

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 116 of 2011

In the matter of
**Petition of Maharashtra State Power Generation Co Ltd seeking review of direction
given during the hearing held on 21st July, 2011 on a Petition for Project Cost
Determination and Tariff Determination in respect of Parli Unit 7 and Paras Unit 4.**

Shri V.P. Raja, Chairman
Shri Vijay L. Sonavane, Member

Maharashtra State Power Generation Co Ltd.

.... Petitioner

ORDER

Dated: September 14, 2011.

MSPGCL submitted a Review Petition under affidavit before the Commission on 10/08/2011 under Sections 94 of the Electricity Act 2003 and under Regulation 85 of MERC (Conduct of Business) Regulations 2004 framed under Section 181 of Electricity Act 2003, seeking review of a direction given during the hearing held on 21st July 2011, as per Record of Proceedings dated 21 July 2011, by the Commission in Case No. 69 of 2011 on a Petition for “Project Cost Determination and Tariff Determination in respect of Parli Unit 7 and Paras Unit 4”. The following are the prayers of the Petitioner:

“

a. *review and recall the direction and order dated 21.07.2011 to the extent as follows:*

i. *that the Hon'ble Commission was pleased to adjourn the public hearing and decided to re-schedule the same at future date*

ii. *that the Review Petitioner should initiate the process de-novo, such a publishing public notices in the News paper commensurate with the regulations at least one month in advance of the new schedule date of public hearing*

b. *to declare that the public hearing held on 21.07.2011 pursuant to public notice dated 28.06.2011, 29.06.2011, 30.06.2011 and 02.07.2011 has been validly convened and as such, no further public hearing is required; and*

c. *Pass such further order(s) as it deems just, fit and proper in the facts and circumstances of the case.”*

2. The Petitioner submitted that the present review petition was being filed against the Order and direction dated July 21, 2011 passed in Case No 69 of 2011. The Petitioner further submitted that it had commissioned two units of 250 MW each, namely Parli unit 7 and Paras unit 4 on July 31, 2010 and August 31, 2010 respectively. On March 31, 2011 the Petitioner filed a Petition for approval of final capital cost of the said projects along with determination of tariff for the said units for FY 2010-11 and FY 2011-12. The Commission, pursuant to the said submission, held a hearing on 30.05.2011 towards admitting the said petition. Thereafter, on 15.06.2011, the Commission identified certain data gaps which were replied to, by the Petitioner on 22.06.2011. Subsequently, a Technical Validation session was held on June 23, 2011, wherein the Commission directed the Petitioner to publish notice for Public hearing in the newspapers. The said public notice was accordingly published by the Petitioner in 2 (two) Marathi and 2 (two) English language

newspapers on 28.06.2011, 29.06.2011 and 30.06.2011. Further, a corrigendum to the said notice was also published on 2.07.2011. The Petitioner further submitted that a copy of all the submissions made by the Petitioner including the Petition and the reply to the data gaps was sent to all the Consumer Representatives authorized by the Commission. Thereafter, the Commission identified another set of data gaps at the hearing on 18.07.2011, reply to which was under process. The Petitioner further submitted that subsequently a Public hearing was held in the matter on 21.07.2011 and was adjourned on the directive by the Commission. The Petitioner further stated that it wished to invoke the review jurisdiction of the Commission to review its Order dated 21.07.2011, directing the Petitioner to initiate *de-novo* proceedings for another public hearing by publishing public notices afresh in the newspapers at least one month in advance of the new scheduled date of Public hearing fixed by the Commission on 15.09.2011 at 11:00 AM. The Petitioner further submitted that by the aforesaid order the Commission cancelled the Public hearing in Case No. 69 of 2011 inter alia on the following grounds :

“...as the public hearing proceeded, the Commission enquired with the Petitioner regarding elementary financial details such as the interest rate of project finance loan availed from PFC, terms of the loan, moratorium period of the loan etc. It was observed by the Commission that these elementary questions could not be satisfactorily replied to, by the representatives of the Petitioner present at the Public Hearing. There were as many as 15 representatives of MSPGCL present besides the Consultant. It was informed to the Commission that Petitioner’s representatives from Finance Department of MSPGCL were not present at the hearing as the senior officers of the Finance wing were busy in other meetings. The Commission observed that, as the said hearing was a Public hearing for determination of Capital costs of two new projects recently commissioned by the Petitioner, it was not appropriate to proceed with the said public hearing in the absence of knowledgeable persons representing the Petitioner to answer the questions. The Commission adjourned the said Public hearing and decided to re-schedule the same, to be held at a future date The Commission directed MSPGCL to initiate the process de-novo such as publishing Public notices in

the newspaper, commensurate with the relevant regulations, at least one month in advance of the new scheduled date of the public hearing.”

3. The Petitioner further submitted that the aforesaid finding was wrong and constituted an error apparent on the face of record for the following reasons :

a) The issue of interest rate was raised for the first time by the Commission in the data gaps sent to the Petitioner on 15.06.2011, which were identified pursuant to the petition filed by the Petitioner for determination of tariff of its generating stations, namely Parli Unit 7 and Paras unit 4 on 31.03.2011. The Petitioner attached to its Petition, the said correspondence regarding the data gaps, for record. The Petitioner further submitted that it had replied to the queries raised in the said data gaps, on 22.06.2011, wherein all the relevant documents including the loan agreements, the details of the loan amount withdrawn, the applicable rate of interest on a particular date of drawal, etc., were submitted.

b) The Petitioner further submitted that it had already submitted the relevant details to enable the Commission to discern the total loan amount and the rates of interest applicable and as such, there was no cause to cancel the public hearing and / or pass orders directing a fresh Public hearing. The Petitioner enclosed a copy of the said data gaps for record.

c) The Petitioner submitted that in the said reply to the data gaps sent on 22.06.2011, the Petitioner on the issue of interest had expressly stated as follows:

“...The Loan agreement cites that the borrower shall repay the loan along with the interest in accordance with the terms and conditions set out in PFC sanction letter dated 3rd Jan 2006 and 19th Jan 2006. As per sanction letter dated 3rd Jan 2006, . “The Borrower shall pay interest on the said loan at the rate of interest prevailing on the date of each disbursement (presently it is 8.5% P A after rebate of 0.25% for timely payment to PFC.

While the effective rate of interest was 8.5% P A at the time of execution of loan agreement, the interest rate was revised over the period of time as per the guidelines of MoP. Few copies of the PFC

Circular regarding interest rate revision are enclosed herewith for reference (Annexure VII). The statement citing interest paid for the period upto COD along with applicable interest rate is enclosed herewith for reference (Annexure VIII) . Also a few copies of the loan disbursement letters from PFC are attached herewith for reference (Annexure IX)

d) The Petitioner further submitted that from the above details it is clear that the matter is within the domain and knowledge of the Commission and failure to refer to the matter already submitted constitutes error apparent on the face of record.

e) The Petitioner further submitted that, admittedly no member of the public has filed any objections nor attended the Public hearing in terms of notices dated 28.06.2011, 29.06.2011 and 30.06.2011, held on 21.07.2011 and therefore there is no cause to cancel the same and direct fresh notice. The Petitioner submitted that the Public hearing can be cancelled only if the Commission came to a conclusion that there was a procedural lapse on the part of the Petitioner. The Petitioner submitted that in the present case, the cancellation of the Public hearing is not based on any procedural lapse on the part of the Petitioner

f) The Petitioner further submitted that MERC (Conduct of Business) Regulations 2004 and MERC (Terms and Conditions of Tariff) Regulations 2005 do not envisage conducting two public hearings for tariff matters. Failure to answer a question related to interest is not a ground to cancel Public hearing when eventually all the relevant information was already submitted before the Commission.

g) The Public hearing is a statutory process and cannot be held, cancelled or adjourned in a manner other than that prescribed in the statute / regulation.

h) There is no regulation permitting de-novo process of Public hearing, and that too, for an alleged failure to respond a query of the Hon'ble Commission.

i) The issue of interest rate has also been addressed during the hearing. The Petitioner submitted that, as per terms and conditions of loan sanction letters of Parli unit 7 and Paras unit 4 , which are annexed to the Petition, as Annexre R/P- 6 ,

interest rates for both the said units are as per the document annexed to the said Petition as annexure R/P – 7

4. The Petitioner stated that the direction of Commission, to initiate the process de-novo for holding a Public hearing on 15.09.2011 including public notices afresh in news papers, is uncalled for in the light of the above submissions hence is an error apparent which requires re-consideration. The cancellation of Public hearing and a direction to de-novo proceed with the process of issuing advertisement is burdensome, since it will cause further delay which would in turn result in financial implications.
5. The Petitioner submitted that Commission did not correctly appreciate the records / materials which were already present before the Commission on 21.07.2011.
6. The Petitioner submitted that the above order needs to be reviewed in the light of the fact that in project financing the rate of interest is a floating one, therefore the Petitioner could not give a simplistic single figure and therefore the failure to submit the same cannot be the reason to cancel a valid Public hearing and direction for initiation of entire process of a Public hearing de-novo. The Petitioner has already submitted before the Commission all the relevant documents including the loan agreements, the details of loan amount withdrawn, the applicable rate of interest on particular date of withdrawal etc. in any event the petitioner gave a range of interest rate that would be applicable as between 10 -13%
7. MSPGCL also submitted that no one from the consumer attended the aforementioned hearing despite notices. The Petitioner undertakes to reply to any of the queries which Hon'ble Commission raises on the next date of hearing and as such there is no reason for the direction by the Commission to initiate the Public hearing process de-novo. Also in a Public hearing, the main purpose is to take note of objections of consumers and then seek the answers from the Petitioner, which will be considered at the time of final order in the tariff petition. Public hearing is not a "question – answer" session. The Commission has had separate hearings to appreciate the issues, both commercial and technical. These go on parallelly, without having to stall the process by adjourning the same for 56 days. The commercial burden of such delay is on the Petitioner.

8. MSPGCL further submitted that there were no written communications received by the Petitioner from any of the consumer representatives. Petitioner also submitted that the Commission did not send any communication desiring the presence of any particular official of the Petitioner company. Absence of certain officer cannot be the reason for cancelling a Public hearing. The Petitioner already submitted on the hearing held on 21.07.2011, that the interest rates are variable, and as such even if personnel from finance department of MSPGCL were present, the submission of the Petitioner would have been the same .
9. MSPGCL further submitted that average rate of interest over a period of loan availed can be submitted in writing as and when required by the Commission. As such according to the Petitioner, there is no requirement of initiating the Public hearing process de-novo on the ground that no one from finance department of the Petitioner was present on the said date of hearing.
10. MSPGCL further submitted that data/ information asked by the Commission required summary of the detailed loan agreements and the same could not be produced instantaneously.
11. The Petitioner submitted that at the time when the Commission raised the said query, the Petitioner submitted the entire loan agreements for the perusal and detailed understanding of the Commission, and for establishing the prudence check. The Petitioner submitted that the Commission, however insisted on an instantaneous reply to certain issues from the finance personnel of the Petitioner, who were not obliged to be present at the said hearing and as explained above, would not have made a difference to the submissions made by the Petitioner.
12. MSPGCL submitted that the purpose of Public hearing is to allow the public or its representatives to submit their objections on petitions before the Commission. However it is pertinent to mention herein that in the present case, neither consumers nor their representatives appointed by the Commission have raised any queries.

13. MSPGCL submitted that TVS in the Petition of Case 69 of 2011, which held on 23.06.2011 was attended to by the representatives from finance, projects, O&M, etc. however the issues on which the adjournment was granted by Commission on 21.07.2011 were never raised by Commission in the said TVS session.
14. Petitioner further submitted that internal queries of the Commission could have been addressed in any subsequent meetings involving all relevant personnel from the petitioner. MSPGCL feels strongly that Commission has power to summon any specific personnel as a part of tariff proceedings to ask for such information. This power has not been exercised. Therefore, in the present case if the Commission was not satisfied by the submission made in the public hearing the same could have been answered subsequently through written submissions and as such, the directions of initiating the process of public hearing *de novo* is without jurisdiction and constitutes an error apparent and need to be reviewed. MSPGCL submitted that adequate time (around 1 month) has already been provided to consumer representatives to file their objections on the Petition in Case No. 69 of 2011. The Petitioner did not receive any objections from the consumers and as such it can be construed that there are no objections and consumers are satisfied due diligence mechanism which has been adopted by the Petitioner.
15. **Hearing:** Hearing in the matter of the said review petition was scheduled by the Commission on 25th August 2011 and copies of the notice were also sent to the four Consumer Representatives authorised as per Section 94(3) of the Electricity Act, 2003. In the hearing as above, held at the Commission's office on Thursday, 25th August, 2011 at 16.00 hours, the Petitioner was represented by Shri J.K. Srinivasan ED Finance, MSPGCL, Shri C.S.Thotwe, Director Projects, MSPGCL and Shri Sanjay Sen, Advocate. In the course of the hearing, the Petitioner reiterated all the submissions as above and further submitted that mere absence of certain representatives of the Petitioner at the Public hearing in the said matter, held on 21st July 2011, cannot be the reason for cancellation of the Public Hearing, as there was no other procedural lapse on the part of the Petitioner. The Petitioner further submitted

that the Commission cannot take the role of the Public and ask questions on behalf of the public at the time of the Public hearing.

16. The Commission explained that Public hearing in tariff fixation matters was a tripartite event between the Petitioner, the Consumers/ Public and the Commission, where the Commission was expected to help and guide the public in a transparent manner the matters which were of interest to the Public. The Commission also explained that the normative ratio of Debt: Equity is specified as 70:30, which means that all project parameters pertaining to the Debt, viz, the Rate of Interest, the Interest during construction (IDC), will play important part in fixation of tariff of the Project, and more so as both the said power projects had been delayed from their 32 months' scheduled implementation period, to more than 40 months period. The Commission further explained that the high proportion of debt in the above ratio called for observing strict discipline in implementation of projects, which appeared to be lacking in the implementation team as the concerned persons of the Petitioner were not even present in the said hearing on 21st July 2011 to clarify issues raised by the Commission in order to consider the petition for project cost approval and fixation of tariff. The Petitioner submitted that in these projects, the debt portion was higher than the Normative value specified. The Commission observed, that such being the case the Interest rate of the debt and the IDC would assume even more serious importance for the public.

17. Decision on review petition:

- 17.1 Having heard the Petitioner and after considering the materials placed on record, the Commission observes that the delay in implementation of projects and resulting high expenditure being a very serious issue impacting the consumers' tariffs, the same required an examination into the root cause *inter alia* as to whether there was inefficient management of the same by the implementation team involved. The Commission was obligated to bear in mind the interests of the consumers. The Commission had to hear the consumers in regard to these facts. There is no way that consumers / public, the major stake holders, would be made aware of these details unless these are specifically brought out in public hearings. The Petitioner had earlier

implemented two other projects viz. Parli unit 6 and Paras unit 3 where there were delays. It is part of routine process for the Commission to scrutinize the submissions and raise queries regarding pertinent points in order to consider the Petition and to ask questions and information / data during the Public hearing *inter alia* for guidance and information of the public. The Commission observes that during the said Public hearing in the matter held at the Commission's office on 21st July 2011, at 11:00 hours, none of the four authorized Consumer Representatives were present though Shri Rakshpal Abrol was present as a member of public.

At the start of the said Public hearing, held in the matter on 21st July 2011, the Petitioner informed about the total capital cost of the Projects and the Debt to Equity Ratio for each one. The Commission enquired as to who was the Lender and what were the major Terms and Conditions of the loan. The Petitioner submitted that PFC was the lender, however, the Petitioner did not have the details of terms and conditions of the loan at that time and the Petitioner further submitted that a copy of the same could be submitted later. The Commission enquired of the Petitioner as to whether there was any moratorium on the loan repayment. The Petitioner stated in the affirmative and stated the details. The Commission observed that the moratorium would not have any effect on the Interest payments as the Interest would have to be repaid immediately after the loan amount is disbursed, with the agreed periodicity. Hence, in the event of delay in implementation of the project the interest on the loan during construction would have a great impact on the project cost and the fact had to be brought out / examined in the hearing in the interest of the public. Therefore, the Commission went on to enquire as to what was the rate of interest in the present case. The Petitioner stated that it did not have the exact details of the rate of interest, however, the Petitioner submitted that normally PFC charges approximately 10% to 13% interest. The Petitioner further submitted that exact details would be submitted later. The Commission expressed its dismay at the absence of the basic and important financial data as required for the discussions / hearing, not being readily available with the Petitioner. The Petitioner furnished explanation that all the details enquired, pertained to Finance Management of the projects and the personnel from Finance

wing were not present at the said Public hearing as they were away at that time, at another meeting.

The Commission is of the view that if the concerned technical persons who are the main project implementers are not aware of or are not able to submit before the Commission the fundamental details affecting the tariff of the plant, it would not be out of place to state that the Petitioner had paid scant attention to these details and had not come prepared to present all facts to the Public.

As a measure of education of the public utilities such as the Petitioner, the Commission did not resort to invocation of its powers to dismiss the ARR and Tariff Petition in Case No. 69 of 2011 and instead rescheduled the public hearing, at that time in the hope that after due education and pointing out of fallacies in the missive of the Petitioner, it would be enough to advise the Petitioner to publish fresh public notices.

The Commission had directed that the Petitioner may not issue a detailed Public Notice for the Public hearing to be held on 15th September 2011 but publish an abridged Public Notice in the Newspapers, announcing the new date of Public hearing in the matter, as 15th September 2011 and further advising the Public to refer to the Project details as detailed out on its website.

17.2 Importance of the queries raised by the Commission

The Commission is of the view that the importance of highlighting the above issues regarding the finance management of the project lies in the fact that the tariff of the plants gets affected through impact of all these elements, individually as well as collectively. The Commission had put up some specific queries to the Petitioner and the fact that the specific set of personnel from the Petitioner's side who could reply to these and further queries pertaining to finance of the project, were not present, clearly meant that meaningful dialogue regarding the same, in the interest of Consumers/Public was not possible at the said public hearing.

The importance of these queries and relevance to the matter are elaborated in the following paragraphs:

17.2.1 What is the “Project Cost”:

Parli Unit 7 and Paras Unit 4 are new Thermal power plant projects. These projects have been implemented and have operationally become an integral part of the MSPGCL’s generating system.

The purpose of the entire exercise undertaken by the Commission, (of which the Public Hearing is a part), is to determine the tariff for these thermal power stations. In this exercise, approval of the “Capital Cost of the project” is a very important step, result of which will go to directly impact the tariff of power generated by these plants, not only in the initial stage, but throughout the life of the plants, and which is charged to the public.

The major elements which constitute the total Capital cost of a typical project are:

- a) Cost of development of land and cost of development of basic infrastructure
- b) Total cost incurred on procurement of equipment and their delivery to site
- c) Taxes and duties
- d) Cost of erection and commissioning of equipment, building and other relevant (implementation cost)
- e) Financing costs and interest on Project Debt

As per Section 64 of the Act and Regulation 31 of MERC (Terms and Conditions of Tariff) Regulations, 2005, (viz., MERC Tariff Regulations), it is the duty of the Commission to examine all the above elements in a fair and transparent manner for considering the Project cost.

17.2.2 Project financing

Financing structure:

Project financing has two components - The Debt and the Equity. Although, the normative ratio of Debt to Equity as specified in Regulation 31.2.1 of the MERC Tariff

Regulations is 70:30, it has been submitted by the Petitioner that in the said projects implemented by the Petitioner, the ratio of Debt to equity is higher. As the actual debt amount was higher in the said ratio for these projects, it goes to show that, interest thereon along with the repayment terms of the loan, play an extremely important part in cost structure and hence on the Tariff of the said Thermal Power plants.

17.2.3 Effect of Interest during construction (IDC) on project cost:

The important aspects of Project Financing, in general, is that, at the outset of the project, the Borrower and the Lender are required to agree upon the modalities and conditions of drawal of funds, payment of interest and repayment of funds. :

Drawal and Repayment of Principal amount of Funds :

Usually, for projects of this size, the total agreed amount of funds is drawn by the borrower in small instalments as required by him, to finance the project costs, from time to time.

The Lender usually releases the funds only if the borrower also infuses the Equity in the project in the agreed ratio of debt : equity

It is understood by the Lender and the Borrower that the repayment of the capital cost is to be done through the earnings of the project. The “project” starts earning only after it is commissioned and starts its Commercial Operation. Hence repayment of the principal amount starts in the agreed instalments, and with the agreed periodicity, only after the date of Commercial Operation (COD) of the project.

The Lender, through mutual agreement may grant moratorium of agreed period of time before the repayment of capital amount starts, as the plant may not attain its rated production level immediately after commissioning (after attaining COD), so that there would not be immediate burden on the borrower on repayment of the Capital amount.

Interest payment :

The instalments of interest payment from the Borrower to the Lender start at the agreed rate and periodicity, immediately after the amount is borrowed by the Borrower from the Lender. The total Interest paid on the borrowed amount upto the date of commercial operation is capitalised as Interest during Construction (IDC) and then it forms an integral part of the Capital Cost of the project.

Controlling the IDC during project implementation

The quantum of IDC (which is capitalised) depends upon,

- a) The total amount borrowed upto the date of commercial operation
- b) The rate of interest payable
- c) The duration for which the interest is paid prior to COD

On a typical project, a project management team, constituted for implementation of a project, consists of Technical personnel, administrators and finance managers. It is the duty of the project management team to collectively work on every aspect of project management and ensure that the IDC which is considered as a controllable part of the project is pegged at a minimum value, so as not to adversely affect the project cost.

The most effective ways to arrest the IDC are, to control the spending (and the borrowing), and also to control the delay in implementation of the project by ensuring tight discipline in project management.

In the two projects under reference here, the Commission has noted that both, cost over-run and time over-run have occurred, which have substantially raised the Capital cost of the project.

It is noted from the submissions made by the Petitioner that the project cost of the said 250 MW projects is more than Rs 5.8 Crores per MW, which is way higher than the normal industry average cost, and the share of excess IDC due to cost and time over-run plays a major role in the runaway cost as above.

17.2.4 Accountability of staff for cost control

It appeared that the cost and time over-run had occurred, almost to the same extent as it had occurred for Parli unit 6 and Paras Unit 3 projects which were implemented by the Petitioner approx. 2 years back. During the hearing held for these projects, the Petitioner had pleaded that in the recent past the Petitioner had not implemented any new thermal plant projects and it had limited experience of handling such projects. It was also stated that for the next projects, appropriate controls would be in place, the personnel managing the project would be adequately trained and accountabilities and responsibilities will be appropriately fixed.

It is well known that such delays in project implementation cause slippage in achieving generation target set by the Central Government. The Commission has noted that on the background of examples of expeditious commissioning of thermal power projects by other utilities in the country, most of which are in private sector, the dragging of feet done by the Petitioner stands out in sheer contrast.

The technology of the 250 MW Thermal power units is well established. The supplier, M/s BHEL is a reputed supplier and a commercially managed PSU. It had concurred with the Project Implementation programme of 32 months put forth by the Petitioner. Therefore, the Commission feels that, through appropriate and intense follow up and by having appropriate project management mechanism, inclusive of adequate Quality Assurance and Quality Control (QA & QC) systems in place, the Petitioner should have commissioned the projects in the scheduled period and save the burden of excessive IDC which has raised the Capital Cost.

17.3 Importance of Public hearing

The importance and need of public hearings in tariff fixation exercise and the unequivocal right of hearing/representation of the consumers in such hearings, has been acknowledged by the Hon'ble Supreme Court in "W. B. Electricity Regulatory Commission v. C.E.S.C. Ltd." AIR 2002 SUPREME COURT 3588 = 2002 AIR

SCW 4212. Certain passages from the said judgment need to be taken note of, as follows:-

“One of the primary objects of the 1998 Act was to create an independent regulatory authority with the power of determining the tariff, bearing in mind the interests of the consumers whose rights were till then totally neglected. The fact that the Commission was obligated to bear in mind the interests of the consumers is also indicative of the fact that the Commission had to hear the consumers in regard to fixation of tariff. This right of the consumers is further supported by the language of Section 26 of the Act, which specifically mandates the Commission to authorise any person as it deems fit to represent the interest of the consumers in all proceedings before it. The mandate of the Parliament in Section 37 to the Commission that the Commission should ensure transparency while exercising its powers and discharging its functions which also indicates that the proceedings of the Commission should be public which, in itself, shows participation by interested persons. From a conjoint reading of Ss. 26,22,29 and 58 it is clear that the Commission while framing the regulations must keep in mind the interests of the consumers for the purpose of determining the tariff. That apart R. 4 (c) of 1999 Rules provides that the Commission before taking any decision on the rates of tariff must notify its intention in this behalf, in leading newspapers and hold public hearing for the said purpose. The Commission, can permit an association or other body corporate or any group of consumers to participate in any proceedings before the Commission, on such terms and conditions, including, in regard to the nature and extent of participation as the Commission may consider appropriate. A combined reading of these provisions of the Act, rules and regulations, clearly shows that the statute has unequivocally provided a right of hearing/representation to the consumers, though the manner of exercise of such right is to be regulated by the Commission. This right of the consumers is neither indiscriminate nor unregulated. The statute does not give individual rights to every one of the consumers. The same is controlled by the regulations. That apart, when a statute confers a right which is in conformity with the principles of natural justice the same cannot be negated by a Court on an imaginary ground that there is a likelihood of an unmanageable hearing before the forum concerned. Though normally price fixation is in the nature of a legislative function and the principles of natural justice are not normally

applicable, in cases where such right is conferred under a statute, it becomes a vested right, compliance of which becomes mandatory. While the requirement of the principles of natural justice can be taken away by a statute, such a right when given under the statute cannot be taken away by Courts on the ground of practical convenience, even if such inconvenience does in fact exist.”

The above principles apply even post enactment of the Electricity Act, 2003.

Holding of Public hearing is hence a mandate laid down by Hon’ble Supreme Court. Around 3 to 4 weeks before the scheduled date of the Public hearing, the Petitioner is required to post his Petition on the net, in the public domain, make the hard copies available to the public on demand and put up public notice in 2 (two) Regional and 2 (two) English language newspapers. This is a limited exercise, and, in spite of this, usually, it is not possible for the general public to be totally aware of all the facts and figures pertaining to the project, which have substantial impact on tariff. Information, facts and figures regarding the project would certainly be known to the Petitioner; while, the Commission, after scrutiny of the Petition and through meetings and discussions could understand the details as required for formulating the Tariff Order; however, members of public who will subsequently pay the tariff should also be in a position to know such nuances and details pertaining to the project which are therefore required to be brought to their notice through the process and procedure of public hearing.

From past experience it is noted that some of the members of the public, persons from Consumer Representative bodies and the stake-holders, do take the efforts of registering themselves in advance, and also there are many others who arrive at the venue, unregistered and are allowed to express their views if so desired.

In the Public hearing, the Commission is expected to guide the public regarding crucial facts which are essential for safeguarding the interest of the public. Although a public notice was issued in the news papers and also, notice was sent to four authorized consumer representative organizations to appear before the Commission

to represent the interest of consumers in the matter of Petition of Maharashtra State Power Generation Co. Ltd in regards to tariff determination and approval of ARR for Parli Unit No. 7 and Paras Unit No. 4 for the year FY 2010-11, none appeared, excepting Shri Rakshpal Abrol as a member of the public. In any case it was essential that the Petitioner should have come prepared to present all facts of the case as would be called for. By not doing so, it is neither a justice to the consumers / public nor a justice to the Commission.

The electricity generated by the Petitioner is purchased by MSEDCL at the cost of “Determined Tariff”. The Commission is aware that almost 70% to 80% of the expenditure of the Power Distribution utilities is towards procurement of power. The power purchase cost thus incurred by the Distribution utility is borne by the consumers. The Commission feels that even MSEDCL who is the immediate downstream customer of MSPGCL, may not ever have learnt about the details about the constituents of the charges or justification of these constituents. Once approved through the Tariff Determination process, these costs would be “passed through” to the consumers of the Distribution utility. The only platform where the general public can know details about such costs, where they can debate on justification of such costs and deliberate and discuss regarding avenues to control these costs is the “Public Hearing”, in case they are made aware of these facts. Unawareness of the Public and lack of discussions would inevitably result in high costs of electricity being implemented and cause subsequent creation of ire in the public, targeted at the Distribution utilities.

The inability of representatives of the Petitioner to reply to simple, pertinent and relevant queries raised by the Commission is indicative of the scant importance given by the Petitioner not only to the said Public hearing but to the entire tariff fixation process, of which, the Public hearing is a part. The stand of the Petitioner that in the present case if the Commission was not satisfied by the submission made in the public hearing the same could have been answered subsequently through written submissions but did not require a Public hearing, raises doubts of transparency on the part of the Petitioner. Is the Petitioner not inclined to clarify

issues in a Public hearing where the members of the public would be present? The Petitioner submits that adequate time (around 1 month) had already been provided to consumer representatives to file their objections on the petition in Case No. 69 of 2011, however no objections from the consumers were received and as such, it can be construed that there are no objections, and consumers are satisfied with the due diligence mechanism which has been adopted by the Petitioner. The Commission is of the view that the stand of the Petitioner lacks substance. The question is how could the members of the public respond to any debatable issues without getting guidance regarding their specific relevance to the matter? Further, the public never got a chance to respond as the Petitioner itself has not been able to answer the questions so raised by the Commission.

The right of audi alteram partem is a valuable right recognised even under the Indian Constitution. Right of hearing conferred by a statute cannot be taken away. Denying a right of Public hearing would amount to violation of principles of natural justice.

The Petitioner also submits that cancellation of public hearing and a direction to *de-novo* proceed with the process of issuing advertisement is burdensome, since it will cause further delay which would in turn result in financial implications. The Commission is of the view that under Section 94(2), the Commission is vested with the power of passing such interim orders as it may consider appropriate to protect the interest of any of the parties to the proceedings. In the opinion of the Commission, it is open to the Commission to exercise this power in the event of there being any delay in determination of tariff by it. This power of interim directions can also be exercised by the Commission in the event of there being any requirement for making any changes for any compelling reasons. Therefore, the apprehension of the Petitioner that a *denovo* public hearing for determining the tariff is impracticable, or, it is likely to jeopardise the interest of the Petitioner, cannot be accepted.

18. **Action of the Commission :**

As the Petitioner had not been able to answer some of the vital questions raised by the Commission at the said Public hearing, and gave the excuse that its Finance personnel were away at that time, it was clear to the Commission that no meaningful discussions regarding financial aspects of the project, which were of key relevance to the Public were possible, The Commission, in its wisdom, took the view that one more opportunity was required to be given to the Petitioner in the interests of justice. Hence, the need to adjourn the said public hearing in the matter on 21st July 2011 and ordering for a fresh Public hearing in the matter, at a future date and hence, re-publication of public notices were requisite. The Commission had directed that the Petitioner may not issue a detailed Public Notice for the Public hearing to be held on 15th September 2011 but publish an abridged Public Notice in the Newspapers, announcing the new date of Public Hearing in the matter, as 15th September 2011 and further advising the Public to refer to the Project details as detailed out on its website.

There is no error in such a decision of the Commission, far less than an error on the face of record.

19. In the passing, the Commission notes in dismay that the Petitioner, being a public body, even after the passage of considerable time since being legally proclaimed as “companies” have not yet come out of their historical legacies and have not started working as professional bodies operating in competitive environment.

Right from the stage of Planning a Generation Project, at every stage, 'Cost-effectiveness needs to be factored in, for every decision. The Commission observes that in these two Projects under reference above, “Time” and “Cost” over-runs have increased the Capital Costs. “Interest During Construction' (IDC) is an important component of this cost increase, which is proposed to be passed on to the Consumers. It is in this context that the inability to answer the simple Questions on the 'rate of interest in which debt has been raised from PFC', by the senior Project

Team in a Public hearing is to be seen and viewed. It clearly reveals that 'Cost Consciousness' is absent in the mind-set of the Senior Project Team. This, the Commission feels, is an unpardonable sin, from the Point of View of the Consumers. As a part of its duty to propagate and ensure 'Transparency' under Section 86(3) of the Electricity Act, 2003, the Commission has a mandate to educate the Consumers and demand accountability from the Project Implementors.

20. In view of the above, the Commission rejects the contentions of the Petitioner, and dismisses the present review petition as not maintainable.

Sd/-
(Vijay L. Sonavane)
Member

Sd/-
(V. P. Raja)
Chairman