

Before the  
Maharashtra Water Resources Regulatory Authority  
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Case No. 1 of 2008

In the matter of  
Petition filed by PRAYAS, Pune seeking directions upon Maharashtra  
Krishna Valley Development Corporation regarding Expression of Interest for  
Completion of Nira-Deoghar Irrigation Project on Build, Operate, Transfer  
(BOT) basis.

Shri Ajit M. Nimbalkar, Chairman  
Shri A.K.D. Jadhav, Member (Economy)  
Shri A. Sekhar, Member (Engineering)

Dr. Subodh Wagle  
Trustee and Group Co-ordinator  
Sh. Sachin Warghade  
Senior Research Associate  
Prayas  
B-21, B K Avenue, Survey 87/10 – A,  
New D. P. Road, Azad Nagar, Kothrud,  
Pune – 411 038.

.... Petitioner

Versus

The Executive Director  
Maharashtra Krishna Valley Development Corporation  
Sinchan Bhavan, Barne Road,  
Mangalwar Peth,  
Pune 411 011

.... Respondent





## ORDER

Dated : 10<sup>th</sup> November 2008

Prayas, Pune, a registered charitable trust, filed a petition on 18-1-2008 objecting to the issuance of an advertisement by the Maharashtra Krishna Valley Development Corporation ("MKVDC") on 12-9-2007 calling for Expression of Interest ("EOI") for selection of Developers/Consortiums for completion of the Nira-Deoghar (ND) Irrigation project on Build-Operate-Transfer (BOT) basis. The objection essentially challenges MKVDC's action of issuing the said advertisement without the due involvement of this Authority in terms of its powers and functions specified under the Maharashtra Water Resources Regulatory Authority Act, 2005 ("MWRRA Act"). Prayas has alleged that in the process of inviting EOI, MKVDC has not divulged the fact that the MWRRA Act is in force and that the Authority has wide and diverse powers to regulate all matters concerning water resources within the State of Maharashtra and hence all activities relating to Nira-Deoghar project including the completion and management of the project on BOT basis, are required to be regulated by the Authority.

2. It is averred in the petition that while issuing the above mentioned advertisement, MKVDC has relied upon a Government of Maharashtra G.R. No. BOT/702 (425/2002)/MP-1 dated 15-07-2003. It is stated that Section 2.1 of the annexure of this GR provides that "*for any reasons, if there is any change in the expected (as planned during the contract) availability of water in the project then the developers shall have the powers to change the standards for irrigation and other water supply*". It is also pointed out in the petition that the aforesaid GR at Section 2.2 of its annexure provides that "*water charges will be levied to the project beneficiaries and the water users associations on the basis of the existing norms prevalent at that time. If there is a need to change these water rates, then there shall be the provision in the contract / tender with the developer for increasing the water charges to maximum 10% of the fixed charges after discussion with the beneficiaries.*" In the submission of Prayas, the aforesaid stipulations in the GR cannot be given effect to without the approval of the Authority. Prayas has also contended that since the Nira-Deoghar project was predicated on certain technical, financial and economic components as well as project design, MKVDC cannot unilaterally permit any developer to effect any drastic or fundamental revision or change in the same. This will consequently affect the (i) economic, financial and ecological interests of a range of stakeholders, State Government and the public; and (ii) socio – economic development of the region. For these reasons, the Nira-Deoghar Project cannot be treated as an old project but should be given the status equivalent to that of a new project. And therefore, this Authority should clearly have a role in the process of issuing advertisement, tenders, selection and award of contract, etc.



3. In essence, it is the contention of Prayas that the aforesaid advertisement calling for EOI is not only misleading but also bad in law for the reasons aforesaid.

4. Subsequently, Prayas filed an amendment to the petition on 31.1.2008 supplementing its prayers made in the petition essentially to seek an opportunity of hearing in the matter and a direction upon MKVDC to file its reply in the matter.

5. The Authority heard the parties on 26-2-2008, 3-3-2008, 29-5-2008 and on 14-8-2008. Shri. Subodh Wagle, Shri. Sachin Warghade and Shri. Vivek Jadhavar, represented Prayas. Shri. D. D. Shinde, Shri. H. Y. Kolawale, Shri. R. R. Shah represented MKVDC. Shri. P.K. Pawar represented Nira Deogarh project. In the course of the hearings both the Petitioners as well as the Respondents made a number of submissions through their affidavits and their oral and written arguments.

6. The main points made by the Petitioner in the Petition and in the various written and oral submissions are :-

- (i) Cognizance of the Authority has not been taken and its powers and functions have not been divulged in the EOI advertisement nor in the EOI booklet distributed to those who responded to the advertisement. References to MWRRA Act & Maharashtra Management of Irrigation Systems by Farmers Act 2005 (MMISF Act) in the EOI booklet are short and cursory and the linkage between the two Acts is not spelt out. There was no mention in the EOI advertisement about sale of EOI booklet.
- (ii) Intervention of the Authority is needed at this stage because the EOI represents serious and concrete steps towards selection of a Developer and non disclosure of the Authority's pivotal role at this stage to the bidders will have many adverse consequences for the selection process as well as the BOT project
- (iii) Government Resolution (GR) dated 15-7-2003 is the fundamental basis on which the EOI has been issued. This administrative order was issued before the enactment of the MWRRA Act 2005. There are dichotomies in the GR and the Act and hence the GR will first need to be amended in the light of the Act. The major dichotomies are:-
  - (a) The GR permits the private developer to make changes in the quantum of water to be made available to various users from the Project. Under Section 11 (a), (c), (g), (h), (l) and (k) of the MWRRA Act the authority to determine water entitlements vests with the Authority and the developer cannot be allowed to exercise the powers of the Authority



- (b) As per the GR, the private developer can increase the water tariff by 10% beyond the existing rates whereas under section 11 (d) and 11 (u) of the MWRRA Act it is the Authority which has to determine revisions in water tariff.
- (iv) There are other contradictions between the GR and MWRRA Act that need resolution, namely:-
- (a) The GR permits recovery of capital cost through water tariff whereas vide section 11 (d) of the Act restricts water tariff to O&M recovery only.
- (b) The GR seeks investment in both backlog and non-backlog areas while the Authority is required to prioritize backlog removal,
- (c) The GR ignores WUA participation in planning and construction which is stipulated by the MMISF Act which in turn is linked to the MWRRA Act in terms of section 65 of the MMISF Act ;
- (d) Neither the GR nor the booklet states that the private promoter shall invest in land acquisition and R & R although in its written submission the Respondent has stated that the required funds for land acquisition and R & R would be obtained from investors.

These matters need to be resolved and until then all further action needs to be halted;

- (v) MKVDC should obtain project clearance from the Authority under Section 11 (f) of the Act in view of likely changes in the project parameters vis-à-vis the originally envisaged project parameters after the project is converted to a BOT project from a purely government funded project. Legal opinions of Shri. Prashant Bhushan, Advocate, Smt. Gayatri Singh, Advocate and Shri. Mihir Desai, Advocate have been submitted in support of this argument.
- (vi) The issue of Viability Gap Funding has not been addressed. This has implications for clearance of backlog as per Governor's Directives which the Authority is bound to follow;
- (vii) PRAYAS and other interested stakeholders should be allowed to participate in the privatization process.

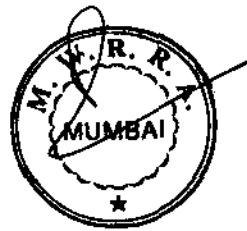
7. MKVDC filed its reply on 25-4-2008 refuting the allegations made by Prayas regarding the contents and the manner in which the aforesaid EOI advertisement was issued. MKVDC has also denied the allegation that the EOI advertisement was not transparent. It has been stressed that the EOI advertisement has been open and transparent. Furthermore, MKVDC has



submitted that the EOI advertisement should be considered as a short tender notice where only MKVDC is involved. It has been explained that the stipulations appearing in the EOI advertisement are supposed to be altered / modified in any case as per the requirements of various statutes and regulations which would be reflected in the final document based on which the offers are proposed to be accepted. MKVDC has also submitted that the role of the Authority will come at a later stage in order to check whether there is any kind of conflict between the aforesaid Government of Maharashtra G.R. dated 15-07-2003 and the MWRRA Act. It has been submitted that the final bid document will address these issues and will be free from all ambiguities. It has been further submitted by MKVDC that at this stage there is no cause of action and calling for intervention of this Authority is unwarranted.

Besides the above submissions, the other points made by MKVDC in its reply and in the various written and oral submissions are as follows:-

- (i) Assessment of the viability of the BOT project is the prerogative of the Government of Maharashtra and is well within the administrative competency of the High Level Committee formulated under the Chairmanship of Chief Secretary vide GR No. BOT 702 (425/02) MP-1 dated 21-3-2006. The Nira-Deoghar project is an old project administratively approved by the Government in May 1984. At present, the construction of the dam is more or less complete and construction of canal works is in progress. The project has already been started after getting administrative approval of the State Government and the storage work is nearly complete. Hence, the proposal contained in the advertisement calling for EOI to complete the balance works on BOT basis will not constitute it as a new project under Krishna River Basin. Thus, not being a new project, it is outside the scope of Section 11 (f) of the MWRRA Act which deals with new projects.
- (ii) MKVDC has denied the contention of Prayas that MKVDC have admitted during the hearings that they would submit the advertisement / EOI to the Authority for assessment / verification of conformity with the MWRRA Act and/or for approval of economic and financial viability of the proposal. Therefore, MKVDC shall not submit these matters before the Authority because they are the prerogative of the Government of Maharashtra. However, MKVDC shall address all the concerns raised by Prayas regarding compliance with MWRRA Act and MMISF Act, while finalizing the bid documents.



- (iii) The High Level Committee under the Chief Secretary constituted vide GR dated 21-3-2006, will look into contradictions, if any, between the GR and the MWRRA Act pointed out by the Petitioner and will finalise the terms & conditions of the BOT contract and decide upon the acceptance of tender offer. However, the aforesaid Government of Maharashtra G.R. dated 15-07-2003 will need to be amended because of the stipulations in the MWRRA Act regarding fixation of water rates and entitlements during drought period. This fact will be brought to the notice of the Government for necessary action. On these issues the Authority will certainly be approached.
- (iv) In response to the EOI advertisement, four prospective developers approached the Executive Engineer and were issued a booklet giving details of the project (EOI booklet). These are Ashoka Builders, Pune, Gammon Infrastructure Limited, IVRCTL Infrastructure Projects Ltd. and IL&FS, Mumbai. This EOI booklet lists all applicable Laws and Manuals and the MWRRA Act, 2005 appears first in the list. Further a conference with Prospective Developers was held on 15<sup>th</sup> October 2007 under the chairmanship of the Executive Director, MKVDC when the developers raised various queries relating to water charges, cropping pattern, water availability etc. Prospective Developers were apprised of the point that water rates are to be fixed by the MWRRA. The dialogue with the developers rests at this stage. The selected Developer would be required to follow the provisions of the MWRRA Act on fixation of water rates. Also, MKVDC has acknowledged that the Authority has the right and power relating to the distribution of water and determination of entitlement.
- (v) Investments made by a private developer are in the category of non budgetary resources from the market and hence Governor's directives on backlog will not be applicable.
- (vi) Expenditure on land acquisition and on the rehabilitation of project affected persons will be the responsibility of the private developer.
- (vii) Assessment of project viability and getting the work completed through the BOT process is within the purview of the State government and thus there is no question of involvement of other agencies like PRAYAS.



(viii) The Petition as such is not admissible and should be dismissed on the above grounds.

8. Prayas submitted its rejoinder to the submissions made by MKVDC during the hearing on 29-05-2008. In brief, Prayas has submitted as under:-

- (i) The issue under consideration concerns public interest and therefore Prayas seeks participation as a stakeholder and not as a third party.
- (ii) The continuous change in the objectives for issuance of the EOI advertisement as stated by MKVDC throughout the proceedings demonstrates lack of application of mind on such a critical issue as well as lack of systematic efforts to validate the legality of the actions and statements.
- (iii) MKVDC has already acknowledged that there are many provisions in the EOI advertisement and in the aforesaid GR that are in contravention of the MWRRA Act and MMISF Act, which it has promised to resolve.
- (iv) The Governor's directives should be adhered to particularly with regard to financial resources and funding.
- (v) Though assessment and implementation of Nira-Deoghar BOT is within the purview of the administrative control of the Government (as submitted by MKVDC), it should be noted that review and regulation of ND-BOT is within the purview of the regulatory oversight by the Authority with the legal sanction provided through the law enacted by the legislature. In the ND-BOT project there is a need for fresh economic review especially in the light of the newly added actor, viz., the private developer who will incur major costs and secure significant benefits. This significant change in distribution of economic costs and benefits calls for fresh economic review by the Authority to assess the possible impacts of entry of private developer on the project as a whole. Such a function of the Authority cannot be substituted by a Government Committee. Hence, there is no legally valid basis for rejecting the proposal for review by the Authority in a participatory manner by involving various stakeholders including Prayas.

9. Subsequently, MKVDC filed further written submissions which, in brief, state as follows:-

- (i) While undertaking the bidding process wide publicity will be given in order to give opportunity to interested parties.





(ii) The Chief Secretary's Committee will look into and resolve contradictions, if any, between the GR dated 15.7.2003 and the MWRRA Act, 2005.

(iii) The funds required for land acquisition and rehabilitation are to be obtained from the private developer. If viability gap funding is required, the same will be met from the funds made available to MKVDC by the Government as per the Governor's formula which is based on backlog components. The Directives issued by the Governor of Maharashtra vide section 7.11 and section 9(1) for the Annual Plan 2002-03, will not be applicable in this case.

10. Having heard the parties and after considering the material placed on record, at the outset it is necessary to set out the back ground to Public Private Partnership in the Irrigation Sector. The large number of incomplete irrigation projects and the paucity of funds to complete them have been engaging the attention of the State Government. As on March 2007, 1246 irrigation projects with a balance cost of about Rs. 36,630 crores and a balance potential of 3.5 million ha were incomplete. Participation of the private sector with the State government was mooted in 2003 in the State Water Policy for the financing and implementation of these water projects as an innovative measure to remedy the situation. A Government resolution was also issued vide GR dated 15-7-2003 laying down the guidelines for private sector participation on BOT basis for the completion of irrigation projects. The State Government initiated the BOT process by offering the Nira-Deoghar project on river Nira in Bhima sub basin of Krishna valley to the private sector for its completion. The project in Bhore taluka of Pune district has a planned annual utilization of 12.981 TMC to irrigate 43050 ha ICA. While the storage works have been more or less completed, work on the canal system is lagging behind. The latest estimated cost of the project is Rs. 1491.22 crore of which the expenditure till July 2008 was Rs. 467.58 crores.

11. The Authority is of the view that on the basis of the various submissions that have been made by the parties, the following issues are required to be framed for rendering a comprehensive decision:-

- (i) Whether Nira-Deoghar project which is already an administratively approved project requires clearance of the Authority under Section 11 (f) of the MWRRA Act before it is taken up for completion through the BOT process?
- (ii) In view of the contentions raised by the Petitioner, is it necessary to interfere with the EOI advertisement either at this stage or at all?



- (iii) Whether the GR dated 15-7-2003, which was issued before the MWRRA Act came into existence, needs revision to bring out the role of the Authority in the BOT process in the light of the duties and powers vested in it in the Act?
- (iv) Whether investment in Land Acquisition and R & R is to be made by the private entrepreneur or by the Government? What is the implication of this for project viability?
- (v) Whether Governor's directives in respect of removal of backlog are applicable to investment in non-backlog areas through the BOT model proposed for Nira-Deoghar?
- (vi) What is the extent and manner in which stake holders and NGOs need be involved in the BOT process?

12. Examination of issues by the Authority:-

(i) As regards the first issue, when the MWRRA Act was formulated in 2005, notwithstanding the fact that a GR of 15-7-2003 on BOT was in place, Section 11 (f) of the Act was envisaged to deal with projects implemented with State Government funds. The term 'Economic' in Section 11 (f), in the context of usual government financed projects, primarily means the usual cost – benefit analyses carried out for such projects viz. annual cost to Government vis-a-vis annual benefits to farmer and the economy in terms of increase in productivity and agricultural production of agri-produce. In BOT proposals the BC ratio would be based not only on socio-economic parameters but also on the revenue model, viz, the revenue streams that the private promoter is projecting to recover his investment. The acceptability of these revenue streams would depend on whether they reduce in any way the benefits that would have accrued to the farmers had the project been a routine government funded project. The acceptability would also depend on whether these revenue streams, *unrelated to water charges*, are capable of meeting capital costs and yielding appropriate rates of return so as not to affect the operational efficiency of the system. This is important because the Act clearly enjoins upon the Authority the duty to ensure that water charges are so determined as to recover the cost of operations and maintenance only. Hence para 1.2 of the enclosure to GR dated 15-7-2003, which states that feasibility of the project be examined as per existing norms, will need to be revised.

In so far as the Nira - Deoghar project is concerned, the Respondent has argued that the state has already expended a substantial sum on the project and the work of the storage reservoir is close to completion. When the project was originally undertaken the project was administratively approved on the basis of viability established by the Benefit – Cost (BC) analysis and, therefore, approval of the project under section 11 (f) is not now required.



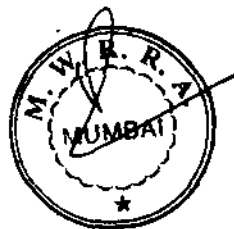
The Petitioner has argued that the entry of the entrepreneur has changed the rules of the game and there is likelihood of a conflict between the public interest and interests of the private party. The private investor will be concerned with returns on investments made and hence it is necessary to check the possible revenue generating sources identified by the investor and how they impact the sustainability of the project as also how it affects local, regional and state level economies. Conflicts and disputes relating to the latter can not only delay project implementation but could aggravate litigation and even lead to abandonment of the project.

An examination of both arguments reveals that while the former is too technical and misses the woods for the trees the latter is too general and unless specific adverse impacts are identified in regard to the conflict between public and private interests on sustainability, likely litigation etc the project cannot be kept on hold merely on apprehensions. Hence, it is necessary to examine this issue in the context of the principles mentioned above. Certain benefits were contemplated by the Government to the farmer when the project was cleared as a budget financed project and funds from the budget were expended. The BOT process has to therefore ensure that newly envisaged revenue streams do not lead to reduction of these in any way. Deviations from the improved cropping patterns envisaged in the BC studies with a view to generate additional sources of income through such means as contract farming, etc have to be not only strictly voluntary in nature from the farmer's side but should demonstrate that the farmer has gained and not lost from these deviations in terms of relative opportunity gains from the former (BC studies) and the proposed gains from the newer activity proposed in order to generate additional sources of revenue. Further these revenue streams should not adversely affect the operational efficiency of the system by for instance cutting budgets for O & M. The Authority thus has a definite role in vetting of the revenue model. As long as the hydrology and inter state issues remain the same, fresh clearance for these would not be required under Section 11 (f) but the vetting of the revenue model will have to be done by the Authority in accordance with the jurisdiction granted by section 11 (f) of the Act over economic viability. In this regard the Authority is inclined to agree with the opinion of Shri. Prashant Bhushan that the Authority's approval is *inter alia* required if significant changes are contemplated in an existing project where such changes have a bearing on the technical and economic parameters of the project. The Authority is not convinced about the opinion presented by Shri. Mihir Desai and Smt. Gayatri Singh that "new" projects are to be examined only where they have implications for regional imbalance because the proviso to 11 (f) uses the word "new" only in this context. It is expected that projects once proposed and approved cannot and will not be proposed again. Hence proposed projects would perforce be newly proposed projects and the word "new" in the proviso refers to such projects only and not to incomplete projects simply because they are incomplete. However, where the economic parameters of an already approved project are likely to change, regardless of the stage at which these changes occur i.e whether mid way or at the



beginning and also regardless of the reasons for such changes like conversion to BOT, unless the revenue model of the revised project is so designed as to retain the public benefit without the slightest erosion, such changes have to be treated as changing the character of an existing project thus converting it into to a new project. Hence the answer to the question of whether the Nira-Deoghar project, which is already an administratively approved project, needs clearance of the MWRRA under Section 11 (f) of the Act before it is taken up for completion through the BOT process is that such clearance would be required only if the economic parameters in terms of the cost to government and benefits to the users undergo a change as a result of the investor's proposal.

(ii) As regards the second issue, it is not disputed that there is no mention of the MWRRA in the advertisement calling for Expression of Interest. It is claimed by MKVDC that the Act has been referred to in the EOI booklet sold to those who responded to the advertisement. However, it is noted that there is no mention of the sale of the EOI booklet in the EOI advertisement either. The advertisement merely states that the EOI is to be submitted along with documents confirming compliance of technical and financial requirements and equity capital. Further it is noted that even in the EOI booklet there is only a mention of the MWRRA Act itself and the implications of certain provisions of the Act such as the Authority's powers relating to water entitlement and tariffs do not find any mention. The EOI process cannot be delinked from the overall BOT process because while on the one hand some who are not aware of the Authority's role in the determination of entitlements and water tariffs may be discouraged from responding to the advertisement, on the other hand there may be those who respond on the incorrect understanding that they will be free to determine these vital parameters. Hence, in fairness to all private developers and in the interest of transparency due reference should have been made to the MWRRA and MMISF Acts in the advertisement. The advertisement should have also mentioned that interested parties are expected to purchase EOI Booklet which, inter alia, contain the framework set out by the said two statutes within which the investors would have to operate. It is noted from the advertisement that a specific statement has been made to the effect that the investment is expected to be recovered through various means including levy of water charges. Since in terms of Section 11 (d) of the MWRRA Act the determination of water charges is within the purview of the Authority and the said enactment prescribes certain parameters on which the Authority is to base these charges, the Authority is of the view that the advertisement can be considered to be misleading in that it does not clearly spell out the stipulations and limitations imposed by the MWRRA Act on the levy of water charges. For these reasons the advertisement is not tenable in its present form and needs to be withdrawn.



(iii) As regards the third issue, Petitioner's argument that the Government Resolution dated 15-7-2003 is the fundamental basis for the privatization initiative has not been countered by the Respondent. The said GR lays down the guidelines for the BOT process and is an administrative order issued before the MWRRA Act came into force in 2005. A reading of the GR and its enclosure reveals that there are dichotomies between the GR and the provisions of the MWRRA Act. These are:-

(a) Para 2.1 of the Enclosure to the GR states that in certain situations the rights of changing the norms of irrigation as well as water supply should be given to the entrepreneur. Para 2.4 further states that the norms of usage and distribution can be changed after discussions between Government and the Entrepreneur. These provisions vitiate section 11 of the MWRRA Act which specifically vests the right of determining water entitlement in the Authority.

(b) Para 1.1 of the Enclosure states that the entrepreneur's investment should be recovered from water charges for water usage in addition to certain other sources. Para 2.2 permits the entrepreneur to negotiate a 10% increase over levied water charges with the beneficiaries. These provisions militate against section 11 (d) of the MWRRA Act which enjoins upon the Authority the task of determining the criteria for water charges and spells out the basis on which this should be done.

(c) There are certain provisions in the MWRRA Act which the GR dated 15-7-2003 omits to mention because the GR preceded the Act. These provisions are contained in Section 11 (d), 11 (f), 21 (1) of the MWRRA Act and Section 2.1 of the State Water Policy, 2003 and relate to exclusion of capital cost recovery, investment in back log vis-a-vis non-backlog areas, participatory planning in association with Water User Associations and Relief and Rehabilitation of affected persons by the entrepreneur. As regards investment in Land Acquisition the GR states that this will be done by the Government whereas the Respondent has claimed that in respect of the Nira Deoghar project this expenditure will be incurred by the entrepreneur.

The Respondent has not touched upon the dichotomies between the GR and the MWRRA Act either in the written or oral submissions but has submitted that the GR having been issued before the MWRRA Act came into force, the latter will prevail. In the second submission dated 3<sup>rd</sup> March, 2008 the Respondent has submitted that no conflicting provisions of the GR on privatization policy vis-à-vis the MWRRA Act will be left in the final bid document. In other words, the final bid document would address these issues in conformity with the MWRRA Act. In the written submissions, stated to have been concurred in by the State Government, the Respondent has submitted that the Chief Secretary's Committee set up by GR dated 21.3.2006 will remove the contradictions and ambiguities regarding water rates and entitlements and due cognizance of the MWRRA Act and MMISF Act will be taken by the Committee while scrutinizing the proposals.



A perusal of the GR dated 21.3.2006 shows that one of the terms of reference of the Chief Secretary's Committee is to assess the necessity of modifications in the present policy of the Government regarding privatization of water resources projects and to give suitable suggestions to the Government in this regard. Since the submissions made by MKVDC with the concurrence of the State Government do not touch upon the dichotomies between the GR and the two aforesaid statutes, it is clear that these dichotomies are still to be taken cognizance of by the Committee. Clearly, therefore, the original GR dated 15-7-2003 needs to be revised so as to remove all dichotomies between the GR and the MWRRA Act and more particularly the dichotomies relating to water entitlements, fixation of water charges, recovery of capital costs, investments in non-backlog areas, WUA participation and investment in land acquisition and relief & rehabilitation. It is, therefore, essential that the State government should revise the GR dated 15-7-2003 in the light of the MWRRA Act and MMISF Act clearly spelling out the various stages in the BOT process and the role of the Authority.

(iv) As regards the fourth issue that of cost of land acquisition and R & R, the Respondent has taken conflicting positions which have been highlighted by the Petitioner. The GR dated 15-7-2003 provides at paragraph 3.4 of its enclosure, that the land will be acquired at Government's expense and leased out to the investor for raising funds (presumably as collateral). This is reiterated by the EOI advertisement and the booklet which are project specific. Petitioner has argued that since Nira-Deoghar is in non-backlog area the expenditure on these activities will come under the purview of MWRRA Act which has a special responsibility in the matter of removing backlog. In its submission dated 25-4-2008, the Respondent has stated that while the land will be acquired by the Government the funds for acquisition and rehabilitation will come from the investor. The implications are two-fold. If the funds are expended by Government then they become a part of the BC equation on the cost side. The benefits to the consumers as spelt out in the BC analysis will need to cover this cost to establish viability. Secondly, if the expenditure is met by the investor then the returns will have to come from revenue flows without affecting, supply and maintenance and without reducing the benefits which would normally accrue to the farmers from the project had the funds been expended by the Government. It is, therefore, necessary for the Respondent to decide the source of funding for LA and R & R and design the project in such a way as to ensure that the costs are rightly reflected and are paid for by the appropriate party.

(v) As regards the fifth issue that is the question of whether the Governor's directives in respect of removal of backlog are applicable to investment in non-backlog areas through the BOT model proposed for Nira-Deoghar and whether this has important ramifications for the programme of completion of



incomplete projects by raising project based funds from the market, the Petitioner has raised the following significant issues :-

- (a) The Governors' directives include funds raised from the market. Hence regardless of the source of the funds the investment priority for back log areas remains;
- (b) If the cost of Land Acquisition and R & R is met by Government then the back log restriction will apply on BOT projects and such projects cannot be taken up in the non-backlog areas;
- (c) The issue of viability gap funding is connected with the back log issue because this is a source of fund from Government and hence the directives relating to back log become applicable. Even if it is raised as a loan by Government the liability will fall on Government and hence VGF is covered by the Governor's directives;

The above issues are discussed below *ad seriatim*:-

- (a) With regard to the Governor's directives applying to market borrowings the Petitioner has submitted in the written submissions made on 29<sup>th</sup> May, 2008 (Para 2.3 of Core Issue 4) that section 7.11 and 9 (1) of the Governor's Directives issued for 2002-03 are applicable to the project. It is stated that these sections require that sources raised from the market should be pooled together with Government funds and distributed equitably amongst all regions on the basis of the formula for removal of backlog. A careful reading of the sections shows that the term "non-budgetable allocations" used in the sections is explained subsequently in that it refers to the market borrowing programme of the State Government through what are commonly known as "irrigation bonds". These borrowings, often described as "off budget borrowings" were raised by the Government through the Irrigation Corporations. The term "pooled together" mainly relates to the fact that borrowings through independent corporations led to some corporations raising more funds than other corporations which further aggravated the imbalance. Hence the Governor's directives have prescribed that these borrowings should be for the irrigation sector of the state as a whole. The basic difference between these generalized borrowings and the private funds to be expended under the BOT programme is that the former are raised on the basis of government guarantees and are serviced directly by the budget. They are a charge on the state treasury and hence these funds are actually government funds. On the other hand BOT borrowings are not to be raised by the



government directly from the market and more importantly are not to be repaid by the government from the treasury. Since the water charges are also restricted to servicing O & M only the returns to the investor are expected to come from sources external to the project such as contract farming, agro processing, ancillary activities like fisheries, tourism, etc. and the borrowings are expected to be repaid from these earnings. Hence the argument that BOT funds are covered by the Governor's directives and hence cannot be expended in non-backlog areas is technically not tenable. However, since this is a policy issue, covered by State of Maharashtra (Special Responsibility of Governor for Vidarbha, Marathwada and the Rest of Maharashtra) Order, 1994, a view will need to be taken by the State Government in this regard.

- (b) The argument that VGF for Nira Deoghar would amount to Government expenditure in non-backlog areas has been elaborated upon by the Petitioner in their submission made on 29.5.2008 (para 2.2.3 – Core Issue 4). The Respondent has not ruled out viability gap funding by Government and has stated (reply to 9 (v) (compliance report) that this will depend on the proposals received from the investors. While it is true that VGF from Government would amount to a public finance component in the BOT project and hence bring the project within the backlog regime the Respondents' response does not amount to an admission that VGF funding will actually happen in the case of Nira – Deoghar as concluded by the Petitioner. Declaring VGF availability in advance can amount to influencing the tender process and can depress prices artificially. The Respondent's contention that this will depend upon the nature of proposal received is reasonable. It cannot be anticipated that investors will find the project non-viable without VGF from Government. The Respondent's admission that if such an eventuality arises then Governor's Directives will apply should therefore suffice. However, since the backlog regime is implemented through the regulation of the Authority it follows that if any VGF is proposed then the proposal would be subject to the Authority's scrutiny and approval. An observation which may not be out of place here is that as mentioned earlier the BOT component does not make an incomplete project a "new project" *per se* but it does lead to an open ended dispensation to the investor for creating new avenues of recovering returns. If these returns do not adversely impinge upon existing costs and benefits in the case of incomplete projects then VGF will not be hit by backlog restrictions *provided the funds are within the allocation for the concerned area* and the revenue model is





subject to the Authority's scrutiny and prior approval for the purpose, *inter alia* of confirmation that such adverse impingement has not occurred.

- (c) With regard to the cost of Land Acquisition and R & R we agree that if the funds are expended by Government then the issue of prioritising back log area projects becomes relevant. The Governor's directives that projects should be cleared first in back log areas apply regardless of the component of the project on which public expenditure is incurred. However, the VGF argument applies here as well. If the funds are already included on the cost side in the pre-BOT BC Analysis and BOT does not in any way dilute the benefits side then this does not become a new project and if funds made available are as per formula they can be expended on the incomplete projects. Whether this is actually the case will be a subject of the Authority's scrutiny and prior approval. Hence, it is not enough for the Respondent to say that funding will be made available after applying the back log formula. It has to be ensured that the earlier BC of the public funding side of the project is maintained by the new BC of the BOT project.

(vi) As regards the sixth and final issue of stakeholder participation and the *locus standi* of the Petitioner's involvement in the BOT process the Petitioner has argued that :-

- (a) In the context of checking the viability of the project interested organizations and individuals should be made party to the process of assessment and approval (written submission on 3<sup>rd</sup> March, 2008). This is a matter of public interest and stakeholders like farmers, NGOs, women's groups, other local groups and activists should be involved. The state water policy requires stake holder participation and the Authority has to act in accordance with the state water policy. The Authority has to ensure judicious equitable and sustainable management of water resources and enhancing stake holder participation will ensure equity.
- (b) The Respondent has argued that the final authority for approval and handing over of BOT projects is that of the Chief Secretary's Committee set up under the GR dated 21-3-2006. Hence no third party like Prayas or the Authority can be involved in the process and such precedents will affect established procedures and lead to complications. Since the beginning the BOT process has been transparent and involvement of outside agencies is never allowed in any bidding process in Government. Assessment of viability is within the

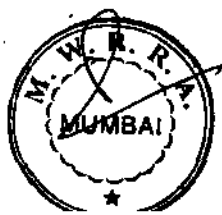


purview of Government and the question of dual control over the process does not arise.

The Authority is of the view that it is necessary to disaggregate the issue into two parts. Firstly, there is the broader issue of determining the design of the BOT process in respect of incomplete projects like Nira Deoghar; and secondly, the narrower issue of selecting a BOT investor for a particular project to work in line with the chosen design. The State Water Policy has laid emphasis on stake holder participation in the preparation of basin and sub basin plans and user participation in planning and development of water resources and operation of water infrastructure through their legally recognized organizations or service providers. The Authority is charged with ensuring stake holder participation (beneficiary public) when determining the water tariff criteria. The Respondent has already agreed that the GR dated 15-7-2003 needs revision in the light of later developments like the MWRRA and MMISF Acts. The GR broadly lays down the policy design of the BOT model and in the process of revision of the GR it would be in the interest of the Government to invite constructive participation from stake holders while designing a more updated PPP policy. As for the process of selection of the BOT investor this is an executive action and it is up to the Government to decide what kind of expertise it should invite to support its PPP initiatives. As long as the executive action is in line with the broader policy design and as long as it takes care to meet statutory requirements laid down in the relevant statutes like the MWRRA Act third party intervention may not be called for.

13. In view of the above, the Authority directs as under:-

- i) The Respondent MKVDC shall withdraw the advertisement within 15 days from the date hereof and shall not re-advertise until such time as the Government Resolution dated 15-7-2003 is revised.
- ii) MKVDC shall approach the State Government seeking revision in the Government Resolution dated 15-7-2003 addressing the various contradictions that need to be resolved in the light of the provisions of the subsequently enacted statutes.
- iii) The revised Government Resolution shall further lay down in clear terms the role of the Authority in the BOT process. This will include :
  - (a) Fixing criteria for selection of project and the developer;
  - (b) Vetting the revenue model;
  - (c) Fixing Entitlement of various users;



- (d) Allowing permissible changes in water tariff rates;
- (e) Vetting of revenue model finally selected for approval;
- (f) Determining whether the project is covered under the backlog regime prescribed by the Governor's Directives viz. State of Maharashtra (Special Responsibility of Governor for Vidarbha, Marathwada and the Rest of Maharashtra) Order, 1994;
- (g) The role of the High Level Committee vis-à-vis the Authority.

The Authority directs that the above orders shall be complied with within 3 months from the date hereof and MKVDC shall report to the Authority regarding the same.

With the above, the present Petition filed by Prayas stands disposed off.

Sd

Shri A. Sekhar  
Member (Engineering)

Sd

Shri A.K.D. Jadhav  
Member (Economy)

Sd

Shri Ajit M. Nimbalkar  
Chairman



Shri. S. V. Sodal  
Secretary