

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No. 36 of 2010

Dated : 2nd August, 2010

**Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice P.S. Datta, Judicial Member**

In the matter of:

- 1. M.P. Power Trading Company Ltd. & Ors
Shakti Bhawan, Vidyut Nagar, Rampur,
Jabalpur-482008**
- 2. M.P. Paschim Kshetra Vidyut Vitaran Co. Ltd.
GPH Capus Polo Ground,
Indore -452 015**
- 3. M.P. Madhya Kshetra Vidyut Vitaran Co. Ltd.,
Bijli Nagar Colony, Nishtha Parisar,
Govindpura, Bhopal -462 023**
- 4. M.P. Poorv Kshetra Vidut Vitaran Co. Ltd.,
Block No. 7 Shakti Bhawan,
Rampur, Jabalpur -482 008**Appellants

Vs

**Madhya Pradesh Electricity Regulatory Commission
4th and 5th Floor, Metro Plaza,
E-5, Area Colony, Bittan Market,
Bhopal -462 016**Respondent

**Counsel for Appellant(s) : Mr. M.G. Ramachandran
Mr. Anand K Ganeshan
Ms. Swapna Seshadri
Ms. Rekha Sharma
Mr. Mohit Gupta**

**Counsel for Respondent(s) : Mr. Sanjay Sen
Mr. Achinta Devedi
Ms. Shikha Ohri
Mr. Gajendra Tiwari,
Ms. Surbhi Sharma**

J u d g m e n t

PER HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

1. This is an appeal filed by Madhya Pradesh Power Trading Company Limited and the three Distribution Companies of the state against the order dated 5.01.2010 passed in the petition No. 14 of 2009 read with order dated 31.01.2009 and 10.02.2009 by Madhya Pradesh Electricity Regulatory Commission in suo-moto petition no.28 of 2008 and petition nos. 29,30 & 32 of 2008 for approval of short term power purchase made during the year 2005-06.
2. Madhya Pradesh Power Trading Company Limited (Appellant 1) is responsible for bulk purchase and bulk supply of power to the state Distribution Companies (Appellants 2 to 4). It is a successor of Madhya Pradesh State Electricity Board in regard to above functions during the transition period of reorganisation of electricity sector in the state. Appellants 2 to 4 are Distribution Companies responsible for distribution and retail supply of electricity in their respective area in the state.

3. Madhya Pradesh Electricity Regulatory Commission is the Respondent.
4. The Commission has disallowed full cost of short term power purchase made by Appellant 1 for supply to the Distribution Companies (Appellants 2 to 4) during the year 2005-06 as a pass through in the true up of the financials of the Appellants 2 to 4 in the orders in the above mentioned petitions. Aggrieved by the order of the Commission, the Appellants have filed this appeal.

Background

5. The Commission (Respondent) notified Madhya Pradesh Electricity Regulatory Commission (Power Purchase and Procurement) Regulations 2004 on 6.11.2004. The Regulations covered Long Term Power Procurement with a time frame of 5 years and Short Term Power Procurement with a time frame of one year.
6. Prior to re-organization of Electricity Sector in the State in June 2005, Madhya Pradesh State Electricity Board was a vertically integrated Company responsible for generation, transmission and distribution of electricity in the State. On 4.3.2005, Madhya Pradesh State Electricity Board initiated a competitive bidding process for procurement of short term power required for the period from April to June 2005 for 100 MW to 900MW during

off peak hours in different time blocks and 800 to 1000 MW during peak hours.

7. The terms & conditions of the tender provided for earnest money and compensation in case of non-supply of contracted power. However, flexibility of conditional offer was given in the form that if the offer is conditional, Madhya Pradesh State Electricity Board had the right to give preference to the un-conditional bid in the first instance.
8. Only three offers were received in response to the competitive bidding from power traders for the limited quantity of power as under:

Sl. No.	Trader	Quantity offered MW	Months	Duration	Price Rs./ kWh
1	PTC	200	April-June-05	Peak	3.70
		100	April-June 05	Non-peak	3.14
2	Tata Power	250	May & June 05	Non-peak	3.16
3	Adani Export	150 to 250	June 05	Non-peak	2.76 to 3.06 in different blocks

The bids received in the bidding were conditional as they did not agree to compensation clause in case of non-supply of power.

9. On 4.4.2005 letter of intent was placed by M.P. State Electricity Board on PTC for procurement of only 100 MW power at Rs 3.67 per Kwh during April to June 05 against their offer of 200 MW as the price of power was considered high. It was decided to manage the peak hour need .by load management. Letter of intent was also placed for procurement of 150 MW off peak power for the month of June 2005 on Adani Export at Rs 2.76 per Kwh. Thus only two letter of intents were placed by M.P. State Electricity Board pursuant to the competitive bidding for short terms procurement of power.

10. Government of Madhya Pradesh vide order dated 31.05.2005 restructured the Electricity Sector in the state and formed a separate generation company, a transmission company and three distribution companies responsible for generation, transmission and distribution functions respectively. The residual M.P. State Electricity Board was made responsible to undertake the Bulk Power Purchase and Bulk Supply function.

11. Subsequent to placement of order for procurement of short term power against bidding due to prevailing power shortage in the State, it was decided by the Board to procure additional power. Letter of Intents were placed through bilateral negotiation on various traders based on the short term power supply offers made by them from time to time during the period April to June 2005. Some of the

contracted power could not materialize due to transmission constraints or for other reasons but a number of orders through bilateral negotiations materialized. The Board procured 258.30 Million kWh through bilateral negotiations during the period April to June 2005. The price of power procured through negotiated route was generally higher than what was discovered through the competitive bidding.

12. A petition was filed on 08.06.2005 before the Commission by the Board for ex-post facto approval of short term power procurement during the period April-June, 2005.
13. On 22.06.2005 Madhya Pradesh State Electricity Board (since succeeded by Appellant 1 for power procurement functions) again initiated competitive bidding process for procurement of short term power during October 2005 to March 2006 for meeting the requirement of the Distribution Companies. The quantum of power sought for procurement was varying from 100 MW to 1275 MW during off peak hours and 400 to 900 MW during peak hours. The Board also submitted the tender documents for approval of the Commission in the petition dated 8.6.2005 earlier filed by it for ex-post-facto approval of power purchase made during the period April-June 2005.
14. Prior to the opening of the bids, Tata power offered 28 MW during off peak hours for the month of October 2005 at a rate of Rs 2.55 per kWh. This rate was found reasonable and therefore letter of

intent was placed on them on 19.07.05 for 28 MW power by the Board.

15. Limited response was received to the competitive bidding again despite extension of last date of submission of bids and only one offer for supply of power from 100 to 250 MW during certain off peak hours for the period October to December 2005 was received. Letter of intent was placed by the Board (succeeded by Appellant 1) for the said quantum at the rate of Rs. 2.87 per kWh for the period October to December 2005.

16 The Commission on the petition dated 8.6.2005 filed by the Board vide order sheet dated 12.08.2005 held that consequent to the notification of transfer scheme by state government the Madhya Pradesh Electricity Board is a trading licensee w.e.f. 1.6.2005 and a Trading Licensee does not require any approval from the commission for purchase of power . However, in accordance with MPERC (Power Purchase and Procurement) Regulation 2004, the Distribution licensee has to prepare its annual power procurement plan and file it before the Commission for approval. It also directed the Distribution Companies to file the requisite information relating to short term power requirement during the period from June 2005 to March 2006. Thereafter, no further proceedings took place in this matter.

17. In order to meet the short fall in availability of power during the period of September 2005 to March 2006 letter of intents were

placed by the Board (succeeded by Appellant 1) on traders against their offers made from time to time through bilateral negotiation. About 1942.59 million kWh additional energy was procured during the period September 2005 to March 2006 through bilateral negotiations.

18. Out of 2387.30 Million kWh procured during the year 2005-06 on short term basis, only 186.41 Million kWh was procured through tender/ competitive bidding and the balance of 2200.89 Million kWh was procured outside competitive bidding through offers received from various traders from time to time.

19. The Commission in the true up order of financials of the three Distribution Companies (Appellants 2 to 4) for the year 2005-06 dated 16.1.2008 disallowed the full cost of short term power purchase made by the Distribution Companies through the Board (Appellant 1). The short term power purchase was allowed at the Bulk Supply Tariff rate and not the actual cost. The reason given by the Commission for disallowance of actual cost of power purchase was failure of the Distribution Companies to obtain the approval of the Commission as per the Regulations and the Commission not being satisfied that the short term requirement has been met in most economic manner and the process has been completely transparent and open to scrutiny. It was however, stated that in case the Appellants 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 that prudent cost at a later date.

20. Aggrieved by the true-up order dated 16.1.2008 of the Commission the two Distribution Companies (Appellant 3 & 4) filed review petitions nos. 29 and 32 of 2008.
21. The Commission also initiated suo-moto proceedings in petition No. 28 of 2008 in the matter of short term power purchase by the Distribution Companies.
22. The Commission in its order dated 31.1.2009 on the petition filed by Appellants 3 and 4 for a review of order dated 16 .01.2008 modified the order dated 16.1.2008 to the extent that actual cost of purchase of 162.67 million kWh procured through competitive bidding during the period October 2005 to December 2006 was approved.
23. The Commission disposed off the suo-moto petition No. 28 of 2008 vide order dated 10.2.2009 holding that procurement of short term power done through stray offers cannot be construed as prudent cost as it did not emerge through competitive bidding and also lacks transparency.
24. On 30.3.2009, the Appellant 1 filed a petition for reconsideration/ review/modification of order dated 10.02.2009 and order dated 31.1.2009 on the ground that the Appellant No1 being the concerned

- party was not heard in the matter. The State Commission admitted the petition filed by Appellant No 1 for hearing and also added the three Distribution Companies (Appellants 2 to 4) as the Respondents to the Review Petition.
25. On 5.01.2010, the Commission disposed off the Review Petition disallowing the full cost of short term power purchase on the ground that the procurement process has been adjudged as not being compliant with the prevailing Regulations.
26. In respect of 2200.89 million kWh procured during the year 2005-06 on short term basis through bilateral negotiations without competitive bidding process by the Madhya Pradesh State Electricity Board at price ranging from Rs 2.91 to Rs. 3.57 per kWh, the Commission has allowed purchase only at Bulk Power Tariff rate of Rs. 1.515. The total amount disallowed by the Commission for short term power purchase during 2005-06 was Rs. 428 crores including the open access charges.
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27. Aggrieved by the order dated 5.1.2010 the Madhya Pradesh Power Trading Company and the three Distribution Companies (Appellants 1 to 4) have filed this appeal.

Submission of the M.P. Power Trading Company and Distribution Companies (Appellants)

28. Learned counsel for the Appellants has submitted the following.

- i) It is accepted that competitive bidding is the desirable mode of procurement of power. Accordingly Madhya Pradesh Electricity Board had initiated short term procurement of power through competitive bidding in March 2005 for the period April –June 2005 and again during June/July 2005 for the period October 2005 to March 2006. However, on both the occasions there was inadequate responses from the bidders and the quantity offered was much less than the requirement.
- ii) In order to meet the demand in the state particularly in view of meeting agriculture load consequent to failure of monsoon, examination of students, etc., they had to procure short term power through bilateral negotiation from time to time . Power was procured through negotiation in public interest to maintain power supply to consumers at large and was necessitated as the competitive bidding process was not successful.
- iii) In the order dated 16.1.2008 for truing up for the year 2005-06 for the Distribution Companies the Commission while disallowing the full cost of procurement of short term power on negotiated basis had held that in case the Distribution Companies could convince the Commission that they had 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 might consider the prudent cost at a later date.

- iv) The Petition of Madhya Pradesh Trading Company (Appellant 1) which led to the impugned order dated 5.1.2010 was admitted by the Commission by its order dated 16.4.2009 to afford it an opportunity to explain and justify the process of procurement and reasonableness of rates of power.
- v) In the impugned order the Commission has accepted the need for procurement of additional power but refused to go into the issue of reasonableness of the rate of power. The Commission rejected the claim of Appellants on the ground that there was no competitive bidding process for procurement of short term power. Thus the Commission has changed its position in the order dated 5.1.2010 with respect to its earlier order dated 16.1.2008 and 16.04.2009 to review the reasonableness of rate of additional power.
- vi) MPERC. (Power Purchase and Procurement) Regulations 2004 cannot be interpreted to mean that the only method for procurement of short term power is competitive bidding process. The Regulations provide for band of prices for short term purchase to be specified by the Commission within which the licensee can purchase short term power without needing to consult the Commission. The fixation of band of prices clearly shows that there need not be competitive bidding if purchase is made within the band.

- vii. The price at which the short term power was procured through stray offers was reasonable for the following reasons.
- (a) The procurement of peak power during April to June 2005 through negotiated route was Rs 3.90/ kWh as against price of Rs. 3.67 per kWh discovered through competitive bidding . Thus the price on negotiated route was only about 7% higher than that discovered through competitive bidding .
 - (b) The price paid for both peak and off peak hours during the year 2005 -06 was less than the price which the Appellant 1 would have paid to NTPC for procurement of power from Kawas Gas Power Station of NTPC if the short term power on negotiated route had not been procured.
 - (c) The price of short term power in negotiated route was less than applicable Unscheduled Intercharge (UI) charges at the relevant time. UI charges are the charges for energy drawn from the grid over and above the schedule and are linked to prevailing frequency of the system.
 - (d) The price was less than the national weighted average price for short term power during the period July 2005 to March 2006 and during the period April –June 2005 it was marginally higher than the national average. Sufficient data was furnished by the Appellant to the Commission to establish the reasonableness of price of procurement of power through negotiated route, but the Commission refused to examine reasonableness of price of power.

- viii) Power market in the country is not mature. Due to prevailing shortage in the country and very few sellers of power in short term, it was a 'sellers' market'. The power was available to the traders generally close to the actual period of supply. In view of shortage of power in various states, the purchaser had very little say to control the price and terms and conditions of supply of power.
- ix) Price of short term power was volatile and on higher side due to gap in demand and supply in the country. Fast decision was required to be taken to finalize the purchase and there was no possibility of filing an application before the Commission for prior approval of the purchase.
- x) According to the Appellants, the information and records submitted to the Commission indicate that Appellant 1 had procured short term power at best possible rate prevalent and had not purchased power in an imprudent and arbitrary manner.

Submission of the Respondent Commission

- 29. Learned counsel for the Respondent Commission has submitted the following:
 - i. Under section 86 (1) (b) of the Electricity Act 2003, the Commission has power and jurisdiction to regulate the power purchase and procurement process of a distribution licensee.

- ii. It is clear from Regulation 32 of MPERC (Power Purchase and Procurement) Regulations, 2004, that the licensee has to mandatorily procure power only through competitive bidding route and can not procure power on the basis of stray offers.
- iii. By virtue of the second part of the Regulation 32, once the commission approves a price band, all procurement within the price band will be allowed as part of the licensee's Annual Revenue Requirement and does not require any specific approval under section 86 (1) (b).
- iv. The Appellants did not follow the process for procurement of power as laid down in the Regulation and therefore the Appellants can not insist on approval of the full power procurement cost.
- v. Out of 2199.31 Million kWh, only 162.67 Million kWh was purchased on the basis of transparent and competitive bidding process. The average power purchase price through competitive bidding was Rs 2.91 per kWh while the average power purchase price through stray offers was Rs 3.46 per kWh.
- vi. In the first instance when PTC had offered under the tender route 200 MW peak power, letter of intent was placed for only 100 MW peak power. The reason for not placing order for entire 200 MW was given as financial constraints. However, shortly thereafter the Appellant issued letter of intent for procurement of power based on stray offer from M/s Adani Export for supply of 30 MW peak power at higher price.

- vii. There were material deviations in the contract/ letter of intent issued vis-a-vis the terms that were disclosed to potential bidders for purchase of power in the short term. A significant deviation was in relation to default clause which was a condition in both the tenders. The explanation for continuing with default clause in tender document and not having the same in the letter of intent placed on negotiated basis has not been explained adequately. Similarly, in stray offers, there was no earnest money required but the same was insisted upon in case of tenders. Thus there was no transparency in the procurement process and can not be justified.
- viii. The regulation framed by the commission are statutory Regulations, notified under section 181 of the Electricity Act 2003 and have the force of law . There is no cogent reason given by the Appellant for not complying with the Regulations. There is also no provision that allows relaxation in MPERC (Power Purchase and Procurement) Regulations, 2004.

Analysis:

30. Based on the arguments of the learned counsels for the Appellants and the Respondent, the following issues arise:
- i) Whether the Appellants have followed the procedure of procurement of power in short term in accordance with the provisions of the MPERC (Power Purchase & Procurement) Regulations, 2004?

- ii) Is short term procurement of power by the Distribution Companies permissible only through the competitive bidding?
 - iii) Whether reasonable cost of short term power purchase through negotiation route could be allowed in the true up of the financials of the Appellants 2 to 4?
31. The time frame provided for short term purchase of power in the MPERC (Power Purchase & Procurement) Regulations, 2004 is one year. According to the Regulations, the licensee is required to approach the Commission every year by 31st October of each year with its Monthly Short Term Power Procurement Plan for the forthcoming year for approval of the Commission.
32. According to the Regulations, the Commission while reviewing the Short Term Power Procurement Plan has to specify the range of cost of purchase of power for the forthcoming year for peak and off peak periods within which the licensee can procure the power without taking specific approval of the Commission.
33. After approval of the Short Term Procurement Plan, the licensee has to refine and detail its short term power procurement on month-before and week-before basis.
34. The relevant clauses in the Regulations giving framework for procurement of short term power are reproduced below:

“ Overall Framework

32. Licensee shall at all times purchase power from the most economical source and shall undertake the competitive bidding

process. For short-term purchase, the Commission shall outline a band of prices for various levels of projected demand so that licensee may undertake short term purchase expeditiously without needing to consult the Commission every time. However, the Commission may at any time choose to oversee the process in order to ensure that commercial sense and financial prudence is observed at all time. It may also choose to verify the forecast demand and availability that licensee computes and assess the validity of the assumptions made by it.

x x x x x x x x x.....

45. The Commission shall communicate its views on the Power Procurement Plan within 2 weeks from the date of all necessary information requested under the above paragraph has been furnished to the satisfaction of the Commission. The Commission shall specify a band for cost of power for the forthcoming year under consideration for Morning peak, Evening Peak and off-peak periods.

46. Licensee will, then, be free to procure power within such specified limits from any source available as long as a transparent and prudent bidding institutional mechanism is adopted and commercial considerations are honored.

Criteria for Power Purchase:

47. The criteria for power purchase will in general follow the principle of least cost commensurate with power system stability, system voltage, frequency profile and system losses. The criteria shall also provide for power purchases and load shedding during the under frequency periods.”

35. Let us first examine whether the appellants had followed the procedure for procurement of power as per the Regulations.

36. According to the Regulations, the licensee was required to submit its Short Term Power Procurement Plan for the year by 31st October of the previous year. In this case the Regulations were notified on 6-11-

- 04 and therefore the licensee viz. M.P. State Electricity Board , at that time a vertically integrated entity, could have approached the Commission for approval of its Power Procurement Plan for the year 2005-06 after November 2004 only. The information furnished by the Appellants indicates that this was not done.
37. On two occasions just prior to commencement of the year 2005-06 and again during the middle of the year process of procurement of power through competitive bidding was undertaken by the Board. However, adequate response was not received on both the occasions.
38. On 8.06.2006, the Board had filed a petition before the Commission to get the ex-post-facto approval of short term power procurement made during the period April-June, 2005. The bidding documents for competitive bidding initiated on 22.06.2005 for procurement of power during October 05 to March 06 were also submitted for approval. After reorganization of electricity sector in June 2005, the Board was left with only bulk procurement and supply of power i.e. trading of electricity. However, the Commission vide its order sheet dated 12.08.2005 held that the Board being the Trading Company was free to procure power without the approval of the Commission. In the same order the Commission directed the Distribution Companies to file requisite information and get the approval of the Commission for short term power procurement as per the provisions of the Regulations. Thereafter, no further proceedings took place in this matter. The Commission also did not determine the price band for procurement of short term power.

39. The MPERC (Power Purchase and Procurement Regulations) 2004 were framed when the Electricity Board was a vertically integrated entity responsible for generation, transmission and distribution in the state. The procedure for procurement of power specified in the Regulations also appears to have been made keeping in view a vertically integrated entity.
40. It is important to understand the structure of electricity sector in the state after reorganization of M.P. State Electricity Board in June 2005. Under the Transfer Scheme order dated 31.05.2005 by the Government of M.P., the Board had to undertake bulk purchase and bulk supply functions including trading of electricity. All the existing power procurement and power purchase arrangements which State Electricity Board had with third parties as on the transfer date vested with the Board. The Board had to sell the pooled power to the three distribution licensees in proportion to their consumption. The retail tariff for the consumers in all the three distribution companies remained the same and therefore the Bulk Supply Rate charged by the Board from the three distribution companies was also different. Even after unbundling the entire cash-flow management of the electricity companies remained with the Board.
41. The Distribution Licensees also signed Bulk Supply Agreement with the Board. According to the agreement, the Distribution Companies had to indicate their annual power requirement prior to commencement of each year and the Board has to procure power consolidating their requirement and allocate the available supplies to the three Distribution Companies. Thus during the transition period

the Board was responsible for bulk procurement and supply to the three Distribution Companies and even the existing long term Power Purchase Agreements vested with the Board.

42. In the transition period of reorganization of the Electricity Sector in the State, the Board had submitted a petition to the Commission for ex- post-facto approval of procurement of power during the period April-June, 2005 and its bidding document for proposed procurement of power for the period October 2005 – March 2006. The Commission could have completed the proceedings, making the Distribution Companies as parties to the petition and could have given directions on procedure to be followed and terms and conditions of bidding process proposed for remaining period of the year and could have specified the band of price for procurement of short term power during the remaining period of the year. Considering that the Board was responsible for bulk procurement of power basically for the Distribution Companies and it was the transition period of reorganization, the Commission could have decided the matter. This was, however, not done. Instead the Commission held that the Board did not require the approval of the Commission to procure power, being a Trading Company. Thus even though the Regulations were not strictly complied with by the appellants, the efforts made by the Board (Appellant 1) to get the approval of the Commission for short term procurement of power during the year could not be completed.

43. We now examine the scone issue if the short term procurement is permissible only through the competitive bidding. The Regulations very clearly state that the power has to be procured from most

- economical source and competitive bidding process has to be undertaken. Regulation 46 also permits power procurement through institutional mechanism.
44. The price in the short term market in India vary widely for different months and time of the day. Thus, the most economical price could only be discovered through a competitive bidding. The price of short term power could also be discovered through an institutional mechanism such as power exchange where price is established on the basis of bids and offers by buyers and sellers. However, during the period under consideration, i.e. 2005-06, no power exchange was functional. The first power exchange was established only in the year 2008.
45. The learned counsel for the Appellants has argued that since the Regulations provide for freedom to the licensee to procure power within the price band specified by the Commission, it implies that the licensee could also procure power through process other than competitive bidding if the price is within the band. This interpretation is not correct. Regulation 46 clearly indicates that the licensee is free to procure power within such specified limits from any available source as long as transparent and prudent bidding or institutional mechanism is adopted. Provision for price band has been kept in the Regulations so that the licensee is not required to take specific approval every time it makes a short term purchase of power. However, in this case the price band had not been determined by the Commission.

46. Learned Counsel for the Appellant has quoted Sachinand Pandey Vs. State of West Bengal & Ors. (1967)(2) SCC 295 and BEST Vs. Lakshya Media Pvt. Ltd. 20010 (1), UJSC 21 and Brihan Mumbai Electric Supply Transport Undertaking Vs. Lakshya Media Pvt. Ltd. 2010 (1), UJSC 21 in support of his argument justifying procurement through negotiated route.

47. In Sachinand Pandey and another Vs. State of West Bengal & Ors., the Cabinet decision of State Government to lease out a plot out of zoo land to the Taj Group for building up a hotel was challenged. The Hon'ble Supreme Court had held the following:

“40. On a consideration of the relevant cases cited at the bar the following propositions may be taken as well as established: State-owned or public-owned property is not to be dealt with at the absolute discretion of the executive. Certain precept and principles have to be observed. Public interest is the paramount consideration. One of the methods of securing the public interest, when it is considered necessary to dispose of a property, is to sell the property by public auction or by inviting tenders. Though that is the ordinary rule, it is not an invariable rule. There may be situations, where there are compelling reasons necessitating departure from the rule but then the reasons for the departure must be rational and should not be suggestive of discrimination. Appearance of public justice is as important as doing justice. Nothing should be done which gives an appearance of bias, jobbery, or nepotism.

41. Applying these tests, we find it is impossible to hold that the Government of West Bengal did not act with probity in not inviting tenders or in not holding a public auction but negotiating straightway at arm's length with the Taj Group of Hotels.”

48. In BSES Vs. L. Media Pvt. Ltd. case, Hon'ble Supreme Court had held that generally disposal of public properties owned by the State or its institutions should be by public auction or inviting tenders. It is also emphasized that the public authority should justify the action assailed on the touchstone of justness, fairness, reasonableness and as a reasonable prudent owner.
49. Thus as per the above rulings for departure from the rule there have to be compelling reasons and the reasons must be rational and should not be suggestive of discrimination. Learned counsel for the Respondent has argued that in the present case, there is a clear regulatory mandate which provides for a procedure of procurement and as such when the Regulations do not create an exception, there is no scope to read an exception to the Regulations. According to learned counsel for the Respondent in the present case, there was change in the conditions relating to default in the tenders and in negotiated route. While the tender had the default condition, it was not insisted in purchase of power in negotiated route. Also the fact that the firm offers were rejected and instead stray offers were accepted at higher rates shows that all was not well in procurement process adopted by the Appellant.
50. Learned counsel for the Appellant has argued that the bidding document permitted conditional offers and the penalty for default condition was not accepted by the bidders in the competitive bidding. Thus the penalty for default condition was neither implemented in orders placed on competitive bidding nor in the procurement made outside the competitive bidding.

51. According to learned counsel for the Appellant, in view of the prevailing shortages and very few sellers available in the short term, they had no alternative but to accept the deviation in terms and conditions of supply of power. Initially after the first tender, they did not place order for the entire 200 MW peak power offered by PTC under the competitive bidding in the month of April-June, 2005 at Rs. 3.67 per kWh. They considered that it would not be financially prudent to procure entire 200 MW power for the period April-June 2005 and thought that they could manage with 100 MW. However, around 29-4-2005, the State Government decided as a matter of policy that supply of power should not be curtailed and to maintain the needs of students appearing at the examination. Accordingly they procured 30 MW peak power from M/s. Adani Export at Rs. 3.90 per kWh subsequently.
52. According to the learned counsel for the Appellants, they had no alternative but to procure power through bilateral negotiations from the trading licensees from time to time due to inadequate response received in the competitive bidding. According to learned counsel for the Appellant, the Commission under its Conduct of Business Regulations had power to relax the conditions of the Regulations due to difficulties explained by the Appellants.
53. We find that in the present case the Appellants had invited bids on two occasions but failed to get adequate response. It is accepted that there was a need for procurement of power. Admittedly, the power market was not matured and was at nascent stage. Power Exchange had also not been established to provide an institutional mechanism to

procure power in short term market. The Appellants had tried to tie up power on negotiated route from all major traders who, as per the statistics furnished by the Appellants, had market share of about 99%. In the prevailing circumstances, the Appellants had no control over the price and the conditions of supply. If the Appellant had not procured power in negotiated route, the option available was either to do load shedding or procure additional power at much higher cost from NTPC's gas based station or overdraw from grid through UI mechanism which were not the desirable options. In our opinion in the circumstances, the appellants had no alternative but to procure power through bilateral negotiations.

54. The Commission in the impugned order has conceded to the petitioner's argument of acute shortage of power and that the power market at that point of time was not mature. However, the Commission has refused to examine reasonableness of price as the competitive bidding process was not followed.

55. In its earlier order dated 16.1.2008 the Commission had held that in case the Appellants 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. At that time it was known to the Commission that the power procurement had been carried out outside competitive bidding. If no exception was possible, there was no need to further to go into the lengthy proceedings and queries relating to reasonableness of price.

56. That exception was possible is evident from the scheme of Regulations, 2004. A separate procedure in detail has been worked out in the Regulations with regard to long term power purchase, whereas concerning the short term power purchase though the first sentence referred to competitive bidding process it is qualified by the words *“for short term purchase, the Commission shall outline a band of prices for various levels of projected demand so that Licensee may undertake short term purchase expeditiously without needing to consult the Commission every time”* This was because the Commission in its legislative jurisdiction was quite conscious that depending on the availability of power to a licensee exigency may arise when purchase for short term would be a desideratum. While saying so, we are not unmindful that regulation 32 when anatomized, it emanates that irrespective of whether purchase is for a long term or short term the utility procuring power must ensure (a) that the process must be transparent denuded of subjective considerations, (b) the price must be a reasonable one and (c) it must follow the principle of least cost which means that the source must be economical. Regulation 47 provides that the least cost must commensurate with power system stability and other factors as enumerated therein. It is crystal clear that transparency and the least cost principle can never be compromised even in a process for short term power purchase. But if data are evidenced in a given situation where even in absence of competitive bidding process it could be established that the principles underlying the competitive bidding process was followed then religious adherence to the formal competitive bidding route may not

be insisted upon. Therefore, the generalization made in paragraph 18 of the order dated 15.1.2010 that since competitive bidding route was not resorted to the Commission was unable to decipher the transparency and reasonableness of the process is difficult to accept because it is not what the Regulation ordains for and that too when band of prices was yet to be settled by the Commission.

57. In this connection, we may refer to paragraph 8.2.1. relating to distribution which begins under the heading `Framework for revenue requirements and costs' concerning the Tariff Policy notified by the Central Government on 6th January, 2006 in continuation with the National Electricity Policy notified on 12.02.2005. It has been stated in subparagraph (i) of the paragraph 8.2.1. that ``*All power purchase costs need to be considered legitimate unless it is established that the merit order principle has been violated or power has been purchased at unreasonable rates*”. On the facts of the case it does not appear that the appellant was offered by anyone a rate of price for short term requirement which was lower than the price at which it purchased power to meet its requirement. The materials or data furnished before the Tribunal do not point out that the least cost principle was disregarded or that the price paid was not a reasonable one, or that the process of transparency was ditched.

58. In June, 2005, the Board had submitted a petition to the Commission for ex-post-facto approval of the short term power purchase made for the period April-June, 2005, and the tender documents for additional power purchase to be made from Oct., 2005 to March 2006.

59. However, in the order sheet dated 12.08.2005, the Commission held that no approval was needed for power procurement by the Board and directed the Distribution Companies to separately file the relevant information for the period 1.6.2005 onwards. No further proceedings have taken place in the petition after the hearing on 12.08.2005.
60. MP Trading Co. (Appellant 1) was again given an opportunity by the Commission by admitting the review petition No. 14 of 2009 to explain and justify the process of procurement and reasonableness of rates.
61. In the circumstances stated above, we are of the opinion that the Commission having accepted the need of additional power procurement and the status of power market in the country at that point of time, should have gone into the reasonableness of price of procurement. Disallowance of reasonable price of short term power procurement will aggravate the financial health of the Distribution Companies which are already constrained to make investment for strengthening of the distribution system for improving their performance.
62. Now let us look into the question of reasonable price of procurement that could be allowed to the Appellants
63. As far as period April-June, 2005 is concerned, the price for peak and off peak power was discovered by the competitive bidding process. The lowest price discovered through the competitive bidding for the months April, May and June, 2005 was as under:

	April 05	May 05	June 05
Off peak	Rs. 3.14/kWh	Rs. 3.14/kWh	Rs. 2.76/kWh
Peak	Rs. 3.70/kWh	Rs. 3.70/kWh	Rs. 3.70/kWh

For power procured through negotiated route during the period April to June 05 the lowest price discovered through the competitive bidding for each month for off peak or peak as the case may be or the actual price for each transaction, whichever is lower, is considered reasonable and be allowed as a pass through to the Distribution Companies in the true up of Annual Revenue Requirement.

64. Similarly the price discovered through competitive bidding during October to December 05 during off peak hours was Rs. 2.87 per kWh. For all procurements through negotiated route during off peak hours during the period October to December, 05 the price discovered through competitive bidding or the actual price of each transaction whichever is lower is considered accepted as a reasonable price.
65. For peak hour procurements during October to December 05, no bid was received. Further no offer through competitive bidding was received for September 2005 and January to March, 2006. Therefore the Commission could determine reasonable price from the market data furnished by the Appellants and as available to the Commission from various sources including the Forum of Regulators for the above period for which competitive bids are not available.
66. The findings of the Tribunal are summarized as under:

- i) According to the Regulations, short term power has to be procured either through competitive bidding or through the Institutional Mechanism against the Short Term Power Procurement Plan approved by the Commission. The licensee is free to procure power from any source within the price band specified by the Commission as long as the transparent bidding mechanism is adopted. In this case, the Appellants tried to procure short term power through competitive bidding on two occasions but did not get adequate response.

- ii) Even though the Regulations were not strictly complied with by the Appellants, the attempt made by Appellant No. 1 to get the approval of the Commission for short term procurement of power during the year could not be completed. The Commission held that the Board (succeeded by the Appellant No. 1) being a trading company did not need the approval of the Commission to procure power even through the Board was procuring power for only the Distribution Companies. The Commission directed the Distribution Companies to file information and seek approval of power procurement plan. The Distribution Companies, however, did not approach the Commission. The Commission also did not specify band of price of power for short term.

- ii) Looking into the circumstances and considering the prevailing shortage of power, very few sellers of power, nascent status of power market and no power exchange established in the country, the Appellant had no alternative but to procure power

through bilateral negotiations against offers received from the various Trading Licensees from time to time to meet its power requirements. The Appellant had to relax the conditions of penalty for non-supply as it was not acceptable to the trading licensees both in the orders placed through competitive bidding and outside the competitive bidding. In the seller's market the Appellant was not in a position to impose its own terms and conditions.

- iv) The Commission having held in its order dated 16.1.2008 that in case the Appellants can convince the Commission that they had procured power as per their needs and also at a rate which was the best at that period and having accepted the Review Petition filed by the Appellants which resulted in the impugned order dated 5.1.2010 giving them opportunity to explain the process of procurement and reasonableness of rates of power, should have examined the reasonableness of price of power and allowed the reasonable price of power in the true up of Annual Revenue Requirements of Appellant No. 2 to 4.
- v) Disallowance of reasonable price of power procurement will lead to severe financial constraints to the Distribution Companies (Appellants No. 2 to 4) which are already facing financial constraints to make investments for strengthening of the distribution system for improving their performance.
- vi) The reasonable price of power procured through bilateral negotiations be determined by the Commission as under:

<p>For period April to June 2005</p>	<p>Lower of the lowest price discovered through competitive bidding in each month or actual price separately for peak and off-peak for each transaction.</p>
<p>For the Period October to December 2005 (Off peak period)</p>	<p>Lower of price discovered through competitive bidding or actual price for only off-peak period for each transaction.</p>

For the remaining period and transactions, reasonable price could be determined by the Commission from the market data furnished by the Appellants and as available from the various sources such as Forum of Regulators and could be allowed for the power procured outside the competitive bidding.

- vii) This will ensure that a reasonable price of power is only allowed in the Annual Revenue Requirement to the Appellants.
- vii) Accordingly the Commission is directed to determine reasonable price of power procured through negotiated route as given above and allow the same to the Appellants in the true up of Annual Revenue Requirement. .

Conclusions.

67 In view of above, the impugned order dated 5.1.2010 read with orders dated 31.01.2009 and 10.02.09 of the Commission is set aside to the extent of disallowance of reasonable price of procurement of short term power outside the competitive bidding during the year 2005-06. The Commission is directed to determine

the reasonable price of 2200.89 MUs of energy procured outside the competitive bidding as per the above directions and allow the same in the ARR of the Appellants..

68. No Costs.

69. Pronounced in the open court on this 2nd day of August, 2010.

(Justice P.S. Datta)
Judicial Member

(Rakesh Nath)
Technical Member

Dated : 2nd August, 2010

INDEX : REPORTABLE / NON-REPORTABLE.