Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.57of 2012

Dated: 18th January 2013
Present : HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

In the Matter of:
M/s. Maharashtra State Power Generation Company Limited
Prakashgad,
Plot No.G-9, Bandra (East),
Mumbai-400 051

…Appellant

Versus

1. **Maharashtra Electricity Regulatory Commission**
13th Floor, Centre No.1,
World Trade Centre,
Cuffe Parade, Colaba,
Mumbai-400 005

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

3. **Prayas (Energy Group)**
Amrita Clinic, Athvale Corner,
Lakdipool, Karve Road Junction
Deccan Gymkhana, Karve Road,
Pune-411 004

4. Maharashtra Grahak Panchayat
Grahak Bhavan, Sant Dynaneshwar Marg,
Behind Cooper Hospital (Vile Parle West)
Mumbai-400 056

5. The Vidarbha Industries Association
1st Floor, Udyog Bhawan,
Civil Line, Nagpur-440 001

6. Thane Belapur Industries Association
Rabale Village, Post-Ghansoli,
Plot P-14, MIDC
Navi Mumbai-400 701

…..Respondent(s)

Counsel for the Appellant(s) : Mr. Sanjay Sen
Mr. Hemant Singh
Mr. Anurag Sharma
Ms. Shikha Ohri
Ms. Surbhi Sharma

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

J U D G M E NT

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

1. Maharashtra State Power Generation Company Limited has presented this Appeal as against the impugned orders dated

30.3.2011 and 30.11.2011 passed by the Maharashtra Electricity Regulatory Commission.

2. The short facts which are required to be considered for deciding the issues in this Appeal are as follows:

(a) M/s. Maharashtra State Power Generation Co. Ltd, the Appellant Company is a Generating Company. Maharashtra Electricity Regulatory Commission (State Commission) is the First Respondent. Maharashtra State Electricity Distribution Company Limited (MSEDCL), is the Second respondent.

(b) The Appellant Company, being a Generating Company executed a Power Purchase Agreement on 1.4.2009 with the Distribution Company (R-2) for selling its power from the existing projects of the Appellant on long term basis.

(c) During the course of approval proceedings, the State Commission directed the Appellant, the Generating Company as well as the Distribution Company (R-2) to execute an Addendum to the existing Power Purchase Agreement for any fresh increase in the quantum of power to be supplied on account of development of the new power

stations of the Appellant. Accordingly, the Appellant and the Distribution Company (R-2), on 24.12.2010 executed an addendum for certain upcoming projects in the Power Purchase Agreement.

(d) Thereupon, on 28.12.2010 both the Appellant and the Distribution Company (R-2) jointly filed a Petition before the State Commission for the approval of the Addendum dated 24.12.2010 to the Power Purchase Agreement.

(e) The State Commission formed a Committee comprising the Members representing the State Commission as well as the Representatives of the Appellant and the Distribution Company in order to study and provide recommendations for approval of the projects mentioned in the Addendum.

(f) Accordingly, the Committee held a discussion. Ultimately it filed a report giving the eligibility criterion for inclusion of the projects mentioned in the Addendum to the Power Purchase Agreement.

(g) The State Commission ultimately passed the impugned order on 30.3.2011. In the said impugned order, the State Commission granted

approval only to some projects of the Appellant but it denied approval to other projects namely Paras 5, Nasik-6 and Uran 9 & 10 projects and also the 3 other projects which are envisaged to be developed under the Joint Venture Public-Private route. Besides this, the State Commission directed the Appellant to incorporate penalty clause in the PPA for addressing a situation where the distribution company(R-2) fails to buy contracted power or the generating company(Appellant) fails to supply contracted power as per the mutually agreed schedule and also have back to back penalty clause in their agreements with the contractors.

(h) On being aggrieved over this order, the Appellant preferred a Review Petition on 15.5.2011 before the State Commission for reconsideration. The State Commission by the order dated 30.11.2011 disposed of the Review Petition modifying the main order by granting approval to some projects but denying the approval to Paras 5 project and the 3 other projects proposed to be developed in Joint Venture route. However, the State Commission did not reconsider the directions issued with regard to incorporation of back to back

penalty clause as prayed for by the Appellant in the Review Petition. Hence, this present Appeal.

3. In this Appeal, the following issues have been raised by the Appellant:

(a) The eligibility criterion of actual possession of 50% land needs to be modified since the same is arbitrary and not in sync with the existing regulatory framework/mechanism.

(b) Approval to Paras 5 Thermal Power Station was wrongly denied for inclusion in the PPA Addendum.

(c) Proposed Joint Venture projects, with a strategic investor, were wrongly left out of the PPA Addendum on account of the requirement of creation of a separate corporate entity.

(d) Direction of the State Commission to incorporate back to back penalty clauses in relation to projects for which contracts have already been placed with the equipment supplier, M/s. BHEL, is not warranted.

(e) Certain other observations made by the State Commission are out of context and not relevant for

the purpose of exercise of regulatory jurisdiction for approval of the PPA.

4. Elaborating these issues, the learned Counsel for the Appellant would make the following submissions:

(a) The **First Issue** is the eligibility criterion of actual possession of 50% land needs to be modified. The Appellant entered into Power Purchase Agreement on 1.4.2009 with the Distribution Company (R-2) for supply of power from different power plants of the Appellant. Thereupon, as directed by the State Commission, the Appellant executed an Addendum dated 24.12.2010 for inclusion of new projects totalling to 26 generating Units in the Power Purchase agreement. Then the State Commission formed a Joint Committee to go into the issues and make recommendations. Accordingly, the recommendations were made. The State Commission by the order dated 30.3.3011 granted approval only for the 12 projects out of 26 projects. Therefore, the Appellant preferred a Review Petition seeking approval for the projects Uran 9 & 10, Nasik-6, Paras 5 and three other projects having 10 Units under the Joint Venture route. The State

Commission passed the final order in the Review Petition on 30.11.2011 by wrongly applying the criterion of actual possession of 50% of land for approval of a project under the Power Purchase Agreement. Thus, the State Commission denied the inclusion of the Project Paras 5 and other projects proposed to be developed under the Joint Venture route. One of the eligibility criterion is that the actual possession of the 50% of the land. This is arbitrary. When the Appellant has taken steps for land acquisition in accordance with the law, the Respondent Commission cannot impose conditions with regard to actual possession of 50% land area. Even though the conditions of actual possession of 50% of land had originally been accepted in the guidelines for procurement of power under tariff based bidding process envisaged by the Central Government, but later it was amended by removing the said conditions and replacing by the only condition to submit Section 4 notification, in case the land is being acquired under Land Acquisition Act,1894 or furnishing documentary evidence in the form of certificate by concerned and competent revenue authority for allotment/lease/ownership/vesting of

at least 33% of the area of the land. Therefore, when the condition of actual possession of 50% of land is nowhere envisaged, the State Commission cannot arbitrarily force the Appellant to adhere to the said requirements. In fact, a resolution was passed on 31.3.2012 deciding to reduce the capacity of Paras 5 from 660 MW to 250 MW. In view of the above, the State Commission ought to have passed the impugned review order taking into consideration that there is no regulatory basis for putting for the conditions of actual possession of the 50% of the land.

(b) The **Second Issue** is Denial of approval to Paras 5 Thermal Power Station for inclusion in the PPA. The one of the main reasons for the denial of approval to Paras 5 was the requirement of 50% of the actual possession of land. The said condition was not at all required for exercising the regulatory jurisdiction at the state of Power Purchase Agreement approval. In any event by the board's resolution dated 31.3.2012, the Appellant decided to reduce the capacity of Paras 5 from 660 MW to 250 MW. This was immediately conveyed to the Distribution Company. By reduction of the capacity, the land

which is required for the said reduced capacity namely 250 MW, 100% land is in possession with the Appellant. Therefore, this Tribunal may give liberty to the Appellant to again approach the State Commission for the approval of the said project for the reduced capacity of 250 MW.

(c) The **Third Issue is** that the Proposed Joint Venture projects, with a strategic investor, were wrongly left out of the Addendum to the PPA on account of the requirement of creation of a separate corporate entity. The Appellant informed the State Commission regarding the future public/private partnership with the strategic investors envisaged for the above project. However, the State Commission refused to consider the same for PPA approval in the impugned order dated 30.3.2011 on the ground that with regard to the projects coming up for Joint Venture Public/Private Route, such projects have to be treated differently as per the guidelines of the Government of India. The State Commission cannot deny the approval to a project solely on the reasoning that in future the same may be developed under the public/private route. To develop a new project under public/private route is

a corporate, and a policy decision which the Appellant is entitled to take under its rights guaranteed by the Companies Act, 1956. Further, in the Review Order dated 30.11.2011, the State Commission has given reasons for denying approval to the projects pending announcement fo the policy decision with Government of Maharashtra with regard to the Joint Venture route. By giving these reasons, the State Commission is confusing the Power procurement through competitive bidding of a distribution licensee with the issue of the Appellant developing projects with a strategic investor.

(d) The **Fourth Issue** relates to the Direction of the State Commission to incorporate back to back penalty clauses in relation to projects for which contracts have already been placed with the equipment supplier, M/s. BHEL. The main purpose of the State Commission in proposing to back to back penalty on the developer was to ensure that the distribution licensees get the power as per the committed schedule. Levy of penalties in this case ensures that the developer is under a constant pressure to expedite the commissioning of the generating stations. Failure

to bring in the generating capacity in time will mean that the developer bears some financial burden for non adherence to the committed schedule. In fact, this Tribunal in Appeal No.72 of 2010 has created a matrix for allocating the risk based on the factual position and not based on any back to back penalty. But, the State Commission has not followed this judgment rendered by this Tribunal when dealing with the issue of allocation risk.

(e) The **Fifth Issue** is relating to certain other observations made by the State Commission which are out of context and not relevant for the purpose of exercise of regulatory jurisdiction for approval of the PPA. The observation of the State Commission regarding efficient operation of the new plants is misplaced. No power utility under a normative regime would like to perform below the expected benchmarks since the same would lead to a financial loss to the utility. Therefore, the State Commission cannot cite the reasons of public interest since the same is taken care of at the stage of tariff determination powers. Any purported future inefficiency in operations cannot stop a generating company from entering

into or seeking approval of a PPA. The Petition filed by the Appellant before the State Commission was not for any performance appraisal. Therefore, the comments made by the State Commission have no role for approving a PPA which is solely on the ground realities. There are other Regulations in place to deal with the issue of non performing units and such comparison ought to have done in a relevant context and not in a manner as has been done in the present case. The observation with regard to delay is out of the context and irrelevant for the approval of the PPA. The said ground of delay cannot be applied to the present situation of approval of the PPA. By doing so, the State Commission has snatched the right from the Appellant to get approval of its long pending PPA which has been executed in line with the existing provisions of law. Therefore, this Tribunal may declare that such observations are not relevant or necessary for the PPA approval u/s 62 of the Electricity Act, 2003.

5. In reply to the above grounds, the learned Counsel for the State Commission has made elaborate submissions defending the impugned order and contended that there is

no ground warranting for the interference of the impugned orders.

6. In the light of the above rival contentions, the following questions of law would arise for consideration:

(a) **Whether the State Commission was justified in applying the purported principle of 50% of land for the approval to PPA while the National Tariff Policy has never stated that actual possession of 50% of land is required in case of new projects?**

(b) **Whether the denial of approval to Paras 5 Thermal Power Station for inclusion in the PPA is valid or not?**

(c) **Whether the State Commission while denying the approval for the Joint Venture projects of the Appellant has not appreciated the fact that the PPA contains an assignment clause which will enable the Appellant to assign the PPA to any future entity?**

(d) **Whether the State Commission is correct in directing the Appellant to have back to back penalty clause in the PPA for Projects whose tariff is to be determined on cost plus basis**

under section 62 of the Act by the State Commission?

(e) **Whether the directions and observations made by the State Commission are not relevant for the purpose of exercising regulatory jurisdiction for the approval of the PPA especially with regard to incorporation of back to back penalty clause which would amount to over reach of jurisdiction in respect of a generating company?**

7. On these questions, we have heard the learned Counsel for both the parties.

8. Before dealing with these questions, let us look into the relevant provisions and deal with the jurisdiction of the State Commission in its scrutiny of such Power Purchase Agreement.

9. Section 86 (1)(b) of the Act provides the powers to the State Commission to approve the Power Purchase Agreement entered into between the Generators and Distribution Licensees. This approval has got to be decided only after the proper scrutiny and prudence check. In its scrutiny of power purchase agreement, the State Commission is duty bound to scrutinise and satisfy itself as to the reasonability

of the various terms and conditions including the quantum, the price, mode of supply and other financial terms contained therein.

10. While considering the question with regard to jurisdiction of the State Commission, the Hon'ble Supreme Court of India in the case of Tata Power Company Vs Reliance Energy Company Ltd reported in 2009 16 SCC 659 has made a detailed study and discussion. The relevant portion of the discussions are extracted hereunder:

> "87. *The word "supply" used in Section 23 of the 2003 Act for bringing in efficient supply would mean regulate and consequentially licensing in respect of the generating company. For the aforementioned purpose it cannot be given a general or popular meaning denoting supplier and receiver. Once it is held that by reason thereof Parliament aimed at ensuring the supply, the purported object it sought to achieve by enacting Section 10 would lose its purpose. It however, does not mean that Section 23 itself becomes unworkable as it would not be possible to secure equitable distribution and supply. The agreement of distribution (PPA) being subject to approval, indisputably the Commission would have the public interest in mind. It has power to approve an MoU which subserves the public interest.* ***It, while granting such approval may also take into consideration the question as to whether the terms to be agreed are fair and just"....***
>
> *"Section 86 Functions of the Commission*

105. Section 86 provides for the functions of the State Commission, clause (a) of sub section (1) whereof empowers it to determine the tariff for generation, supply, transmission and wheeling of electricity. Clause (b) empowers it to regulate electricity purchase and procurement process of distribution licensees. Inevitably it speaks of PPA. PPA may provide for short-term plan, a mid-term plan or a long-term plan. ***Depending upon the tenure of the plan, the requirement of the distribution licensee vis-a-vis its consumers, the nature of supply and all other relevant considerations, approval thereof can be granted or refused****. While exercising the said function necessarily the provisions of Section 23 may not be brought within its purview. While even exercising the said power the State Commission must be aware of the limitations thereto as also the purport and object of the 2003 Act. It has to take into consideration that PPA will have to be dealt with only in the manner provided therefor.*

106. The scheme of the Act, namely, the generation of electricity is outside the licensing purview and subject to fulfilment of the conditions laid down under Section 42 of the Act a generating company may also supply directly to consumer where for no license would be required, must be given due consideration. The said provision has to be read with Regulation 24. In regard to the grant of approval of PPA the procedures laid down in Regulation 24 are required to be followed.

107. While exercising its power of "regulation" in relation to purchase of electricity and procurement process of distribution, it is not permissible for the Commission to direct allocation of electricity to different licensees keeping in view their own need. Section 86 (1) (b) read with Section 23 if interpreted

differently would empower the Commission to issue direction to the generating Company to supply electricity to a licensee who had not entered into any PPA with it. We do not think that such a contingency was contemplated by Parliament.

108. A generating company, if the liberalization and privatization policy is to be given effect to, must be held to be free to enter into an agreement and in ***particular long-term agreement with the distribution agency, terms and conditions of such an agreement, however, are not unregulated. Such an agreement is subject to grant of approval by the Commission. The Commission has a duty to check if the allocation of power is reasonable. If the terms and conditions relating to quantity, price, mode of supply, the need of the distribution agency vis-a-vis the consumer keeping in view its long-term need are not found to be reasonable, approval may not be granted****."*

11. As per this decision, the State Commission while approving the Power Purchase Agreement and while making inclusion of the generating projects in such power purchase agreement, shall keep in mind the paramount consideration of the public interest and the reasonableness of the terms of the Power Purchase Agreement. This decision specifically mandates that the State Commission is duty bound to check if the allocation of power is reasonable. If the terms and conditions are not found to be reasonable, then the State Commission should not grant the approval.

12. One other decision on this point, rendered by this Tribunal is in the case of BSES Rajdhani Power Limited Vs Delhi Electricity Regulatory Commission 2011 ELR (APTEL)1196 . The relevant portion of the judgment is as follows:

> " *6.10. Shri A.N. Haksar, learned Senior Counsel for the State Commission has argued that no prejudice would be caused to the Appellant as the power purchase cost would in any case be trued up.* ***This, in our view, is not the right approach. The State Commission is expected to make a realistic assessment of the power purchase quantum. Any large deviation due to incorrect assessment as made in this case is going to have revenue gap and may result in cash flow problem for the distribution company.*** *Subsequent true up of power purchase cost will result in allowance of carrying cost with the power purchase cost which in combination with normal rise due to inflation and other factors may result in tariff shock in the subsequent year which may not be in the interest of the consumers of the distribution company.*

13. So, perusal of both the judgments of the Hon'ble Supreme Court as well as of this Tribunal would clearly reveal that it would be the mandatory obligation of the State Commission to ensure that the Power Purchase Agreement entered into by the Generating Company and the Distribution Licensees contain the terms that are reasonable, sub serve the public interest and would enable a reasonable estimation of the power purchase quantum to be procured by the Distribution Licensees.

14. In terms of the law laid down by the Hon'ble Supreme Court and this Tribunal as referred to above, the State Commission held as under in the impugned order dated 30.3.2011:

> "*16. The Commission observes that in the present scenario there are no specific guidelines available for defining pre-requisites needed to enter into PPA through MoU route. Hence, there was need to carry out the study by the MERC Committee including representatives from the Petitioners to analyse this issue in the light of reforms envisaged in the power sector through National Tariff Policy post 6th January, 2011 to promote competition in the power Sector.* ***Further, the Commission is of the view that regarding the pre-requisites as described in paragraph 13 of this order, the major consideration is to ensure that the viability of the projects should be examined based on the actual project preparatory activities completed. If projects is at a preliminary stage, then there lies the uncertainty about the project, which will lead to delay or non supply of power, in turn will result in procurement of short term costly power i.e. cost burden on the consumers".***

15. In order to discharge the above mentioned responsibility, the State Commission has in the impugned order formulated the following criteria on the basis of which the status and suitability of a particular project may be determined for inclusion in the Power Purchase Agreement. The relevant portion in the impugned order dated 30.3.2011 is as follows:

"i. ***Site identification and land acquisition:***

Should have acquired and taken possession of at least 50% of the area of land.

In case of land to be acquired under the Land Acquisition Act 1894, the notification under Section-4 of the Land Acquisition Act 1894 should have been issued.

In all other cases documentary evidence in the form of certificate by concerned and competent revenue / registration authority for acquisition / ownership / vesting of land is required.

ii. ***Environmental clearance for the power station:***

Submission of the requisite proposal, for the environmental clearance to concerned administrative authority responsible for according final approval in the central/state govt. as the case may be.

iii. ***Forest Clearance (if applicable):***

Submission of the requisite proposal for the forest clearance, to the concerned administrative authority responsible for according final approval in the central/state govt. as the case may be.

iv. ***Fuel Arrangements:***

Fuel arrangements shall have to be made for the quantity of fuel required to generate power from the power station for the total installed capacity of the project/unit for the term of the PPA.

In case of domestic coal, supplier shall have made firm arrangements for fuel tie up either by way of coal block / mine allocation or fuel linkage.

In case of imported coal, the supplier shall have either acquired mines having proven reserves for at least 50% of the quantity of coal required for a term of at least five years or the term of the PPA, whichever is less.

In case of domestic gas, the supplier shall have made firm arrangements for fuel tie up by way of long term fuel supply agreement.

In case of RLNG/gas fuel, the supplier shall have made firm arrangements for fuel tie up by way of fuel supply agreement for at least 50% of the quantity of fuel required for a term of at least five years or the term of the PPA, whichever is less.

v. ***Water linkage:***

Should have acquired approval from the concerned State Irrigation Department or any other relevant authority for the quantity of water required for the power station.

If part water arrangement is done then for the remaining water, project developer /owner should propose the source or arrangement, ensuring that the complete quantity of water requirement will be met"

16. This criteria which has been formulated by the State Commission has not been challenged in this Appeal, except that the requirement of acquisition of land to the tune of 50% is arbitrary and does not have any statutory force and cannot be enforceable.

17. On the other hand, the challenge of the Appellant is only limited to non inclusion of certain projects referred to in the PPA. In the impugned order, the State Commission on the basis of the said criteria accepted 12 proposed generating stations for inclusion in the Power Purchase Agreement out of the 26 units. However, the 5 other units as also the projects proposed to be set-up under the Joint Venture route were rejected for inclusion in the PPA in the impugned order dated 30.3.2011.

18. Challenging this impugned order, the Appellant filed a Review Petition before the State Commission praying for the inclusion of the Paras, Nasik and Uran Stations in the PPA and also the projects proposed under Joint Venture route.

19. The State Commission on considering the review, modified the earlier order and accepted the inclusion of some stations in the PPA and rejected the proposal for Paras 5 Station and proposed Joint Venture stations.

20. In the 1st impugned order dated 30.3.2011, the State Commission has given the following findings with direction to include a back to back penalty clause:

> "*17. Keeping in view delays in commissioning of generation projects, it is seen that escalation of time ultimately results in increase in project cost which translates into higher tariff. It is essential therefore to allocate risks among various stakeholders and entities*

responsible for the project execution so that consumers are insulated from the risks. Thus, inclusion of penalty clause in the Power Purchase Agreement is essential as both the prime contractor and the owner are finally answerable for the delays. The Commission is of the view that it is essential to have stringent project management to ensure timely project execution to avoid time and cost overruns.

18. The Commission would like to emphasize upon the Petitioners the importance of Risk allocation which necessitates insertion of penalty clause in the PPA. However, so far the Petitioners have not incorporated any penalty clause in the PPA and only depend upon the Force Majeure clause and Liquidated Damages clauses in supply and construction contracts. The Commission is of the view that these provisions are inadequate as financial determents. The Commission is of the view that there should be a back to back penalty clause in the PPA for addressing a situation where MSEDCL fails to buy contracted power from MSPGCL or MSPGCL fails to supply contracted power as per schedule mutually agreed. In view of the specific requirements laid down in the EA 2003 that generation, transmission, distribution and supply of electricity should be "conducted on commercial principles", ambiguities with respect to financial responsibility and back to back commitments must not be allowed to remain. In view of the reasons outlined above, there is a need to include back to back penalty clause, so that the interest of consumers are safeguarded."....and...

(iii) The Commission is not satisfied with the contention of the Petitioner regarding their inability to incorporate a back to back penalty clause in the PPA at this stage. The Commission believes that both the procurer and generators need to safeguard their

interests. This in turn safeguards consumer interests otherwise, non inclusion of penalty clauses expose the generators to unforeseen financial risks. On procurement side, it would affect the revenue streams and/or the economic and financial viability of MSEDCL or otherwise adversely affect the rights and interests of MSEDCL."

21. As mentioned above, the Appellant filed Review Petition for reconsideration and by the order dated 30.11.2011, the State Commission accepted the inclusion of the other projects except Paras Unit 5 and the projects of Joint Venture Route.

22. As regards Paras 5 Unit, the State Commission has given the following findings in the Review Order:

"***6.3.3 Paras TPS1 X 660 MW Unit 5***

Paras is located in Akola District. The land has been generally identified but not in hand. *Matter regarding Environmental clearance is yet to be taken up. While Coal linkage is available from Mahanadi block as per M/s Mahaguj (Letter No. ED/Mahaguj/031 dtd.18th May, 2011). Adequate water linkage for the plant is not available. Water is available to the extent of 10 MCM/year from existing sources. For Balance requirement (8 MCM/year), approval process is underway with WRD. Process of financial arrangements such as approval of the State Cabinet, Provision for equity infusion and loan arrangements are yet to be initiated. With these uncertainties, the Commission does not wish to grant approval of the said project for inclusion in the PPA"*

23. The above findings would indicate that the State Commission has come to the conclusion that the Paras Unit 5 Station does not qualify for inclusion as per the criteria laid down by the State Commission in its order.

24. With regard to the rejection of the proposed joint venture projects, the State Commission has given the following findings in the Review Order:

> *7.* ***Scrutiny of projects under Joint Venture Route.***
>
> *The Commission observes that regarding the projects proposed under JV route, the Petitioner has submitted as follows:*
>
> > *".....as regards the second issue regarding projects coming up from the JV Public Private route, as on date there is no final decision on implementing these projects on joint venture basis, which involves selection of strategic partner etc. The Petitioner submitted that the projects are to be primarily developed by the Petitioner on the basis of financial strength and technical experience as a Generation company. The decision whether or not to implement these project on Joint venture basis is a policy issue which is subject to the final approval of the State Government and also subject to the provisions of the Companies Act, 1956. The Petitioner submitted that, this in no case affects the regulatory jurisdiction of the Commission to approve Power Purchase Agreement executed between the Petitioner and MSEDCL. The Petitioner further reasoned that the Commission*

cannot base its findings on a condition which is subsequent and not in control of the Petitioner."

The Commission observes that Govt of Maharashtra is yet to announce its policy on PPP joint ventures in Power Sector and associated terms and conditions regarding JV. This will greatly affect the cost of electricity generated by these projects. In its submissions, the Petitioner has accepted that it cannot reply to the queries raised by the Commission as these are beyond its control. The Commission observes that in the days of competitive pricing of electric power, it is going to be extremely difficult for a power generating company or a power distribution utility to survive, if the basic parameters of pricing are not identified and controlled.

Further, based on scrutiny of the submission made by the Petitioner, elaborated in the earlier sections of the Order above, the Commission observes that basic criteria set out by the Commission have not been fulfilled and these projects are just in conceptual stage*.*

Such being the case, the Commission does not approve inclusion of the following JV route projects in the said PPA"

25. In the light of the observations made by the State Commission on the issue of proposed Joint Venture Projects, the following aspects are made clear:

(a) When the Appellant comes before the Commission with the proposed projects under the Joint Venture route, the Commission is expected to consider and approve the same for their

inclusion in the Power Purchase Agreement only when the Commission has been given some rudimentary details about the proposed Joint Venture projects from the Appellant. If it is not made available, the Commission cannot be expected to approve the same.

(b) When the Appellant comes before the Commission with the proposal for inclusion of the Joint Venture projects, the Commission could not be expected to consider such projects as if they were **not** on a joint venture basis.

(c) The rejection of such projects under Joint Venture Route for inclusion in the Power Purchase Agreement is not only on account of their ownership status but on account of the fact that the said projects do not qualify for inclusion in the PPA on the basis of the criteria formulated by the Commission.

(d) The Commission has in the impugned order clearly found that on the basis of the data submitted by the Appellant, the proposed Joint Venture projects do not fulfil even the basic criteria formulated by the Commission and such projects were only in the conceptual stage.

(e) Hence the rejection of the Joint venture projects for their inclusion in the PPA is not only on account of their legal status as was sought to be contended by the Appellant, but the Commission has considered their factual status on the ground before rejecting their inclusion in the PPA.

(f) Even according to the Appellant, as admitted in the Review Petition filed before the Commission that the proposed Joint venture projects are only at the very initial stage of their conception. When such being the case, the Joint Venture Projects cannot presently be considered for inclusion in the PPA in terms of the criteria formulated by the State Commission.

26. Regarding Paras Unit 5, the State Commission after taking into consideration the submissions made by the Appellant has taken a view that the land had been identified by the Appellant but, the same had not been taken into possession. It also took into consideration that no steps had been taken for getting the environment clearance certificate. In fact, the State Commission referred to Appellant's submissions in the Review Order dated 30.11.2011. The relevant extract in the said order is as follows:

> **" 4.6.3 Paras TPS Unit No.5(1X660 MW):** *Paras is located in Akola District. The land has been generally identified but not in hand. Regarding site identification and land acquisition, it is submitted that District Collector, Akola has given final decision in Land Acquisition file No.7/47/2006-07 on 16th June, 2011. Payment to 79 (out of total 86) landowners has already been disbursed. Regarding Environment Clearance for Power station and Rapid Environment Impact Assessment Studies (EIA), it is submitted that Environment Clearance matter is yet to be taken up and the process of Appointment of consultant is in progress".*

27. Even, according to the Appellant, as seen from his submissions referred to in the order, Paras Unit 5 was not able to meet the eligibility criteria set out by the State Commission for inclusion in the addendum to existing PPA. Therefore, the State Commission disallowed the inclusion of Paras Unit 5 of Project of the Appellant in the addendum dated 24.12.2010 to the PPA dated 1.4.2009. In fact, the Committee which was formed by the Commission had considered the various eligibility conditions so that the risk of uncertainty of project execution is negligible and the electricity consumers do not suffer due to the failure of the project owner in implementing the project in future. Those conditions are related to the following:

    (a) Site identification and land acquisition

    (b) Environmental clearance for the power project.

(c) Forest Clearance (if applicable)

(d) Fuel Arrangements

(e) Water linkage

28. This Committee was formed by the State Commission on noticing that there were no specific guidelines for defining pre-requisites needed to enter into a PPA through MoU route in the present scenario and hence there was a need to carry out the study by the Committee. In fact, the Committee included the representative from the Appellant's side also to analyse the issue.

29. After holding a meeting, the Committee gave the following recommendations with reference to the site identification and land acquisition. These are:

(a) Should have acquired and taken possession of at least 50% of the area of land

(b) In case of land to be acquired under the Land Acquisition Act 1894, the notification under Section 4 of the Land Acquisition Act 1894 should have been issued

(c) In all other cases documentary evidence in the form certificate by concerned and competent revenue / registration authority for acquisition / ownership /vesting of land is required.

30. On receipt of the report of the Committee, the Commission had considered the recommendations of the Committee for inclusion of new project in the PPA.

31. The Commission had not granted the approval to those projects of the Appellant which could not meet the specific criteria set out by the Committee formed by the State Commission to look into the project intending to get the approval through the MoU route. This was done primarily to ensure that the approval is granted to those projects which are identified as viable i.e. the project has reached a stage, where the risk of uncertainty of project execution is negligible. The status of acquisition of land is a major criterion, which provides certainty about the execution of the project. We do not find any infirmity in the criteria adopted by the State Commission regarding requirement of land acquisition.

32. The Appellant admittedly, has not produced any documentary evidence which could be treated as a conclusive proof, in order to show that it meets all the requisite criteria set out by the Committee for the purpose of inclusion of new projects in the PPA. As Paras Unit 5 project did not meet the said criteria, the inclusion of the said project was rejected by the State Commission. However, the Appellant has now submitted that the unit size of the Paras

Unit 5 has been proposed to be reduced from 660 MW to 250 MW and 100% land required for the Project is now in their possession after the reduction of capacity. Therefore, the Appellant has sought liberty to again approach the State Commission for approval of the said project for reduced capacity to 250 MW.

33. In view of the submissions of the Appellant regarding Paras5, we grant leave to the Appellant to approach the State Commission for inclusion of Paras 5 with installed capacity of 250MW in the Addendum to the PPA and the State Commission shall consider the same as per the eligibility criteria laid down by it.

34. Regarding the other issue of non inclusion of the Joint Venture project in the Addendum to the PPA, the State Commission holds that same view as reflected in the impugned order. The extract of the finding is set out as under:

> "*The Commission observes that Govt of Maharashtra is yet to announce its policy on PPP Joint ventures in Power Sector and associated terms and conditions regarding JV. This will greatly affect the cost of electricity generated by these projects. In its submissions, the Petitioner has accepted that it cannot reply to the queries raised by the Commission as these are beyond its control. The Commission observes that in the days of competitive pricing of*

electric power, it is going to be extremely difficult for a power generating company or a power distribution utility to survive, if the basic parameters of pricing are not identified and controlled. Further, based on scrutiny of the submissions made by the Petitioner, elaborated in the earlier sections of the Order above, the Commission observes that basic criteria set out by the Commission have not been fulfilled and these projects are just in conceptual stage.

Such being the case, the Commission does not approve inclusion of the following JV route projects in the said PPA.

a) Dondaicha Thermal Power Station, Unit No.1 to 5 (5 X 660 MW):

b) Dhopawe Thermal Power Station, Unit No.1 to 3

c) Latur (Gas based (1500 MW)".

35. Even according to the submissions of the Appellant before the Commission, there are uncertainties regarding vital issues such as technology that is to be adopted, fuel to be used etc., and consequently the same will have further repercussion on items such as cost of projects, requirement of infrastructure and finance arrangements, vital resource requirement such as water, etc.

36. The Appellant has admitted that the JV Partner had been identified but there was no formal agreement or approval

from the Government of Maharashtra. When such being the case, the State Commission cannot consider such a project having so many uncertainties in basic parameters for granting in principle approval for inclusion in the addendum to the PPA.

37. The State Commission has taken a view that there should be a penalty clause in the PPA for addressing a situation where the distribution licensee fails to buy contracted power from the Appellant or the Appellant fails to supply the contracted power as per schedule mutually agreed and the risk should be allocated to the various stakeholders and entities responsible for the project executions. The above findings of the State Commission in the impugned order dated 30.3.2011 have been quoted in para 20 above.

38. The Appellant filed a review petition against the above findings stating that in projects for which Engineering, Procurement and Construction(EPC) contracts have been executed, it is not possible to reopen such contracts for allocation of risks in the event of delays and under the present contracts the Appellant is entitled to only Liquidated Damages for delays by the contractor.

39. However, the State Commission did not accept the contention of the Appellant and in the Review Order dated 30.11.2011 held as under:

"8. <u>Project Guarantees:</u>

The Commission has observed that the Petitioner has reiterated its earlier stand regarding inability of providing back-to-back project completion guarantees. The Commission also notes that MSEDCL does not insist for inclusion of supply guarantee clause in the PPA as against its insistence of inclusion of such a clause in Power Supply Contracts with private generating companies.

The Commission is not satisfied with the contentions of the Petitioner in this regard. The Commission believes that both the procurer of Electric power (the Distribution utility) and Generators need to safeguard their interests. This in turn safeguards consumer interests, as otherwise, non-inclusion of penalty clauses expose both the generators and distribution utilities to unforeseen financial risks. In case of delays by Generating Company, the Distribution Company will have to procure power on short term basis at higher prices and will make all attempts to pass on the same to consumers. The Commission, therefore, directs both the Petitioner and MSEDCL to include penalty clause in the amendment to PPA to minimize financial risk. The Commission would like to advise the Petitioner to make strong attempts to strengthen its project implementation skill, keep meticulous and legally acceptable records regarding deviations from the accepted

conditions, lodge the claims with the suppliers, take recourse to legal actions as necessary, and assure the consumers that the cost of failures and delays on the part of supplier will not be loaded on them".

40. The above findings of the State Commission would indicate that the State Commission wants to have a penalty clause similar to Agreements with Private generating Companies in the PPA for delay in commission of the generating projects so that the Appellant and its contractors bear the risk of increase in cost of the project caused by the delay as also the consequential increase in power purchase cost due to procurement of the power by the distribution licensee in short term and the consumers are insulated from loading of the costs in the retail supply tariff due to delays on the part of the Appellant and its suppliers. This would mean that the Appellant and his contractors have to bear the consequential costs for arrangement of alternate power by the distribution company in case of delay in the commissioning of the power project besides the enhanced capital cost of the project caused by the delay.

41. According to the Appellant the contracts for Engineering Procurement and Construction ('EPC') of the projects have

already been entered into with BHEL, the state owned company, and the contracts have provision for only Liquidated Damages for delay for a default by the contractor. The Liquidity Damages recovered by the Appellant could be subtracted from the project cost for the purpose of tariff. There is also an overall cap on LDs that may be recovered from the EPC contractor. Such LDs may not be sufficient to cover the disallowance of Interest During Construction ('IDC') and the expenses on account of arranging alternate power. Thus, the Appellant would be subjected to almost entire risk on account of disallowance of IDC and cost of alternate power. This type of risk may be borne by the project developer selected under tariff based competitive bidding where the cost of the project and tariff is not scrutinized and determined by the State Commission. Such financial burden could not be borne by the Appellant as its tariff is determined by the State Commission under cost plus regime.

42. In this connection, the learned counsel for the Appellant referred to findings of this Tribunal in Appeal nos. 72 of 2010 and 99 of 2010 where a matrix for allocating the risks between the generating company and the distribution licensee based on the factual position was decided.

43. According to learned counsel for the Appellant based on the market conditions and standard industry practices, all EPC contractors insist on capping of LDs. Inclusion of back to back guarantee clause in the EPC contract will force the contractors of the Appellant to submit higher quote for their equipments. The same will eventually lead to front loading of cost to be borne by the contractors in anticipation of a delay in executing a project. Such a clause in the contracts will also hinder the participation of contractors and increase the project cost upfront.

44. While we agree that the Appellant should bear the cost of time over run in commissioning of the power projects for reasons attributable to them, the risk allocation matrix for the projects executed under cost plus tariff under Section 62 can not be the same as applicable to projects developed through tariff based competitive bidding under Section 63. Moreover, it would not be prudent to open the contracts to renegotiate LD clause with EPC contractors which have been entered into by the Appellants. To that extent, we find substance in the submissions of the Appellant regarding penalty clause. The tariff of the Appellant's generation projects is to be determined on cost plus basis as per the norms specified in the Tariff Regulations. The capital cost of the project for computing

the tariff is determined by the State Commission based on the audited accounts of the generating company, subject to the prudence check. The Appellant is allowed the tariff based on the normative expenses, depreciation, interest on loan and normative return on equity. On the other hand for the projects developed through tariff based competitive bidding undertaken under section 63 of the Electricity Act, the developer has to quote the tariff to be charged for different years of the contract period and its capital cost and tariff is not subjected to scrutiny by the Commission.

45. According to Section 63 of the Act, the State Commission has to adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government. The bidding guidelines of the Central Government has appropriate clause for Liquidated Damages for delay in commissioning of the project. The generating company participating in the competitive bidding has option to load the cost of perceivable risk of delay in execution of the project on the tariff quoted by them. The same concept of penalty as envisaged in the Standard Bidding Document of the Central Govt. for procurement of power by the distribution licensee under section 63 of the Act can not be applied to procurement of power from power projects where

the tariff has to be determined by the State Commission as per its Tariff Regulations under Section 62 of the Act.

46. For power projects whose tariff is determined by the State Commission under section 62 of the Act, the State Commission has to determine the capital cost which forms the basis of the generation tariff as per its Tariff Regulations. The Tariff Regulation provides for determination of capital cost based on the audited accounts subject to prudence check by the State Commission. Thus, if it is established that the delay in execution of the project was for reasons entirely attributable to the generating company, the State Commission may not allow such enhanced cost of the project which has not been found prudent, thus insulating the consumers from loading of the imprudent costs on retail supply tariff.

47. This Tribunal in judgment dated 27th April, 2011 in Appeal No. 72 of 2010 in the matter of Maharashtra State Power Generation Co. Ltd. vs. Maharashtra Electricity Regulatory Commission & Ors. has laid down the principle of risk allocation on account of delay in commissioning of the project developed by the Appellant on cost plus tariff under Section 62 of the Act. The relevant extracts are reproduced as under:

"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".

48. Thus, the Tribunal has given a finding for allocation of risk for a project developed under cost plus tariff in another case involving the power project of the Appellant. In view of the findings of the Tribunal, the Commission has to decide the

allocation of cost as per the findings of the Tribunal in the above judgment in case of delay in commissioning of the project beyond the agreed schedule of commissioning or the bench-mark laid down by the State Commission.

49. We find force in the argument of the Appellant that it will not be prudent to open the contracts which have already been entered into with the EPC contractors for inclusion of appropriate penalties covering consequential damages to be borne by the contractors in the event of delay in the commissioning of the project. Reopening of the contracts may also result in delay the execution of the new projects. Moreover, the terms and conditions for contracts of the generating company for equipment suppliers and EPC contracts need not be regulated by the State Commission as it would result in micro management of the affairs of the generating company. The consumer interest can be safeguarded by prudence check of the capital cost of the Project by the State Commission by allocating the costs due to time over run as per the findings of this Tribunal so that the imprudent costs are not passed on to the consumers.

50. The last issue is regarding certain observations made by the State Commission which according to the Appellant are not relevant for the purpose of exercise of regulatory jurisdiction for approval of PPA.

51. We find that observations made by the State Commission about delay in execution of the recently commissioned projects of the Appellant are only to express its apprehensions regarding delay in execution of the future projects and to advise the Appellant to cover the risk of delays so as to insulate the consumers. The State Commission is within its rights to advise the Appellant and such advice should be taken in the right spirit by the Appellant. The apportioning of the risk due to delay in execution of the projects has already been discussed by us while answering the fourth issue. Therefore, we do not want to interfere with the observations made by the State Commission regarding delay in execution of the projects.

52. **Summary of Our Findings**

i) The State Commission has laid down the eligibility criteria on the basis of which the status and suitability of a particular power project may be determined for inclusion in the Power Purchase Agreement with the distribution licensee. One of the eligibility criteria is relating to site identification and acquisition of land against which the Appellant is aggrieved. We feel that the criteria has been adopted primarily to ensure that approval is granted by the State Commission to only those projects which are identified as viable i.e. the

project has reached a stage where the risk of uncertainty of project execution is negligible. The status of land acquisition is a major criterion which provides certainty about the execution of the project. The distribution licensee is responsible for planning of procurement of power to meet the future requirement of its consumers. If there is uncertainty in execution of a project, the distribution licensee has to make alternate arrangements for procurement of power. Thus, we do not see any infirmity in the criteria adopted by the State Commission including the requirement of land acquisition.

ii) The State Commission has correctly not permitted inclusion of Paras TPS unit No.5(1X660 MW) in the Addendum to the PPA as the project did not meet the conditions laid down in the eligibility criterion relating to land. However, the Appellant has now submitted that the unit size of Paras Unit 5 is proposed to be reduced from 660 MW to 250 MW and 100% of land required for the project is now in their possession after the reduction in capacity. In view of the above, the Appellant has sought liberty to approach the State Commission for approval of the said project for reduced capacity of 250 MW.

Accordingly, the liberty is being granted to the Appellant to approach the State Commission again and the State Commission shall consider the submission of the Appellant as per the eligibility criteria laid down by it.

iii) Regarding the Joint Venture Projects the State Commission has correctly disallowed inclusion of such projects in the Addendum to the PPA as the policy for execution of these projects is yet to be decided. When these projects have been envisaged as Joint Venture Projects the State Commission could not be expected to consider such projects as if these are not on a Joint Venture basis as is urged by the Appellant.

iv) The back to back penalties for delay in execution of the Project by the generating company as envisaged for projects developed on tariff based bidding undertaken under section 63 of the 2003 Act where the capital cost and tariff of the project is not scrutinised and determined by the State Commission will not be applicable to the projects of the Appellant the tariff of which has to be determined by the State Commission as per its Tariff Regulations under Section 62 of the 2003 Act. According to the Tariff Regulations, the State

Commission has to determine the capital cost of the project as per the audited accounts subject to the prudence check. Thus, if it is established that the delay in execution of the project is for reasons entirely attributable to the generating company the State Commission may not allow such enhanced cost of the project which has not been found prudent, thus insulating the consumers from loading of the imprudent costs on retail supply tariff. The risk allocation for the projects developed through tariff based competitive bidding under Section-63 and those where the tariff is to be determined by the State Commission under section 62 have to be different as the tariff of the generating company under section 62 is determined as per the norms laid down in the Tariff Regulations and the generating company does have option to pass on to perceivable risks in the tariff. Tribunal in its judgment dated 27.7.2011 in Appeal No.72 of 2010 in the matter of Maharashtra State Power Generation Co. Ltd., Vs MERC has laid down principle of allocation of risk due to delay in execution of a project developed by the Appellant on cost plus basis under section 62. The State Commission has to decide allocation of risk as per

the findings of the Tribunal in case of delay in commissioning of the project beyond the agreed schedule or the benchmark laid down by the State Commission for completion of the project. It will also not be prudent to open the EPC contracts for execution of the Projects to renegotiate the LD clause as it may result in delay in execution of the Projects.

v) On the last issue relating to observation of the State Commission in delay in execution of the recently commissioned projects we do not want to interfere with the observations made by the State Commission.

53. In view of above, the Appeal is allowed partly to the extent indicated above. In terms of the above, the State Commission is directed to pass the consequential orders.

54. However, there is no order as to costs.

55. Pronounced in the open court on the **18th day of January,2013.**

(Rakesh Nath) ***(Justice M. Karpaga Vinayagam)***
Technical Member ***Chairperson***

Dated: **18th January 2013**

√REPORTABLE/~~NON-REPORTABALE~~