

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
World Trade Centre, Centre No.1, 13th Floor, Cuffe Parade, Mumbai 400005
Tel. 022 22163964/65/69 Fax 22163976
Email: mercindia@merc.gov.in
Website: www.mercindia.org.in/www.merc.gov.in

Case No. 19 of 2017

Date: 13 April, 2017

CORAM: Shri. Azeez M. Khan, Member
Shri. Deepak Lad, Member

Petition filed by RattanIndia Power Limited (formerly Indiabulls Power Ltd.) under Section 86 of the Electricity Act, 2003, seeking a declaration for sale of un-availed capacity to third parties in terms of Article 4.5.3 of the PPAs of the Power Purchase Agreements dated 22.04.2010 and 05.06.2010 executed between RIPL and Maharashtra State Electricity Distribution Company Limited.

Petitioner: RattanIndia Power Limited (RIPL) ...Petitioner

V/s.

Maharashtra State Electricity Distribution Company Ltd. (MSEDCL) ...Respondent 1

Maharashtra State Load Despatch Centre (MSLDC) ... Respondent 2

Representative for the Petitioner: Shri. Amit Kapoor (Counsel)
Adv. Vishrov Mukerjee

Representative for the Respondent: Shri. M. G. Ramachandran (Counsel)

Representative for the Consumer Representative: Shri. Ashok Pendse, TBIA

Daily Order

Advocate of RIPL stated that, in compliance with the directions of the Commission in Daily Order dated 7 February, 2017, a joint meeting was conducted on 8 and 9 February, 2017 at which the 5 prayers were discussed as below:

1. Quash the communication dtd:13.01.2017 issued by MSEDCL refusing to grant permission for sale of available capacity not being scheduled
2. Direct MSEDCL to grant Short Term Open Access (STOA) to the Petitioner and / or purchasers of such unscheduled capacity in accordance with the Distribution Open Access Regulations.
3. Direct MSEDCL to act in a reasonable and prudent manner and follow proper procedure allowing sufficient time for recall of such unscheduled capacity; and
4. Declaration of Availability, scheduling and injection of power.

On these, MSEDCL's issue-wise submissions have been recorded as under:

1. RIPL shall be allowed to sale the power at or above the tariff rate (i.e. Fixed and Variable charges, including Change in Law) to third parties and shall share the sale realization over and above the Tariff rate equally.
2. MSEDCL shall grant STOA permission as per provisions of Distribution Open Access Regulations and the directives issued by the Commission from time to time on a case to case basis.
3. As per the provisions of PPA, MSEDCL shall recall such power as and when required.
4. RIPL shall declare the availability and shall arrange to schedule the power exactly as per the contracted power with the third party. MSEDCL shall not procure any power scheduled and injected by RIPL under such third party sale.
5. MSEDCL has exclusive right over the contracted capacity with RIPL. Further, from the demand projection of MSEDCL and forecasted availability, there may be requirement of scheduling power from the contracted capacity of RIPL Units in future. However, the Commission may take appropriate decision regarding commercial aspects of this matter.

Advocate of RIPL stated that both parties are agreed on points no. 3 and 4, whereas on point no. 1 and 2, RIPL is seeking relief regarding Open Access from MSEDCL.

RIPL owns and operates a 1350 MW (5x270 MW) coal fired Power Plant located at Nandgaonpeth, Amravati District, in Maharashtra. RIPL has been generating and supplying power to MSEDCL since 3 June, 2013 pursuant to PPAs dated 22 April, 2010 and 5 June, 2010.

Since MSEDCL has not been off-taking power from the Project despite almost 100% availability, RIPL had approached MSEDCL on 22.07.2016 and 07.01.2017 seeking to sell power to third parties in terms of Article 4.5.3 of the PPAs. Since no response was received from MSEDCL, RIPL entered into arrangements for sale of 15 MW to third parties. MSEDCL has refused grant of STOA on the ground that RIPL has entered into PPAs with MSEDCL and cannot sell power to third parties. Consequently, the entire capacity has been

bottled up with low levels of despatch.

The present Petition has been filed impugning the decision of MSEDCL to refuse STOA and thereby holding RIPL hostage.

During February and March, 2016, MSEDCL secured shut down and zero scheduling of the Project with the help of Maharashtra State Load Despatch Centre (**MSLDC**).

On 21.05.2016, RIPL wrote to MSEDCL with a copy to MSLDC intimating the financial impact of the frequent shutdown and start-up instructions. RIPL requested MSEDCL to permit at least one Unit to be operational at all times and not to enforce complete shutdown of the Power Station.

On 22.07.2016, RIPL wrote to MSEDCL intimating the significant drop in scheduling available capacity during the year 2016.

RIPL suggested to MSEDCL that available capacity not being scheduled may be allowed to be sold to third parties in terms of Article 4.5.3 of the PPAs.

On 07.01.2017, RIPL wrote to MSEDCL highlighting the low PLF and informed MSEDCL that it may be possible to reduce the financial liability on MSEDCL by selling power to a third party, and that such an arrangement would benefit MSEDCL by up to Rs. 0.10 / kWh in the energy charge.

RIPL entered into a PPA with Global Energy Private Limited, a Trading Licensee, for sale of up to 15 MW between 01.02.2017 to 28.02.2017 and sale of power subject to MSEDCL not scheduling power as MSEDCL has the first right over the power up to 1200 MW.

On 08.01.2017 and 09.01.2017, STOA applications were submitted on behalf of the third party aforesaid buyers to MSEDCL, which MSEDCL rejected on 13.01.2017 on the ground that RIPL has already entered into PPAs with MSEDCL for sale of power from the Power Plant.

Subsequently, on 27.03.2017, RIPL wrote to MSEDCL seeking its concurrence to participate in a short-term power procurement process for which the last date for bid submission was 01.03.2017.

On 16.03.2017, MSEDCL wrote to RIPL stating that the further course of action would be decided subsequent to decision of the Commission.

He further stated that a conjoint reading of Articles 4.5 and 5.4.2 indicates that:-

- (a) ***Subject to the provisions of the PPA***, the entire Aggregate Contracted Capacity is for the exclusive benefit of MSEDCL and it shall have the exclusive right to purchase the said quantum. Therefore, MSEDCL's right over the Aggregate Contracted Capacity is subject to other provisions of the PPA. [**Article 4.5.1**]
- (b) RIPL shall be entitled to sell Available Capacity not availed or despatched. [**Article 4.5.2 (b)(i) and Article 4.5.3**]
- (c) Exercise of such right is subject only to the conditions mentioned in Article 4.5.3 which require consent by MSEDCL only if the capacity is being sold to an affiliate or shareholder at a tariff less than the tariff applicable to MSEDCL.

MSEDCL has admitted that instances like the present case are covered under Article 4.5.3, in Paragraph 12 of the its Reply. MSEDCL has contended that only if it intimates RIPL in advance that it shall not be availing the capacity in full or part, can RIPL sell such surplus capacity.

Between 15.11.2016 and 17.11.2016, MSEDCL wrote to MSDLC requesting that Unit Nos.1, 2, 4 and 5 of the Project be given zero schedule until further communication (Unit No.3 was already under Zero Schedule since 29.06.2016).

At the time the applications for STOA were submitted (i.e., on 08.01.2017 and 09.01.2017), there was a standing instruction from MSEDCL to MSLDC to continue zero scheduling till further communication. This is squarely covered by the admission made by MSEDCL that third party sales are permitted under Article 4.5.3 in cases where MSEDCL has intimated in advance that it will not be availing power. Once MSEDCL has admitted that RIPL is entitled to sell power under Article 4.5.3 when there is a standing instruction, this is a fit case for admission on the principles enshrined in Order 12 Rule 6 of the Code of Civil Procedure. This admission is binding on MSEDCL and the relief sought by RIPL ought to be allowed.

RIPL's right to sell the unavailed capacity to third parties as also MSEDCL's obligation to grant STOA to qualified purchasers is not contingent upon any approval / permission from MSEDCL. As long as there is unavailed capacity available, RIPL has the right to sell such power to third parties, subject to sale to affiliates and shareholders at a price lower than the quoted tariff requiring MSEDCL approval; and MSEDCL's power to recall such power by giving notice of two hours to RIPL.

MSEDCL has rejected the STOA applications on completely extraneous grounds citing the existence of PPAs between RIPL and MSEDCL. The PPAs entitle RIPL to sell unavailed capacity to third parties without exception. Therefore, the refusal to grant STOA on this ground is unlawful and violating statutory obligations.

MSEDCL's refusal to allow RIPL to schedule power on the premise that RIPL is recovering capacity charges is arbitrary and unfair. Besides the fact that RIPL is entitled to capacity charges in terms of the PPAs, refusal to grant STOA is without any legal or rational basis.

MSEDCL has filed a detailed Reply on 10.04.2017 taking wholly extraneous grounds to deny RIPL's claim. MSEDCL has made the following submissions in the detailed Reply which are a testimony to MSEDCL's unlawful, arbitrary and malafide conduct:-

- (a) RIPL is not entitled to enter into any firm arrangement for generation and sale of electricity till 3 pm, which is the cut-off time under the MSLDC Scheduling and Despatch Code.
- (b) Due to uncertainty of the quantum of power that may be available to RIPL for sale to third party, no Open Access application can be entertained from RIPL.
- (c) Surplus power available can only be sold through Unscheduled Interchanges or, if permissible, through Power Exchange without affecting MSEDCL's rights to revise the despatch instructions.
- (d) MSEDCL may allow RIPL to sell surplus capacity to a third party, under Article 4.5.3 of the PPAs, only when it is of the opinion that such sale shall be at a price higher

than the variable charges, which would benefit MSEDCL. MSEDCL will be well within its right to refuse sale of surplus power to third parties if there is no financial benefit accruing to it in the form of reduction of deemed fixed charges.

- (e) The choice to schedule or not to schedule the available capacity from time to time is entirely with MSEDCL and needs to be decided by it only at the time of giving despatch instructions.
- (f) Grant of Open Access to RIPL for sale of surplus power would cause financial prejudice to MSEDCL.

MSEDCL has relied on Article 4.5.2 to contend that the right to sell power to third parties accrues only after despatch instructions are finalised. This submission is in the teeth of Article 4.5.3 since:-

- (a) Article 4.5.3 does not limit RIPL's right to sell to third parties only after finalization of despatch instructions.
- (b) Article 4.5.3 does not refer to the term 'despatch' used in Article 4.5.2(b) of the PPAs. Importing a limitation into Article 4.5.3 is impermissible.

Article 1.2.13 states that different parts of the Agreement have to be interpreted in a harmonious manner so as to give effect to each part. Moreover, MSEDCL's contention that surplus power can only be sold through Unscheduled Interchange or through the Power Exchange is without any legal basis because Articles 4.5.2 and 4.5.3 do not limit where surplus power can be sold. The liability to pay capacity charges remains irrespective of sale of unavailed capacity to third parties.

Article 4.5.3 does not limit or restrict the price at which power is to be sold. The only limitation is sale of power to affiliates and third parties at a price lesser than the tariff applicable for MSEDCL. MSEDCL is attempting to nullify RIPL's rights under Article 4.5.3 under the garb of conditions which do not find a mention in the PPA.

The Petitioner may be allowed MSEDCL and MSLDC directed to grant STOA in accordance with the applicable Regulations for supply of unavailed capacity; and to clarify the obligations and factors governing grant of LTOA and STOA of Distribution Licensees in Maharashtra.

Advocate of MSEDCL stated that the issues are based on interpretation of the PPA provisions. It is MSEDCL's right under the PPAs to schedule or not to schedule the available capacity from time to time, and this has to be decided by it only at the time of giving despatch instructions. RIPL is not entitled to enter into any firm arrangement for generation and sale of electricity till 3 pm, which is the cut-off time under the MSLDC Scheduling and Despatch Code. The quoted Tariff is sacrosanct for the provisions of the PPA.

Being a Public Sector Undertaking, MSEDCL is answerable to the stakeholders. MSEDCL has discharged its obligation by paying the Capacity Charge as per the PPAs.

RIPL's Tariff was discovered through a Competitive Bidding process, in which RIPL has quoted Capacity Charge and Energy Charge considering all aspects. Through Capacity Charge, RIPL is getting the complete capital cost including O&M, RoE, Depreciation, etc.

RIPL cannot make Open Access applications, due to uncertainty of the quantum of power that may be available for sale to third party. Surplus power available can only be sold through Unscheduled Interchanges or, if permissible, through Power Exchanges without affecting MSEDCL's rights to revise the despatch instructions.

MSEDCL may allow RIPL to sell surplus capacity to a third party, under Article 4.5.3 of the PPAs, only when it is of the opinion that such sale will be at a price higher than the variable charges, which would benefit MSEDCL. MSEDCL will be well within its right to refuse sale of surplus power to third parties if there is no financial benefit accruing to it in the form of reduction of deemed fixed charges.

The choice of whether to schedule or not to schedule the available capacity from time to time is entirely with MSEDCL, and has to be decided by it only at the time of giving despatch instructions.

He further stated that granting Open Access to RIPL for sale of surplus power to third party including by reduction in the requirement of cross-subsidising consumers would cause financial prejudice to MSEDCL and may cascade the effect of bringing down the generation because of reduction in demand. As per Article 15.3, PPA may only be amended or supplemented by a written agreement between the parties and after obtaining the approval of the Commission.

The Commission enquired whether, if the MSEDCL declared that it will not be scheduling the power for 3 months, it would allow RIPL to sale the unscheduled power to third party.

Advocate of MSEDCL stated that, as per Article 4.5.5, MSEDCL, as demand increases, may schedule generation with intimation of 2 hours and MSEDCL is entitled to follow the provisions regarding scheduling as per IEGC. Under Article 4.5.5 read with Article 4.5.2, RIPL shall be permitted to sell a part of the Contracted Capacity to third parties only if it is not being despatched by MSEDCL.

He stated that, if Article 4.5.2, 4.5.3 and 4.5.5 are read with the Indian Electricity Grid Code, it is not possible to allow RIPL to sale the Contracted Capacity. He also referred to Section 28, 32 of EA, 2003 and Clause 3 (a) of the Grid Code regarding optimum scheduling. Clause 9 of the Scheduling and Despatch Code lays down the procedure of despatch, under which the schedule is finalized by MSLDC at 3 pm. Thereafter, as per Article 4.5.2 b (i), the power which has not been despatched is available for sale to third parties. He also stated that RIPL seeks to sell to third parties considering Energy Charge at Rs. 2.75/kWh, whereas as per MoD the rate of Energy charge is Rs.3.07/kWh. If RIPL is ready to sell at Rs. 2.75/kWh to MSEDCL, it would come within the MoD of MSEDCL.

Dr. Ashok Pendse of TBIA pointed out that the sale price of RIPL to Trader is at Rs. 2.85/kWh, and the Trader is selling to the consumer at a much higher rate, resulting in the Trader earning a huge profit.

The Commission observed that, as per Article 8.5.2, if MSEDCL did not make payments by due dates of an invoice, RIPL, after giving due notice, has the right to offer 25 per cent of the

Contracted Capacity for sale to third-parties. However, RIPL has not sought or commented on this option available to it.

Advocate of RIPL stated that, as per Article 8.5.9, sales to any other person other than MSEDCL shall cease and regular supply of power to MSEDCL shall be restored on the later of the date on which MSEDCL pays the due amounts, renewable of Letter of Credit, restores Default Escrow Account, etc., which demonstrates that third party sale is fundamentally allowed by the PPAs.

He further stated that the Commission is empowered under the Section 60 of the Electricity Act, 2003 to issue such directions as it considers appropriate to MSEDCL if it abuses its dominant position or acts in a manner likely to have an adverse effect on competition in the electricity industry.

As the PPAs are based on the Case 1, Standard Bid Document issued by MoP, the Commission directs both parties to submit any case law relating to third party sale of power under Article 4.5.3 or other relevant provisions of such PPAs within 15 days.

The Case is reserved for Order.

Sd/-
(Deepak Lad)
Member

Sd/-
(Azeez M. Khan)
Member