Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No.72 of 2010

Dated 27th April, 2011

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member

In the matter of:

Maharashtra State Power Generation Co. Ltd.,
A company incorporated under the
Companies Act, 1956 and having
its registered Office at Plot No. G-9,
Prakashgad, Bandra (East),
Mumbai-400 051. ... Appellant(s)

Versus

1. **Maharashtra Electricity Regulatory Commission,**
   a Commission constituted under the provisions
   of Electricity (Supply) Act, 1998 and having its office at
   13th Floor, Center No. 1,
   World Trade Centre, Cuffe Parade,
   Colaba, Mumbai-400 005.

2. **Chandulal Mohanlal Biyani**
   Gurukrupa Nagar, Parli Vainath
   Pin Code-431515

3. **Shrikant Chandrakant Patharkar**
   Khandoba Nagar, Ganeshpar,
   Parli Vajnath-431515

4. **Wakade Laxman Ishwarrao,**
   Behind Shrinath Chitra Mandir,
   Parli Vajnath-431515.

5. Advocate Jeevan Babasaheb Deshmukh
Deshmukh Lane, Ganeshpar
Parli Vajnath-431515.

6. Dhammanand Munde,
Bhimwadi, Parli Vajnath-431515.

7. Suresh V. Darade
Ganesh Xerox and General Stores,
Arun Tak, Complex Tower,
Parli Vajnath, Taluka Beed-431515

8. Prayas (Energy Group),
Amrita Clinic, Athwale Corner,
Deccan Gymkhana, Karve Road,
Pune-411 001.

9. Mumbai Grahak Panchayat,
Grahak Bhavan, Saint Dyaneshwar Marg,
Behind Cooper Hospital,
Vile Parle (W),
Mumbai- 400 056.

10. The General Secretary,
Thane Belapur Industrial Association,
Plot No. P-14, MIDC, Rabale Village,
P.O. Ghasoli,
Navi Mumbai-400 701.

11. Vidarbha Industrial Association,
1st Floor, Udyog Bhavan,
Civil Lines, Nagpur-440 001.

12. Maharashtra State Electricity Distribution Co. Ltd.,
Plot No. G-9, Prakashgad,
Bandra (East), Mumbai-400 051 ...Respondent(s)

Counsel for the Appellant(s): Ms. Deepa Chavan, Mr. Kiran Gandhi & Ms. Taruna A. Prasad

Counsel for the Respondent(s): Mr. Buddy A. Ranganadhan for R-1

JUDGMENT

HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

This Appeal has been filed by Maharashtra State Power Generation Company Limited challenging the Tariff order dated 21.10.2009 passed by Maharashtra Electricity Regulatory Commission (State Commission) for Unit no. 6 at Parli Thermal Power Station for part of FY 2007-08, FY 2008-09 and FY 2009-10. The State Commission is Respondent no. 1. Respondent nos. 2 to 11 are the Consumers/ Consumer representatives who appeared at the public hearings of the tariff proceedings. The Respondent no.12 is the distribution company.

2. The brief facts of the case are as under:

2.1. On 13.10.1997 the erstwhile Maharashtra State Electricity Board, the predecessor of the Appellant,

approved the proposal for development of the 250 MW Parli Extension Project (Unit no. 6). The Central Electricity Authority also accorded the techno economic clearance to the project, required under the Electricity (Supply) Act, 1948, on 9.7.1999.

2.2. Subsequently, on 14.1.2004, the Project implementation commenced with placement of order for main plant equipment on M/s. Bharat Heavy Electricals Ltd. (BHEL). On 8.7.2004, an agreement was entered into between predecessor of the Appellant, the Electricity Board and BHEL for design, engineering, manufacture, supply and commissioning of various equipments. The Agreements provided for commissioning of the project in 32 months from the date of Letter of Acceptance.

2.3. In June, 2005 the Appellant's Company was formed as a result of re-organisation of the erstwhile Electricity Board. In August 2005, the Tariff Regulations of the State Commission came into force.

2.4. On 1.11.2007 the Parli Unit no. 6 was commissioned after a delay of about 14 months with respect to the contractual data of commissioning agreed with BHEL. According to the Appellant, the delay was caused due to technical inadequacy and breaches on the part of BHEL, the principal supplier of the main plant.

2.5. Subsequently, the Appellant filed a petition before the State Commission for determination of tariff for Unit-6 at Parli.

2.6. On 21.10.2009, the Respondent no. 1/State Commission passed the impugned order disapproving

a part of Capital cost mainly on account of delay in commissioning of the project. Aggrieved by the said order dated 21.10.2009, the Appellant has filed this Appeal.

3. The Appellant has raised the following issues in the Appeal:

(i) Reason for delay in commissioning of the Parli Unit no. 6 and consequential disallowance of the capital cost;
(ii) Disallowance of actual capital cost incurred;
iii) Disapproval of Advance Against Depreciation (AAD);
iv) Deferment of Additional Capitalization;
v) Disallowance of Return on Equity on investments;
vi) Non-consideration of carrying cost.

4. On the above issues the Appellant has submitted as under:

4.1. The State Commission has considered the delay in commissioning of the Parli Unit no. 6 and attributing the entire delay to the Appellant, has wrongly rejected the claims of the Appellant for capital cost on the ground of delay. This is not justified as the materials placed before the State Commission established that M/s. BHEL alone was responsible for the time over-run. The effect of the impugned order is to penalize the Appellant for no fault of its own. The State Commission in its analysis and findings has not ruled any delay on account of actions or inactions on the part of or attributable to the Appellant.

4.2. The State Commission has erred in disallowing capital cost on account of overheads, initial spares and Interest During Construction (IDC) and disallowance of interest on loan due to pro-rata reduction in debt

component. The State Commission ought to have approved the capital cost based on the audited accounts, subject to prudence check. Against the claim of Rs. 1249.92 crores, the Respondent1/State Commission allowed only a sum of Rs. 1100.67 crores. The overheads have not been approved as per the audited accounts. Delay by M/s. BHEL led to an increase in the overheads in the project unit. Similarly, reduction in Interest During Construction (IDC) is also not justified and is contrary to the Regulations. Further the State Commission considered a normative pattern of draw down of loans and upfront infusion of equity to work out the normative IDC as against adopting IDC according to the audited accounts, subject to prudence check. The Tariff Regulations do not stipulate pattern of drawdown of loans during the implementation of the

Project. The State Commission has also restricted the cost of spares at 2.5% of original capital cost according to the Regulation 30.1 of the 2005 Regulations. These Regulations were not available at the time of placement of order. CEA in its Techno-Economic Concurrence had considered spares cost at 3%. The lower capital cost approved by the State Commission due to above reasons, has also resulted in difference of Rs. 222.35 crores between actual loan and the approved loan amount.

4.3. The State Commission has disapproved Advance Against Depreciation for Parli Unit no. 6 contrary to the Regulation 32.3 which allows the Advance Against Depreciation (AAD) to a generating station in case the actual amount of loan repayment exceeded the amount of depreciation during the financial year. The State Commission has wrongly denied the AAD on the

ground that depreciation for the Appellant's company as a whole was less than the actual loan repayment of the company. This approach is contrary to the Tariff Regulations.

4.4. The Appellant had provided details to the State Commission in its petition regarding additional capitalization which was not allowed contrary to the Regulation 13.2 on the ground that adequate details had not been furnished. The State Commission ought to have asked the Appellant for any additional information required for determining additional capitalization instead of deferring the same to final truing up.

4.5. The State Commission has disallowed capital cost to the tune of Rs. 81.29 crores on account of cost of common facilities whereas the development of these

facilities were critical for operation of Parli Unit No. 6. It is consequential that these facilities will also be used by Unit no. 7 which was under construction at the time of determination of tariff for unit no. 6. The benefits of such common facilities would eventually reduce the cost of Unit no. 7, the benefit of which will be passed on to the consumers. The disallowance of the capital cost of these common facilities will result in servicing of such loans from internal accruals leading to financial impact due to increase in Working Capital loans. The Appellant will also be unjustifiably denied eligible return on equity.

4.6. The Appellant has been charging provisional tariff approved by the State Commission in the APR order for 2007-08 which was lower than the approved tariff. The State Commission has not permitted the carrying

costs on such deferred true up amount, which is wrong.

5. Mr. Buddy A. Ranganadhan, learned counsel for the State Commission has argued strenuously defending the findings of the State Commission on the above issues. He contended that the cost overrun of the project due to delay in execution can not be passed on to the consumers. He further submitted that BHEL is an agent of the Appellant who has to shoulder the responsibility of any act or omission of its agent and only the capital cost which has been prudently incurred by the Appellant can be approved by the State Commission.

5.1. On the other issues Shri Buddy A. Ranganadhan relied on the Regulations and findings of the State Commission in the impugned order.

6. On the basis of the rival contentions of the parties, we frame the following questions for consideration:

i) Was the State Commission correct in attributing the entire delay in commissioning of the Parli Unit no. 6 and disallowing the entire time overrun related cost to the Appellant without considering the delays and shortcomings on the part of the main supplier, M/s. BHEL?

ii) Was the State Commission right in rejecting part of capital cost due to overheads, IDC, cost of initial spares and interest on loan?

iii) Has the State Commission erred in considering Advance Against Depreciation company-wise instead of station-wise?

iv) Was the State Commission correct in deferring the Additional Capitalistion on the ground of inadequate data?

v) Was the State Commission right in disallowing the part of cost of common facilities of Parli Unit no. 6 and Unit no. 7?

vi) Should the State Commission have allowed carrying cost on the differential of provisional tariff allowed for the FY 2007-08 and the final tariff?

7. The first issue is regarding cost overrun due to delay in commissioning of the Unit.

7.1. According to the learned counsel for the Appellant the delay was solely on account of BHEL and the State Commission has not been able to point out any act of omission or commission by the Appellant. On the other hand, the learned counsel for the State

Commission has contended that the Appellant can not absolve itself of the responsibility by passing on the blame on its contractor/agent and the project cost overrun due to delay in execution of the project could not be passed on to the consumers.

7.2. The relevant Regulation 30.1 of the Tariff Regulations, 2005 is reproduced below:

> *" 30.1 Subject to prudence check by the Commission, the actual expenditure incurred on completion of the project shall form the basis for determination of the original cost of project. The original cost of project shall be determined based on the approved capital expenditure actually incurred up to the date of commissioning of the generating station and shall include capitalized initial spares subject to following ceiling norms as a percentage of the cost as on the cut- off date:*
>
> *(i) Coal-based/lignite-fired generating stations – 2.5%."*

Thus the capital cost has to be determined on the basis of actual expenditure incurred on completion of the project subject to prudence check by the State Commission. The dictionary meanings of the word 'prudent' are "sensible and careful when you make judgments and decisions and avoiding unnecessary risk". The prudence check of the capital cost has to be looked into considering whether the Appellant has been careful in its judgments and decisions while executing the project or has been careful and vigilant in executing the project.

7.3. The Tariff Regulations of the State Commission do not specify any benchmark norms for prudence check of the capital cost. The Central Commissions Tariff Regulations, 2009 for prudence check of capital cost

provide for the following:

> "*(2) The capital cost admitted by the Commission after prudence check shall form the basis for determination of tariff:*
>
> *Provided that in case of the thermal generating station and the transmission system, prudence check of capital cost may be carried out based on the benchmark norms to be specified by the Commission from time to time:*
>
> *Provided further that in cases where benchmark norms have not been specified, prudence check may include scrutiny of the reasonableness of the capital expenditure, financing plan, interest during construction, use of efficient technology, cost over-run and time over-run, and such other matters as may be considered appropriate by the Commission for determination of tariff".*

The Central Commission has also not laid down any benchmark norms for prudence check, but its Regulations only indicate the area of prudence check including cost overrun and time overrun. The State Commission has not examined the reasons for delay in commissioning of the project and attributed the entire time overrun related cost with respect to the contractual schedule agreed with BHEL to the Appellant. In our view, this is not prudence check. In the absence of specific regulations, we will now find answer to the question raised by us relating prudence check of time overrun related costs.

7.4. The delay in execution of a generating project could occur due to following reasons:

i) due to factors entirely attributable to the generating company, e.g., imprudence in selecting the contractors/suppliers and in

executing contractual agreements including terms and conditions of the contracts, delay in award of contracts, delay in providing inputs like making land available to the contractors, delay in payments to contractors/suppliers as per the terms of contract, mismanagement of finances, slackness in project management like improper co-ordination between the various contractors, etc.

ii) due to factors beyond the control of the generating company e.g. delay caused due to force majeure like natural calamity or any other reasons which clearly establish, beyond any doubt, that there has been no imprudence on the part of the generating company in executing the project.

iii) situation not covered by (i) & (ii) above.

In our opinion in the first case the entire cost due to time over run has to be borne by the generating company. However, the Liquidated Damages (LDs) and insurance proceeds on account of delay, if any, received by the generating company could be retained by the generating company. In the second case the generating company could be given benefit of the additional cost incurred due to time over-run. However, the consumers should get full benefit of the LDs recovered from the contractors/suppliers of the generating company and the insurance proceeds, if any, to reduce the capital cost. In the third case the additional cost due to time overrun including the LDs and insurance proceeds could be shared between the generating company and the consumer. It would also be prudent to consider the delay with respect to some benchmarks rather than depending on the provisions

of the contract between the generating company and its contractors/suppliers. If the time schedule is taken as per the terms of the contract, this may result in imprudent time schedule not in accordance with good industry practices.

7.5. In our opinion, the above principles will be in consonance with the provisions of Section 61(d) of the Act, safeguarding the consumers' interest and at the same time, ensuring recovery of cost of electricity in a reasonable manner.

7.6. Having laid down the principles for prudence check, let us examine the facts of the present case. The relevant extracts of the impugned order dated 21.10.2009 are reproduced below:

"iv. Reasons for Delay in Commissioning

MSPGCL submitted that it had considered an optimistic target of commissioning the Unit in 32 months from date of award of contract to M/s Bharat Heavy Electricals Limited (BHEL); however, besides the other factors, delay in sequential supplies of material by M/s. BHEL served as a major cause in the delay. This led to delay in commissioning of the Unit from its earlier envisaged target of September 2006. MSPGCL therefore, imposed Liquidated Damages of Rs. 49 crore on M/s. BHEL as on February 2008, for causing the delay in commissioning of the Unit. MSPGCL submitted that the final amount of Liquidated Damages would be finalized in due course of time".

"59………Since this increase could be justified on account of the time gap of around 4.5 years between the CEA approval and the Order

placement, the Commission has considered the Order placement cost as the base hard cost, for the purpose of arriving at capital cost of the project. This itself works out to Rs. 4.23 crore per MW for a brown-field expansion project like Parli Unit 6, and if the IDC is considered, then the effective Order cost per MW works out to be even higher" .

"65. As regards the contract price variation, the Commission observes that the same is within the 20% price variation cap stipulated in the contract. At the same time, it is true that the price variation could have been lower, had the project been completed on time. However, the main reason for increase in completed cost with respect to contract order value is on account of increase of overheads".

"77. As regards the impact of time over run on account of delay in the project commissioning,

MSPGCL has considered the entire IDC incurred till actual COD of the Project and has proposed to reduce the same by the Liquidated Damages levided on the Contractors for delay in project. The Commission agrees with the views of some of the stakeholders raised during the hearing that the burden of increase in IDC due to delay in Project should not be loaded to the consumers. The Commission has therefore, re-computed the IDC considering original schedule and original phasing of expenditure. The Commission obtained the detail of the phasing of expenditure (scheduled and actual) and accordingly re-computed the IDC based on the original phasing of expenditure as per the original schedule of the Project".

7.7. Admittedly, there is no dispute regarding capital cost incurred by the Appellant. We have noticed that

the State Commission has not gone into the reasons for delay in commissioning of the project and has proceeded with attributing the entire delay and cost of such delay on the Appellant, except allowing the Appellant to retain the Liquidated Damages. The State Commission has also not considered the reasons for delay as submitted by the Appellant in its petition.

7.8. Let us now examine the matter in light of the principles laid down by us in para 7.4 above. It has been indicated by the Appellant that against the Notice Inviting Tender for the main plant only one bid was received, viz. from BHEL. Thus there was no alternative available to the Appellant in so far as placement of order for main plant is concerned presumably due to lack of competition in manufacturing of main plant equipment at that point of time. The agreement with the BHEL provided for a

reasonable time schedule for completion of the project as also a reasonable clause for Liquidity damages. Thus there seems to be no imprudence on the part of the Appellant in selecting the main equipment supplier, which happens to be a major state owned equipment manufacturing company and in the terms & conditions of the agreement.

7.9. We have gone through the documents in the form of letters from the Appellant to BHEL indicating the delay in supply and other shortcomings on the part of BHEL and claiming there has been no delay on account of providing inputs by the Appellant to BHEL. On the other hand, there is a letter from BHEL to the Appellant, though accepting some delays on its part, also alleging delay on the part of the Appellant in providing inputs with reference to contractual schedule. However, the Appellant in its reply to BHEL

has indicated that even after handing over the inputs, BHEL could not immediately commence the work and took more time in completing the activities. Besides main plant equipment, there is no mention about commissioning of the Balance of Plants which are also major components of the plant. We have also noticed inordinate delay in stabilization of the unit after commissioning.

7.10. It is also argued by the Appellant that BHEL being the only major supplier of the equipment in the country at that time could not cope up with the targetted schedules due to heavy orders. Delays were experienced not only at Parli Unit 6 but also at other projects. In our opinion, this appears to be the case of sudden spurt in execution of the Power Projects in the country and consequential increase in demand of

equipments and the gestation period required by the industry in enhancing the manufacturing capacity.

7.11. Considering all these facts and documents submitted before this Tribunal, though it is evident that there was delay on the part of BHEL in supply and commissioning of the main plant, it is not established beyond doubt that the entire delay was due to the reasons beyond the control of the Appellant.

7.12. In view of above, we feel that this case falls under category (iii) described in para 7.4. Accordingly, following the principles of prudence check laid down by us, the cost of time over run has to be shared equally between the generating company and the consumers. Admittedly, there is no enhancement in cost of the contract price of the equipment as no price variation escalation was permissible to BHEL beyond

the schedule date of completion of the Project according to the terms of the agreement. The impact of time over run beyond the contractual schedule is only on IDC and overhead costs. Accordingly, the same have to be shared between the generating company and the consumers. Excess IDC and overhead costs for time overrun from scheduled date of commissioning to actual date of commissioning has to be worked out on prorate basis with respect to total actual time taken in commissioning of the unit. 50% of the excess IDC and overhead costs will have to be disallowed. Deduction on account of 50% of the Liquidity Damages received by the Appellant from its suppliers/contractors has also to be allowed from the capital cost, to give due credit for LDs to the consumers. This issue is answered accordingly.

8. The second issue is regarding rejection on part of capital cost. The various components of capital cost denied by the State Commission are being dealt with in the following paras:

8.1. The State Commission has rejected part of overheads. According to the Appellant the overheads pertain to expenses incurred by head office and other units which need to be recovered as revenue expenses in the ARR. However, a part of such revenue expenses is capitalized in the project cost of the upcoming stations/capital extensive works of existing stations.

8.2. The State Commission in its order has noticed substantial increase in overheads which included cost of Head Office supervision charges (salary and other establishment expenses), employees salary and other establishment expenses at project site, construction

power charges, etc. The State Commission has observed that the overheads according to Techno Economic Clearance (TEC) of CEA is Rs. 76.49 crores against the total approved cost of Rs. 946 crores i.e. 8.09% of total cost excluding Interest During Construction (IDC) and Financing Charges (FC). Accordingly, the State Commission has allowed the overheads @ 8.09% of total cost of the project of Rs. 1249.92 crores.

8.3. We find that there are no specific regulations for determining the overhead cost. Overhead of 8.09% of total project cost was not a CEA norm but a derived figures from the elements of capital cost approved by the CEA in its Techno-economic clearance. The State Commission has not determined the project cost based on CEA's approval and has taken the order placement cost as the base cost. Thus, it would not be correct to

determine norms of overhead cost from CEA approved cost.

8.4. There is no dispute that the total overhead cost as claimed by the Appellant has been incurred. As pointed out by the Appellant a part of total Operation and Maintenance (O&M) cost are booked to the upcoming projects and the same is excluded from the O&M expenses of the existing power plants. Thus if the expenses booked to the upcoming project are not allowed in O&M cost of existing plants, the same has to be allowed in the capital cost of upcoming projects. However, a part of this overhead cost is on account of time over run of the project. Therefore, a part of the overhead cost on account of delay in commissioning of the project may have to be disallowed on the principles as decided in the first question. Accordingly, the State Commission is directed to determine the overhead cost

for the time overrun from the scheduled date of commissioning of the project on pro-rata basis with respect to actual time taken in completion of the project. 50% of the excess overheads due to time over run calculated thus may be disallowed.

8.5. As regards IDC, the Appellant has submitted that the loan amount has reduced due to lower approved capital cost, on the other hand the State Commission has considered a normative pattern for draw-downs of loans and upfront infusion of certain part of the overall equity funding instead of actual pattern for working out the normative IDC. Ms. Deepa Chavan, learned counsel for the Appellant has argued that economic scenario and credit worthiness and various factors at the time of procurement of loans are vital elements which necessitate deciding the drawdown of loans and equity infusion. The Regulations also do not stipulate

pattern of drawdown of loans during the implementation of the project. This would also amount to micro management of the utility.

8.6. The State Commission has computed the IDC considering the original schedule and original phasing of expenditure. Regarding drawdown of loans and equity infusion the State Commission in the impugned order has recorded as under:

> *"79. As per the prudent industry practice, any project is funded in the following pattern:*
>
> - *Certain proportion of Upfront Equity (30% or 50%)*
> - *Similar proportion of Upfront Debt*
> - *Debt and Equity in proportion to Debt:Equity Ratio*
>
> *In case the project is initially funded with debt and equity is infused at later stage to repay the debt, the IDC component will increase as compared to proportionate debt and equity funding".*

We agree with the State Commission that the infusion of debt & equity has to be more or less on pari passu basis as per normative debt equity ratio. However, the increase in IDC due to time over run has to be allowed only according to the principles laid down in para 7.4 above. Accordingly, the State Commission is directed to re-determine the IDC for the actual period of commissioning of the project and then work out the excess IDC for the period of time over run on a pro-rata basis and limit the disallowance to 50% of the same on account of excess IDC. This question is answered accordingly.

8.7. As far as cost of initial spares is concerned, the State Commission has restricted the same to 2.5% of the capital cost according to Regulation 30.1. On the other hand, the Appellant wants it to be 3%, according to the TEC of CEA. According to the Appellant when

the order was placed on 14.1.2004, the Regulations, 2005 were not in place.

8.8. We find substance in the arguments of the Appellant. It is true that the tariff has been determined according to the 2005 Regulations. However, the State Commission has powers to relax under the provisions of the Regulations. When the Appellant placed the orders, there were no regulations and it could be guided only by the CEA's TEC which allowed capital spares @ 3% of capital cost. Admittedly the Appellant has incurred the cost of capital spares. Looking into the circumstances of the case, it is fit case where the State Commission may exercise its power to relax the norms. Accordingly, we direct the State Commission to consider the actual cost of initial spares subject to maximum of 3% of the approved capital cost.

8.9. As regards disallowance of interest on loan, we have directed the State Commission to re-determine the capital cost according to our findings on cost of spares, overheads, etc. Accordingly, the debt and interest on debt will have to be re-determined. This question is answered accordingly.

9. The next issue is Advance Against Depreciation.

9.1. This issue has been dealt with in details by this Tribunal in Judgment dated 27th April, 2011 in Appeal no. 191 of 2009 in the matter of Maharashtra State Power Generation Co. Ltd. vs. Maharashtra Electricity Regulatory Commission & Ors. The relevant extracts are as under:

> *"12.5. Let us now examine the above contentions of the Respondent no. 1 in seriatim.*

i) In the entire tariff exercise the tariff is being determined station-wise. All the components of tariff are determined for each station. The availability at which a generating station recovers its full fixed cost is also determined station-wise. Regulation 32.3 also provides for AAD specific to a generating station. Therefore, it is logical that AAD is also allowed station-wise and not company as a whole. AAD results in front loading of the tariff but the balance depreciation after repayment of loan is appropriately adjusted for AAD so that the total depreciation allowed to a generating station remains the same. If the Regulations provide for AAD for a generating station, it should not be denied on some other grounds which do not form part of the Regulation.

ii) The second contention of the Respondent No. 1 is that the State Commission adopted similar approach for AAD in earlier tariff order. In our opinion each tariff proceeding is a separate and distinct cause of action. Failure

of the Appellant to challenge an issue in earlier tariff order does not bar the Appellant to challenge that issue in a subsequent tariff order.

iii) According to the Appellant same generic loans were taken by the erstwhile Maharashtra State Electricity Board prior to its reorganization which have been allocated station-wise. In our opinion the Appellant's contention of allocating such loans station-wise is the correct approach. The station-wise interest on loan and tariff of the generating stations of the Appellant is also being determined on the basis of such allocated loans and specific loans taken for a generating station. Thus actual repayment of such allocated loans can also be apportioned power station-wise.

In view of above we decide this issue in favour of the Appellant and direct the State Commission to determine station-wise AAD".

9.2. In view of above we decide this issue in favour of the Appellant. The State Commission is accordingly directed to re-determine station-wise AAD, as per its Regulations.

10. The next issue is deferment of Additional Capitalization.

10.1. According to Ms. Deepa Chavan, learned counsel for the Appellant, even though data sought by the Respondent-1/State Commission had been provided it deferred the consideration of additional capitalization on certain expenditure till the final truing up which is contrary to the principles of Section 61 of the 2003 Act and National Tariff Policy. On the other hand the learned counsel for the State Commission has maintained the position that the Appellant did not submit detailed scope of work along with estimates and the claim of Additional

Capitalization would be considered at the time of final true-up.

10.2. Tariff Regulation 30.2 provides for additional capitalization for inclusion in the original cost of project, subject to prudence check. In our opinion, the Additional capitalization should be considered expeditiously by the State Commission as the delay would only add IDC or carrying cost besides delaying return on equity to the Appellant. Accordingly, the Appellant is directed to submit the desired information to the State Commission and the State Commission would consider it at the earliest. This issue is answered accordingly.

11. The next issue is disallowance of return on equity on investments made on the common facilities for unit nos. 6 and 7 at Parli .

11.1. According to the Appellant, construction and development of common facilities like land, approach road, coal handling plant, raw water pump reservoir, chimney, fuel handling and storage system, railway siding, etc; were critical for operation of Unit no. 6. It is consequential that the Appellant is constructing another unit and such facilities would be shared by the subsequent unit also. According to Ms. Deepa Chavan denial of servicing of the capital cost is leading to increase in working capital loans as also deprivation of return on equity. According to Shri Buddy Ranganadhan, the learned counsel for the State Commission all costs common to number of units have necessarily to be apportioned amongst the units.

11.2. Provision of common facilities is done mainly for optimum utilization of resources including land,

benefit of which is ultimately passed on to the consumers. There could be two approaches for capitalization of cost of common facilities. In the first approach, the common facilities essential for operation of the first unit could be loaded to this unit. This will ensure timely servicing of capital cost incurred and eventually reduce the capital cost of the subsequent unit including the IDC on deferred capital cost of common facilities till the commissioning of the subsequent unit. The second approach is to apportion the total cost to each unit. In this case the generating company will be entitled to IDC on the deferred capital cost of common facilities till the commissioning of the subsequent unit. There is, however, no specific Regulation on apportioning of cost of common facilities. In our opinion, where the gap between two generating units is more, it would be prudent to allow

cost of common facilities essential for commissioning of the first unit alongwith the capital cost of the first unit.

11.3. In the present case common facilities have been created for units 6 and 7 at Parli which have been executed one after another. Order for unit 6 was placed first followed by order for unit 7 after sometime. The commissioning of some of the common facilities was essential for operation of unit no. 6 and the same facilities will be used by Unit no. 7 subsequently. In our opinion, it would be prudent to allow capitalization of such common facilities which were essential for operation of Unit no. 6 in the capital cost of Unit no. 6. This will result in reduction of capital cost of Unit no. 7 on account of common facilities and IDC on the same and also ensure servicing of capital cost incurred by the Appellant for common facilities which have been

commissioned along with Unit no. 6. Accordingly, the State Commission is directed to allow capitalization of only such common facilities, commissioning of which were essential for commissioning of Unit no. 6, in capital cost of Unit no. 6.

12. The last issue is non consideration of carrying cost due to difference in provisional tariff and final tariff.

12.1. According to the learned counsel for the Appellant, the State Commission ought to have permitted carrying cost. According to Mr. Buddy Ranganadhan, the learned counsel for the State Commission if the determination of tariff has been done by the impugned order, there can be no question of any entitlement of the generator for any period prior thereto. The carrying cost, could, if at all, be awarded

only when the generator is held to be entitled to a cost and has been wrongly deprived of such cost. The entitlement of a tariff flows from the impugned order. Merely because the final tariff is higher than the provisional tariff earlier, it would not mean that the Appellant has been deprived of same tariff.

12.2. The Appellant had submitted the petition on 23.5.2008 for approval of tariff of Parli Unit 6 for the part of the year 2007-2008 and also for 2008-2009 and 2009-10 and also prayed for allowing to recover the differential tariff from the distribution company for energy supplied to them from 1.11.2007, the commissioning date of the unit. The State Commission has by the impugned order determined the tariff w.e.f. 1.11.2007. Accordingly, the Appellant is entitled to the approved tariff w.e.f. 1.11.2007. The State Commission in the impugned order has not given

any reason for not allowing carrying cost. In our opinion, the Appellant is entitled to carrying cost for difference between the final tariff and provisional tariff charged. In case the final tariff had been lower than the provisional tariff, the consumers would have been entitled to refund of carrying cost by the Appellant. On the same analogy if the final tariff is higher than the provisional tariff, the Appellant is also entitled to carrying cost. Accordingly, this issue is answered in favour of the Appellant.

13. <u>Summary of our findings</u>

13.1. The first issue is regarding disallowance of time over run related costs attributable to the Appellant. According to the Regulations the actual expenditure incurred on completion of project, subject to prudence check shall form the basis for determination of the original capital cost of the

Project. The Tariff Regulations of the State Commission do not specify any benchmark norms for prudence check of the capital cost. However, the State Commission has not gone into the reasons for the delay in commissioning of the project and attributed the entire time overrun cost of the Appellant. In our opinion, this is not prudence check. In the absence of the benchmark norms for prudence check, we have laid down the principles of prudence check of time overrun related costs in para 7.4 above. After detailed examination we have come to conclusion that though it is evident that there was delay on part of the BHEL in supply and execution of main plant but it is not established beyond doubt that the entire delay was for reasons beyond the control of the Appellant. Accordingly, it is held that the 50% of the excessive cost incurred

due to time overrun, in overheads and IDC, has to be disallowed to the generating company.

13.2. The second issue is regarding rejection on part of overheads, IDC, initial spares and interest on loan.

i) **There is no dispute that the entire overhead cost as claimed by the Appellant has been incurred. A part of the overhead cost is on account of delay in execution of the project, 50% of which may have to be disallowed according to the principles laid down by us. Accordingly, the State Commission is directed to determine the excessive overheads cost for the period of delay on pro-rata basis with respect to actual time taken in completion of the Project. 50% of the overheads due to time**

overrun thus calculated may be disallowed.

ii) As regards IDC, we agree with the State Commission that infusion of equity and debt has to be more or less on pari passu basis as per normative debt equity ratio. However, increase in IDC due to time overrun has to be allowed only according to the principles laid down by us in para 7.4. Accordingly, the State Commission is directed to re-determine the IDC for the actual period of commissioning of the project on the principles of pari pasu deployment of equity and debt and then work out the excess IDC for the period of time overrun on a pro rata basis and limit disallowance to 50% of the same from the total IDC.

iii) As regards, cost of initial spares, we notice that the order for initial spares was placed before the formation of the Regulations and the Appellant could be guided by the TEC accorded by CEA which provided for initial spares @ 3% of cost as against 2.5% specified in the State Commission's Regulations notified subsequently. Accordingly, we direct the State Commission to consider the actual cost of initial spares subject to maximum of 3% of the approved capital cost.

iv) As regards disallowance of interest on debt, we have already directed the State Commission to re-determine the capital cost according to our findings.

Accordingly, the debt and interest on debt will also be re-determined. This question is answered accordingly.

13.3. The next issue is Advance Against Depreciation. This issue has already been decided by this Tribunal in its Judgment dated 27th April, 2011 in Appeal no. 191 of 2009 in the matter of Maharashtra State Power Generation Co. Ltd. vs. Maharashtra Electricity Regulatory Commission & Ors. which would apply to the present facts of this case. Accordingly, the State Commission is directed to re-determine station-wise AAD as per its Regulations by following the Judgment of this Tribunal referred to above.

13.4. The next issue is deferment of Additional Capitalization. In our opinion, the Additional

capitalization should be considered expeditiously by the State Commission. Accordingly, the Appellant is directed to submit the desired informations to the State Commission and the State Commission would consider it at the earliest.

13.5. The next issue is disallowance of return on equity on investments made on the common facilities for unit nos. 6 and 7 at Parli. We have noticed that the commissioning of some of the common facilities was essential for operation of unit no. 6 and the same facilities will be used by Unit no. 7 subsequently. In our opinion, it would be prudent to allow capitalization of such common facilities commissioning of which were essential for operation of Unit no. 6 in the capital cost of Unit. Accordingly, the State Commission is directed to allow capitalization of only such

common facilities which were essential for commissioning of Unit no. 6.

13.6. The last issue is regarding carrying cost due to difference in provisional tariff and final tariff. The State Commission has determined the tariff w.e.f. 1.11.2007. Accordingly, the Appellant is entitled to the approved tariff w.e.f. 1.11.2007. In case the final tariff had been lower than the provisional tariff, the consumers would have been entitled to refund of carrying cost by the Appellant. On the same analogy if the final tariff is higher than the provisional tariff, the Appellant is also entitled to carrying cost. Accordingly, this issue is answered in favour of the Appellant.

Conclusion

14. In view of above, the Appeal is partly allowed and the impugned order is set aside to the extent indicated above. The State Commission is directed to give effect to the findings in this Judgment at the earliest. No order as to cost.

15. Pronounced in the open court on this ***27th day of April, 2011***.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

REPORTABLE / NON-REPORTABLE

vs