

**Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No. 10 of 2011

Dated: 11th January, 2012

**Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice P.S. Datta, Judicial Member**

In the matter of:

Tata Power Trading Co.
Senapati Bapat Marg
Lower Parel
Mumbai 400 013

.... Appellant (s)

Versus

**1) Maharashtra Electricity Regulatory
Commission**
World Trade Centre No.1, 13th floor,
Cuffe Parade, Colaba,
Mumbai – 400 001

..... Respondent (s)

2) Tata Power Company Ltd.
Bombay House
24, Homi Mody Street
Mumbai – 400 001

Counsel for the Appellant (s) : Mr. Sitesh Mukherjee
Mr. Vishal Anand
Mr. Sakya Chaudhari
Mr. Avijeet Kr. Lala
Ms. Mandakini Ghosh

Counsel for the Respondent (s) : Mr. Buddy A Ranganadhan for R-1
Ms. Surbhi Sharma
Mr. Sanjay Sen for R-2
Ms. Shikha Oheri
Ms. Sunil Sharma
Ms. Richa Bharadwaja

JUDGEMENT

HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

This appeal has been preferred by Tata Power Trading Company Ltd. against the order dated 12.09.2010 passed by the Maharashtra Electricity Regulatory Commission (“State Commission”) regarding true-up for the FY 2008-09, Annual Performance Review for the FY 2009-10 and determination of Aggregate Revenue Requirement (ARR) and tariff for the FY 2010-11 for the distribution business of Tata Power Company

Ltd., allegedly affecting the contractual rights of the appellant under the Power Purchase Agreement that it had executed with Tata Power Company.

2. The State Commission is the first respondent. Tata Power Company Ltd. is the second respondent.

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

3.1 The appellant is an inter-state trading licensee and is a wholly owned subsidiary of the respondent No.2.

3.2 The respondent no.2 is engaged in the business of distribution of electricity in the city of Mumbai. It is also involved in the generation of electricity and owns generating stations. However, the respondent no.2 has segregated and ring-fenced its distribution and

generation businesses for the purpose of operation. Hereinafter, the expression “Tata Power – Distribution” will be used for the distribution business of the respondent no.2 and “Tata Power – Generation” will be used for referring to the generation business of the respondent no.2.

3.3 Tata Power - Generation has a generation capacity of 2027 MW in and around Mumbai. Out of this, Tata Power – Generation has entered into long term PPAs for supply of 1000 MW with BEST undertaking, a distribution licensee operating in the city of Mumbai and 527 MW with Tata Power – Distribution. Additionally, Tata Power – Generation has committed to sell about 500 MW power to the appellant through two separate PPAs as under:

(i) PPA dated 21.12.2007 for sale of 92 MW (net capacity) plus any additional power available from Tata Power – Generation’s recently commissioned unit no.8.

(ii) PPA dated 12.01.2010 for sale of 400 MW capacity.

3.4 On 12.01.2010, the appellant also entered into a PPA with Tata Power – Distribution for sale of upto 160 MW power on round the clock basis with effect from 01.04.2010 as per the projections to be communicated by the latter on quarterly basis at least 90 days before the start of the period to meet the growing demand in its licensed area of supply. No approval for the PPA was obtained by Tata Power – Distribution from the State

Commission as it was a short term PPA for a period of one year.

3.5 Tata Power – Distribution filed a petition being no.98 of 2009 before the State Commission for true-up for the FY 2008-09, Annual Performance Review for the FY 2009-10 and determination of ARR and tariff for the FY 2010-11 in which it submitted its projections of power purchase of 527 MW for Tata Power – Generation and 160 MW from the appellant for the FY 2010-11.

3.6 The State Commission passed the impugned order on 12.09.2010 in which it decided to consider the procurement of additional 160 MW required by Tata Power – Distribution during the FY 2010-11 as directly contracted from Tata Power – Generation instead of being supplied by the appellant.

3.7 Aggrieved by the above finding of the State Commission in its order dated 12.09.2010, the appellant has filed this appeal.

4. Ld. Counsel for the appellant has submitted the following:

4.1 The State Commission has wrongly and arbitrarily altered the contractual rights and entitlements of the appellant under its validly executed PPA with Tata Power – Distribution without any notice to the appellant and without giving any reason in the impugned order for such a decision.

4.2 As per the provisions of the 2003 Act, transaction between a trading licensee and a generating company are

outside any regulatory superintendence. It is well settled by the judgment of Hon'ble Supreme Court in the case of Tata Power Company Ltd Vs Maharashtra Electricity Regulatory Commission & Ors. reported as 2009 ELR (SC) 0246 that a generating company has the choice of counter-party buyer and has freedom from tariff regulation when it supplies to a trader or directly to a consumer. Therefore, the legality of PPA executed between TPC-G and the appellant can not be called into question.

4.3 Tata Power – Distribution has entered into the PPA for short term purchase with the appellant according to the Tariff Regulations.

4.4 The price offered by the appellant including its trading margin of 7 paise/unit is comparable to the competitive

short term power prices as estimated by the State Commission for short-term power purchase for the FY 2010-11.

4.5 Power generated by Tata Power – Generation is not low-cost power, therefore, Tata Power – Distribution would have run the market risk and could be subjected to market volatility in case it procured power directly from Tata Power – Generation as against the PPA with the appellant where it had the right to refusal without any penalty.

4.6 Thus the PPA between the appellant and Tata Power – Distribution was both legal and beneficial to Tata Power – Distribution and its consumers.

5. Ld. Counsel for the respondent no.2 has submitted as under:

5.1 The requirement of additional power by the distribution licensee was due to change over customers pursuant to the order dated 08.07.2008 passed by the Hon'ble Supreme Court in Civil Appeal Nos. 2898, 3466 and 3467 of 2006 and the subsequent orders of the State Commission dated 15.06.2009 and 15.10.2009 which allowed consumers to change their supplying licensee. The exact demand for power could not be estimated and some flexibility towards purchase had to be built in for the transition period. Therefore, a short term arrangement with the appellant was preferred to a direct contract with Tata Power – Generation.

5.2 The PPA signed with the appellant for upto 160 MW power would indicate that the tariff for sale was at regulated price and not at market price. Thus, the transaction was wholly at arms length and entirely bonafide.

5.3 The State Commission without finding any reason proceeded to directly allocate power from Tata Power – Generation to Tata Power – Distribution when the latter did not have any claim, contracted or otherwise, over the 160 MW generation capacity available with Tata Power – Generation, thus exceeding its jurisdiction.

5.4 Although no reason has been given in the impugned order for ignoring the arrangement entered into between the appellant and the respondent no.2, the Commission has filed a detailed counter affidavit justifying its order.

The validity and correctness of the impugned order cannot be supplemented by fresh reason in the shape of affidavit or otherwise. In this regard, the appellant relied on the principle annunciated in the judgment in Mohinder Singh Gill's case reported in (1978) 1 SCC 405.

6. Ld. Counsel for the State Commission besides supporting the impugned order has argued that the respondent no.2 has accepted the impugned directions regarding direct supply of 160 MW from Tata Power – Generation to Tata Power – Distribution and, therefore, the appellant had no locus standi to maintain the present appeal. He further added that as the price of power at which Tata Power – Distribution would purchase from the appellant would be the same as if the power had been purchased directly from the Tata Power – Generation, there was no need to introduce the

appellant as trading company in between. According to him the State Commission by the impugned directions has not sought to interdict in anyway the right of the generator because it has only given a treatment to the power in the hands of the Tata Power – Distribution and not in the hands of Tata Power – Generation. Also the impugned direction was in consonance with paragraphs 118 and 119 of the judgment of Hon’ble Supreme Court in the matter of Tata Power Company Vs M.E.R.C. & Ors. reported as 2009 ELR (SC) 246.

7. After examining the contentions of the parties, the following question would arise for our consideration:

Whether the State Commission has exceeded its jurisdiction by giving a finding regarding supply of additional 160 MW power from Tata Power – Generation

directly to Tata Power – Distribution when the latter did not have any claim or contract for the power, thus interdicting the right of generator to sell power to any person of its choice?

8. Before we take up the above issues for consideration, we would like to answer the question of maintainability raised by Ld. Counsel for the State Commission.

8.1 According to Ld. Counsel for the State Commission, the respondent no.2, who was given the impugned direction had accepted the same. Therefore, the appellant had no locus standi to file this appeal.

8.2 Admittedly, the appellant had entered into PPAs with Tata Power – Generation for purchase of power and PPA with Tata Power – Distribution for sale of 160 MW power.

The appellant was entitled to get some trading margin on the power resold by the appellant to Tata Power – Distribution. The impugned direction by the State Commission considering the 160 MW power required by Tata Power – Distribution as directly contracted from Tata Power – Generation has effectively disallowed the inclusion of trading margin of the appellant in the ARR of Tata Power – Distribution affecting the commercial interests of the appellant. Therefore, in our opinion, the appellant is a party aggrieved by the order of the State Commission, and is entitled to prefer an appeal against the said order under section 111 of the 2003 Act. Accordingly, we hold that the appeal is maintainable.

9. Now we will take up the question framed by us in paragraph 7.

10. We notice that the impugned order was passed in a ARR/tariff petition filed by the respondent no.2 for its distribution business before the State Commission after a public hearing. The respondent no.2 issued public notice inviting suggestions and objections to the petition. After receipts of suggestions and objections, a public hearing was held by the State Commission. Thus, due procedure was followed by the State Commission before passing the impugned order.

11. The respondent no.2 in the petition had proposed procurement of 160 MW from the appellant to meet its additional requirement during the FY 2010-11. The respondent no. 2 had submitted that in the interest of its consumers it had consciously contracted the additional capacity from the appellant to meet the requirement on quarterly basis so as to spare the burden of additional

fixed cost on its consumers. The respondent no.2 also submitted that the power from the appellant could be drawn as per its requirement communicated on quarterly basis to meet the increase in demand on account of change over consumers migrating to the respondent no.2.

12. Now let us examine the finding of the State Commission regarding procurement of additional 160 MW power by the respondent no.2 which is reproduced below:

“The Commission has gone by the PPAs entered into by different Utilities and other power procurement arrangements as on date. Hence, the Commission has considered the additional 160 MW required by TPC-D as directly contracted from TPC-G”.

Thus the State Commission approved the additional power procurement of 160 MW as if the entire power had to be procured directly from Tata Power - Generation. The State Commission in the impugned order has not given any reason for not allowing the procurement of power through the appellant. We would, therefore, examine the whole issue keeping in view the contentions raised by the appellant that the State Commission should have allowed the procurement of additional power through the appellant according to the PPA dated 12.01.2010 entered into between the appellant and Tata Power – Distribution.

13. It is noticed that the base tariff for sale of additional 160 MW power by the appellant to Tata Power – Distribution was proposed at the regulated generation tariff of Tata Power – Generation and not the market price. The only

add-on to the generation tariff of Tata Power – Generation would have been the trading margin of 7 per kwh of the appellant if the transaction had been allowed to be routed through the appellant. The State Commission by considering the additional power as procured directly from Tata Power – Generation has effectively disallowed the trading margin of the appellant to be included in the power purchase cost of Tata Power – Distribution. Thus, the core issue that is required to be considered by us is whether the State Commission should have allowed the procurement of additional power through the appellant so as to allow the trading margin of the appellant to be included in the ARR of Tata Power – Distribution.

14. Before going into the main issue, let us examine the intent of the Act and the National Electricity Policy in

introducing trading in electricity sector. One of the key features of the Act is to promote competition in the electricity sector which is expected to lead to significant benefits to consumers. The Act recognizes trading as a distinct activity with the safeguard of the Regulatory Commissions being authorized to fix ceiling on trading margins, if necessary. The National Electricity Policy envisages promotion of power market to infuse competition aimed at consumer benefit. One of the measures envisaged for development of power market is to promote trading of electricity.

15. In the present case Tata Power Co., the respondent no.2 herein, entered into a PPA on 12.01.2010 with the appellant, which is a subsidiary of the former, for sale of 400 MW power from its generating stations. On the same day, the appellant signed a PPA with Tata Power –

Distribution for sale of upto 160 MW power as per the requirement projected on a quarterly basis by Tata Power – Distribution to meet its growing demand. Since the PPA between the appellant and Tata Power – Distribution was for a short term of one year no approval of the State Commission was necessary.

16. Even though the generation and distribution business of Tata Power company have been ring fenced for operation purposes it is still a single corporate entity. The introduction of a trader in a power supply arrangement is expected to provide value addition to the transaction but in this case we do not find any value addition by this transaction which is nothing but supply of power by the generation wing of Tata Power Company to the distribution wing of Tata Power Company through a trader which is also a subsidiary of Tata Power

Company. This is definitely not what was intended to be achieved by the 2003 Act by recognizing trading as a distinct activity.

17. It is argued by the Ld. Counsel for the appellant that the power generated by Tata Power – Generation is not low cost power and, therefore, Tata Power – Distribution would run the market risk and could be subjected to market volatility in case it procured power directly from Tata Power – Generation as under the PPA with the appellant it had right to refusal without any penalty. The Ld. Counsel for the respondent no.2 has also argued that the exact demand for power could not be estimated in view of uncertainty of switchover consumers from other area and some flexibility towards purchase had to be built. Therefore, a short term arrangement with the appellant was preferred to a direct contract into Tata

Power – Generation. We do not find any force in these arguments. Firstly, the rate of power proposed to be procured by Tata Power – Distribution directly from Tata Power – Generation was less than the competitive short term power prices as estimated for short term power purchase for the FY 2010-11 according to the submissions of the appellant before the State Commission. The projected average price for direct purchase from Tata Power – Generation was Rs.3.84 per kwh while the average price of short term external power purchase as approved by the State Commission on the basis of the data submitted by Tata Power – Distribution before the State Commission was Rs.4.71 per kwh. Thus the average price for direct procurement from Tata Power – Generation was expected to be lower than the average market price. Secondly, according to the PPA entered into between the appellant and Tata Power –

Distribution, the latter had to give its quarterly power requirement at least 90 days before the start of the period. The quantum of power not requisitioned by Tata Power – Distribution could be sold by the appellant to third parties. Thus, according to the appellant and the respondent no.2, the distribution licensee was not burdened with the market risk of fixed charges of the unutilized power. In our opinion the same arrangement could have been possible in case of a direct short term (quarterly) supply arrangement between Tata Power – Generation and Tata Power – Distribution. The quantum of power not requisitioned by Tata Power – Distribution 90 days before the start of the period could be offered to the appellant for sale to third parties. Thus the same results as intended by the respondent no.2 could have been achieved without burdening Tata Power –

Distribution with additional trading margin of the appellant and without subjecting it to the market risk.

18. The State Commission under section 86 (1) (b) is authorized to regulate electricity purchase and procurement process of distribution licensee including the price at which electricity shall be procured from the generating companies or licensees or from other sources. The State Commission in the impugned order has not gone into legality of the PPA entered into between the appellant and the respondent no.2 but has decided to consider the cost of additional power of 160 MW in the power purchase cost of Tata Power – Distribution as if the power is directly procured from Tata Power – Generation. Thus, effectively, it has disallowed the trading margin of the appellant to be included in the ARR of Tata Power - Distribution. We feel that the State

Commission is within its rights to allow only prudent power purchase cost. In the present case the State Commission has correctly decided to treat the additional power of 160 MW as having procured by Tata Power – Distribution directly from Tata Power – Generation thus not allowing the cost of trading margin of the appellant in the Annual Revenue Requirement of Tata Power – Distribution, in the interest of the consumers of Tata Power - Distribution.

19. Ld. Counsel for the appellant has relied on the judgment of the Hon'ble Supreme Court in the matter of Tata Power Company Ltd. Vs M.E.R.C. & Ors. reported as 2009 ELR(SC) 0246 to say that the transaction between the trading licensee and a generating company are outside any regulatory superintendence. In our opinion the findings regarding freedom of supply by the generator

in the above judgment will not be of any use to the appellant. In the present case, the additional 160 MW power from the power plants of Tata Power Company was intended to be supplied to the licensed area of Tata Power Company by the combined effect of both the PPAs dated 12.01.2010, one between the appellant and Tata Power – Generation and the other between the appellant and Tata Power – Distribution. This has been given effect by the State Commission by including the generation cost of the additional power in the ARR of Tata Power - Distribution. However, the State Commission by considering the additional 160 MW power as being supplied directly by the Tata Power Company – Generation to Tata Power – Distribution has effectively disallowed the trading margin of the appellant to be included in the power purchase cost/ARR of Tata Power – Distribution for passing on to the consumers. As held

by the Hon'ble Supreme Court in the above referred judgment, Section 86 (1)(b) of the Act empowers the State Commission to regulate electricity purchase and procurement process of distribution licensee. In this case, the State Commission has correctly allowed only the generation cost of the additional 160 MW without allowing the cost of trading margin of the appellant.

20. Thus we hold that the State Commission has correctly passed the impugned order within its powers under the 2003 Act.

21. In view of above we do not find any reason to interfere with the findings of the State Commission.

22. The appeal is dismissed devoid of any merits without any cost.

23. Pronounced in open court on **11th day of January, 2012.**

(Justice P.S. Datta)
Judicial Member

(Rakesh Nath)
Technical Member

REPORTABLE/NON-REPORTABLE

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