

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
World Trade Centre, Centre No.1, 13th floor, Cuffe Parade, Mumbai 400 005.
Tel. No. 022 22163964/65/69 – Fax 022 22163976
E-mail mercindia@mercindia.org.in
Website: www.mercindia.org.in

Case No. 69 of 2005

In the matter of
Petition filed by Tata Power Company Limited seeking a review of Commission's Order dated 2nd March 2006 in Case No. 46 of 2005 (reg. Strategy to bridge the Demand-Supply Gap in the City of Mumbai.)

**Dr Pramod Deo, Chairman
Shri A. Velayutham, Member
Shri S. B. Kulkarni, Member**

Dated: August 16, 2006

ORDER

The Tata Power Company Limited ("TPC") filed a Petition on 28th March, 2006 seeking a review of an observation made by the Commission at paragraph 16(b) of Order dated 2nd March, 2006 in Case No. 46 of 2005. In brief, it is the case of the Petitioners that in another matter in Case No. 17 of 2005, Maharashtra State Electricity Distribution Company Limited ("MSEDCL") had filed a Petition before the Commission seeking directions to TPC to refrain from 'overdrawal' from the Grid and to operate in this regard strictly in accordance with the instructions given by the State Load Despatch Centre ("SLDC"), Kalwa from time to time. These directions had been sought in the context of the demand supply gap that necessitated load shedding by MSEDCL to their own consumers, and purchase of outside power, including overdrawals by them from the Western Regional Grid, at a high cost. It has been contended by the Petitioners herein that in the said Case No. 17 of 2005, an energy purchase agreement entered into in the year 1964 between TPC and MSEB was a matter in issue and under consideration for determination of the rights of TPC for drawal of power from MSEDCL/MSETCL. It has been further contended that, the only direction passed by the Commission in terms of its interim Order dated 16th August, 2005 and final Order dated 20th January, 2006 passed in the said Case No. 17 of 2005 was that, the proposed arrangement of drawal of power by TPC should be in line with the provisions of the Electricity Act, 2003 ("EA 2003"). There has been no other direction that has been passed by the Commission which would enable the Commission to come to a finding as at paragraph 16(b) of the Order dated 2nd March, 2006 in Case No. 46 of 2005. It is their contention that the Commission having not arrived at the finding that MSEB and/or MSETCL/ MSEDCL were not obliged to supply power to TPC (pursuant to the 1964 agreement) under 'normal conditions', which was the subject matter in Case No. 17 of 2005, it is not open for the Commission to subject or base its finding at paragraph 16(b) of the Order dated 2nd March, 2006 on the proceedings in Case No. 17 of 2005 and Orders passed thereunder. The Petitioners have submitted that the agreement of 1964 being the principle issue in dispute in Case No. 17 of 2005, being still left open pursuant to the interim Order dated 16th August, 2005 and final Order dated 20th January, 2006 and the parties having not arrived at



any final arrangement, there is an error apparent on the face of the record in the Order dated 2nd March, 2006 to the extent of the finding at paragraph 16(b) thereof.

2. At the admissibility hearing held in the matter on 21st June 2006, Shri. Darius Khambatta, Counsel for the Petitioners supported the contentions taken in the Petition by submitting that in the interim Order dated 16th August, 2005 in Case No. 17 of 2005, the SLDC has been directed by the Commission to regulate the drawal of power by TPC from MSEDCL's allocation based on TPC's arrangement with the erstwhile MSEB for 'normal' exchange of power. Therefore, the Commission has erred in holding at paragraph 16(b) of the Order dated 2nd March, 2006 that there is no obligation on MSEDCL to supply power to TPC. Counsel further contended that the Commission in Case No. 17 of 2005 having observed that the agreement of 1964 needs to be examined, an error has crept in while basing the finding as in the said paragraph 16(b) of the Order dated 2nd March, 2006 in Case No. 46 of 2005, on the proceedings in Case No. 17 of 2005. Counsel also submitted that the said Case No. 17 of 2005 having not been finally decided by the Commission, particularly in view of the application filed by TPC for revival of the said case for a decision on merits, and which is still pending, to base the finding as in the said paragraph 16(b) on the proceedings in Case No. 17 of 2005 would be an error apparent on the face of the record in the said Order dated 2nd March, 2006.

3. MSEDCL has opposed the Petition on the grounds of maintainability, and Smt. Deepa Chawan, Counsel for MSEDCL submitted that the observations of the Commission in the said paragraph 16 (b) is an observation and not a finding. It has been further contended on behalf of MSEDCL that it is not open for the Petitioners to seek a review of the said Order dated 2nd March, 2006 on the ground that the Commission has wrongly interpreted its Orders dated 16th August, 2005 and 20th January, 2006 while making an observation in the said paragraph 16(b). Therefore, the said Order dated 2nd March, 2006 would not qualify to come within the purview of review and consequently, the Review Petition would not be maintainable.

4. Having heard the parties and after considering the material on record, the Commission is of the view as under:

(i) Since the present petition is limited to the extent of seeking a review of the observation made by the Commission at paragraph 16(b) of Order dated 2nd March, 2006 in Case No. 46 of 2005, it would be necessary to refer to and examine the said portion of the Order dated 2nd March 2006, which reads thus :—

"16. The Commission's views on the objections and comments received from the stakeholders is given below:

....

b) From the proceedings in the above case, it is clear that there is no obligation for MSEDCL to supply to TPC under 'normal' exchange, over and above the obligation of MSEDCL to supply 'standby' support. It should be noted that MSEDCL is currently offering standby support to TPC, as its two units are under planned shutdown, and thus the consumers' objections that payment of standby charges is not beneficial appears to be misconceived. It is only the additional quantum of power that MSEDCL is unable to provide, which is understandable when MSEDCL itself is facing a shortage of around 4500 MW and is undertaking load shedding of upto 12 hours in certain areas."

It is the first sentence from the above referred paragraph that the Petitioners are aggrieved and have sought a review thereof. The first sentence reads thus *"From the proceedings in the above case, it is clear that there is no obligation for MSEDCL to supply to TPC under 'normal' exchange, over and above the obligation of MSEDCL to*



supply 'standby' support." As per the Petitioners, the observation made in the said sentence pre-empts the matter referred to the Commission in Case No. 17 of 2005 and since the Commission has not given any final findings in the said case, it is an error apparent on the face of the record inasmuch as the aforesaid observation of the Commission having a bearing on Case No. 17 of 2005, the said case cannot be concluded thus by an Order in Case No. 46 of 2005, viz., the impugned Order dated 2nd March, 2006.

- (ii) The Commission is of the view that it would be a short sighted approach to pin-point to a specific sentence in the said Order dated 2nd March, 2006 without considering the objective and the basis on which the said observation has been made. To a certain extent, the objective and basis would be clear from the succeeding sentence of the aforesaid paragraph 16(b) which read thus " *It is only the additional quantum of power that MSEDCL is unable to provide, which is understandable when MSEDCL itself is facing a shortage of around 4500 MW and is undertaking load shedding of upto 12 hours in certain areas.*"
- (iii) The basis of arriving at the observation in the first sentence in paragraph 16(b) is also explained in the preceding paragraph 16(a), which reads thus: —

"a) *The issue of support to be provided to TPC by MSEDCL under 'normal' exchange of power has been elaborated in detail in the Commission's Interim and Final Order in Case 17 of 2005, in the matter of excessive drawal of power by TPC from the grid, as follows:*

(i) *The Commission in its Interim Order dated 16th August 2005, opined that "At hours or times when MSEDCL and their consumers are facing serious shortages of power, it cannot be expected that a part of the MSEDCL allocation would continue to be provided to TPC through the mechanism of 'normal' exchange of power, apart from the separate standby commitment which would continue to be available".*

(ii) *The Commission vide its interim Order directed "that the SLDC shall allow TPC to draw power from the MSEDCL allocation based on TPC's arrangement with the erstwhile MSEB for 'normal' exchange of power to the extent which is possible taking into account grid stability and frequency, and the generation availability considering MSEDCL's demand requirement. When SLDC instructs TPC not to draw from MSEDCL's allocations considering these parameters, TPC shall desist from doing so, pending further orders or the final disposal of this Petition."*

Therefore, at hours or times when MSEDCL and their consumers are facing serious shortages of power and in view of the looming crisis, MSEDCL cannot be expected to supply electricity to TPC under 'normal exchange'. The contentions of the Petitioners cannot be sustained inasmuch as they seek to contend that the agreement entered into between TPC and MSEB in the year 1964 would work as an estoppel against the functions of the Commission under the EA, 2003. In fact, prior arrangements cannot prevent or hinder the Commission to exercise of its functions under the EA, 2003. On the other hand, the observation at paragraph 16(b) which is the subject matter of the present review petition cannot work as an estoppel for the Commission to decide any issues that the Commission would like to take up afresh and pass orders thereon as is provided in the Order dated 20th January, 2006 in Case No. 17 of 2005. It would be relevant to quote the following portion of the said Order below:



“15. *The Commission opined that the arrangement proposed to be arrived at should be in line with the provisions of EA, 2003. The Commission further opined that even after the issues are sorted out, as proposed, in case of any operational issues arising thereafter, the Commission can pass appropriate Orders, and either party can approach the Commission, as there is no permanent estoppel.*”

- (iv) It is the Petitioners’ own contention that the Commission has not arrived at any final finding on the rival contentions of the parties in Case No. 17 of 2005. Therefore, it would be meaningless to express that the Commission cannot make an observation as in paragraph 16(b) and which is the subject matter of review herein, as it has been admitted by the Petitioners that the Commission has not arrived at any final finding on the rival contentions of the parties. If no final finding has indeed been arrived at, then there cannot in any case be a bar on the Commission to make an observation as at paragraph 16(b), needless to say that the said observation has a basis and an objective as explained in the preceding paragraph of this Order.
- (v) While on the other hand, in its Order dated 20th January, 2006 in Case No. 17 of 2005 the Commission has observed that *“Under the EA, 2003 power purchase agreements require the Commission’s prior approval and whether the existing agreement is valid in its present form or whether it needs to be renewed or reviewed also needs to be examined.”* It is clear that the Commission did not make any representation and/or promises to TPC, since it is not a party to the earlier agreement of 1964 relied on by them. Therefore, the Commission is not restrained by any principle of promissory estoppel from making an observation as at paragraph 16(b) of the Order dated 2nd March, 2006.
- (vi) It would also not be out of place to quote a portion of the Order dated 2nd March 2006, as under:—

“8.TPC made the following submissions in the Public Hearing:

- a) *Though the legal position is clear that MSEDCL is obliged to supply to TPC under the standby arrangement even under ‘normal’ conditions under the 1964 agreement, TPC is not insisting on this agreement in view of the severe shortage of electricity faced by MSEDCL. However, TPC is willing to buy any additional power that MSEDCL is willing to supply.*”

It is clear from the above, that the Petitioners have recognised that severe shortage of electricity is indeed faced by MSEDCL and that in view thereof, the Petitioners would not insist on the agreement entered into in the year 1964 between the Petitioners and MSEDCL. This admission and representation of the Petitioners have been made by them with the knowledge of their rights under the said agreement of 1964 and the Commission has passed the said Order dated 2nd March, 2006 in the *bona fide* belief that the Petitioners have so represented within their rights under the said agreement. Therefore, the admission and representation of the Petitioners are conclusive in the context in which it has been made and the Petitioners cannot be permitted to contradict it.

- (vii) Going into the merits of Case No. 46 of 2005 would not be within the ambit of the present review proceedings, suffice it would be to state that the Commission has clearly



provided other alternatives for the Petitioners in its Order dated 2nd March, 2006. It would be relevant to quote the following provision of the said Order in this regard:

“16 d).In case the TPC is able to contract additional power from outside the State, then MSETCL has to provide the network to TPC for bringing in this power to serve Mumbai’s needs, rather than claiming that MSEDCL will be able to absorb this power.”

- (viii) For the aforesaid reasons, the Commission is of the view that there is no mistake or error apparent on the face of the record of paragraph 16(b) of Order dated 2nd March, 2006 in Case No. 46 of 2005, which is the subject matter of review, so as to allow the present Review Petition. Accordingly, the Review Petition is not maintainable.

The Commission dismisses the review petition filed by TPC seeking a review of Commission’s Order dated 2nd March, 2006 in Case No. 46 of 2005.

Sd/-
(S.B. Kulkarni)
Member

Sd/-
(A. Velayutham)
Member

Sd/-
(Dr Pramod Deo)
Chairman



(Ms. Malini Shankar)
Secretary, MERC