

**Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 16 of 2008

**In the matter of
Miscellaneous Application filed by M/s. Maharashtra State Power Generation Co. Ltd.**

**Shri. V.P. Raja, Chairman
Shri S. B. Kulkarni, Member
Shri V. L. Sonavane, Member**

M/s. Maharashtra State Power Generation Co LtdApplicant

ORDER

Date: 19 January, 2010

During the Technical Validation Session (TVS) on 13-1-2010 in respect of the exercise being carried out by the Commission in Case No. 16 of 2008 to implement the decisions and directions contained in the judgment dated 10-4-2008 of the Hon'ble Appellate Tribunal in Appeal No.s 86 and 87 of 2007, M/s. Maharashtra State Power Generation Co Ltd., ("MSPGCL") filed a Misc. Application with the following prayers: -

“

- (a) *This Hon'ble Commission be pleased to direct that the 'no Public hearing' is required for carrying out true up exercise and further that the order on this Application seeking such dispensation of public hearing be issued expeditiously and in any case within a period of 3 days from the date of hearing (i.e.) January 13, 2010*
- (b) *This Hon'ble Commission be pleased to dispose of true up commencing FY 2005-06 expeditiously.*
- (c) *For such further and other reliefs as the nature and circumstances of the case may be deemed necessary.*”

2. Shri Ravi Kadam, Advocate General of Maharashtra assisted by Smt. Deepa Chawan, Advocate appeared for the Applicant. It was submitted by Learned Counsel that Section 64 of the EA 2003 contemplates a public hearing, which is in the nature of receiving suggestions and objections from the public. However, for the purpose of truing up, a public hearing is



not contemplated. The financial condition of the Applicant is very bad. Working capital requirement, which was negligible at the time of formation of MSPGCL, had increased to an amount of Rs. 2,900 crore approx. Thus, the Applicant is constrained to move this application as the Hon'ble Tribunal has allowed certain tariff items. These items could be segregated into three categories as mentioned in the Application. Repeated public hearings are not required for items, which have been allowed by the Tribunal, since it will be a judicial impropriety to sit in appeal over a decision of the Tribunal. When the Utility goes in appeal to the Tribunal over the tariff determination by the Commission, then only the consumers who have voiced their objections to the averments of the Utility against the tariff determination, have the right to give their opinions. However, the process of again taking indiscriminate views from the public would not be good in law. In the case of MSPGCL, the consumers who had appeared before the Tribunal undoubtedly had the right to be heard and to give objections. Since, the Judgment of the Tribunal has attained finality and no consumer / utility has gone in appeal against this Judgment to the Hon'ble Supreme Court, the Commission, which is a creature of the statute, would definitely have to obey the said judgment. TVS is a pre-public hearing process. When the Applicant received the notice of TVS, it was under the impression that therefore, consequently a Public Hearing was about to be held by the Commission. The Applicant will fully assist the Commission in the TVS. However, the Applicant definitely objects to a public hearing process, when by each day's delay, the Applicant is financially bleeding. It was also submitted that if just a paragraph of the Tribunal's Judgment where re-fixation of the tariff is required to be conducted has been indicated, full justice will not be done, since the Tribunal has indicated each of the tariff heads and ruled accordingly. Where true up with a prudence check is provided it does not require re-determination of tariff. If only a sentence appearing in the Judgment is read in isolation, then the portions of the Judgment (ratio decidendi) will completely be rendered nugatory. The Judgment should, therefore, be read harmoniously. It was submitted that without prejudice to the rights under the present Application, the TVS may be taken up.

3. The Commission has considered the oral submissions made during the hearing by Learned Counsel and the averments made in the aforesaid Application. Briefly, the submissions made are as follows -

(1) In the notice issued by the Commission dated 5-1-2010, the Commission indicated that a Technical Validation Session ("TVS") will be held on 13-1-2010 for implementing the decisions and directions contained in the Judgment dated 10-4-2008 of the Hon'ble Appellate Tribunal in Appeal No.s 86 and 87 of 2007. The Applicant submits that there are three types of directions contained in the said Judgment broadly categorized as follows:

- (a) Tariff items for which the Hon'ble Tribunal has allowed the appeal;
- (b) Tariff items not affected by any independent study for which true up was required to be carried out;
- (c) Tariff items wherein independent study was required to be undertaken within 3 months of the passage of the Tribunal's Judgment.

(2) As regards item (a), the Applicant submits that where the Hon'ble Tribunal has simplicitor allowed the appeal, the Commission is not required to undertake any further public hearing.



(3) As regards items (b) and (c), the Applicant submits that no public hearing is required as the matters under items (b) and (c) only deal with a truing up exercise to be undertaken by the Commission pursuant to the Tribunal's said Judgment. The Applicant has submitted that truing up contemplates an exercise to fill in the gaps between the actual expenses at the end of the year and anticipated expenses at the beginning of the year. According to the Applicant, the matters covered by the category of directions of the Hon'ble Tribunal under (b) and (c) above only deal with truing up exercise to be undertaken by the Commission. As such, no public hearing is required on these items.

(4) The Applicant has submitted copies of certain Judgments to support its submissions, as under:

- (a) *North Delhi Power Ltd. v/s CERC and ors* [2007 APTEL 278]
- (b) *Delhi Electricity Regulatory Commission* [2007 APTEL 193]
- (c) *WBERC v/s CESC Ltd.* [2002 (8) SCC 715]

4. Heard the Applicant. Before giving the decision in the matter, the Commission would like to highlight that the tariff of MSPGCL (the Applicant herein) accounts for approximately 50% of the power purchase costs of Maharashtra State Electricity Distribution Company Limited ("MSEDCL") which supplies electricity to consumers. The exercise to be carried out by the Commission to implement the aforesaid Judgment of the Hon'ble Tribunal would consequently change the tariff, as the newly determined expenses would be a pass through in the tariff in respect of whom the public was originally heard. The consumers therefore have a right to be informed, if not invited to give suggestions or objections, which would depend upon the nature of the decision and directions of the Hon'ble Tribunal in the aforesaid Judgment. There are certain cost items or subject heads in the Judgment, which do not require invitation of suggestions and objections, either because they have to be straight away implemented or costs trued up albeit after prudence check. However, there are certain items, which require the Commission to arrive at a decision afresh on which the public ought to be heard and their suggestions and objections considered. This is within the requirements laid down in Section 64(3) of the Electricity Act, 2003 ("EA 2003") and also in order to comply with the principles of natural justice. This is where the Judgment in *WBERC v/s CESC Ltd.* [2002 (8) SCC 715] would not apply because the said Judgment predates the enactment of the EA 2003 and thus, does not apply in view of the requirements laid down in Section 64(3) thereof.

5. As regards the Applicant's contention that it became aware of the Commission's intention to hold a Public Hearing in the matter only after receiving the Notice for TVS, this contention is factually incorrect, as the Commission had clearly stated in its Order dated June 2, 2008 in Case No. 71 of 2007, as reproduced below:

*"The Commission is of the view that as the Orders of the Commission have been set aside and the ATE in its Order has directed the Commission to re-determine the tariff, and as the original Orders in both the cases, i.e., ARR and Tariff Determination for FY 2006-07 and MYT Order for the first Control Period, i.e., FY 2007-08 to FY 2009-10 were issued after following the due public process including public hearing, **the re-determination of ARR and tariff for MSPGCL needs to be undertaken after following the due public process including public hearing.** The Commission will*



initiate a separate process for re-determination of tariff for MSPGCL for FY 2005-06, 2006-07 and FY 2007-08. However, this Order has to be issued, since the tariff payable to MSPGCL is a major input cost to MSEDCL, and the Order of MSEDCL cannot be delayed till such time the complete data is submitted by MSPGCL and the due regulatory process is followed to revise the tariff of MSPGCL.” (emphasis added)

Notwithstanding the above, the Commission has admitted the Application filed by MSPGCL and has given its ruling on the issues raised by the Applicant in the paragraphs below.

Keeping these principles in view, the Commission is of the decision as under:-

(1) **A&G Expenses for FY 2005-06**

The direction of the Hon’ble Tribunal is to carry out truing up of the said expenses subject to prudence check. This truing up exercise does not require or mandate consideration of suggestions and objections from the public. As such, inclusion of this subject head in the public notice would be only for information of the public.

(2) **Transit Loss of Coal**

For FY 2005-06, the Hon’ble Tribunal has allowed transit loss level in terms of the station-wise loss reduction trajectory approved by the Commission in the previous Order. Therefore, when there is no re-determination of transit loss of coal, this subject head neither requires nor mandates consideration of suggestions and objections from the public. As such, inclusion of this subject head in the public notice would be only for information of the public.

(3) **Station Heat Rate**

The direction of the Hon’ble Tribunal is to engage appropriate independent agency(ies), who can carry out a study in a time bound (preferably within three months) manner to reasonably assess the achievable SHR of the plants owned by MSPGCL. Based on the study, the Commission has been directed to determine the SHRs in respect of plants operated by MSPGCL. Thus, this contemplates a re-determination of the SHRs. On this aspect, while taking into account the study report of the independent agency, suggestions and objections would be invited from the public and taken into consideration. While considering the need to hear the public, the Commission is also guided by the observations made by the Hon’ble Tribunal as follows:-

“We are of the opinion that if the SHR allowed by the Commission is not achievable, then the same would not be in anybody’s interest; entity would suffer by not recovering its reasonable cost of supply of the electricity and the consumers would not get the right signal about the pricing of the product they would be using. It is as much essential for the consumers to know the right price of the product they are using, as much as it is for the entity to recover its cost of operations. Unless the consumer knows the true price of the product, he will not be able to take an informed decision about the quantum of his consumption, particularly the industrial and

commercial consumers who recover such costs from their consumers. Determining right price is also essential to send signals to the prospective developers/investors in the sector enabling them to take decision about the investment potential in the sector.”

As such, on this subject head, suggestions and objections of the public would be invited.

(4) **Tariff for Small Hydro Power Station**

The Hon’ble Tribunal has held as under:-

“However if the Appellant has subsequently received Government Orders for determining lease rentals different from those approved by the Commission, it may approach the Commission with the relevant Government orders for truing up of the sum approved.”

The Commission, in its Order dated October 27, 2008 in Case No. 17 of 2007, has approved the revised lease rent for hydel stations with effect from April 1, 2009. The Commission has already held above that the truing up exercise does not require or mandate consideration of suggestions and objections from the public. As such, inclusion of this subject head in the public notice would be only for information of the public.

The above decision would also apply for re-calculation of interest on working capital while the Commission takes up truing up of lease charges payable to State Government.

(5) **Billing of incentive on monthly basis.**

The Hon’ble Tribunal has held as under:-

“43. The Appellant has submitted that billing for incentive should be allowed to be made on monthly basis. We find that the Tariff Regulations have not specified any periodicity in this regard. However, as the bill for recovery of fixed and energy charges is to be raised on monthly basis, we find no basis to deny the same treatment in respect of incentive claims. Any under or over recovery on account of such claims may be adjusted on monthly basis.”

The above decision of the Hon’ble Tribunal leaves no scope for considering suggestions and objections from the public. The above decision has to be implemented. As such, inclusion of this subject head in the public notice would be only for information of the public.

(6) **Truing up for fuel expenses for FY 2005-06**

The Hon’ble Tribunal has held as under:-

“SHR being a dominant factor in deciding the fuel expenses and is one of the performance parameters to be determined through the aforesaid process, we are inclined to allow the appeal in this regard till such time the re-assessed improvement trajectory of parameters is available.”



The above decision of the Hon'ble Tribunal leaves no scope for considering suggestions and objections from the public. The fuel expenses are derived by multiplying SHR with the cost of coal and calorific value and since views/objections are being sought for on the issue of SHR, this item will automatically get determined accordingly. As such, inclusion of this subject head in the public notice would be only for information of the public.

(7) **Truing up of Depreciation**

The Hon'ble Tribunal has held as under:-

“Therefore, we allow the depreciation claimed by the Appellant. However, if the Commission has allowed any extra recovery in the past under the head of depreciation, the same may be adjusted.”

The above decision of the Hon'ble Tribunal leaves no scope for considering suggestions and objections from the public. The above decision has to be implemented and the Commission has to take a view based on data submitted by MSPGCL in accordance with the Hon'ble Tribunal's Judgment. As such, inclusion of this subject head in the public notice would be only for information of the public.

(8) **Truing up of other debits; Truing up of Interest expenses and Finance Charges; Truing up of Revenue Earned**

The Commission has already held above that the truing up exercise does not require or mandate consideration of suggestions and objections from the public. As such, inclusion of this subject head in the public notice would be only for information of the public.

(9) **O&M Expenses for Base Year for MYT Period**

The Hon'ble Tribunal had indicated that MSPGCL could take up its claim in the matter before the Commission in view of the submission of the Commission that once the desired audited figures are submitted to the Commission under the truing up process, and the Commission has assessed the prudence of the same, the Commission will consider the same for projection of the O&M expenditure over the Control Period.

The Commission has already held above that the truing up exercise does not require or mandate consideration of suggestions and objections from the public. As such, inclusion of this subject head in the public notice would be only for information of the public.

(10) **Hydel Tariff**

The Hon'ble Tribunal had directed the Commission to devise a mechanism and determine the ratio of peak-off-peak tariff after taking into consideration the operational capacity of MSPGCL as well as the system pattern.

On this aspect, the suggestions and objections of the public would be invited.



(11) **Reactive Energy Charges**

The Hon'ble Tribunal had held as under:-

“The Commission has already worked out a mechanism for incentive/penalty for reactive energy injection/drawal depending upon the voltage at inter-change points, which is applicable to the Transmission Licensees, Distribution Licensees and the open Access users. We feel that since the Appellant is incurring additional expenditure without being compensated, the Commission should extend the above dispensation to the Appellant or may work out a scheme specifically for state power generators within three months.”

On this aspect, the suggestions and objections of the public would be invited.

(12) **Normative O&M Expenses for Hydel Plants**

Since, the decision of the Hon'ble Tribunal contemplates re-determination vis-à-vis the past expenditure and the norms specified in the Regulations, suggestions and objections from the public would be invited.

(13) **Employee Incentive Schemes**

Since, the decision of the Hon'ble Tribunal contemplates a fresh decision to be given by the Commission on this aspect, suggestions and objections from the public would be invited.

6. As regards the prayer to expeditiously undertake truing up, the Commission will comply with the directions contained in the Hon'ble Tribunal's Judgment as expeditiously as possible and within a short time frame.

With the above, the present application stands disposed off.

(V. L. Sonavane)
Member

(S. B. Kulkarni)
Member

(V. P. Raja)
Chairman



(P.B. Patil)
Secretary, MERC