

## **RECORD OF PROCEEDINGS**

HEARING : 18 January, 2013 at 10.30 hrs.  
CASE NO. : 68 of 2012  
PETITIONER : Adani Power Maharashtra Ltd.  
RESPONDENT : Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL)  
MATTER : In the matter of for adjudication of dispute u/s 86 of the Electricity Act, 2003 and for return of Performance Guarantee pursuant to the termination dated 16.02.2011.  
CORAM : Shri V. P. Raja, Chairman

### **Statement by the Commission**

1. At the outset, Chairman Shri V P Raja, made a statement in open court regarding a Petition filed by MSEDCL, the Respondent in the present case, for adoption of Tariff in the LTPP bids invited by it in 2006. He pointed out that adoption of Tariff has not taken place which was lapse on the part of the Commission. He pointed out neither MSEDCL nor APML pursued the matter with the Commission. The statement read out by the Chairman is appended as Annexure 1.

### **Pleadings by APML**

2. Shri Sanjay Sen, Advocate for the Petitioner, said that there was a possible case for change of law in the present case given 2 reasons – coal block de-allocation and the change in coal linkage policy. However, the Advocates for the Petitioner maintained that Force Majeure remained their main plea.
3. APML made submissions in response to the directions of the Commission in the last hearing. On behalf of the Petitioner, KPMG made a presentation on the various scenarios worked out by the Petitioner as suggested by the Commission in its last Daily Order dated 31 December, 2012. However, the Commission noted the scenarios presented were limited to those suggested by the Commission only. The Petitioner replied that they were unable to think of any others that would have had a significant impact on the matter under

dispute. The Petitioner will submit a certificate authenticating the factual basis of the computations shown in the presentation made by KPMG.

4. The Petitioner reiterated that the Tariff of Rs 2.64/kWh is no longer an economic Tariff given the withdrawal of ToR for the Lohara West and Extension coal blocks and the probability of higher prices for coal resulting from the current policies on allocation for both linkage and captive blocks.
5. Shri Aspi Chinoy, Advocate for the Petitioner, quoted different provisions in the PPA with regard to Force Majeure and said they ought to be read together in order to make sense of the provisions. Shri Chinoy referred to two judgments by the Bombay and Calcutta High Court on the reading of Section 56 of the Contract Act and the Doctrine of Frustration of Contract. He also referred to a judgment by a US court on the same. The Commission asked counsel for similar opinions delivered by Indian law courts.
6. During the presentation, the Commission asked the Petitioner to specify the boiler configuration of the Tiroda plant. Shri Kandarp Patel, VP APML, clarified that the boilers are designed for GCV of 4000 Kcal of Indian origin coal.
7. The Commission also asked the Petitioner to clarify at what stage is the effort to explore underground mining at Lohara. The Petitioner submitted that he will revert with correct information on the matter.

#### **Pleadings by MSEDCL**

8. In response to the presentation by APML, Shri Chirag Balsara, Advocate for MSEDCL, said that other bidders who participated in the bid process are also supplying at similar prices – JSW is supplying power at Rs 2.72 kWh. Therefore, the Respondent does not think that Rs 2.64/kWh is unviable. He also pointed out that it may not be possible to raise the Tariff only for one bidder.

#### **Pleadings by Consumer Representatives**

9. Ms Ahwini Chitnis of Prayas Energy Group said that it was inappropriate for the Commission to be considering various scenarios before deciding on whether the Force Majeure condition as claimed by the Petitioner was applicable in this case.
10. Shri Ashok Pendse of Thane Belapur Industries Association said that in the case of Tata Power-Mundra being heard by CERC currently, Tata Power, though invoking Force

Majeure, has not terminated the PPA. It has sought a revision in Tariff while continuing to supply power. He also pointed out that Lanco Amarkantak in a similar situation did not terminate the PPA.

11. The Commission directed APML and MSEDCL to make efforts to work out options for viable Tariffs amicably in line with the enabling provisions of Article 17.2 of the PPA.
12. The parties were directed to keep the following aspects in perspective in their efforts to reach an amicable solution:
  - (a) Legal and contractual provisions including sanctity of the contract;
  - (b) Protection of investment made in generating asset in rural part of Maharashtra ;
  - (c) Interest of other stakeholders, i.e., consumers ,lenders, etc., is protected;
  - (d) Non availability of generation capacity (1320 MW) to MSEDCL; and
  - (e) Tariff is reasonable and competitive considering the other supply options.
13. MSEDCL is directed to submit a copy of Minutes of Meeting of the pre-bid meetings for Case 1 Stage-I bid process.
14. The Commission has appointed Shri Harinder Toor, Advocate as amicus curiae in line with the provisions of Regulation 21(d) of the Maharashtra Electricity Regulatory Commission (Conduct of Business) Regulations, 2004.

**Post the matter for further hearing on 23 January, 2013 at 11.00 Hours**

**List of Participants present during the hearing held on 18. 1 .2013 at 10.30 hours**

1. Shri Aspi Chinoy, Advocate, Petitioner
2. Shri Sanjay Sen, Advocate, Petitioner
3. Shri Kandarp Patel, VP, Adani Power
4. Shri Santosh Kamath, KPMG, for the Petitioner
5. Shri Chirag Balsara , Advocate, Respondent
6. Shri A. S. Chavan, CE (PP), MSEDCL
7. Ms Ashwini Chitnis, Prayas Energy Group, Consumer Representative
8. Mr Ashok Pendse, Thane Belapur Industries Association, Consumer Representative

## Annexure 1

### Note read out by Chairman Shri V P Raja on adoption of tariff 18. 1.2013:

1. The Electricity Act, 2003 provides two methods for determination of Tariff, i.e., Section 62 for determination of Tariff under cost plus approach and Section 63 for market determined Tariff through Competitive Bidding approach. Section 63 of the Electricity Act, 2003 stipulates that:

*“Notwithstanding, anything contained in Section 62, the Appropriate Commission **shall** adopt tariff, if such tariff has been determined through the transparent process of bidding in accordance with the guidelines issued by the Central Government ”*

2. In accordance with Section 63 of the Electricity Act, 2003 the Ministry of Power, Govt. of India has issued Competitive Bidding Guidelines, 2005 for determination Tariff through Competitive Bidding Process. The Clause 6.2 and 6.4 of the said guidelines states as under:

*“6.2 After the conclusion of bid process, the evaluation Committee constituted for evaluation of RFP bids shall provide appropriate certification on conformity of the bid process evaluation according to the provisions of the RFP document. The procurer shall provide a certificate on conformity of the bid process to these guidelines.*

... ..

*6.4 The signed PPA along with the certification certificates provided by the evaluation committee and by the procurer as provided in clause 6.2 shall be forwarded to the Appropriate Commission for adoption of tariffs in terms of Section 63 of the Act.”*

3. In the year 2005, the Maharashtra Electricity Distribution Co. Ltd (MSEDCL) initiated the process for procurement of Power through Competitive Bidding process under Case-1 route.
4. MERC vide Orders dated 8 September 2005 and 17 October 2006 issued in Case No 22 of 2005 allowed MSEDCL to initiate power procurement for 2000 MW through Case-1

Competitive Bidding route. Thereafter, vide Order dated 24 January 2008 in Case No 38 of 2007 the Commission approved the deviations in RFP documents.

5. On completion of Competitive Bidding process, MSEDCL has approached MERC in Case No 54 of 2008 for adoption of Tariff discovered through above said Competitive Bidding process. In the said Petition, MSEDCL submitted that Govt. of Maharashtra had communicated its consent for the rates offered by the Bidders subject to amendment to Article 3.2.2 of the PPA. During the proceedings of the case, MSEDCL requested for approval of amendments in the PPA, so that they can sign the amended PPA with selected Bidders. MSEDCL submitted that once modified PPA is signed they will approach the Commission for adoption of Tariff as per clause 6.4 of the Competitive Bidding Guidelines.
6. As the amendment in clause 3.2.2 of PPA was in the interest of the consumers of Maharashtra, the Commission vide Order dated 14 August 2008 in Case No 54 of 2008 approved the deviation as sought in clause 3.2.2 of PPA and directed MSEDCL to come for adoption of Tariff once modified PPAs are signed. The relevant directive given in the said Order is reproduced below:

*“9. The Commission will consider the matter of adoption of tariff for long term procurement of power through Case-1 competitive bidding process in accordance with the provisions of Section 63 of the Electricity Act, 2003 and Competitive Bidding Guidelines notified by the Ministry of Power, after MSEDCL submits the PPAs signed with the selected bidders, along with other certificates and documents on affidavit, for adoption of the tariff by the Commission.”*

7. Accordingly, MSEDCL had submitted a Petition dated 16 October, 2008 for adoption of Tariff under Section 63 of the Electricity Act, 2003 which was received in the office of the Commission on 17 October, 2008. It has now come to our notice that further action to process this Petition for adoption of Tariff was not taken by the office of the Commission. The Commission is separately taking steps to ensure that such lapses do not occur in the future in spite of the large numbers of records / papers received in the Office of the Commission.
8. We have now looked through the Petition dated 16 October 2008 submitted by MSEDCL for adoption of Tariff and *prima facie*, find that the transparent process of competitive bidding has been followed by MSEDCL for procurement of 2000 MW of power through Case-1 route.

9. The only thing that remains to be done is the formal Order from the Commission regarding adoption of Tariff. It also needs to be pointed out that this matter of adoption of Tariff was neither followed up by MSEDCL nor the concerned selected Bidders/ Generating Companies. On the other hand, the preamble / introduction of PPA signed on 8 September 2008 states as follows:

*“Whereas*

*A. The Procurer has obtained order of the Maharashtra Electricity Regulatory Commission adopting the Tariff (as defined hereinafter) under Section 63 of Electricity Act, 2003, copy of which has been made available to the Seller, the receipt of which is hereby acknowledged by Seller, on date of execution of this Agreement.”*

10. Under Section 86(3) of Electricity Act, 2003, ***“the State Commission shall ensure transparency while exercising the powers and discharging its functions”***. In view of this, a full set of documents submitted by MSEDCL and received by the Commission Office on 17 October 2008, for adoption of Tariff is being made available to all Parties and authorised Consumer Representatives. Parties and Consumer Representatives are requested to make any responses on these sets of documents as a part of present proceeding of Case No 68 of 2012.