

**Before the**  
**MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**  
**World Trade Centre, Centre No.1, 13th Floor, Cuffe Parade, Mumbai - 400 005**  
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Case No. 22 of 2011

In the matter of

Petition filed by M/s The Tata Power Company Ltd assailing the legality and propriety of the letter dated 29 January, 2011 issued by the Respondent No.1- Maharashtra State Load Despatch Centre refusing to schedule 200 MW quantum of power in accordance with the request of the Petitioner.

Shri V.P. Raja, Chairman

Shri Vijay L. Sonavane, Member

The Tata Power Company Limited

...Petitioner

Versus

1. Maharashtra State Load Dispatch Centre

2. Maharashtra State Electricity Transmission Limited.

3. M/s. Reliance Infrastructure Ltd.

...Respondents

Present during the proceedings:

For the Petitioner: Shri Sitesh Mukherjee, Advocate

For the Respondents: Shri Ashish Alaspurkar, Advocate for Respondents MSLDC, MSETCL  
Smt Anjali Chandurkar for Respondent No.3, RInfra

## ORDER

Dated: 18 July, 2012

The Petitioner Tata Power Company Limited (TPC) filed the present petition challenging letter dated 29 January, 2011 (impugned letter) issued by the Respondent No.1, MSLDC, whereby MSLDC refused to schedule 200 MW quantum of power with effect from 1 February, 2011 from the Petitioner's generation facility to its distribution business as requested by the Petitioner in letter dated 25 January, 2011.

2. TPC, prior to filing this petition before the Commission had filed a Writ Petition before the Hon'ble High Court of Bombay (W.P. No. 71 of 2011). The Hon'ble High Court disposed of Petition via judgment dated 18 January, 2011 in which the Hon'ble High Court set aside the memorandum of 7 May, 2010 issued by the Government of Maharashtra. The Hon'ble High Court also held that the memorandum of 19 May, 2010 which was consequential to the earlier memorandum should not have been issued as it was impermissible.
3. TPC amended its Petition and filed the same before the Commission on 23 May, 2011. The prayers in the amended Petition are as under-

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*a) Quash and set aside the impugned letter dated 29-01-2011 issued by the Respondent No. – Maharashtra State Load Dispatch Center, thereby refusing to schedule 200MW w.e.f. 01-02-2011 in accordance with the petitioner's instructions contended in letter dated 25-01-2011;*

*b) direct the Respondent No.1 to schedule the power as requested by the petitioner in its letter dated 25-01-2011 to its distribution division, as per its requirements, in accordance with the Electricity Act, 2003 and the regulations framed by this Hon'ble Commission;*

*c) direct that the Tata power- Distribution shall be entitled to compensation from the Respondent No. 1 and Respondent No. 2 for the power brought from the spot/UI/short term power market up to 200 MW not scheduled from 00.00 hrs of 1<sup>st</sup> February 2011 until such power is finally scheduled;*

*1) direct the Respondent No. 1 to show cause and thereafter impose the maximum penalty under Section 142 of the Act;*

*d) Pass ex parte and interim order in terms of prayer(b) above;*

*e) Pass such other & further orders/directions as this Hon'ble Commission may deem appropriate in the facts & circumstances of the case. ”*

4. TPC, in its Petition, submitted as under:

a) The Petitioner, TPC is a company incorporated under the laws of India and having its registered office at the address indicated in the cause title. The generation capacity of the TPC in and around Mumbai is 2027 MW. Out of this capacity, it has entered into long-term power purchase agreements (PPAs) for supply of 1000 MW with BEST and 527 MW with the Tata Power-Distribution. 92 MW is committed for sale to Tata Power Trading Company Ltd., on an arms length basis. TPC is also supplying 160 MW power to its distribution business on short-term basis from 01 July, 2010.

b) The 200 MW of power which the Petitioner was compelled to supply to the Respondent No.3, RInfra was sought to be originally scheduled to Tata Power- Distribution from 1 February, 2011 on a short-term basis but the scheduling was refused by the Respondent No.1.  
1q a

c) The Government of Maharashtra (GOM) issued memorandum of 7 May, 2010 directing TPC to supply 360 MW to RInfra till 30 June, 2010 and thereafter 200 MW till 31 March, 2011. GoM subsequently issued a memorandum dated 19 May, 2010 directing the officers and employees of the Respondent No.1 to maintain status quo regarding the scheduling of TPC's power.

d) Thereafter, on 19 May, 2010 TPC approached the Hon'ble High Court of Bombay by way of Writ Petition No. 71 of 2010 assailing memorandum dated 07 May, 2010 and the subsequent actions of GOM in as much as they purported to interfere with, restrict or otherwise circumscribe the right of the Petitioner, TPC, over its generation capacity. The Hon'ble High Court in its judgment dated 18 January, 2011 set aside the aforesaid memorandum as being ultra vires. The Hon'ble High Court also held that the memorandum of 19 May, 2010 should not have been issued as it was impermissible.

e) TPC provided a chart detailing the capacity allocation from its generation capacity which are as follows-

Capacity (MW) from 01 February, 2011

Unit	Capacity of the Unit	Capacity for TPC-D	Capacity for BEST
Unit	150	40	68
Unit	500	244	256
Unit	500	244	256
Unit	180	88	92
Unit	250	50	100
Hydro	447	218	229
Total	2027	885	1000

f) The Petitioner alleged that the Respondent No.1 had rejected the Petitioner's scheduling request vide letter dated 29 January, 2011 on the strength of the Judgment passed by the Hon'ble High Court of Bombay which had not set aside the MERC order in Case No. 37 of 2010, dated 29 September, 2010.

- g) It is stated that the Petitioner has a legal right to have its power scheduled for which it made a fresh application which has to be decided as per section 33 of the Electricity Act, 2003 (EA 2003). The Respondent No.1 is an apex body exercising statutory powers under Section 32 of the EA 2003 and therefore, it cannot refuse to discharge its duties by mechanically referring to the Order of the Commission. The Respondent No.1 has not cited any technical constraints or any other reason envisaged under EA 2003 for its refusal. TPC has suffered and shall continue to suffer a loss of approximately Rs. 1400 lakh per month if scheduling and dispatch its generating capacity is denied.
- h) TPC has further alleged in its amended Petition wherein it has added para 3 & 4 stating that the Respondent No. 2, MSETCL of which the Respondent No 1 is a part, and is liable for any loss caused to the Petitioner. The impugned letter dated 29 January, 2011 issued by the Respondent No.1 discloses a deliberate, well orchestrated and a willful plan which is a colorable exercise of the Respondent No.1's powers under Section 33 (1) in order to prevent the scheduling of 200 MW of power to which Tata Power-Distribution is entitled to under the provisions of law. The Petitioner, therefore, has requested the Commission to take action under Section 142 of EA 2003 against the Respondent No.1.
- i) It is alleged that the Respondent No.1 is also in violation of the duties under Regulation 36 of the MERC (State Grid Code) Regulations, 2006. The Respondent No.1 has clearly discriminated against Tata Power-Distribution by refusing to schedule 200 MW of power from the Petitioner's generation facility to Tata Power-D.
- j) The Petitioner submitted that the impugned letter dated 29 January, 2011 issued by the Respondent No.1 is completely arbitrary and has adopted a high handed approach, which is contrary to the very scheme and object of EA 2003. The Commission's Order in Case No. 37 of 2010 was based on the peculiar circumstances of the case after having a view of the memorandum dated 07 May, 2010 and 19 May, 2010 issued by GoM and which therefore has no relevance with regard to the scheduling instructions issued by the Petitioner on 25 January, 2011 to the Respondent No.1 .
5. The Respondent No.1 filed its affidavit in reply on 05 April, 2011 and submitted that GoM, realizing a peculiar situation in respect of scheduling of power within part of Mumbai had issued memoranda dated 7 May, 2010 and 19 May, 2010 after considering the report of the five member committee. All the parties concerned including the Petitioner were directed to maintain status-quo in respect of the supply of the subject generation capacity of the TPC. The Hon'ble High Court had also not set aside the Commission's Order dated 29 September,

2010 in Case No. 37 of 2010. Thus, there is no change in the circumstances whereby the earlier decision of the Commission needs to be reviewed through this Petition.

6. The Respondent No.1 also submitted that the Petitioner had also made the similar prayer in its application for stay in Appeal No. 32 of 2011 before the Hon'ble Appellate Tribunal for Electricity (ATE) as mentioned in the present Petition and the Appeal is still pending before the Hon'ble ATE.
7. The Respondent No.1 further denied in its affidavit in reply dated 4 May, 2011 to the amended Petition that it had never refused the scheduling of the power for collateral or extraneous reasons. The petitioner has not made out any case either in the petition or by the proposed amendment for invoking the provisions of Section 142 of EA 2003. The Respondent No.1 opposed the prayer of the Petitioner seeking penal action against its officers and compensation as prayed by the Petitioner in its amended Petition. It further submitted that looking at the totality of the facts and circumstances of the case the Petitioner has not made out any cause of action against the Respondents No.1 and 2. The Petition is not within the jurisdiction of this forum and therefore, not maintainable.
8. The Respondent No.3, RInfra, in its reply dated 05 April, 2011 opposed the admission and/ or grant of any interlocutory relief in the petition. Furthermore, it submitted that there is no provision in the Act, empowering the Hon'ble Commission to award such compensation or damages and the said prayers are liable to be dismissed for the said short reason alone.
9. The Commission vide notice dated 11 March, 2011 scheduled a hearing in the matter on 6 April, 2011. During the hearing, Shri Sitesh Mukharjee, Advocate appeared for the Petitioner. Shri Ashish Alaspurkar, Advocate appeared for Respondents MSLDC, MSETCL. Smt. Anjali Chandurkar appeared for the Respondent No.3, RInfra.
10. The counsel appearing for the Petitioner submitted that the Petitioner had earlier filed a Writ Petition against the order dated 29 September, 2010 in Case No. 37 of 2010 (W.P. No. 71 of 2011) before the Hon'ble High Court of Bombay and also challenged the GoM memoranda dated 7 May, 2010 and 19 May, 2010. The Hon'ble High Court has set aside the memoranda in Judgment dated 18 January, 2011. Thereafter, the Petitioner has filed the present petition before the Commission. The Petitioner is not seeking a review of the Commission's order dated 29 September, 2010. The cause of action of the present petition arises from the impugned letter issued by the Respondent No.1. Furthermore, the counsel of the Petitioner argued that Respondent No.1 had refused its request dated 25 January, 2011 on the basis that the Hon'ble High Court has not set aside the Commission's Order dated 29 September,

2010. Hence, the Respondent No.1 will maintain status quo in respect of scheduling of 198 MW of power till further directives from the Commission. The Respondent No.1 issued the impugned letter dated 29 January, 2011 by taking a myopic view of the provisions of EA 2003. It was further contended by the Petitioner that although the period concerning the scheduling of power is over, the Commission is empowered to declare the action of the Respondent No.1 illegal. Counsel for TPC relied upon a Judgment of the Hon'ble Supreme Court of India in *Chairman, SEBI Versus Shriram Mutual Fund and Another*, (2006)5 SCC 361 to press for imposition of penalty on the Respondent No. 1.

11. The Counsel for the Respondents No. 1 & 2 argued that the Petitioner had earlier filed Writ Petition No. 71 of 2011 being aggrieved by the order of the Commission dated 29 September, 2010 in Case No. 37 of 2010. The said Order has not been set aside by the Hon'ble High Court of Bombay. The Respondents No. 1 and 2 contended that with regard to the prayers made in the present Petition, the Commission has already decided the same in its earlier Order in Case No. 37 of 2010. Furthermore, the counsel invited the attention of the Commission on the point of similarity in the prayers in the present Petition and in the application for stay in Appeal No. 32 of 2011 which was pending before the Hon'ble ATE. The counsel for the Respondent No.3, RInfra, echoed these views. It has been contended by the Respondents that the Petition is not maintainable.
12. On 2 August, 2011 the counsel for TPC contended that the Respondent No.1, MSLDC refused both requests for the scheduling power from its generation division to its distribution division. And that the present request for 200MW is absolutely separate from the previous requests. The previous requests were made for scheduling 160MW and 100MW which were refused by MSLDC. In the present case, the Hon'ble High Court has not set aside the Commission's Order in Case No. 37 of 2010 but it had set aside the aforesaid GoM memoranda vide Judgment in W.P. No. 71 of 2011. There was no need for the Respondent No.1 to get confused after the Judgment and there is no reason whatsoever to refuse the request of the Petitioner. The Hon'ble High Court stated that the action of MSLDC in issuing such memoranda by the State Government is baseless. However, the Hon'ble High Court held that this Commission is at liberty to consider whether a case has been made out for the exercise of its statutory or regulatory powers independent of the memorandum dated 7 May 2010 and that the said order of the Hon'ble High Court shall not be construed as precluding the exercise of statutory powers by the Commission in accordance with law.
13. The counsel on behalf of MSLDC and MSETCL advanced the argument that there was no new cause for action in the present case but it is an extension of the previous case. The Petitioner has failed to exhibit any new cause for action. The counsel also contended that the setting aside of the GOM memoranda by the Hon'ble High Court has nothing to do with the impugned letter written by MSLDC refusing to schedule power for the Petitioner.

Furthermore, it has been argued that the Hon'ble High Court itself clarified that the setting aside of the Memorandum dated 7 May 2010 will not interdict the decision of the Commission. The Hon'ble High Court also stated that the Commission has the liberty to decide the matter within its statutory and regulatory powers.

14. Thereafter, the matter was heard on 26 August, 2011 wherein the Petitioner submitted its written submissions as per the directions of the Commission. It has been contended that the conduct of MSLDC is arbitrary in so far as it declined to schedule the Petitioner's generation capacity. Further, it stated in the written submissions that TPC has the right to claim compensation for the business loss suffered as a result of the Respondents' actions. The Respondent No.1 is also liable to be penalized under Section 142 of EA 2003 after issuance of a show cause notice.
  
15. The Respondent No.1 stated in its written submissions dated 16 August, 2011 that the request letter of Petitioner dated 25 January, 2011 is not an application as required under the Regulations and the procedures. It contended that the Petitioner is claiming compensation in favour of another independent company viz., TPC- Distribution, which is unlawful. With regard to the prayer to impose penalty on MSLDC, there is no pleading as to which provision of law has been contravened by MSLDC. Hence, the prayer to impose penalty cannot be allowed.
  
16. The Respondent No.3, M/s. RInfra, submitted in its written submissions dated 16 August, 2011 that in so far as the prayers in the amended Petition are concerned, prayers (a), (b) and (d) have become infructuous inasmuch as Respondent No.1 has scheduled power with effect from 1 April, 2011. It is further submitted that insofar as prayers (c) and (c1) are concerned no cause has been made out on the basis of which and in support of which the aforesaid prayers have been purportedly sought.
  
17. The Petitioner filed an additional affidavit dated 25 August, 2011 after filing its written submissions dated 16 August, 2011 in which it stated that the Respondent No.1 had taken different stands at different point in time for refusing the request dated 25 January, 2011 made by it for scheduling power.

18. Respondent No.1 requested the Commission to grant some time enabling it to file a reply to the additional affidavit filed by the Petitioner on 25 August, 2011. The Commission granted the Respondent No.1 one week to file its reply.
  
19. The Respondent No. 1 filed its reply on 30 August, 2011 in which it denied the allegation made by TPC. The Respondent No.1 stated that the Petitioner tried to re-open the same cause of action by its communication letter dated 25 January, 2011 and is confused about the statements made by MSLDC regarding to its stand in its pleadings and written submissions.

DECISION WITH REASONS:

20. Having heard the parties and after considering the materials placed on record, the Commission is of the view that the main basis on which the Respondent No.1 has tried to justify its action of refusing to schedule 200 MW of power w.e.f 1 February 2011 is that it was to comply with the directions of the Government of Maharashtra vide Memorandum dated 19 May, 2010 to maintain *status quo* till further directives are received from this Commission or till further orders/directions in this behalf are issued by GOM. Respondent No.1 has also tried to justify its action on the ground that although the Hon'ble Bombay High Court had vide Judgement dated 18 January, 2011 set aside the GOM memoranda dated 7 May, 2010 and 19 May, 2010, the Hon'ble High Court has not set aside this Commission's Order dated 29 September, 2010. According to the Respondent No.1 there is no change in this circumstances whereby this Commission's Order dated 29 September, 2010 requires to be reviewed. During the proceedings, the Respondent No.1 has stated that the Petitioner has by filing an interim application before the Hon'ble ATE in Appeal No. 32 of 2011 raised the same issues as have been raised before this Commission. The Commission is of the view that although the periods in question and the quantum of power for scheduling involved in the present petition are different from the ones underlying Appeal No 32 of 2011, the legal issues are similar. The Hon'ble ATE delivered Judgment dated 30 May, 2012 in Appeal No 32 of 2011 setting aside this Commission's Order dated 29 September, 2010. Hence, this Commission has taken some time to dispose of this present Petition.
  
21. The Hon'ble ATE has held that MSLDC (Respondent No.1 herein) could not have acted on Government instructions contained in the aforementioned Memoranda and refuse to schedule power as requested by TPC because the Hon'ble Bombay High Court in Writ

Petition of 71 of 2011 held in its Judgment that the GOM swore an affidavit on 11 June, 2010 to the effect that the Government did not exercise its power under Section 11 or Section 37 of the EA 2003 and that the aforementioned Memoranda are merely advisory in nature. The learned Advocate General of Maharashtra made a submission before the Hon'ble Bombay High Court that the Memorandum was only a request to this Commission and not a statutory directive, and it was recorded in the Hon'ble High Court's orders dated 11 June, 2010 and 16 June 2010. The Hon'ble ATE has also held that after the aforesaid developments MSLDC could not have been said to be in a state of flux.

22. In view of the above, the Commission holds that the action of Respondent No.1 to refuse scheduling of power undoubtedly needs to be deprecated. The action of Respondent No.1 is unfair and erroneous. The Petitioner has contended that the Respondent No.1 can only restrict the scheduling if there are technical constraints or other reasons contemplated in the statute but should not have refused to schedule power by mechanically referring to the Commission's order dated 29 September, 2010. The Hon'ble ATE has held in its aforesaid Judgment that MSLDC is undoubtedly a statutory body designed to ensure integrated operation of power system and it acts in terms of Section 33 of the EA 2003. It was not the case of MSLDC that there was network constraint or congestion and lack of required metering infrastructure. The grounds of refusal must be within the parameters of the law and any action which is not within the domain of the Authority would be without jurisdiction. The Commission agrees with the said view and reiterates the same.
23. Hence, the action of Respondent No.1 in refusing the scheduling of 200 MW power for the petitioner cannot be sustained. Accordingly, letter dated 29 January, 2011 issued by the Respondent No.1 is hereby set aside. The question of compensation and damages on account of unlawful action on part of MSLDC also arose in Appeal No 32 of 2011. The Hon'ble ATE held that such a claim was a far fetched one. As the Respondent No.1 is a statutory body, an award of damage can only be made if it can be said that the actions are actuated by malice, misfeasance, malafide motive and negligent discharge of duties. The Commission is not able to attribute these conducts to Respondent No.1 or Respondent No. 2 . These cannot be attributed without proper evidence and nothing of the sort has been placed in proof against Respondents. Hence, the Commission cannot accede to the prayer claiming compensation from Respondent No.1 and/or Respondent No.2. As regards the prayer to proceed under Section 142 , the following words in the said section "*any of the provisions of this Act or the Rules or Regulations made thereunder or any direction issued by the Commission*" required identifying specific sections or specific rules or specific directions that is said to be contravened then only this Commission can proceed against Respondent No.1 under Section 142. The Commission has not been able ascribe any such specific contravention. In the 2004 (2) SC 783 Karnataka Rare Earth and Another vs.

Senior Geologist, Department of Mines & Geology and another the Hon'ble Supreme Court held as under:

*“An order imposing penalty for failure to carry out the statutory obligation is the result of a quasi-criminal proceeding and penalty will not ordinarily be imposed unless the party obliged has either acted deliberately in defiance of law or was guilty of contumacious or dishonest conduct or acted in conscious disregard of its obligation.”.*

Contravention of a specific provision of EA 2003 or the Rules or Regulations made thereunder or any direction issued by the Commission are the foundation on which the case under Section 142 could be built up. Though the action of the Respondent No. 1 was erroneous and incorrect in view of the Hon'ble High Court's Judgement, particularly in view of the admissions made by GOM and the Advocate General of Maharashtra and in view of the Hon'ble ATE's Judgment dated 30 May, 2011 this Commission is not able to ascribe specific, precise and unambiguous allegations to make out a case for issuance of show cause notice. There are infractions and irregularities on the part of Respondent No. 1 but that does not constitute contravention or violation of any of the provisions of EA 2003 or Rules or Regulations made thereunder or directions issued by this Commission which necessitates the issuance of a show cause notice to conduct an inquiry under section 142 of the EA 2003. Hence, the Commission is not inclined to proceed against the Respondent No.1 under Section 142.

In view of the above, Case No. 22 of 2011 stands disposed of.

Sd/-

(Vijay. L. Sonavane)

Member

Sd/-

(V. P. Raja)

Chairman