Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 34 of 2012

Dated 30th January, 2013

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

In the matter of:

Maharashtra State Power
Generation Company Limited,
Prakashgad,
Plot No. G-9, Bandra (East),
Mumbai-400 051 … Appellant (s)

Versus

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

2. **Mahatrashtra State Electricity**
   Distribution Company Limited,
   Prakashgad,
   Plot No. G-9, Bandra (East),
   Mumbai-400 051.

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

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

5. **The Vidarbha Industries Association,**
   1st Floor, Udyog Bhawan,
   Civil Lines, Nagpur-400 041

6. **The General Secretary,**
   Thane Belapur Industries Association,
   Rabale Village, Post: Ghansoli,
   Plot P-14, MIDC
   Navi Mumbai-400 701. ...Respondent(s)

Counsel for Appellant(s) : Mr. Sanjay Sen,
Mr. Hemant Singh,
Mr. Anurag Sharma

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

JUDGMENT

RAKESH NATH, TEHNICAL MEMBER

This Appeal has been preferred by Maharashtra State Power Generation Company Ltd. against the order dated 22.12.2011 passed by the Maharashtra Electricity Regulatory Commission ('State Commission') on the petition filed by the Appellant for determination of final tariff and approval of Annual Revenue Requirement for FY 2010-11 and FY 2011-12 for Parli Unit 7 and Paras Unit 4 of the Appellant.

2. The Appellant is a State owned generating company. The State Commission is the first Respondent. The Maharashtra State Electricity Distribution Company is the second Respondent.

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

3.1 The Appellant commissioned Parli Unit no. 7 and Paras Unit 4 with generation capacity of 250 MW each on 31.7.2010 and 31.8.2010 respectively. The power generated from these units is to be supplied to the distribution licensee, the Respondent no. 2 herein.

3.2 The Appellant filed a petition before the State Commission for determination of tariff and approval of ARR for the above units for the FY 2010-11 and FY 2011-12.

3.3 The State Commission, after conducting a public hearing passed the impugned order dated 22.12.2011. Aggrieved by disallowance of certain costs incurred by

the Appellant in the impugned order dated 22.12.2011, the Appellant has filed this Appeal.

4. The Appellant has raised the following issues:

4.1 **Disallowance of capital cost due to Interest During Construction ('IDC'):**

As against the total project cost of Rs. 1485.93 crores for Paras Unit-4, the State Commission allowed only Rs.1333.25 crores. Similarly for Parli Unit-7, the total project cost incurred till the commissioning of the unit is Rs. 1416.42 crores, against which the Commission approved only Rs. 1269.36 crores. There was delay in commissioning of the projects but the same was entirely due to M/s. BHEL, the main equipment supplier of the Appellant. This resulted in increase in Interest During Construction ('IDC') component. Even though the Appellant did everything in its control and

took proactive measures so as to complete the projects on time but despite these efforts, the delay happened on account of M/s. BHEL. The Appellant has given details of follow up action done with M/s. BHEL. The State Commission did not consider the reasons for the delay caused in the completion of the projects which were beyond the control of the Appellant and disallowed 50% of the excess IDC and overhead costs. The State Commission has wrongly applied the findings of this Tribunal in judgment in Appeal no. 99 of 2010. In the present case the delay occurred due to factors beyond the control of the Appellant and, therefore, the Commission should have allowed the entire IDC.

4.2 **Disallowance of initial spares cost in capital cost:**

The State Commission has considered the quantum of initial spares as 2.5% of the capital cost as

on date of commissioning of the Parli Unit 7 and Paras Unit 4 i.e. 31.7.2010 and 31.8.2010 respectively. However, as per the regulations, the same should have been 2.5% of the capital cost as on the cut off date i.e. March 31, 2012.

4.3 **Incorrect working of base IDC Cost:**

The State Commission has computed the base IDC at a notional IDC calculated at around 9.02% which was used by the Appellant for approval of the project cost by its Board instead of taking the actual interest rate for the approved project cost as per the phasing schedule submitted by the Appellant. The interest allowed for the term loan has to be allowed for computation of IDC.

4.4 Liquidated damages reduced from capital cost:

The Appellant had withheld payments of M/s. BHEL of Rs. 59.64 crores and Rs. 70 crores for Paras

Unit-4 and Parli Unit-7 respectively on account of delay in execution of the projects. The State Commission has deducted the entire amount of Liquidated Damages ('LDs') which have been upheld by the Appellant from its contractors. Even if it is assumed that the State Commission in its order has correctly considered the present case where the cost due to time overrun has to be shared equally between the generating company and the consumers in line with the judgment of the Tribunal in Appeal no. 99 of 2010 according to the same judgment, only 50% of the LDs should have been deducted from the capital cost of the project. However, the State Commission has deducted 100% of LD from the capital cost without giving any reason.

4.5 **Disallowance of Variable Cost:**

The Appellant is aggrieved by the disallowance of variable cost caused by the deviation in performance parameters of Paras Unit-4 and Parli Unit 7 even though according to them the normative performance parameters could not be achieved due to poor quality of coal supplied by the coal companies which is beyond the control of the Appellant. The problem due to poor quality of coal further aggravated during monsoon season due to choking problems caused by usage of wet, sticky and muddy coal leading to poor plant load factor which in turn results in high auxiliary consumption. The Appellant has given detailed submissions regarding the problems due to poor quality of coal, constraints in blending of imported coal and problems experienced during monsoon due to high moisture content.

5. Ld. State Commission has filed counter affidavit supporting the findings in the impugned order which we shall discuss at the appropriate place.

6. We have heard Shri Sanjay Sen, learned counsel for the Appellant and Shri Buddy Ranganadhan, learned counsel for the State Commission. After taking into account the rival contentions of the parties, the following questions would arise for our consideration:

i) Whether the State Commission has erred in disallowing part of increased capital cost incurred on Parli Unit 7 and Paras Unit 4 by the Appellant due to delay in commissioning of the projects without considering that the delay was entirely attributable to the contractor of the Appellant, viz. M/s. BHEL?

ii) Whether the State Commission has erred in disallowing the initial spares cost in the capital cost contrary to the Tariff Regulations?

iii) Whether the State Commission has wrongly adopted a lower interest rate while computing the IDC?

iv) Even assuming that the delay in execution of the projects was not entirely attributable to M/s. BHEL, whether the State Commission was correct in deducing from the capital cost of the project the entire Liquidity Damages recovered by the Appellant from its contractors on account of delay in execution of the projects?

v) Whether the State Commission has erred in disallowing the variable cost incurred by the Appellant in operating Parli Unit 7 and Paras Unit 4 without considering that the specified normative operational

parameters could not be achieved due to poor quality of coal, which is beyond the control of the Appellant?

7. Let us take up the first issue regarding disallowance of capital cost due to IDC.

8. According to learned counsel for the Appellant, the State Commission has not considered the reasons forwarded by the Appellant for delay in commissioning of the generating units and the proactive steps taken by the Appellant to expedite the execution of the projects.

9. The State Commission in its counter affidavit has submitted the following:

a) M/s. BHEL's scope was limited only to the supply, erection of BTG (main plant) package and some electrical equipment whereas the Balance of

Plant and civil works have been executed by the Appellant through various agencies. The Appellant is responsible for project monitoring and take corrective action from time to time. However, both during the Technical Validation Session as well as at the time of hearing, the Appellant failed to establish before the State Commission that a strong project monitoring mechanism was present at the site in order to take immediate corrective actions.

b) The schedule of 35 and 33 months for completion of the project for Paras Unit 4 and Parli Unit 7 respectively was agreed at the time of finalization of the contract based on industry practices.

c) Paras Unit 3 and Parli Unit 6 have recently been commissioned and the main supplier for these units was also M/s. BHEL. It is, therefore, reasonable

to expect that the lessons learnt from earlier projects would have helped the Appellant to avoid the mistakes which have been committed in the past.

d) Similar matter has been dealt by the Tribunal in Appeal nos. 72 of 2010 and 99 of 2010 wherein the Tribunal *interalia,* decided the principle of allocation of the cost escalation due to delay in execution of the project between the project developer and the consumer.

10. We have carefully considered the submissions made by both the parties.

11. We notice that Parli Unit 7 was commissioned in 47 months instead of the schedule of 33 month resulting in delay of 14 months. Similarly Paras Unit-4 achieved commercial operation in 48 months as

against the schedule of 35 months, i.e. with a delay of 13 months.

12. The Appellant has attributed the reason for the entire delay to M/s. BHEL. The Appellant has also given the reference to the letters sent by them to M/s. BHEL by which the delay in supply of some of the equipments and in execution of the project have been pointed out. The data for actual completion time of similar projects initiated during the year 2006 in various states has also been furnished. These have also been recorded by the State Commission in the impugned order.

13. Let us now examine the findings of the State Commission in the impugned order. The relevant extracts are reproduced below:

> *4.10.7 The difference in the IDC amount calculated under two different conditions as above comes to*

Rs. 63.41 Crore. The Commission observes that the reason for increase in the IDC as above is solely on account of the extension of the delays in the time of implementation of the project. The Commission observes that the excuses given by the Petitioner for the said delay are exactly identical to those given by the Petitioner for delays caused in implementation of Paras Unit 3 project. Considering the fact that the Paras Unit 4 of Paras is of the same size of unit 3 which has been recently commissioned and the main supplier and erection / commissioning contractor for the project is also same as Unit 3, viz. BHEL, it was expected that the lessons learnt in the earlier project would have helped the Petitioner to avoid these mistakes and complete the project within the scheduled period. The Petitioner has stated that the two projects being very close to one another, the time to internalise the learnings and to act on them was not sufficient. The Petitioner also stated that due care would be taken in the future projects of the Petitioner. The Commission has accepted the statement of the Petitioner and has applied the

same criteria of allowing 50% of the additional IDC caused by the said delay, to be capitalized, in line with the judgment given by Hon'ble ATE in the matter of Appeal 99 of 2010, the relevant excerpts of which are given below:

> *"The impact of time over run beyond the contractual schedule is only on IDC and overhead costs. Accordingly, the same have to be shared between the generating company and the consumers. Excess IDC and overhead costs for time overrun from scheduled date of commissioning to actual date of commissioning has to be worked out on prorate basis with respect to total actual time taken in commissioning of the unit. 50% of the excess IDC and overhead costs will have to be disallowed".*

4.10.8 Therefore the Commission disallows the 50% of the extra IDC incurred on account of delay in project execution. The extra cost overrun due to additional IDC, thus shall be shared between the MSPGCL and its Consumers, equally".

14. Thus, the State Commission has not accepted the submissions of the Appellant regarding attributing the entire delay on factors beyond the control of the Appellant and has allowed only 50% of extra IDC incurred on account of delay in execution of the project in line with the judgment given by the Tribunal in Appeal no. 99 of 2010.

15. According to the Appellant, the State Commission has not correctly interpreted the judgment of this Tribunal in Appeal no. 99 of 2010.

16. Let us now examine the principles laid down by this Tribunal in the judgment in Appeal no. 99 of 2010 regarding allocation of cost on account of delay in execution of a project for the purpose of determination of capital cost and tariff. The relevant extracts of the

judgment are as under:

> *"7.6. This issue has been dealt with in this Tribunal's Judgment dated 27.4.2011 in Maharashtra State Power Generation Co. Ltd. vs. MERC and Others in appeal No. 72 of 2010. The relevant extracts of the Judgment are reproduced below:*
>
> > *"7.2.............The prudence check of the capital cost has to be looked into considering whether the Appellant has been careful in its judgments and decisions while executing the project or has been careful and vigilant in executing the project.*
> >
> > *7.3. The Tariff Regulations of the State Commission do not specify any benchmark norms for prudence check of the capital cost......... The Central Commission has also not laid down any benchmark norms for prudence check, but its Regulations only indicate the area of prudence check including cost overrun and time overrun. The State*

Commission has not examined the reasons for delay in commissioning of the project and attributed the entire time overrun related cost with respect to the contractual schedule agreed with BHEL to the Appellant. In our view, this is not prudence check. In the absence of specific regulations, we will now find answer to the question raised by us relating prudence check of time overrun related costs.

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

i) due to factors entirely attributable to the generating company, e.g., imprudence in selecting the contractors/suppliers and in executing contractual agreements including terms and conditions of the contracts, delay in award of contracts, delay in providing inputs like making land available to the contractors, delay in payments to contractors/suppliers as per the terms of contract, mismanagement of finances, slackness in project management like

improper co-ordination between the various contractors, etc.

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

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

In our opinion in the first case the entire cost due to time over run has to be borne by the generating company. However, the Liquidated Damages (LDs) and insurance proceeds on account of delay, if any, received by the generating company could be retained by the generating company. In the second case the generating company could be given benefit of the additional cost incurred due to time over-run. However, the consumers should get full benefit of the LDs recovered from the contractors/suppliers of the generating company and the insurance proceeds, if any,

to reduce the capital cost. In the third case the additional cost due to time overrun including the LDs and insurance proceeds could be shared between the generating company and the consumer. It would also be prudent to consider the delay with respect to some benchmarks rather than depending on the provisions of the contract between the generating company and its contractors/suppliers. If the time schedule is taken as per the terms of the contract, this may result in imprudent time schedule not in accordance with good industry practices.

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

7.12. In view of above, we feel that this case falls under category (iii) described in para 7.4. Accordingly, following the principles of

prudence check laid down by us, the cost of time over run has to be shared equally between the generating company and the consumers. Admittedly, there is no enhancement in cost of the contract price of the equipment as no price variation escalation was permissible to BHEL beyond the schedule date of completion of the Project according to the terms of the agreement. The impact of time over run beyond the contractual schedule is only on IDC and overhead costs. Accordingly, the same have to be shared between the generating company and the consumers. Excess IDC and overhead costs for time overrun from scheduled date of commissioning to actual date of commissioning has to be worked out on prorate basis with respect to total actual time taken in commissioning of the unit. 50% of the excess IDC and overhead costs will have to be disallowed. Deduction on account of 50% of the Liquidity Damages received by the Appellant from its suppliers/contractors has also to be allowed

from the capital cost, to give due credit for LDs to the consumers. This issue is answered accordingly."

7.7. In our opinion, the facts of the present case are similar to that in the Appeal No. 72 of 2010".

17. Thus, the Tribunal in the above case has held that:

i) where the delay is due to factors entirely attributable to the generating company, the entire cost due to time overrun has to be borne by the generating company and no extra cost should be passed on to the consumers. However, the LDs from the contractors and proceeds from insurance, if any, can be retained by the generating company.

ii) Where it is clearly established beyond doubt that the delay was due to factors beyond the control of the generating company, the generating company could be given the benefit of additional cost incurred

due to time overrun. However, the benefit of LDs recovered from the contractors by the generating company should be passed on to the consumers.

iii) In the situation not covered by the above two, the additional cost due to time overrun including the LDs and insurance proceeds could be shared by the generating company and the consumers.

18. We have examined the submissions made by the Appellant regarding delay in execution of the project by BHEL. The letters written by the Appellant to M/s. BHEL point out some delay in supply of certain equipments and in execution of the project. However, these letters do not substantiate the claim of the Appellant that the entire delay of 13/14 months in each project was entirely due to reasons attributable to M/s. BHEL, the main equipment supplier and do not establish that the delay was due to factors beyond the

control of the Appellant. The State Commission by allowing 50% of the extra IDC to the Appellant has already condoned about 6½ to 7 months of delay in line with the judgments of this Tribunal in Appeals 72 of 2010 and 99 of 2010 in the matter of Maharashtra State Power Generation Co. Ltd. vs. MERC & Others.

19. We feel that the present case falls in the third scenario of delay described in the above judgments of the Tribunal in which case the extra IDC due to delay has to be shared equally between the generating company and the consumers. Thus, we do not find any infirmity in the findings of the State Commission.

20. The second issue is regarding disallowance of the initial spares cost.

21. According to the Appellant the cost of spares is to be allowed at 2.5% of the capital cost as on the cut off

date i.e. 31.3.2012 and not on Commercial Operation Date.

22. The State Commission in its counter affidavit has submitted that the State Commission has issued the Tariff Order for Paras Unit 4 and Parli Unit 7 on 22.12.2011, much before the “cut off date” of 31.3.2012 of the projects. Therefore, the initial spares cost of the project was considered as 2.5% of the capital cost on the COD of the project. However, the Appellant may now approach the State Commission with the revised project cost as on the cut off date i.e. 31.3.2012.

23. In view of the submissions made by the State Commission, the Appellant is given liberty to approach the State Commission with the revised project cost.

24. The third issue is regarding interest rate for computation of IDC.

25. According to the Appellant the State Commission ought to have computed the IDC based on actual interest rate instead of interest rate of 9.02% which was the interest rate used for estimating the cost of the projects.

26. The State Commission in its counter affidavit has submitted as under:

i) No data/information contained in the submissions of the Appellant has escaped the attention of the State Commission.

ii) The initial estimate of the project approved by the Board of the Appellant was based on the estimated hard cost and IDC at 9.02%. The revised cost was also apprised to the Appellant's Board with IDC at 9.02%.

iii) The IDC has gone up due to delay in execution of the project and increase in the hard cost of the project. The State Commission has factored

both the elements in re-computing the IDC cost considering the project approved by it. The recomputed IDC is based on the approved capital cost and the expenditure phasing as projected by the Appellant for the actual period of completion of the project.

iv) The State Commission has also computed the IDC with the scheduled date of commissioning at 9.02% interest rate.

v) The difference in IDC amount calculated under two different conditions has been worked out as additional IDC due to delay in execution of the project and 50% of the additional IDC has not been allowed in line with the judgment of the Tribunal in Appeal no. 99 of 2010.

27. We find that the State Commission has considered the interest rate at 9.02% used for

estimating the cost of the project instead of actual interest rate at which the Appellant obtained debt from the Financial Institutions. The State Commission has allowed interest on loan for post COD period based on the actual percentage of interest rate but for computation of IDC, the State Commission has considered the assumed interest rate of 9.02%. According to the Tariff Regulations, the State Commission should have considered the actual rate of interest at which the debt was taken by the Appellant during the construction period. However, we find that the Appellant has not indicated the actual interest rate for IDC and has not furnished the necessary supporting materials to establish the actual interest rate in the main appeal as well as in the written submission. We, therefore, grant an opportunity to the Appellant to submit the supporting documents for

actual interest rate at which debt was obtained during the construction period and the State Commission shall consider the same and decide the matter as per law.

28. Accordingly, we remand this matter to the State Commission on this issue.

29. The fourth issue is regarding the deduction on account of LDs from the capital cost.

30. According to the Appellant, even if it is assumed that the State Commission has correctly applied the findings of the Tribunal in the judgment in Appeal no. 99 of 2010, only 50% of the LD should have been deducted from the capital cost in line with the judgment of the Tribunal.

31. According to the counter affidavit filed by the State Commission, the LD amount has been deducted from the project cost, as the same amount had not

been paid by the Appellant to the contractors. However, the State Commission vide the impugned order had also directed the Appellant to submit the actual LD amount recovered from the contractor so that the same could be considered. The Appellant till date has not submitted any report to the Commission.

32. The State Commission by its own submission in the impugned order has indicated that 50% of the additional IDC on account of delay in execution of the project has not been allowed in line with the judgment of the Tribunal in Appeal no. 99 of 2010. The ratio in the same judgment is that both additional IDC and the liquidated damages have to be shared by the generating company and the consumer equally. While the State Commission has partially followed the judgment by disallowing 50% of the additional IDC it

has incorrectly deducted the entire LD from the capital cost instead of restricting the same to 50%.

33. Accordingly, the Appellant is directed to submit the actual LD amount recovered from the contractors and the State Commission shall consider the same and allow deduction of only 50% of the LD amount from the capital cost in line with the findings of this Tribunal in the judgment in Appeal no. 99 of 2010.

34. The fifth issue is regarding disallowance of variable cost incurred by the Appellant in operating the power plants.

35. According to the Appellant, the State Commission should have allowed the actual variable cost and not restricting the same as per the specified normative operational parameters as the deviation in operational performance is due to poor quality of coal which is beyond its control.

36. According to the State Commission, the responsibility for making arrangement of good quality of coal, washed coal and imported coal, as the case may be, lies with the Appellant. The Appellant should have considered appropriately blending of coal taking into the design parameters of the power plants. The aforesaid issue has already been decided by the Tribunal in Review Petition no. 9 of 2011 in Appeal no. 199 of 2011 wherein it has given directives vide order dated 19.4.2012.

37. Let us examine the submissions made by the Appellant in its petition before the State Commission.

38. The Appellant in respect of Parli Unit-7 indicated that even though the unit achieved stabilization within the stipulated period of 180 days as per the Regulations, it was not able to achieve normative

operational parameters during the stabilization period of 180 days due to AOH/planned outage, poor quality coal and wet coal on account of heavy rainfall, low system demand and Coal Handling Plant design issues and envisaged higher auxiliary consumption, secondary oil consumption and station heat rate due to partial loading and Coal Handling Plant problems. It was added that the Appellant employed single stream system in Coal Handling Plant for Unit-6 and Unit-7 but new double stream unloading scheme is planned by the Appellant for improving unloading of coal. The Appellant also envisaged actual availability of 55.24% during the stabilization period and 80% availability during post stabilization period. The availability during the stabilization period was less due to the above mentioned reasons. The Appellant has

requested for the following relaxations:

a) Target availability and plant load factor of 55.24% during the stabilization period as against the target availability/PLF of 80%. According to the Appellant the total loss of generation due to coal handling problem was 202 million units and further loss of 124 million units due to other coal related issues. However, the Appellant claimed the specified availability/PLF post stabilization period and during FY 2011-12.

b) Auxiliary consumption of 11.31% during stabilization period and 10% post stabilization period against the norm of 9.5% and 9% respectively due to partial loading on unit.

c) Station heat rate of 2582 kCal/kWh as against 2600 kCal/kWh as per the Regulations during stabilization period and 2554 kCal/kWh beyond stabilization as against the norm of 2500 kCal/kWh. For the year 2011-12, the Appellant prayed for consideration of station heat rate of 2553 kCal/kWh instead of 2500 kCal/kWh as per norms.

d) Secondary oil consumption: As against the normative oil consumption of 4.5 ml/kWh during stabilization period and 2 ml/kWh post stabilization period, the Appellant requested for allowing actual specific oil consumption during FY 2010-11 and 4.25 ml/kWh during FY 2011-12. The reason for higher oil consumption has been indicated as wet and sticky coal experienced during rainy seasons and partial loading due to Coal Handling Plant problem.

39. Regarding Paras Unit-4, the Appellant in its petition before the State Commission has stated that even though the stabilization of the unit was achieved within the stipulated period of 180 days as per the Regulations, it has not been possible to achieve normative parameters during the stabilization period due to 15 number of trippings, forced outage, high partial loading, delay in PG test, coal mill problems, poor quality coal and wet coal on account of heavy rainfall and Coal Handling Plant problems. In Paras Unit-4 also one of the reasons for the low performance parameters has been single stream Coal Handling Plant design. The relaxation sought for Paras-4 by the Appellant was:

a) Availability/PLF of 69.28% during the stabilization period as against the target availability of 80%. However, post stabilization period and during

the FY 2011-12, the Appellant envisaged achieving the normative availability of 80%.

b) Auxiliary consumption of 10.84% during the stabilization period due to above mentioned reasons and 9.05% post stabilization period against the norm of 9.5% and 9% respectively. However, for 2011-12, no relaxation was claimed.

c) Heat rate of 2742 kCal/kWh during stabilization period as against the norm of 2600 kCal/kWh due to above mentioned reasons and 2580 kCal/kWh for the period beyond stabilization in FY 2010-11 against the norm of 2500 kCal/kWh. For the year 2011-12, the Appellant considered station heat rate at the same level as the norm.

40. It is clear from the submissions made before the State Commission in the petition that poor quality of

coal and wet coal during monsoon is one of the reasons submitted by the Appellant for its poor performance. Other reasons given in the petition are design of single stream of Coal Handling Plant instead of double stream, coal mill problems, trippings, planned outage, coal mill problems etc., which could not be attributable beyond the control of the Appellant. We feel that the Appellant has failed to design the Coal Handling Plant appropriately with adequate redundancy which has also contributed to loss of generation and only after commissioning of the power plants the Appellant has taken corrective action to provide for double stream instead of single stream of Coal Handling Plant provided earlier. Even arranging the required fuel for the power plant is the responsibility of the generating company and the generator cannot escape this responsibility and seek

relaxation in normative operational parameters on account of quality and quantity of fuel especially as the cost of fuel is a pass through. If the required quality and quantity of coal is not available from indigenous sources, it could be imported for blending with the indigenous coal. The Appellant has raised various operational problems associated with blending of the imported coal. We feel that the Appellant itself is responsible for resolving these problems.

41. Supply of wet coal during the monsoon is a normal phenomenon experienced by all the power plants and the norms specified do take into account such practical problems normally experienced at the power plant during the monsoon season. It is for this reason that margins are provided in the norms e.g. the normative heat rate is not the design heat rate of the station but is higher than design heat rate to take

care of the practical problems at site. Normative operational parameters specified for the stabilization period are also higher than for the period subsequent to the stabilization to account for the problems experienced during the stabilization period. The operational norms are the average norms for the whole year. Even if the generating company is not able to achieve the specified operational norms for some periods of the year, the same has to be made up by achieving better performance during the balance period.

42. If the contentions of the Appellant for considering quality of coal beyond the control of generating company and relaxing norms as per actual performance as normative performance is accepted, then there will be no purpose of setting up norms for the thermal power stations. The objective of normative

tariff is that there is incentive for achieving better norms and the generating company is awarded for the same. Similarly, there is disincentive for not achieving the norms and the generating company is penalized for not achieving the operational norms. The contention of the Appellant strikes at the root of the normative tariff determination.

43. While for the year 2011-12, the Appellant has claimed availability of 80% as per norms but still relaxation is other normative parameters have been proposed which is not understood. The Appellant has clearly stated that the units attained stabilization within 180 days as per Regulations but still relaxation in operational norms has been sought.

44. One of the reasons for low availability has been indicated as low demand. We do not understand how the availability which is pertinent for recovery of fixed

charges will be affected by low demand. Even under the conditions of low demand in the system of the distribution licensee, the generating company can declare full availability.

45. The Appellant in the present Appeal has attributed the reason for non-achievement of the operational norm to quality of coal only. However, we have analysed all the reasons indicated by the Appellant in the petition filed before the State Commission.

46. The issue regarding relaxation of operational norms due to quality of coal has also been dealt with in the order dated 19.4.2012 of this Tribunal in Review Petition no. 9 of 2011 in Appeal no. 199 of 2010 in the matter of Maharashtra State Power Generation Co. Ltd. vs. MERC & Ors. wherein the Tribunal rejected the contention of the Appellant generating company

that quality of coal is totally beyond the control of the Appellant. The same ratio will be applicable in this case as well.

47. The State Commission has allowed operational parameters according to the norms specified in the Tariff Regulations. We have examined all the documents submitted by the Appellant in support of its claim. However, we are also not convinced by the submissions made by the Appellant for relaxation of norms for operational parameters of the new generating units and, therefore, we do not find any infirmity in the impugned order of the State Commission.

48. <u>Summary of our findings</u>:

i) The Appellant has not been able to substantiate its claim that the entire delay of 13/14 months in commissioning of Parli Unit-7

and Paras Unit-4 was due to reasons entirely attributable to M/s. BHEL and to clearly establish that the entire delay is due to factors beyond the control of the Appellant. We feel that the present case falls in the third scenario of delay described in our judgments in Appeal nos. 72 of 2010 and 99 of 2010 in the matter of Maharashtra State Power Generation Co. Ltd. vs. MERC & Ors. in which case the extra IDC due to delay has to be shared equally between the generating company and the consumers. Thus, we do not find any infirmity in the order of the State Commission.

ii) According to the Regulations, the cost of initial spares is to be allowed at 2.5% of the capital cost as on the cut off date i.e. 31.3.2012 and not on Commercial Operation Date. The State Commission has correctly stated that the Tariff

Order was issued on 22.12.2011, much before the "cut off date". Therefore, the initial spare parts cost was considered as 2.5% of the capital cost on the date of COD. However, the Appellant may now approach the State Commission with the revised project cost as on the cut off date i.e. 31.3.2012. In view of the submissions made by the State Commission, the Appellant is given liberty to approach the State Commission with the revised project cost. The State Commission shall consider the same and decide the cost of initial spares as per the Regulations.

iii) Regarding interest rate for computation of IDC, we remand the matter to the State Commission granting an opportunity to the Appellant to submit the supporting documents for actual interest rate at which debt was obtained

during the construction period and the State Commission shall consider the same and decide the matter as per law.

iv) Regarding the deduction on account of Liquidity Damages from the capital cost, we find that the State Commission has not correctly applied the findings of the Tribunal in judgment in Appeal no. 99 of 2010 with respect to deduction of LD from the capital cost. Accordingly, the Appellant is directed to submit the actual LD amount recovered from the contractors and the State Commission shall consider the same and allow deduction of only 50% of the LD amount from the capital cost.

v) Regarding disallowance of variable cost, we find that the Appellant in its petition before the State Commission has given various reasons for

not achieving the normative operational parameters during the stabilization period and beyond the stabilization period of the generating units. However, in the present Appeal the Appellant has only indicated quality of coal and wet coal as the reasons for not achieving the operational parameters as per the norms. The State Commission has allowed the operational parameters according to the norms specified in the Tariff Regulations. We are not convinced with the submissions made by the Appellant for relaxation of norms for operational parameters. We also reject the contention of the Appellant that the quality of coal is to be considered totally beyond its control. This issue has been decided by us in Review Petition no. 9 of 2011 in Appeal no. 199 of 2010 in the matter of Maharashtra State Power

Generation Co. Ltd. vs. MERC & Ors. where the contention of the Appellant, Generating Co. that the quality of coal is totally beyond the control of the Appellant has been rejected. The same ratio would be applicable in this case also.

49. In view of our above findings, the Appeal is partly allowed to the extent as indicated above. The State Commission is directed to pass the consequential orders in terms of our judgment. No order as to costs.

50. Pronounced in the open court on this ***30th day of January, 2013***.

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

√
REPORTABLE/~~NON-REPORTABLE~~

vs