there is acute shortage of power. Copy of the above U.O. Note conveying the Board decision is filed herewith.

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(xii) Commission's Query

It is not clear, why was PTC offer accepted other than 12.00 to 16.00 hrs. (as mentioned in para 23), when :-

- (i) 00.00 to 06.00 hr requirement was already fulfilled by Adani Power.
- (ii) There was no requirement during 06.00 to 12.00 hrs as per Tender, in October, 2005.
- (iii) For the off peak power, the rates of PTC were 13% higher than Adani rates, which were received through Tender route.

Response of the Petitioner

As regards query in para 7 (l) reasons for considering the offer of M/s PTC for the period other than 12-16 hours are as under:-

- (a) It is submitted that in the meeting that the Board has decided to save hydel reserves and avail power from traders for the period October to December 2005.
- (b) Requirement for 12-18 hours was still existing.
- (c) The offer given by M/s Adani Exports Ltd. against tender was for different quantum of supply for the month of October 2005. The LoI was placed in August 2005 for full and offered quantity. In October, 2005 it was observed that demand is considerably higher compared to the availability and, therefore, LoIs were placed on M/s PTC. The price in such situation are likely to be governed by market forces prevalent at the relevant time.

(xiii) Commission's Query

When the Tender was to be opened on 29.07.05, why was LoI placed on TATA power for Oct., 05 on an offer made on 19.07.05 (para 24). If this offer of TATA was accepted, than it is not clear, why not the LoI on Adani and PTC was accordingly reduced by the 28 MW already booked.

Response of the Petitioner

As regards query in para 7.(m) it is submitted that offer of M/s Tata for supply of power during October, 2005 received on 19th July 2005 (Para 24) was considered primarily for the reason that the rates were competitive. Secondly as per the Open Access Regulation, application for short term open access was required to be submitted to RLDC three months in advance, therefore, in order to book the transmission corridor, it was also considered to place LoI against this offer so as to take advantage of the situation.

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(xiv) Commission's Query

In para 26, Jan to March, 06 PTC supply hours are not mentioned.

Response of the Petitioner

It is submitted that the LoI for 28 MW was not adjusted against the LoIs placed on M/s Adani Exports & M/s PTC as efforts were made to place LoIs for more quantity of power for October 2005 so as to save hydel reservoir for generation of electricity in subsequent months based on our demand.

(xv) Commission's Query

CERC Regulation capping the trading margin was issued on 27th January, 2006. It may be clarified whether all the purchases made after 27th January, 2006 were made with the trading margin of not more than 4 paise per unit. A confirmation is required in this regard as most of the LOIs for February to March, 2006 were issued much before 27th January, 2006.

Response of the Petitioner

As regards query in para 7 (o) it is submitted that the CERC trading margin Regulation, 2006 was notified on 27.1.2006 providing that a licensee shall not charge trading margin exceeding 4 paise/kwh including all charges except the charges for scheduling energy, open access charges and transmission losses. This regulation came into force w.e.f. the date of publication in the Official Gazette i.e. 27.1.2006. Consequently the petitioner insisted on all the traders to whom LoIs were placed for supply in January & February 2006 that they cannot charge trading margin exceeding 4 paise /kwh for the transaction taking place w.e.f. 27.1.2006. Based on this contention the bills of traders were passed for payment allowing trading margin of 4 paise/kwh only.

Aggrieved by above decision M/s Subhash Kabini Power Ltd. filed a petition bearing No. 40/06 before the CERC for adjudication of dispute between him and MPSEB. During the proceeding before the CERC, M/s Adani Exports Ltd. also filed application as an intervener which was accepted by the Commission. After hearing the parties the Commission vide order dated 27.10.2006 stated that the Regulation for trading margin do not govern the agreement entered into prior to publication in the Official Gazette but will apply to all agreements signed after that date. In view of above, the trading margin in case of M/s Adani Export Limited and M/s Subhash Kabini Power Ltd. were allowed on the basis of the agreements/ LoIs and in rest of the LoIs trading margin of 4 paise/kwh was allowed as these parties did not agitate this issue.

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(xvi) Commission's Query

In para 27, the method of ascertaining reasonability/competitiveness of Adani RTC power @ Rs.3.45/U is not mentioned.

Response of the Petitioner

As regards query in para 7. (p) it is reiterated that a decision was taken that in order to cope up the demand of power in rabi season, it would be necessary to save hydel reserves for generation of electricity in subsequent months based on our demand during the rabi season. It was therefore decided that in case power is available through short term contracts from the different sources, the same may be availed by us. The offer @ Rs. 3.45/kwh on 23rd August 2005 for supply during rabi season was considered reasonable when compared with the price received through the tender for the month of April to June 2005 which was Rs. 3.67/kwh. During rabi season the availability was much less compared to the demand and therefore, the rate of Rs. 3.45/kwh was considered acceptable.

(xvii) Commission's Query

From Annexure of Short term power procurement during 2005-06, it is seen that:-

- i. In Oct., 05 and Nov., 05, Adani off peak power (23.00 to 17.00 hrs.) is costlier @ Rs.3.52 than the power supplied by it Round The Clock (RTC) (00.00 to 24.00) @ Rs.3.45.
- ii. Similarly, in Jan. & Feb., 06 Adani off peak power @ Rs.3.68/U is costlier than RTC power @ Rs.3.65/U.

Response of the Petitioner

As regards query in para 7 (q) it is submitted that the LoI for supply of RTC power was placed on 23rd August, 2005 for supply in the month of October, 2005 @ Rs.3.45/kwh. Source of this supply was Sikkim. Subsequently in September, 2005 M/s Adani Exports offered to supply off-peak power during the months of October, November & December 2005 @ Rs. 3.55/kwh (DVC source). The matter was negotiated and ultimately M/s Adani Exports Limited agreed to supply power for the month of October, 2005 @ Rs. 3.52/kwh and the for the month of November 2005 @ Rs. 3.54/kwh.

In view of the above fact that our requirement existed for the month of October, November & December 2005, the LoIs were placed.

In regard to LoIs placed on 19th Nov. 2005 for supply in January & February 2006 on M/s Adani Exports Ltd. for RTC power, @ Rs.3.645/kwh. Source was WBSEB. Subsequently M/s Adani offered off-peak power @ Rs.3.645/kwh (TNEB & APSEB &

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Sikkim) for the month of Jan & Feb. 06 against which LoI was placed on 24.11.2005. It is submitted that in a volatile market rates are changing with reference to time and source, demand, supply gap, season etc. Rates therefore are likely to be varying based on the market on which we have no control.

(xviii) Commission's Query

It is seen from the submission that there is a difference between rates quoted by different traders i.e. Adani/Tata/PTC for the same time blocks.

Response of the Petitioner

As regards query in para 7 (r) it is submitted that short term trading was in the nascent stage and there were hardly 6-7 registered traders. The source of power for these registered traders were different utilities like DVC, Gridco, WBSEB etc. Based on the procurement cost these traders, have offered rates to the purchasing entities. In view of these circumstances the rates offered by different traders are likely to be different in a volatile market.

(xix) Commission's Query

It is also observed with regard to some of the LOIs not honoured that some traders during the same month backed out from supplying power at lower rates but supplied power at higher rates against the LOI issued by MPSEB.

Response of the Petitioner

As regards query in para 7 (s) it is reiterated that demand of power more than the availability it was predominantly a sellers market. Secondly, traders were not accepting LOIs with compensation clause. In such a situation whenever offer was received for supply of power at a particular rate the LOIs were placed on them after ascertaining reasonability. The decision was required to be taken at the particular time without the hindsight of what would be the position in future. Subsequently, some traders have offered power at a higher rate from different source & transactions concluded. It is submitted that in a highly volatile market until clearing price is attained transaction may not mature. In order to get business, some traders offered competitive rates without tying up source. However, after receiving LOIs, they could not supply power due to changed market situations.

It is reiterated that MPSEB acted reasonably and without any deliberate act or gross negligence in finalizing the short term power purchase from various suppliers of electricity. This was done in larger public interest and in the interest of consumers in the State. Further, the price which was paid was mostly below the national weighted average

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price for short term purchase during the relevant period except for the quarter April to June 05. During April to June 05. it was slightly more than national weighted average due to less availability of power in the market. However, the price paid was not way ahead from the national weighted average.

It is reiterated that there is no evidence that MPSEB did not make efforts to purchase short term power economically and procure the cheaper price possible. The onus or burden that MPSEB could have purchased power at a price cheaper than Rs.3.46/kwh (average) can not be placed on MPSEB. It is further reiterated that no person has shown or indicated to the Hon'ble Commission that in the facts and circumstances prevalent, MPSEB could have purchased power at Rs.3.46/kwh or at a price of DBST rate allowed by the Hon'ble Commission for pooled cost of old generating stations supplying power on long term basis.

It is further submitted that MPSEB did issue tender for procurement of power through competitive bidding process but such process had a very little success. Thereafter, there was no option whatsoever for MPSEB except to purchase power through negotiated rates so long as price payable is not high in comparison to those prevalent in the market and on which other electricity utilities have procured power. The statement indicating the average rate of procurement by Maharashtra Discom and Delhi Discom is also filed herewith for comparison.

11 The petitioner made another written submission before the Commission received in the office of the Commission on 16th November, 2009 submitted the following in his additional submission :-

- a) The statement regarding details of short term power procured for FY 2005-06 from M/s PTC India Ltd. and M/s Adani Enterprises by several other utilities of the country like GEB, CSEB, MSEB, PSEB, CESC, UPPCL, HVPNL, WBSEB etc.. The petitioner has also provided the rate of short term power purchased by MP Tradeco for the same quarters of FY 2005-06.
- b) The petitioner with the above statement has intended to make a comparison of the short term power purchase rate indicating that the rates of short term power procured by MP Tradeco were in the same range as made in other States also.
- c) With the above contention, the petitioner has submitted that the procurement done by MPSEB during FY 2005-06 through short term power purchase had been done on prudent cost.
- d) The petitioner has clarified the issue of procurement of 100MW peak power from M/s PTC India Ltd. during first quarter of FY 2005-06 @ Rs.3.67 per unit against their offer of

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200MW. MPSEB had subsequently procured peak power for the same quarter from M/s Adani Enterprises @ Rs.3.90/kwh. The petitioner in its reply on this issue has mentioned that,

- (I) The requirements of power during peak hours of supply during April to June, 2005 was on the order of 877MW after placing the contract of 100MW to M/s PTC India Ltd.
- (II) Efforts were therefore, made to procure additional power as the examination period was continued.
- (III) M/s Adani Enterprises offered 30MW peak power vide their offer dated 29th April, 2005 @ Rs.3.90/kwh. MPSEB contacted M/s PTC authorities over phone and requested to supply additional 100MW peak power before considering the offer received from M/s Adani.
- (IV) M/s PTC informed over phone that although 200MW was offered by them during peak hours, but as LoI for only 100MW was placed in favour of M/s PTC therefore, M/s PTC had tied up for balance power with other buyers and no peak power was available with M/s PTC at that time.
- (V) As the peak power could not be made available by M/s PTC therefore, offer of M/s Adani @ Rs.3.90/kwh was considered and LoI was placed to M/s Adani.
- (VI) While considering the peak power offer of M/s Adani, specific instructions were also issued to M/s SLDC for not scheduling the costly liquid fuel power of Kawas station, which was costing at that time around Rs.5.70/kwh.
- (VII) The petitioner has enclosed copies of the quarterly information in Form No.III & IV regarding power trading being submitted by the electricity traders to CERC on quarterly basis during FY 2005-06. The petitioner has collected this information from CERC through an application dated 29th April, 2009 filed with CERC along with requisite fees.

12 The Commission has examined the submissions made by the parties in light of the grounds on which this Petition was admitted. Section 94(1)(f) of the Electricity Act 2003 provides that,

“ The Appropriate Commission shall, for the purposes of any inquiry or proceedings under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 in respect of the following matters, namely: -

- (a).....
-
- (f) reviewing its decisions, directions and orders;
- (g)..... ”

The powers of a Civil Court to review its Orders are defined under section 114 of the Code of Civil procedure read with Order XLVII, Rule 1 of the Code. As per statutory provisions, a review is permissible on the following grounds:

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- (i) Discovery of new or important matter of evidence, which after exercise of due diligence was not within the knowledge of the Petitioner, or could not be produced by him, at the time when the Order was made, or
- (ii) Mistake or error apparent on the face of record, or
- (iii) Any other sufficient reason

13 Exercising the powers conferred under Section 181(1) read with 86(1) (b) and 86(1) (g) of the Act, the Commission has notified regulations namely, MPERC (Power Purchase and Procurement Process) Regulations,2004 dealing with long-term and short-term power procurement by the distribution licensees. Clause 32 of the regulation provides as under :

“Licensee shall at all times purchase power from the most economical source and shall undertake the competitive bidding process. For short-term purchases made by it”.

14 The Commission while scrutinizing the true-up petitions of the Distribution Companies in the state for FY 2005-06 had observed that erstwhile MPSEB who had procured short term power for the three Distribution Companies, had not obtained the Commission’s approval for short term power procurement. The Commission in para 1.20 of the order on True-up of financial profit or loss for the period June ‘2005 to March ‘2006 issued on 16 January, 2008 had stated that,

“It is pertinent to note that while the Regulations mentioned above, framed as early as 2004, required the Licensee to obtain MPERC’s approval for short-term procurement, no such approval was sought by the MPSEB(the bulk buyer and deemed trading licensee) or the Discoms. The Commission takes a very serious view of this and considers that the Licensees cannot be allowed to get away with such a blatant non-compliance of its Regulations. The Commission is of the opinion that the Discoms, being under universal service obligation, do require power from electricity traders and other short-term sources in case long-term contracts are unable to meet their demand. However, it is the responsibility of the Licensees to ensure and demonstrate to the satisfaction of the Commission that such short-term requirement has been met in the most economical manner and that the process has been completely transparent and open to scrutiny (emphasis supplied). In the absence of any such evidence from the Licensees, the Commission can not allow the supply of short-term power to the Discoms by the erstwhile MPSEB at the rate indicated, which is Rs. 3.46 per unit. The only rate for power procurement recognized by the Commission is the differential BST notified under the Transfer Scheme, so while the Commission allows the procurement of short-term power to the Discoms as claimed by them, the rate of such procurement from erstwhile MPSEB has been limited to the Discoms’ respective BST rate. In case the Discoms/ MP TradeCo can convince the Commission that they have procured the additional power only as per their needs and also at a rate which was the best at that period of time, the Commission may still consider the prudent cost at a later date.”

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15 The Central Distribution Company, Bhopal and the East Distribution Company, Jabalpur had filed review petitions on the Commission's order dated 16th January, 2008 on True-up of financial profit-loss for the period June, 2005 to March, 2006. The Commission in para 10 of the Order issued on 31st January, 2009 in petition no. 32/2008 and 29/2008 on the review petitions filed by the Distribution Companies had mentioned that,

“The Commission in its Order on True-up for FY 2005-06 dated 16th January, 2008 had already allowed the quantum of short term power purchase filed by the Distribution Licensees in their petition for trueing-up of ARR for FY 2005-06. The Commission had not considered the supply of short term power to the Distribution Companies by erstwhile MPSEB @ 3.42 per unit since the petitioners could not establish that the short term power was procured in the most economical manner and that the procurement process had been completely transparent” (emphasis supplied).

The Commission had further mentioned in para 11 of the same order that,

“The Commission after careful examination of the details furnished and analysis done by its officers, holds that the procurement of short term power done through stray offers can not be construed as prudent cost as cost of procurement through this method has not emerged through competition.....” (emphasis supplied).

16 The petition for review/ reconsideration/modification in the impugned orders was filed by the M.P. Power Trading Company Ltd., Jabalpur under the subject petition. The Commission has provided enough time and opportunity to the Petitioner to establish the grounds for review. The subject petition was admitted by the Commission in the motion hearing accepting plea of the Petitioner to afford him an opportunity to explain/ justify the process of procurement of power and reasonableness of procurement rates as mentioned in para No. 2 of this order and recorded in the Commission's order dated 16th April, 2009 on this petition. The Petitioner during the course of proceedings in the instant petition under subject, produced some additional facts before the Commission in respect of the process of short term power procurement. The Petitioner emphasized that the short term market was in a nascent stage and was just evolving at that point of time. It has been argued that the power availability was much less than the requirement (demand) thereby making it a sellers' market in FY 2005-06. The situation demanded immediate action in such a volatile market when the traders were seeking confirmation of their offers on the same days and some other buyers were ready to buy the electricity offered by traders. The Petitioner also informed that the response to the tender/enquiries was very poor in both the tenders issued during FY 2005-06 however, five to six major traders responded to offers after the tendering process. The Petitioner has produced some copies of internal correspondence regarding approval obtained before issuing Letter of Intent (LoIs) to traders against their offers. It has also been argued that procurements were not restricted to one or two traders and invariably in each month power was procured from three or more traders, making such procurement broad based. Based on the submission made and the documents produced before the Commission by the Petitioner, it is observed that the petitioner could not establish with proper documents that the

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deviations taken in terms and conditions in procurements outside tenders vis-à-vis tender conditions were informed to all the possible suppliers and that he has also informed to such suppliers that the procurement process on the basis of revised conditions was an ongoing process. Though the Petitioner informed that the possible suppliers were contacted telephonically to offer power to the Petitioner, he could not produce any document in support of his statement.

While conceding petitioner's argument of acute shortage of power and that the power market at that point of time was not mature, the Commission maintains that the process adopted for procurement was not in conformity with the provisions in the relevant regulations then in force. The Commission does not accept the argument that this non-compliance was on account of then prevailing constraints. Even if it was so, appropriate time for its redressal was then and not at this late stage.

17 On the issue of direction in the Regulation that "Licensee shall at all times purchase power from the most economical source", it has been argued that quarterly average rate at which power procurement was done is less than All India average for the same period in last three quarters of the year. Only in the first quarter it is marginally higher. The petitioner has argued that based on this the procurement be construed as done from most economical source. As regards average purchase price, the Commission is of the view that rates of electricity vary substantially seasonally as also within a day depending on time of supply (peak and off-peak). Average of such prices cannot be taken to establish reasonableness or otherwise of individual purchases. Moreover, as the procurement process has been adjudged as not being compliant of the prevailing regulations, the Commission does not intend to examine reasonableness or otherwise of each purchase in this review petition.

It has also been pleaded by the petitioner that unless malaise is established or it is established that in contemporary period electricity was available at a cheaper rate, power purchase cost as incurred need be allowed. The Commission does not intend to go into this issue while scrutinizing this petition as it feels that the same is not within its assigned functions.

18 As may be seen from the paras 14 and 15 above that the Commission had been consistently holding the view that the procurement should have been done following the competitive bidding route, as mandated by the Commission's Regulations referred to in para 13 above. In fact whatever rate had emerged through the competitive process, the Commission had considered that rate as reasonable and allowed all related costs. No compelling and convincing reasons have been put-forth by the petitioner necessitating change in this consistent stand of the Commission.

Subject: : In the matter of review/reconsideration/modification in the Order dated 10th February, 2009 in Suo-Moto Petition No.SMP-28/2008 and in the Order dated 31st January, 2009 in Petition No.29/2008 and 32/2008.

19 In view of the observations made by the Commission in aforementioned paragraphs No.12 to 18, the Commission concludes that the process of procurement of short-term power through offers was not consistent with its Regulation and hence does not find adequate grounds for any review/reconsideration/modification of the impugned orders. This petition stands disposed off.

**(C. S. Sharma)
Member (Eco.)**

**(K. K. Garg)
Member (Engg)**

**(Dr. J. L. Bose)
Chairman**