Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.161 of 2011

Dated:18th Oct, 2012

Present : HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

In the Matter of:

Maharashtra State Power Generation Co. Ltd.,
Prakashgad,
Plot No.G-9, Bandra (East)
Mumbai-400 051

…Appellant

Versus

1. **Maharashtra Electricity Regulatory Commission**
   13th Floor, Centre No.1,
   World Trade Centre,
   Cuffe Parade, Colaba,
   Mumbai-400 005
2. **Maharashtra State Electricity Distribution Co. Ltd.,**
   Prakashgad,
   Plot No.G-9, Bandra (East)
   Mumbai-400 051
3. **Prayas (Energy Group)**
   Amrita Clinic, Athvale Corner,
   Lakdipool, Karve Road Junction
   Deccan Gymkjhana, Karve Road
   Pune-411 004

4. Mumbai Grahak Panchayat
Grahak Bhavan,
Sant Dynaeshwar Marg
Benind Cooper Hospital (Vile Parle West)
Mumbai-400 056

5. The Vidarbha Industries Association
1st Floor, Udyog Bhawan,
Civil Line, Nagpur-44 001

6. The General Secretary,
Thane Belapur Industries Association
Rabale Vilalge, post Ghansoli,
Plot P-14, MIDC
Navi Mumbai-400 701

…..Respondent(s)

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

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

J U D G M E NT

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

1. Maharashtra State Power Generation Company Limited is the Appellant herein. Maharashtra State Regulatory

Commission is the First Respondent. Maharashtra State Electricity Distribution Company Limited (MSEDCL) is the 2nd Respondent.

2. The Appellant has presented this Appeal as against the orders dated 13.04.2011 and the Review Order dated 30.6.2011 passed by the Maharashtra State Commission. The short facts are as follows:

   (a) The Appellant's Company is a Generating Company. It had set-up Generation Units Parli Unit 6 and Paras Unit 3 with a generation capacity of 250 MW each. The Parli Unit No.6 was commissioned on 01.11.2007. The Paras Unit No.3 was commissioned on 31.3.2008.

   (b) The Appellant filed a Petition on 23.5.2008 before the State Commission for determination of tariff for Parli unit No.6 under Multi Year Tariff Framework for the first control period. The said Petition was filed for Tariff Determination for the Financial Year 2007-08, 2008-09 and 2009-10.

   (c) On 23.10.2008, the Appellant filed a Petition for determination of tariff for Paras Unit No.3 under the Multi Year Tariff Framework for the first control

year period in respect of the Financial Year 2008-09 and 2009-10.

(d) The State Commission on 21.10.2009, notified the MYT order for Parli Unit No.6 wherein the State Commission determined the generation tariff for the remaining part of the Financial Year 2007-08, 2008-09 and 2009-10. The Appellant was aggrieved by certain issues of the said order and filed an Appeal before this Tribunal in Appeal No.72 of 2010.

(e) The State Commission passed the MYT order in respect of Paras Unit No.3 on 15.12.2009 to determine the generation of tariff for the Financial Year 2008-09 and 2009-10. However, the Appellant, aggrieved over the certain issues preferred an Appeal before this Tribunal in Appeal No.99 of 2010.

(f) Prior to this i.e. on 1.4.2009, the Appellant entered into a Power Purchase Agreement with Maharashtra State Electricity Distribution Company (MSEDCL) (R-2).

(g) On 5.2.2010, the Appellant filed a Petition before the State Commission for Truing-UP for the

Financial Year 2007-08 and 2008-09 for Paril Unit No.6 and Financial year 2008-09 for Paras Unit No.3. In the same Petition, it prayed for determination of Annual Performance Review for the year 2009-10. It also prayed for determination of tariff for approval of Annual Revenue Requirement (ARR) for the Financial Year 2010-11 for both these units. In this Petition, the State Commission held a Technical Validation Session (TVS) on 24.8.2010. The consumers represented and filed objections. On the basis of the materials furnished by the consumers, the State Commission asked the Appellant to present an alternative scenario of truing-up and ARR considering the guidelines approved by the State Commission passed in its earlier orders dated 21.10.2009 for Parli Unit No6 and 15.12.2009 for Paras Unit No.3.

(h) Accordingly, the Appellant filed a revised Petition submitting the two scenarios as required by the State Commission. The above revised Petition was also published to ensure adequate public participation.

(i) In pursuance of the said notice public hearing was held on 16.12.2010.

(j) Ultimately, the State Commission passed the impugned order dated 13.4.2011 whereby the State Commission did not approve the deviations in the technical performance of these two units and disallowed the actual fuel cost as well as the recovery of fixed cost.

(k) Aggrieved by this order, the Appellant filed a Review Petition before the State Commission in case No.81 of 2011. However, the State Commission dismissed the said Review petition on 30.6.2011. Hence, this present Appeal.

3. The Appellant has raised two issues in this Appeal which are as follows:

(a) Disallowance in actual fuel cost

(b) Disallowance in the recovery of fixed cost

4. On these issues, the Learned Counsel for the Appellant has made the following submissions:

(a) The malfunctioning of various equipments was solely attributable to the equipment manufacturer i.e. BHEL. The Appellant cannot be held guilty for

choosing BHEL which is a Central Government Company. Therefore, this is uncontrollable. In fact, BHEL was the sole tenderer for the Project. Therefore, the Appellant really did not have much choice at that stage.

(b) While passing the impugned order dated 13.4.2011, the State Commission did not go into the question whether the instance for the malfunctioning of the equipments were controllable or not. In fact, there is no finding on this issue. The State Commission has simply gone on the basis that these are new equipments and should perform as per bench mark norms. The State Commission, instead of investigating the matter, has proceeded to disallow the claims.

(c) The State Commission had the power to allow deviation from performance parameters. This power should have been exercised since malfunctioning of the new equipments cannot be attributable to the negligence of the Appellant. As a matter of fact, there was a specific prayer by the Appellant requesting deviation from the norms which was not actually considered. The State Commission has failed to comply its own

Regulations which envisage uncontrollable factors including Force Majeure Event. In this case, the equipment's failure was beyond the control of the Appellant which would constitute Force Majeure Event.

5. On the above three grounds, the Appellant prays that the impugned order be set aside and remanded back directing the State Commission to go into these aspects and pass an order after giving opportunity to the Appellant.

6. The learned Counsel for the State Commission argued in justification of the impugned order and requested this Tribunal to dismiss the Appeal.

7. In the light of above contentions, the **following questions would arise for consideration:**

   (a) Whether the State Commission was justified in not allowing deviation in operational performance of two Stations which were due to uncontrollable factors?

   (b) Whether the State Commission was justified in not appreciating that the malfunctioning of machines and equipments of the Appellant was attributable to the contractor M/s. BHEL and the same cannot be borne by the Appellant?

(c) Whether the State Commission was justified in not considering the actual variable Fuel Cost for the two units in the light of the difficulties faced?

8. The present Appeal arises out of the Tariff Order passed by the State Commission for two generating units of the Appellant namely Parli Unit No.6 and Paras Unit No.3.

9. As regards Parli Unit No.6, the impugned order dated 21.10.2009 deals with truing up for the Financial Year 2007-08, 2008-09, Annual Performance Review for the Financial Year 2009-10 and Tariff for the Financial year 2010-11.

10. As regards the Paras Unit No.3, the impugned order dated 15.12.2009 deals with the truing-up for the Financial year 2008-09, Annual Performance Review for the Financial year 2009-10 and Tariff for the Financial Year 2010-11.

11. The main contention urged by the Appellant in this Appeal is as follows:

> “One of the main reasons on account of which the actual fuel cost of the generating units was higher than the normative values was due to numerous trippings, low availability and PLF which were solely attributable to the malfunctioning of the machines and equipment supplied by the contractor M/s. BHEL. The Appellant intimated its equipment supplier about the

malfunctioning of the various critical equipments. Thus, the reason behind the deviations in technical performance of the two units is on account of the manufacturer M/s. BHEL which has manufactured the equipments of these Generating Units of the Appellant. This is clearly beyond the control of the Appellant".

12. The crux of the arguments of the Appellant is that the faults and deficiencies of work in setting up the Generating Units committed by the Contractor cannot be attributable to the Appellant and that, therefore, the Appellant should not be penalised for the faults committed by its contractor.

13. At the outset, it shall be stated that in principle, no generating unit or utility ought to be permitted to avoid the application of operational norms mandated by the Regulations on the ground of failure or inaction of contractors appointed by it. The parameters mandated by the Regulations would apply to Generating Company. Such parameters have to be complied with by the Generating Company. The Regulation cannot be concerned as to the inter-se relations between the generating company and its contractors. According to the Appellant, the contractor has failed in its task in setting-up a good generating plant. This argument does not deserve acceptance.

14. It is the responsibility of the Generating Company to ensure that the plant performs in accordance with the technical parameters mandated by the Regulation. If the Generating Plant does not perform in accordance with the parameters, as per the Regulation, it is the Generating Company which has to bear the cost of such a non-performance. Whether such non-performance is on account of failure of the Generating Company's internal management systems or on account of the failure of the Generating Company's contractors are the issues which are to be dealt with by the Generating Company either by itself or with its contractors.

15. In fact, the Appellant had sought revision of the stabilization period from 180 days as per the Tariff Regulation to 427 days and relaxation of performance parameters in the MYT Petitions for the control period 2007-08 to 2009-10, on account of the technical deficiencies in the Generating Plant caused by its contractor. The State Commission in the said order dated 21.10.2009 rejected the prayer for extension of the stabilization period and also the relaxed operational norms and set out the trajectory of operational performance parameters. In case **No.26 of 2008** for Parli Unit No.6, the State Commission has observed as follows:

> *"The Commission has observed that the reasons provided by MSPGCL such as "frequent tripping during the initial period due to mal-operation of flame*

failure detection system", "faulty performance of the coal mills", "inexperience of the operating staff", etc., are not tenable as it is an acknowledged fact that machine size of 250 MW and all the accessories and auxiliaries are a proven technology and it is expected that it would be of good quality, proven performance and well matched with the requirements. The Commission is of the opinion that it is the duty of the owner of the plant to ensure thorough inspection and testing that the equipment being procured are of good quality, these are stored at site as required and imparting training to its operating personnel well in advance and any losses incurred through not performing these elementary duties properly cannot be passed on to the consumers.

114. The Commission is of the view that the poor performance of the equipment and systems at the beginning itself can be attributed singly or collectively to any or all of the following reasons:

a. Failure of Quality Assurance and Quality Control systems at site, not observing proper Customer Hold Points(CHPs) during the manufacturing, assembly and Commissioning process and not conducting proper inspections at the works, not conducting proper pre-commissioning tests/checks, improper storage of material at site, etc.

b. Inexperience of the operating staff can be attributed to inadequate training given to the staff and lack of ability and experience to perform the given tasks(operating the Unit)

c. Parli Unit No.6 was commissioned by MSPGCL, even when all the systems were not fully checked out and integrated operation and continuous operation for stipulated period were not carried out."

16. Similarly, the State Commission in its order in **Case No.95 of 2008** for Paras Unit No.3 has made the following remarks:

> *"The Commission has observed that the reasons provided by MSPGCL such as collapse of ESP, hoppers and RHS of flue gas duct from boiler outlet to ESP inlet, commissioning of various equipments like C&I auto loops, smart soot blowing system, ESP washing arrangement, etc. are not tenable. Considering the experience of MSPGCL in operating power plants, and the experience of BHEL in erecting standard sized 250 MW power plants, such failures and collapse of various equipments should have not taken place. Moreover, it is an acknowledged fact that machine size of 250 MW and all the accessories and auxiliaries are a proven technology and it is expected that it would be of good quality, proven performance and their construction features, supporting infrastructures etc would be well matched with the requirements. The Commission is of the opinion that it is the duty of the owner of the plant to ensure full compliance with all norms of Quality Assurance and Quality Control (QA & QC) through regular inspection and stage wise testing of the equipment, to ensure that the equipment being procured are of good quality, these are stored and erected at site as required, and training is imparted to its operating personnel well in advance, and any losses incurred through non performance of these elementary duties effectively cannot be passed on to the consumers.*
>
> *130. The Commission is of the view that the poor performance of the equipment and systems at the*

beginning itself can be attributed singly or collectively to any or all of the following reasons:

a. Failure of Quality Assurance and Quality Control systems at site, not observing proper Customer Hold Points(CHPs) during the manufacturing, assembly, erection and Commissioning process and not conducting proper inspections at the works, not conducting proper pre-commissioning tests/checks, improper storage of material as site, etc.

b. Inexperience of the operating staff can be attributed to inadequate training given to the staff and lack of ability and experience to perform the given tasks(operating the Unit).

c. Paras Unit No.3 was commissioned by MSPGCL in haste, even when all the systems were not fully checked out and integrated operation and continuous operation for stipulated period were not carried out."

17. The above observation would show that the State Commission has not approved the extended stabilization period and relaxed performance parameters on account of delay in stabilization of units. The Commission has also allowed the operation norms as specified in the Tariff Regulations for the post stabilisation period. The reasons for the Appellant for praying for an increase in the stabilization period are virtually the same that the Appellant is citing in order to support its case to the effect that the State Commission has to overlook the deviation from the normative parameters in the true up for FY 2007-08 and 2008-09, ARR for FY 2009-10 and APR for FY 2010-11.

18. As narrated in the facts referred to above, these orders have been challenged in Appeal No.72 and 99 of 2010 and these Appeals have also been disposed of. Admittedly, the finding of the State Commission on the basis of the above observations had not been challenged in the Appeal No.72 of 2010 and 99 of 2010. The Appeals were filed on different grounds. This means that the findings given by the State Commission in the said MYT order with reference to above aspects have attained finality and shall be deemed to have been accepted by the Appellant.

19. In other words, the Appellant cannot be permitted to challenge such a finding which have not been challenged in the earlier Appeals even though the impugned orders had been challenged on other grounds.

20. The Appellant has contended that in Appeal Nos. 72 and 99 of 2010, the aforesaid findings were not challenged because the truing-up and the actual performance revenues for the years in question were pending at that time before the State Commission which ultimately passed these impugned orders. This contention is misplaced in view of the fact that the Appellant had chosen not to challenge the above finding in Appeal No.72 and 99 of 2010 whereas it has chosen to challenge the other findings.

21. That apart, the State Commission has dealt with the Appellant's contention with regard to this aspect in the impugned order in detail. They are as follows:

> "*The Commission asked MSPGCL to explain the sequence of events associated with both the projects and the reasons behind the delay. Further, the Commission also asked justification for higher expenses incurred after commissioning of Parli Unit 6 and Paras Unit 3.*
>
> *During the public hearing, MSPGCL submitted that the factors responsible for the delay related to the commissioning of Parli Unit 6 and Paras Unit 3 were uncontrollable and therefore, beyond the control of MSPGCL. MSPGCL submitted that one of the main reason on account of which, Parli Unit 6 and Paras Unit 3 could not be commissioned on time, was due to delay in supply of the required equipment and further delay in sequential order, attributable to M/s. BHEL.*
>
> *MSPGCL further submitted that due to frequent failure of various equipment after commissioning, the Units could not be operated continuously leading to lower efficiency and below par performance, which led to increase in operating expenses.*
>
> *The Commission during the hearing observed that one of the important reasons for time overrun was MSPGCL's inability to get things executed on time as the project implementation was not up to the mark. The Commission further observed that due to time overrun the Interest During Construction increased considerably.*
>
> *The Commission is of the view that MSPGCL could have avoided frequent failure of equipment if there were joint checks carried for assuring quality of work.*

Therefore, it seems from the frequent failure of equipment that such checks were not diligently carried resulting into forced outages and frequent tripping. This has resulted into lower plant availability and higher cost as evident from the filings of MSPGCL.

MSPGCL in this regard, submitted that they have proper quality assurance and quality checks in place but the problems were beyond the control of MSPGCL and hence, unavoidable.

MSPGCL also expressed its concerns over the quality of coal it has been receiving and expressed its willingness to completely switch over to washed coal as the quality of domestic coal received is muddy and there is also lot of pilferage. MSPGCL further submitted that at the time of performance Guarantee Test, coal used was washed and was of better quality as compared to the raw coal MSPGCL has been receiving. MSPGCL has been receiving much inferior coal, which adversely affected the performance parameters.

MSPGCL further requested the Commission to take a considerate view and allow deviations in technical performance of stations due to uncontrollable factors while approving the cost of generation which is much lower than that allowed to be purchased by Distribution Companies."

....

"The Commission observes that the main reasons for higher fuel cost are very high Station Heat Rate and Secondary Fuel oil consumption. MSPGCL submitted that the reasons for higher SHR and SFOC are partial loading of the Units, MSPGCL further submitted that these Units have been facing various technical issues which have resulted into frequent outages and

downtime. This resulted into lower SHR and higher oil support.

The Commission has gone through the submissions and is of the view that since these Units are new and that 250 MW Units are based on proven technologies hence they are expected to operate at maximum efficiency. Therefore, the performance parameters as submitted by MSPGCL cannot be allowed. Considering the normative performance parameters, the Commission has computed fuel cost for both the Units. For computing the fuel costs, the Commission has taken fuel price and calorific value as submitted by MSPGCL. The Commission has adjusted the fuel price to the extent of the allowable normative transit loss of 0.8% for Financial year 2007-09 and Financial year 2008-09".

"For Paras Unit 3, the Commission in its MYT Order, has given similar reasons for not allowing lower availability than that stipulated in the Tariff Regulations, 2005.

Further, the Commission in its Order in Case No.102 of 2009 for existing stations of MSPGCL, has reduced AFC based on the actual availability and target availability considering recovery of full AFC at 80% availability in accordance with MERC Tariff Regulations, 2005. Accordingly, the Commission in this Order has reduced the recovery of Annual Fixed Charges for Financial Year 2007-08 and Financial year 2008-09 on pro-rata basis.

....

"The Commission, in accordance with the provisions of MERC Tariff Regulations has allowed the expenses for Financial year 2007-08 and Financial Year 2008-09 based on revised performance parameters

approved in this order and has carried out the sharing of efficiency gains and losses."

....

"In accordance with the MERC Tariff Regulations, the Commission has shared 1/3rd of the gains and losses with the Distribution Licensees, while 2/3rd of gains are allowed to be retained by MSPGCL and 2/3rd of losses are to be borne by MSPGCL."

....

"Commission's Ruling on Availability and PLF:

The Commission approved the Availability in its MYT order for each year of the Control Period. For both the units, MSPGCL's actual availability during Financial year 2009-10 has been lower than the Commission approved availability of 80%. The Commission, in its MYT order, has stated that MSPGCL has not followed standard industry practices and has declared Commercial Operation Date (CoD) of both the Units within 6 months from the date of synchronization without conducting necessary checks and Performance and Guarantee tests. The Commission further stated that MSPGCL actions do not conform to "good engineering practice" and therefore, the consequences of such low level of operation of the generating unit cannot be passed on to consumers, as the consumers have already suffered high load shedding due to lower generation from these units. Therefore, the loss has to be borne by the generator."

....

"The Commission has analysed the submissions made by MSPGCL and finds no merit in allowing higher heat rate on account of frequent failure of equipment as the two units are new and the 250 MW

units are proven technologies and therefore, ideally such issues should not arise and, therefore, the Units are expected to operate efficiently. The Commission has adhered to the provisions of MERC Tariff Regulations, 2005, while approving the heat rate for the two Units".

..

"As regards availability of the two Units, the Commission observes that since both the Units are new and have stabilized therefore, they should operate at full efficiency. The Commission hence, finds no reasons to deviate from the operational norms specified in the MERC Tariff Regulations, 2005. The Commission, therefore, for Financial Year 2009-10 and Financial Year 2010-11 approves availability of 80% for full recovery of fixed charges for both the Units."

22. These details given in the impugned order would clearly show that the Appellant has failed to operate the units efficiently and since the Appellant's action do not conform to good engineering practice, the consequences of such inefficiency in operation of the generating units cannot be allowed to be passed on to the consumers especially when the consumers have already suffered high load shedding due to lower generation from these units and therefore, the loss has to be borne by the Generating Company. As such we do not find any infirmity in these reasonings and conclusions in the impugned order.

23. The other argument of the Appellant is that in the Tribunal's judgment in Appeal No.72 and 99 of 2010, the Tribunal had also noticed inordinate delay in stabilization of the unit after the commissioning and the same is sufficient to argue that the findings of the State Commission in regard to stabilization period were also in question. This submission does not merit acceptance.

24. As pointed out by the learned Counsel for the State Commission, the Appellant had never mentioned or asserted in these Appeals that the findings of the State Commission in regard to the delay in stabilization period had ever been challenged before this Tribunal in those Appeals.

25. It is further argued by the Appellant that there were uncontrollable factors but the same have not been taken into consideration by the State Commission.

26. Elaborating this point, the Appellant argued that one of the types of uncontrollable factors is Force Majeure event. According to the Appellant, the Force Majeure Event includes the events, which forces the Company to shut down its units to prevent major damages. In order to substantiate this argument, the Appellant has relied upon some documents filed along with the Appeal.

27. On perusal of these documents, it is clear that the said documents are the Appellant's response to the data gaps in the filing before the State Commission. In those documents, the Appellant has not pleaded or furnished any thing to show that there was a Force Majeure Event. Even in the Tariff Petition filed by the Appellant, there was no word about the Force Majeure conditions. Similarly, in the revised Petition filed by the Appellant subsequently as directed by the State Commission would not show that the Appellant has taken a stand on Force Majeure. On the other hand, they have pleaded that they did not shut down the plant despite the problems.

28. This Tribunal in two judgments have interpreted the ambit of controllable factors and un-controllable factors. They are:

    (a) Maharashtra State Electricity Transmission Corporation Limited Appeal No.139 of 2009 reported in 2011 ELR 559

    (b) Tata Power Company Limited, Mumbai Vs Maharashtra Electricity Regulatory Commission, Appeal No.173 of 2009 reported in 2011 ELR(APTEL)336.

29. In the above judgments, this Tribunal proceeded on the basis that uncontrollable factors which is far above and beyond the control of the utility. In these judgments, this

Tribunal has discussed various aspects to define the controllable factors and uncontrollable factors. These decisions would clarify that the deviation in performance parameters due to the contractor's default cannot be considered to be the uncontrollable factor. Therefore, the argument of the Appellant on the interpretation of the controllable and uncontrollable factor is misplaced and so the same is liable to be rejected.

30. As indicated above, the Appellant, aggrieved by certain issues decided by the State Commission in Case No.26 of 2008 for tariff determination for the Appellant's Parli Unit No.6, filed Appeal No.72 of 2010 before this Tribunal. Similarly, the Appellant had also preferred an Appeal before this Tribunal in Appeal No.99 of 2010 being aggrieved by certain issues in the Commission's order in case No.95 of 2008 for the tariff determination for Appellant's Paras Unit-3.

31. The issues in Appeal No.72 of 2010 were mainly as follows:

(a) Reason for delay in commissioning of the Parli Unit No.6 and consequential disallowance of the capital cost;

(b) Disallowance of actual capital cost incurred;

(c) Disapproval of Advance Against Depreciation (AAD);

(d) Deferment of Additional Capitalization;

(e) Disallowance of Return on Equity on investments;

(f) Non-consideration of carrying cost.

32. The issues raised in Appeal No.99 of 2010 were as follows:

(a) Non-consideration of reasons for delay in commissioning of the Paras Unit No.3 and consequential disallowance of the capital cost;

(b) Disallowance of actual capital cost incurred;

(c) Disapproval of Advance Against Depreciation (AAD);

(d) Deferment of Additional Capitalization;

33. In these Appeals, this Tribunal made a detailed discussion with reference to the issue regarding the reasons for delay in commissioning the units and consequential disallowance of the capital cost. The question in respect of this issue in Appeal No.72 of 2010 has been framed as under:

> "Was the State Commission correct in attributing the entire delay in commissioning of the Parli Unit No.6 and disallowing the entire time overrun related cost to the Appellant without considering the delays and

shortcomings on the part of the main supplier, M/s. BHEL ?

34. Similarly, in respect of the 2nd issue, i.e. non-consideration of reasons for delay in commissioning of the unit, the following question has been framed in Appeal No.99 of 2010 which is as follows:

> "Was the State Commission right in attributing the entire delay in commissioning of the unit to the Appellant and disallowing entire time over-run related cost to the Appellant without considering the delays and shortcomings on the part of the supplier, viz, M/s. BHEL ?

35. The detailed discussions with reference to the Question in Appeal No.72 of 2010 is as follows:

> "7.1 According to the learned counsel for the Appellant the delay was solely on account of BHEL and the State Commission has not been able to point out any act of omission or commission by the Appellant. On the other hand, the learned counsel for the State Commission has contended that the Appellant can not absolve itself of the responsibility by passing on the blame on its contractor/agent and the project cost overrun due to delay in execution of the project could not be passed on to the consumers.
>
> ....
>
> ....

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.

36. In the above judgment the Tribunal referred to the Regulation 30.1 for determination of capital cost which envisaged the determination of capital cost subject to prudence check by the Commission. Since the Regulations did not specify any bench mark norms for prudence check, the Tribunal laid down the principles of prudence check for determination of time overrun related costs. The Tribunal accepted the argument of the Appellant that at that time BHEL was the only major supplier of the equipment in the country and it could not cope up with the targeted schedules due to heavy orders due to sudden spurt in execution of Power Projects in the country and consequential increase in demand of the equipments and the gestation period in enhancing the equipment manufacturing capacity in the country. It was also noted that delays had been experienced not only at Parli Unit 6 but also at other projects. Keeping in view the circumstances of the case, the Tribunal had decided that it was not established beyond doubt that the entire delay in execution of the Project was due to reasons beyond the control of the Appellant.

Accordingly, the Tribunal allowed the cost of time over run to be shared equally between the generating company and the consumers. The above discussions by this Tribunal would indicate that factors regarding delay is not entirely attributable to the generating company namely, imprudence in selecting the contractors and in executing the various agreements and in providing inputs, delay in payments to contractors/suppliers as per the terms of contract, mismanagement of finances, slackness in project management like improper co-ordination between various contractors, etc.

37. The above principles would not apply to the present case in which the Appellant has claimed relaxation in performance norms due to reasons attributable to the contractors as the operational norms for plant availability, Station Heat Rate and auxiliary consumption, etc, have already been clearly specified in the tariff regulations. In the MYT Tariff order, the norms of operation as specified in the Tariff Regulations were specified by the State Commission. There is no question of reviewing the operational performance norms in the true up based on the actual performance. Similarly, for the Financial Year 2010-11 also there is no case for relaxed norms for the new units commissioned during 2007-08/2008-09 based on the established technology. Therefore, the findings which have been given in Appeal

No.72 of 2010 with reference to increase in capital cost of the project due to time over run due to reasons attributable to the contractors and disallowance in recovery of fixed cost on this account would not be of any use to the Appellant.

38. On the similar lines, the judgment has been rendered by this Tribunal in Appeal No.99 of 2010 which has given the findings with reference to the non-consideration of the reasons for delay in commissioning and consequential disallowance of the capital cost. The issues with regard to the Actual Fuel Cost and the Recovery of Fixed Cost as raised in this Appeal are entirely different from the issues in Appeal No.99 of 2010 and so it cannot be of any use to the Appellant.

39. Keeping in mind these findings in those Appeals, let us see the findings given in the impugned order in the present Appeal.

40. It must be pointed out in this context that while these Appeals i.e. 72 of 2010 and 99 of 2010, were pending before this Tribunal, the Appellant on 5.2.2010 filed a Petition in these proceedings before the State Commission in respect of Parli Unit No.6 and Paras Unit No.3. After due process, the State Commission passed the impugned order dated 13.4.2011. The State Commission in the impugned order has given a finding with regard to poor performance of Parli

Unit 6 and Paras Unit No.3. The reasons for the said finding is as follows:

(a) In case of Parli Unit 6, Appellant has stated that "high vibrations of HP turbine were one of the causes of turbine tripping. It is clear from the Appellant's submission that after re-alignment of the shaft the bearing vibrations disappeared. This clearly indicates that the QA-QC personnel of the Appellant had not ensured that proper alignment has been done by the contractor.

(b) The Appellant has stated that for both the Units, Cold Reheat Pipe joints made by M/s. BHEL in their shop had leaked. It is to be noted that all high pressure joints need to be covered under diligent checks through appropriate "Contractor Hold Points" whereby test results on critical work done by the manufacturer at its plant is cross-checked and cleared QA-QC personnel of the purchaser. This clearly indicates that there was slippage of task.

(c) In case of Parli Unit 6, non-provision of second parallel conveyor belt stream is indication of the poor project planning on the part of the Appellant. No equipment or system in the plant is immune

to the failure and redundancy of such critical item such as conveyor belt stream is considered as essential feature which was omitted.

(d) In case of Paras Unit 3, site inspection of supports is an important activity failures of which can cause deficient support of ESP hoppers.

(e) It would be in the interest of consumers for the Appellant to make claims of damages, etc, for the failure of the supplier/contractor rather than passing amount to consumers through tariff.

41. On these reasons, the State Commission came to the conclusion that any losses incurred through the non performance of these elementary duties cannot be passed on to the consumers.

42. According to the State Commission, the Appellant should have avoided frequent failure of the equipment by ensuring joint checks carried out for assuring quality of work. The State Commission felt that from the frequent failure of the equipment, it is clear that such checks were not diligently carried out resulting into forced outages and frequent tripping which resulted into lower plant availability and higher cost.

43. It is the duty of the owner of the plant to ensure full compliance with all norms of Quality Assurance and Quality Control through regular inspection and stage wise testing of the equipment. This alone would have made it to ensure that the equipment being procured are of good quality, they are stored in a safe place and erected at site as required.

44. According to the State Commission, the main reason for higher fuel cost is very high Station Heat Rates and Secondary Fuel Oil consumption. Considering the normative performance parameters, the State Commission had computed fuel cost for both the units. For computing the Fuel Cost, the State Commission had taken fuel price and calorific value. The State Commission adjusted the fuel price to the extent of the allowable normative transit loss of 0.8% for the Financial Year 2007-08 and Financial Year 2008-09.

45. The State Commission had considered the normative operation and maintenance expenses as allowed by the State Commission in its MYT order for both the units for truing up purposes. The State Commission has also allowed the impact of pay revision of Rs.2.275 Crore for each unit as requested by the Appellant.

46. The Appellant, in its Petition for Parli Unit 6 and Paras Unit 3, submitted that the total fuel cost for the Financial Year

2009-10 is estimated to be Rs.240.76 Crores and Rs.248.06 Crores respectively. The Appellant submitted before the State Commission that it had estimated the fuel price for second half of the Financial Year 2009-10 considering the actual fuel prices during the Financial Year 2009-10.

47. The State Commission had not considered any revision in fuel prices for the Financial Year 2009-10 since the impact in variation in fuel prices is allowed as pass through under the FAC mechanism. However, the State Commission had estimated the total fuel costs considering the performance parameters as approved in Section 3 of the Order.

48. The Appellant, in its Petition for both the units had submitted that it intends to use indigenous coal and washed coal for the ensuing Financial Year 2010-11. The Appellant with reference to the secondary fuel oil consumption submitted that for Parli Unit 6, the prices and calorific values of oil have been projected to be the same as taken in the original Petition.

49. On the other hand, for Paras Unit 3, the prices for oil have been projected with escalation of 4% above the actual prices in the Financial Year 2009-10.

50. In fact, the State Commission, asked the Appellant to submit the actual fuel price and calorific value of fuels from April to

September, 2010. The Appellant though submitted the fuel price details, but it did not submit the calorific values of the different fuels used by it for the said period. In that context, the State Commission has taken note of the submissions made by the appellant. The State Commission in respect of the Financial Year 2010-11, has considered the actual price of fuel equivalent to average actual fuel price for the period between April to September, 2010.

51. In its revised petition, the Commission has considered the calorific value of fuel. The State Commission has not considered any escalation in fuel prices as the adjustment for variations in fuel prices is allowed as part of FAC mechanism.

52. In respect of availability and recovery of fixed cost, the State Commission has given the following findings:

> "The actual availability of Parli Unit 6 during the Financial Year 2007-08 and Financial Year 2008-09 was lower than that approved by the Commission in its MYT orders. The Appellant, in its MYT Petition, submitted the target availability of Parli Unit No.6 as 64.85% and 80% for the Financial Year 2007-08 and Financial Year 2008-09 respectively. With regards to lower availability of Parli Unit 6 for the Financial Year 2007-08, the Commission in its MYT order in Case No.26 of 2008 had stated as follows:
>
> > *"It may be observed that* ***MSPGCL, with 6 months of synchronization of the Unit, has***

declared the "commercial operation of Parli Unit No.6" on November 1, 2007, even though sustained performance of the Unit for 28 days with 72 hours at full load, was not established and MSPGCL had full knowledge that the generating Unit was not in a position to perform on sustained basis. *In accordance with standard industry practice, the Performance Guarantee (PG) test has to be conducted before declaring COD. However, MSPGCL declared COD before conducting the PG test, and the PG test was conducted well after the COD. There was no compulsion on MSPGCL to declare commercial operation of the Unit prior to its stabilization. Given the above background, the Commission is of the view that relaxation of target availability norms for the generating station to the level of actual availability for the purpose of tariff is not justified. The risk of such low level of operation of the generating station has to be borne by the generator. Hence, the target availability for the generating station for the period from Financial Year 2007-08 to Financial Year 2009-10 has been considered as 80% in accordance with the norms stipulated in the MERC (Terms and Conditions of Tariff) Regulations, 2005".*

53. In view of the above, the State Commission, in its order had reduced the recovery of annual fixed charges for the Financial Year 2007-08 and Financial Year 2008-09 on pro-rata basis. For Paras Unit No.3, the State Commission in its MYT order had given similar reasons for not allowing lower availability than stipulated in the Tariff Regulations, 2005.

54. The Appellant in its Petition for Paras Unit 3, had submitted that the availability during the Financial Year 2009-10 as per the MERC Tariff Regulations, 2005 has been 69.89%. According to the Appellant, the Unit availability was low due to frequent tube leakage, non availability of stand by coal mill and operation of Unit on half the load due to restoration of collapsed Right Hand side flue gas duct etc. and this further led to furnace draft variation and resulted into boiler structure vibration and to control the vibrations, the unit was partially loaded which resulted into deviation in performance parameters.

55. Rejecting these arguments, the State Commission has held that the Appellant's action do not conform to the "good engineering practice" and therefore, the consequences of such low level operation of the generating unit cannot be passed on to the consumers.

56. As regards availability of the two Units, the State Commission observed that since both the units were new and conforming to the established technology, they should operate at the desired efficiency. Ultimately, the State Commission found no reasons to deviate from the operational norms specified in the Tariff Regulations, 2005. The State Commission, therefore, for the Financial Year

2009-10 and Financial Year 2010-11 approved availability of 80% for full recovery of fixed charges for both the units.

57. The Appellant has also claimed increase in Station Heat Rate(SHR) due to poor quality of Coal which is beyond their control and the increase in SHR due to poor quality of coal which is an uncontrollable factor should have been allowed by the State Commission.

58. This issue has been decided by the Tribunal in its judgment dated 15.2.2011 reported as 2011 ELR(APTEL)0336 in the matter of Tata Power Company Ltd. Vs Maharashtra Electricity Regulatory Commission. In this judgment the Tribunal has not allowed relaxation of Station Heat Rate on account of quality of coal. The findings of the Tribunal are reproduced below.

"22. Thus, the State Commission has given a reasoned order while approving the heat rate. We agree with the State Commission that under the MYT mechanism it is appropriate to share both gains and losses on account of controllable factor instead of just shararing the gains for better performance and passing on the loss due to under performance to consumers. The Appellant had made the submissions regarding age, high moisture content of coal, etc. being made in this Appeal before the State Commission while deciding the MYT order. The State

Commission after considering all these factors and actual operation of the units for last 10 years decided the trajectory of heat rate norms for the control period in variance with the design heat rate and the norms specified in the Regulations for similar units. The variation in heat rate due to supply of fuel can not be considered entirely beyond the control of the Appellant."

This findings would squarely apply to this Appeal.

59. **Summary Of Our Findings**

(1) The prayers of the Appellant for extension of the stabilization period and relaxation of the operational performance parameters of Parli Unit No.6 and Paras Unit No.3 were considered by the State Commission in its orders dated 21.10.2009 and 15.12.2009 for determination of tariff for the MYT control period(2007-08 to 2009-10). These orders were challenged by the Appellant in Appeal Nos 72 of 2010 and 99 of 2010 on some other grounds viz. disallowance of capital cost, advance against depreciation, etc. However, the findings of the State Commission on extension of stabilization period and relaxation of operational performance parameters were not challenged in these Appeals and therefore, the orders of the State Commission dated 12.10.2009 and 15.12.2099 have

attained finality on these issues. Principle of constructive res judicata is applicable vis-à-vis the earlier two Appeals(72 & 99 of 2010) in which the findings on extension of stabilization period and relaxation of operational performance norms were not challenged.

(2) The Appellant can not be permitted to avoid the application of the operational norms mandated by the Regulations on the ground of failure or inaction of its contractor. The deviation in operational performance parameters due to contractor's default could not be considered as uncontrollable factor for passing on the consequential cost to the consumers.

(3) The findings of the Tribunal in judgements in Appeal Nos 72 of 2010 and 99 of 2010 regarding the prudence check for determining the capital cost will not be applicable to the present case relating to relaxation of operational norms as specified in the Tariff Regulations and in MYT Tariff orders for factors claimed as uncontrollable.

(4) We are in agreement with the findings of the State Commission for not allowing relaxed operational norms for reasons claimed as uncontrollable.

(5) On the basis of the findings of this Tribunal in 2011 ELR(APTEL) 0336, the deviation claimed by the Appellant on account of quality of coal can not be allowed.

60. In view of the above findings, we do not find any reason to hold that there is infirmity in the impugned order. Hence the Appeal is dismissed as devoid of merits.

61. However, there is no order as to cost.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated:18th Oct, 2012

√REPORTABLE/~~NON-REPORTABALE~~