

Before the  
**MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**  
World Trade Centre, Centre No.1, 13<sup>th</sup> floor, Cuffe Parade, Mumbai 400 005.

**CASE Nos. 7 of 2002**

**In the matter of**  
**application dated March 27, 2002 filed by M/s Tata Power Company**  
**in respect of (i) Payment of Standby Charges, (ii) Payment of Energy Charges for Actual**  
**Drawal, and, (iii) Minimum Guaranteed Off-take.**

**Shri P. Subrahmanyam, Chairman**  
**Dr Pramod Deo, Member**

**ORDER**

**Dated: October 17, 2002**

M/s Tata Power Company, through its Advocates, Doijode Phatarphekar & Associates, submitted a Petition, under Section 22(2)(n) of the Electricity Regulatory Commissions (ERC) Act, 1998 dated March 27, 2002, with following prayer [page 27-28 of the petition]:

- (i) *The BSES be ordered and directed to pay to TPC for energy supplied at 220 KV interconnection at the rate of Rs.2.09 per kwh in accordance with the Principles of Agreement dated 31<sup>st</sup> January 1998*
- (ii) *BSES be ordered and directed to pay to TPC a sum of Rs.8,95,18,160 as per the particulars of claim together with interest at the rate of 24% per annum*
- (iii) *BSES be ordered and directed to pay to TPC a sum of Rs.116,10,69,201 as per the Particulars of Claim together with interest at the rate of 24% / pa on the principal sum of Rs.94,39,50,000 till payment or realisation.*

2. The Commission held a hearing, before admission, in the above matter on 12<sup>th</sup> September 2002. The Petitioner submitted that the main issues, arising out of "Principles of Agreement" signed on 31.1.1998, and distinct from each other, are: [para 41/page 24 of the petition]:

- (i) Payment of standby charges,
- (ii) Payment of energy charge for actual drawal and
- (iii) Minimum guaranteed off-take.

3. The counsel of the TPC further submitted that with regard to standby charges, the matter is sub-judice. He further submitted that the Honourable High Court has passed an interim order dated 25.1.2002 in Notice of Motion No.206 of 2002 directing the BSES to deposit certain amount with the Commission.

4. The counsel further submitted that the TPC and the BSES had signed Principles of Agreement (PoA) whereby the BSES shall pay to the TPC for the 220 KV interconnection at Borivli at the rate of Rs.3.5 crores per month as standby charges. The Agreement further stipulates that the off-take of energy at Borivli interconnection will be billed at Rs.2.09 per unit, plus FCA. This average energy charge is based on an estimated annual flow of 250 MUS. The BSES agreed to take or pay in each financial year (a) overall minimum guaranteed aggregate energy off-take, and (b) minimum aggregate maximum demand at 22 / 33 KV points. The BSES must, therefore, adhere to the contractual agreement and pay at the rate of Rs.2.09 per unit.

5. On Commission's query about technical feasibility about providing standby without delivering energy, the counsel clarified that whether the BSES draws the energy or not, the TPC had to maintain the standby system/facility at Borivli interconnection.

6. As per the agreement [clause 4/Principles of Agreement (Exhibit-C) at Pp 50-51 of the petition] *the BSES will submit their realistic projection for the year 1998-99 and 1999-2000 for minimum guaranteed aggregate energy off-take and aggregate maximum demand by first week of March 1998.* Accordingly BSES submitted their projection vide letter dated 10<sup>th</sup> March 1998 [Exhibit-O at page 343] but with a condition, alien to the Principles of Agreement. The TPC also requested, vide letter dated 15<sup>th</sup> February 2001, the BSES to furnish realistic estimated annual off-take for the years 2001-02, -2002-03 and 2003-04, and BSES's replied vide its letter dated 13<sup>th</sup> March 2001 [refer Exhibit-Q at Pp. 345-346 of the Petition]. The BSES's letter further states that *"the figures indicated above are the projected, based on the actual growth rate in the recent past and are given only for the purpose of planning. No commitment for the off-take should be read into this since the actual off-take would vary depending upon several factors including the direct sale affected by TPC in our area of supply and BSES generation".* Therefore, the BSES cannot violate the terms of agreement by unilateral introduction of caveats. The counsel further referred to BSES letter dated 9<sup>th</sup> April 2001 refuting TPC letter with supplementary bill dated 6<sup>th</sup> April

2001, and pointed out that BSES is not honouring the binding provisions of Principles of Agreement and misinterpreting them to suit its convenience.

7. The counsel invited Commission's attention to Exhibit -X at page 368 of the petition, showing outstanding amount and interest thereon for the minimum off-take at 22 KV for 1998-99 and 1999-2000. He therefore submitted the BSES is liable to pay to TPC and the Commission may be pleased to grant the prayers.

8. The counsel, therefore, concluded his argument stating that the issue of payment of standby charges is pending before the Honourable High Court, wherein the HC has issued only an interim order directing the BSES to make certain deposits with the Commission till a final decision is arrived at and therefore, subjudice. However, the present petition is entirely distinct in nature, seeking directive for the payment of minimum guaranteed off-take through the Borivli interconnection and other 22/33 KV points of off-take as per the Principles of Agreement entered between the TPC and the BSES.

9. He submitted that TPC's claim based on clauses 3 & 4 of Principles of Agreement is distinct and cannot be linked to clause 2 of Principles of Agreement, which had been before the Commission in Case No. 7 of 2000 and now before the Honourable High Court. He further referred to Commission's Order dated 7<sup>th</sup> December 2001 [para 51 & 52 in Case No. 7 of 2000/Exhibit-F/Pp 94-95 of the petition] and mentioned "*since the two parties had agreed upon the rate of Rs.2.09 per kwh, BSES cannot make a grievance of it before the Commission.*" [page 95 of petition]. Therefore, TPC is entitled to come before the Commission since no specific stay by the Honourable High Court is operating.

10. While replying, the senior counsel of the BSES submitted that the present petition of the TPC is nothing but an attempt to enforce the claim based on clauses 3 & 4 of agreement which is shown at Exhibit C at page 50 of the petition He mentioned that no Court or Arbitrator, or Tribunal while dealing in the matter, allows a part of the agreement under arbitration to be operative. He submitted giving an estimate for MD / Energy requirement inherently necessitates caveat, which TPC has never contested earlier except now. He invited the Commission's attention to the findings mentioned at para 8 in its own order-dated 7.12.2001 (Case No.7 of 2000): "*Both parties agreed to cooperate in order to ensure that the orders of the State Government dated 19<sup>th</sup> January 1998 were implemented in the spirit of it, and to execute by 2<sup>nd</sup> April 1998 a detailed Power Supply Agreement on mutually agreed basis incorporating the above*

*points. However, it must be mentioned at this stage that no such detailed Power Supply Agreement was ever entered into till date.”* The matter is under Appeal (as both issues are inter related) before the Honourable High Court and therefore, it is subjudice.

11. The counsel of the BSES further submitted that the TPC is now showing certain amount as receivables, which was not shown to the consultant appointed by the Commission at the stage of dealing in case No.7 of 2000. Further, there is no mention of this amount in its Annual Accounts under the head ‘Receivables’, which is amounting to deliberate suppression of fact. Therefore, the present petition cannot be admitted, treating clause 2 differently than that of clause 3 & 4 of the Principles of Agreement, basically on the following three grounds:

- (i) The TPC has suppressed information from the Commission.
- (ii) The matter is pending before the Honourable High Court.
- (iii) They managed to get advantage from standby charges, by not showing the ‘receivable’ in full.

12. In response, the counsel for the TPC submitted that they have not suppressed any information / data from the Honourable Commission. In fact, the TPC had filed a review application against the MERC Order dated 7<sup>th</sup> December 2001 before the Honourable Commission before preferring an Appeal. Regarding the ‘receivables’, he submitted that since the amount is disputed by the BSES and payment was not forthcoming, as a matter of accounting prudence, the same is not shown as ‘receivables’ in the Annual Accounts. Otherwise, it will attract Income Tax and increase the tax liabilities for an amount, which is not actually received by the TPC.

13. Shri S.M. Dixit, Prayas, consumer representative under Section 26 of the ERC Act, 1998, submitted that since both parties want certain issues to be decided upon by MERC, and this is also one of the demands in their cases before the HC, the petition should be admitted. He further submitted that if the parties want the issues raised in the petitions before MERC, to be decided upon by the High Court, then the parties should withdraw their petitions before the MERC.

14. Shri R.B. Budhiraja, Principal Secretary (Energy), Government of Maharashtra submitted that he has nothing to say in the matter since the matter is before the Honourable High Court.

15. The Commission is of the view that the cause of action in Case 7 of 2000 was enumerated in para 3 of its Order dated 7<sup>th</sup> December 2001, and the observation narrated in para 8 of the same Order remains valid till now except for both the parties having preferred their appeal before the Honorable HC. In view of the Appeals, filed by both the parties pending before the Honourable High Court, against the Commission's Order dated 7<sup>th</sup> December 2001 in Case No.7 of 2000, the present petition cannot be admitted under Section 22(2)(n) of the ERC Act, 1998.

16. Therefore the application submitted by the TPC does not merit consideration under Section 22(2)(n) of the ERC Act, 1998.

Thus ordered.

Sd/-  
(Dr Pramod Deo)  
Member

Sd/-  
(P. Subrahmanyam)  
Chairman, MERC

Sd/-  
(Sanjay Kumar)  
Secretary, MERC

Dated 17<sup>th</sup> October 2002.