

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

Appeal No. 102 of 2007

Dated: November 23, 2007

**Present: Hon'ble Mr. Justice Anil Dev Singh, Chairperson
Hon'ble Mr. H.L. Bajaj, Technical Member**

Maharashtra State Electricity Distribution Co. Ltd.
Plot No.G-9, Prakashgad, Bandra (E),
Prof. Anant Kanekar Marg,
Mumbai – 400 051.

... Appellant

Versus

(1) Maharashtra Electricity Regulatory Commission
Through its Secretary,
13th Floor, Center No.1,
World Trade Centre, Cuffe Parade,
Colaba, Mumbai – 400 005.

(2) State of Maharashtra
Through Principal Secretary (Energy),
Industries, Energy and Labour Department,
Mantralaya, Mumbai – 400 032.

... Respondents

For the Appellant : Mr. Amit Kapoor, Mr. Ravi Prakash,
Mr. Varun Agarwal &
Ms. Neelam Singh

For the respondent(s) : None

JUDGMENT

Per Hon'ble Mr. Justice Anil Dev Singh, Chairperson

This appeal is directed against the order of the Maharashtra Electricity Regulatory Commission (for short 'MERC') dated May 28, 2007 in case No. 69 of 2007. The facts giving rise to this appeal are as follows:-

2. On December 19, 2006, the appellant, Maharashtra State Electricity Distribution Co. Ltd. (for short 'MSEDCL') filed a petition before MERC under Section 63 of the Electricity Act, 2003 (for short 'the Act') with the prayer to examine its proposal for procurement of an additional quantum of 4000 MW of power and to allow it to initiate bidding process under Case-2 of competitive Bidding Guidelines issued by the Government of India. The petition was based on the disturbing fact that the demand supply gap in terms of availability of electricity in the State of Maharashtra had been growing rapidly. The projections of demand

and supply deficits were grounded on 16 E.P.S. published by the Central Electricity Authority both for Case-1 and Case-2.

3. The MERC however, by the impugned order directed that the appellant should undertake the long term demand forecast on scientific basis.
4. In the impugned order, the MERC also referred to an order passed by it in case no. 22 of 2005. The relevant part of the order reads as follows: _

“The Commission directs MSEDCL to prepare demand forecast by engaging experts. The methodology to be adopted should be presented to the Commission for in-principle approval. Based on this demand forecast, long term power procurement plan including annual rolling plan should be submitted for the Commission’s approval.

For the purpose of this Order, the Commission has considered the bidding to be undertaken for only 2000 MW, unless the demand forecast establishes the need for higher quantum of procurement. The demand-forecast would also need to take a re-look at the demand-supply gap during peak and off-peak hours, and the duration of the peak and off-peak hours”.

(emphasis supplied)

5. As is apparent from the above, the MERC allowed the appellant to undertake bidding for only 2000 MW.
6. In para-32 of the impugned order, the MERC also referred to an earlier direction dated February 6, 2007, whereby the appellant was directed to expedite the constitution of the Expert Committee. Finally in the impugned order, the MERC directed the appellant to submit the status relating to the constitution of the Expert Committee for carrying out the demand forecast on scientific basis, within two weeks from the date of the order.
7. The appellant feeling aggrieved by the impugned order, has filed the instant appeal.
8. The appeal was admitted for hearing and dasti service was directed to be affected on the respondents.
9. The respondents, however, have not responded to the dasti notices issued by this Tribunal. Therefore, only the arguments advanced by the appellant were heard. It was pointed out by the learned counsel for the

appellant that the Government of India had issued guidelines for determination of tariff by bidding process for procurement of power by distribution licensees. The learned counsel also pointed out that as per the guidelines the demand forecast is to be based on the latest available EPS published by the Central Electricity Authority. He brought to our attention that the Central Electricity Authority issued 16th E.P.S. under Section 73 of the Act, which made a demand projection of 22348 MW for the entire State including Mumbai for 2011-12. The learned counsel argued that MERC has no jurisdiction to direct the respondent to undertake long term forecast by constituting an expert committee and in the mean time withhold the approval for procurement of additional quantum of 4000 MW of power through Competitive Bidding Guidelines via Case-2 route.

10. The learned counsel also referred to a communication of the MERC dated July 23,2007, whereby the MERC

decided to take the initiative itself for forming a Working Group to undertake studies to formulate a methodology for Demand Forecast. The Learned counsel pointed out that pursuant to the communication, a meeting of the representatives of the Distribution Licensees operating in the State and the authorized Consumers Representatives was held on July 30, 2007 for formation of a "Working Group". It was urged by the learned counsel that all these steps taken by the MERC are not warranted by law and they interfere with the Indoor Commercial Management of the appellant company. According to the learned counsel, MERC has acted as a Super Board of the appellant.

11. We have considered the submissions of the learned counsel for the appellant. State of Maharashtra suffers from endemic power shortages. The demand for electricity has grown tremendously. The demand and supply gap in terms of availability of electricity in

Maharashtra has reached over 5000 MW, resulting in load shedding for 4.5 hours to 10 hours in towns and for 14 to 15 hours in rural areas. Due to rampant load shedding consumers are suffering endlessly. This is adversely affecting the growth of industry in the State.

12. According to Section 63 of the Act, the Central Government is empowered to issue guidelines for bidding process. Therefore, in exercise of power vested in it by Section 63, the Government of India has issued guidelines called 'Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees' on January 19, 2005. These guidelines were amended on March 30, 2006, August 18, 2006 and September 27, 2007. Clause 2.3 of the guidelines deals with the question of additional demand forecast. This clause reads as under:-

“2.3 Sub-clause (a) of clause 3.1(iii) is replaced by the following:

(a) For the quantum of capacity / energy to be procured, in case the same is exceeding the projected additional demand forecast for next three years

*following the year of expected commencement of supply proposed to be procured. Such demand forecast shall be based on the latest available (at the time of issue of RFQ) Electric Power Survey published by Central Electricity Authority. (Both for **Case I** and **Case 2**).”*

13. Thus, it is apparent that according to the aforesaid guidelines the demand forecast is required to be based on latest available EPS published by the Central Electricity Authority. It needs to be mentioned that it is a statutory function of the CEA to issue EPS. At the relevant time 16 EPS was in vogue. During the pendency of the matter, the Central Electricity Authority has issued EPS No. 17. There is no provision in the Electricity Act whereby the Commission could undertake an exercise to determine the demand projection for power of a utility through the agency of a Study Group'. Study Group will take its own time to determine the demand projection for the State of Maharashtra. In the mean time, the State cannot be allowed to reel under power shortages. Immediate steps are required to be taken by the

appellant to cover the demand supply gap so that the industrial output does not suffer and the domestic and other consumers are not put to inconvenience and hardship. The MERC cannot interfere with the Indoor Management of the company. It has no power under the Act to undertake such an exercise. In *Karnataka Power Transmission Corporation Limited vs. Karnataka Electricity Regulatory Commission, Bangalore & Ors.* , 2007 APTEL 223, it was held that the Commission cannot regulate the investment approval for generation, transmission, distribution and supply of electricity within the State as it is not the repository of the whole spectrum of transmission or distribution including financial management of utilities. In this regard, it was held as under:-

“6. The functions of the State Commission are enumerated in Section 86(1)(a) to (k) of The Electricity Act, 2003. We notice from the above provision that the role played by the Commission in slashing the investment is not one of the enumerated function Section 86(2) provides that the Commission shall advise the State Government on all or any of the matters enumerated in Clauses (i) to (iv) of the said Sub-

section. Section 86(4) provides that the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and Tariff Policy. Section 61 to 66 provides for framing Tariff regulations and determination of Tariff. These provisions are also silent in this respect.

7. In contrast, Section 22(2) of The Electricity Regulatory Commissions Act, 1998, since repealed provided that the State Govt. may confer functions enumerated Clause (a) to (f) to Sub-section (2) of Section 22. Section 22(2)(a) reads thus:

22. (2)(a) to regulate the investment approval for generation, transmission, distribution and supply of electricity to the entities operating within the State;

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xxx

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There is no parallel provision in Section 86 or any other provisions in The Electricity Act, 2003 which will enable the Commission to regulate the investment approval for generation, transmission, distribution and supply of electricity within the State, and it is not as if it is the repository of entire power or authority to control the whole spectrum of Transmission or Distribution including financial management of utilities or it has the power to micromanage the affairs of the utilities.

8. The learned Counsel appearing for the contesting Respondents is unable to point out any provision in this respect. Provisions of 2003 Act, has made a deviation and that being the position we are at loss to know how the Commission could take upon itself to examine

the sagacity of investment proposed by utility in development or up gradation or maintenance of its system, by engaging a team of experts to review or study the merits of the proposal or plans to invest.

9. The only provision, if at all which has a relevance is Section 86(2), which is advisory in nature. This being the position it is obviously clear that the legislature has left it to the utilities to decide their plans of investment or improvement of system or expansion to meet the demand of power within their area including up gradation and maintenance for a better and quality generation, transmission or supply as the case may be. It is the commercial decision of the utility and its source to raise funds which falls within the domain of the utility and not liable to be interfered, except at the stage when utility claims for return on such investment, interest on capital expenditure and depreciation. It is at that stage the Commission shall undertake a prudent check and if deemed fit allow the claim. In appropriate cases the Commission may disallow such claims of utility and it is for the utility to bear the brunt of such investment and it cannot pass it on to consumers.

10. We are unable to appreciate the procedure adopted by the Commission in appointing a Committee to examine the proposal or to find out whether it is feasible or not to implement the investment proposal. It is being commented as a day dream on the part of utility. Yet they are within the domain, commercial decision and internal management of the utility and there is time enough for the Commission to undertake prudent check when the utility comes forward

to claim return on such investment in its annual Revenue requirement and till then the proposal to invest is well within the domain of the utility. It is sufficient if the utility confirms its proposal to invest.

11. Further when the Technical Experts and Engineers, have applied their mind with respect to their proposal and plan it is not for the Commission to examine by appointing another expert Committee. No expert agrees with another expert as presumably either add or comment. By this it shall not be taken that we are commenting upon the expert Committee appointed by Commission. Even the Committee did not opine that the proposed capital investments are not at all required or otherwise not suitable nor an efficient proposal.

12. All that it is being pointed that it may not be possible to execute. Here again it is within the domain and control of the utility. Assuming that the utility has a dream, it is expected that it will wake up with determination and act, lest the State which owns the undertaking will not spare and accountability of the utility is unending to the State, State Legislature and Audit by the The Accountant General. The power demand is increasing by leaps and bounds and quality has to be maintained and this compels the utility to update its transmission system including reduction in transmission loss ordered by the Commission. It is not for the Commission to throw its spanner in the wheels of the utility when it has proposed to invest for the improvement and expansion of system after a study by its Technical Team and when its board has approved the investment proposals.

13. Section 11 of the Karnataka Electricity Reforms Act, 1999 also does not spell out such power on the Commission, as it only enables the Commission to require licensee to formulate respective plans and schemes for promotion of transmission, generation etc. Section 12 of The Karnataka Electricity Reform Act, saves the power of State Government to issue policy directives concerning electricity in the State including the overall planning and coordination. Thus, viewed from any angle, the power of the Commission to interfere with the proposal of investment by the transmission corporation or for that matter a distribution licensee as well cannot be assumed”.

14. In view of aforesaid discussion, the appeal is allowed and the impugned order is set aside.

15. No costs.

(Anil Dev Singh)
Chairperson

(H.L. Bajaj)
Technical Member

Dated: November 23, 2007