

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
E-mail: mercindia@merc.gov.in
Website: www.merc.gov.in/www.mercindia.org.in

CASE No. 123 of 2018

**Petition of Maharashtra State Electricity Distribution Co. Ltd. for review of Order
dated 27 February, 2018 pronounced in Case No. 19 of 2017.**

Coram

Anand B Kulkarni, Chairperson
I.M.Bohari, Member
Mukekesh Khullar, Member

Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL)Petitioner
V/s.
RattanIndia Power Limited (RPL)Respondent No 1
Maharashtra State Load Dispatch Centre (MSLDC)Respondent No 2

Appearance

For MSEDCL : Shri. Ashish Singh (Adv)
For RPL : Shri. Vishrov Mukerjee (Adv)
For MSLDC : Shri. E.T.Dhengle (Rep)

ORDER

Date: 24 October, 2018

1. Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL) has filed a Petition on 11 April, 2018, under Regulation 85 of MERC (Conduct of Business) Regulations, 2004 read with Section 94 (1) (f) of the Electricity Act, 2003 for review of Order dated 27 February, 2018 in Case No.19 of 2017 passed by the Commission.
2. Main prayers of MSEDCL are as follows:
 - a) *Review the order dated 27.02.2018 passed in Case No. 19 of 2017 by allowing the present review petition.*

- b) *Declare that the contracted capacity under the PPA is the exclusive right of MSEDCL which under ordinary circumstances cannot be taken away under the guise of a third party sale; or in the alternative;*
- c) *Hold that this Hon'ble Commission had no jurisdiction to adjudicate upon a non-tariff related issue arising out of the PPA.*

3. MSEDCL's case is as follows:

3.1. The impugned Order dated 27 February, 2018 in Case No. 19 of 2017 is subjected to review on the following grounds:

- a) The Commission has erroneously interpreted Articles of PPA related to non-tariff issues for which a separate mechanism of Arbitration is provided for under the PPA.
- b) The Commission has failed to appreciate that Articles in the PPA are sacrosanct and cannot be modified meaning thereby that remedies provided under the Articles can be availed only under the adjudicatory mechanism envisaged under the PPA and not otherwise.
- c) The Commission has failed to appreciate that no third party sale can be allowed under Article 4.5.3 of the PPA when the purported third party sale is below the contracted price.
- d) The Commission has failed to appreciate that third party sale is only allowed when such sale results in mutual financial benefit of both the parties and not otherwise. Further, such Third Party sale is completely different from Open Access.
- e) The Commission has failed to appreciate that the purported record of GEPL/trader considered as third party sale clearly establishes that the said price was lower than MSEDCL contracted rate as per PPA. Hence any consequential order would be rendered ineffective if the premises of the Order is itself incorrect.
- f) The Commission has failed to appreciate that third party sale allowed under the PPA can only be bilateral and not through a trader.
- g) The Commission has erred by holding that price at which the trader sells power to its buyers is unrestricted and has no nexus with Article 4.5.3 of the PPA. Article 4.5.3 is for the mutual benefit of the parties and not for the benefit of a third party.
- h) The Commission has erred by not appreciating that the time frame of two hours available to MSEDCL to recall the power mandates that RPL cannot get into any short term/long term RTC supply of power to third parties and can only be for a very meagre intermittent period. Moreover prayer made by RPL for relaxation of two hours period makes it evident that allowing any third party sale would defeat

the intent of the PPA as RPL would not be in a position to supply power to MSEDCL in a case of recall of such power by MSEDCL.

- i) The Commission has erred by not appreciating that flow of electricity happens in real time and the terms of the PPA have to be read as per the real ground scenario. Hence, Article 4.5.3 has to be read in sync with the Universal Service Obligation of MSEDCL. Any default by RPL in making power available within 2 hours of recall would severely jeopardize the universal service obligation of MSEDCL.
- j) The Commission has erred by not appreciating that apart from MSEDCL's own demand there is demand of other Discoms and Deemed Discoms to the tune of 500 MW which needs to be met by MSEDCL by providing standby support. Such demands are largely unforeseeable. Hence allowing third party sale can cause severe detriment of interest of all Discoms.
- k) The Commission has erred by not appreciating that the Fuel Supply Agreement (FSA) of RPL is based completely on the Power Purchase Agreement (PPA) with MSEDCL. Such subsidized supply of fuel is for the benefit of MSEDCL and not for some third party or trader.
- l) The Commission has erred by overlooking the large issue of allowing open access through the contracted capacity from the PPA. This would further create a vicious cycle of demand and supply gap and would also negatively impact the consumer of MSEDCL financially. A PPA is for the benefit of parties and not to their derogation. Moreover a long term PPA takes into account all intermittent factors and such minor intermittent factors cannot usually be used to disrupt a chain of transaction which otherwise is completely for the benefit of consumers of State.
- m) The Commission has erred by not appreciating that the word "ordinarily" appearing in Article 4.5.2 (i) of the PPA which means in ordinary circumstances and not otherwise. The backing down instructions issued in the past were not ordinary circumstances and were circumstances beyond the control of MSEDCL.
- n) The Commission has erred by holding unscheduled power in same parlance to un-dispatched power. It is submitted that unscheduled power can never mean un-dispatched power which can only be known around 4 PM on a daily basis as per the Scheduling and Dispatch Code.

3.2. Further, present review Petition is filed on discovery of new and important data which was not a part of the record when the Order was passed. The Commission relied on data and circumstances which were for the period 15 February, 2016 and 23 February, 2016. Now the circumstances have changed and MSEDCL is not in a position to issue any future standing instructions relating to backing down of RPL generating units. The power demand scenario in last one and half year has tremendously changed due to the various reasons like Seasonal Temperature variation, irregular rains in monsoon period

etc. Further the availability of the thermal units has become unpredictable due to the shortage of coal scenario nationwide and constraints relating to transportation of coal.

4. RPL in its reply dated 28 September, 2018 stated as follows:

- 4.1. MSEDCL is seeking re-opening/ re-hearing/ re-consideration of the issues conclusively decided by the Commission in its Order dated 27 February, 2018 (which can only be done by way of an appeal), under the garb of a review. This is not permissible in law, as settled by the Supreme Court through a catena of judgments.
- 4.2. MSEDCL has failed to demonstrate that there is any error apparent on the face of the record, which would justify the Commission to exercise its powers of review.
- 4.3. MSEDCL in its review Petition raised the issue of jurisdiction of this Commission whereas in its additional submissions dated 10 April, 2017 in original matter, MSEDCL had categorically submitted that, *“the jurisdiction of the Commission to deal with the matter is not denied”*. This admission by MSEDCL is recorded by the Commission in Paragraph 9.6 of the impugned Order sought to be reviewed. Therefore, MSEDCL is estopped from raising this issue in the present Review Petition.
- 4.4. The Commission in impugned Order dated 27 February, 2018 in Case No. 19 of 2017 stated that in terms of Article 4.5.2(b) of the PPAs, RPL can sell, out of the Contracted Capacity, power to third parties to the extent of the Available Capacity which has not been despatched by MSEDCL. Any sale realisation from such third-party sale in excess of the contracted Energy Charges shall be shared between RPL and MSEDCL in terms of Article 4.5.3 of the PPAs. The Commission has in Paragraph 19 of the Order further rightly held that, the price at which RPL sells power to a Trader is unrestricted, but has to be declared to MSEDCL. That price is relevant in terms of Article 4.5.3 of the PPAs. Furthermore, the price at which the Trader thereafter sells the power is unrestricted, and has no nexus with the PPA provisions.
- 4.5. Article 4.5.3 of the PPAs does not limit or restrict the price at which power is to be sold by RPL to any third party. The only limitation is that RPL has to obtain approval from MSEDCL in case of sale of power to its affiliates and shareholders, i.e. at a price lower than the tariff applicable for MSEDCL. MSEDCL is attempting to nullify RPL’s rights under Article 4.5.3 under the garb of conditions which do not find a mention in the PPAs.
- 4.6. During the proceedings in Case No.19 of 2017, MSEDCL had never raised any contention qua meeting the demand of other distribution licensees from its own demand, and the same is being raised for the first time in the instant Review Petition, which is not permissible in law.
- 4.7. The Commission has in Para 15 of the Order categorically held that the PPAs allow sale of contracted power by RPL to the extent that it is not despatched to MSEDCL.

Furthermore, the PPAs provide for sharing the gains between the parties, depending on the rate of such sale. The intention behind the provision is utilisation of contracted and available generation resources, which are not required by MSEDCL, with the possible benefits to both parties. Evidently, the Commission has rightly recognised that, the provisions of the PPAs permit sale of power to third-party, only when the power is not availed by MSEDCL. Therefore, it is not the case that RPL is using the available generation resources for private gain, so as to prejudice MSEDCL's interest. In light of the foregoing, it is submitted that MSEDCL's aforementioned contentions cannot be said to be an error apparent on the face of the record, so as to seek review of the Order.

4.8. The Electricity Act and the Commission's Open Access Regulations permit/ authorise any consumer (with load above 1 MW) to buy power through Open Access. Open Access Consumers are therefore statutorily permitted to buy power from any generator/ exchange/ trader as per its feasibility. Therefore, MSEDCL's contention qua Open Access being responsible for demand and supply gap is patently erroneous and contrary to the statutory mandate. It is further submitted that, for purchase of power by any Open Access Consumer in MSEDCL's licensed area, MSEDCL receives Wheeling Charges, Cross-Subsidy Charges and any other charges approved by the Commission. MSEDCL shall further save on purchasing costly power to that extent as per the Merit Order Despatch. In light of the foregoing, MSEDCL's submission that, third party sale of power by RPL would burden MSEDCL's consumers with costly power is wrong, erroneous and vehemently denied.

4.9. By the instant Review Petition, MSEDCL seeks to rely on certain alleged data/ circumstances which have taken place subsequent to the hearings in the matter and passing of the Order. In order to make a case for review on the ground of discovery of new and important matter, such matter has to be something which existed at the date of the order and there can be no review of an order which was right when made on the ground of the happening of some subsequent event.

4.10. MSEDCL failed to appreciate the Commission's in its Order dated 27 February, 2018 has not granted RPL's prayer for relaxation of the period of 2 hours for resuming supply of power in terms of the PPAs.

4.11. Furthermore, Commission has also duly addressed MSEDCL's concern qua RPL's ability to resume supply of power, in case third-party sales are permitted. The Commission has categorically observed "*that if, because of its third-party sale arrangements, RPL is unable to resume supply from its own generation within the stipulated time, Article 4.6 allows it to do so for some period from alternative sources, but only at the contracted rate*". Therefore, MSEDCL's contention that the Commission has failed to appreciate the rationale for the two hours clause is wrong and erroneous.

4.12. It is settled law that an order or judgment cannot be corrected merely because it is erroneous in law or because two different views can be taken on the law or fact of the case, as it would amount to sitting in appeal over its own judgment. The power of

review is not to be confused with appellate powers which enable the appellate court to correct all manner of errors committed by the subordinate court. In this regard, the Judgment in *Haryana State Industrial Development Corporation Limited v. Mawasi & Ors.* reported as (2012) 7 SCC 200 (Paras 30, 31 and 35) is noteworthy.

5. The proceedings of the hearing held on 3 October, 2018 are summarised as follows:

- 5.1. Advocate of MSEDCL reiterated the facts mentioned in its review Petition and said that RPL and MSEDCL are bound by the contractual obligations and within that the third party sell was not allowed. Also as the original Petition was filed for denial of Open Access, however the Commission in its Order has interpreted provisions of PPA which are not related to Tariff and allowed Third Party sales. Any non-tariff dispute under the PPA needs to be referred to arbitrator. Hence, he requested for review of the Order.
- 5.2. Advocate of RPL reiterated the facts mentioned in its submission. He stated that MSEDCL in its review Petition raised the questions on the jurisdiction of the Commission whereas in the Original Petition MSEDCL itself has stated that it does not deny the jurisdiction of the Commission. The third-party sale was allowed by the Commission as per contractual obligations in terms of PPA with MSEDCL and it should abide by that. The issue of seasonal Demand which was raised by MSEDCL in the Review Petition was not part of Original Petition. RPL requested the Commission to reject the review as it is not tenable.

Commission's Analysis and Ruling

6. MSEDCL filed this Petition for review of the Commission's Order dated 27 February, 2018 issued in Case No. 19 of 2017 on the following grounds:
 - a) The Commission has no jurisdiction to adjudicate dispute related to non tariff issues arising out of PPA;
 - b) To review the approval for sale of un-availed generation capacity to third parties under clause 4.5.3 of PPA the Commission has relied on FY 2016-17 data. Present scenario about demand and supply has changed.
 - c) Changed demand-supply position
7. Regulation 85(a) of the MERC (Conduct of Business) Regulations, 2004 regarding review reads as follows:

“85. (a) Any person aggrieved by a direction, decision or order of the Commission, from which (i) no appeal has been preferred or (ii) from which no appeal is allowed, may, upon the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by

him at the time when the direction, decision or order was passed or on account of some mistake or error apparent from the face of the record, or for any other sufficient reasons, may apply for a review of such order, within forty-five (45) days of the date of the direction, decision or order, as the case may be, to the Commission.”

Thus ambit of the review is limited and this Petition has to be evaluated accordingly.

A. Jurisdiction of the Commission to adjudicate non-tariff issues:

8. MSEDCL has contended that in the original matter in Case No. 19 of 2017 which was filed by RPL for non-issuance of No Objection Certificate by MSEDCL for Open Access, the Commission while issuing its Order dated 27 February, 2018 has interpreted non-tariff related provisions of PPA. As per MSEDCL, the Commission has no jurisdiction to adjudicate non-tariff related disputes for which a separate mechanism of Arbitration is provided under the PPA. Therefore it requested to review the impugned Order dated 27 February, 2018.
9. In the Review Petition, MSEDCL has raised objection about Commission’s jurisdiction to deal with non-tariff dispute between RPL and MSEDCL. MSEDCL stated that as various covenants of PPA are sacrosanct, as per clause 14.3.2 under PPA in case of any dispute arising out of or in connection with any claims not covered under Article 14.3.1.1, the same can be resolved through Arbitration. With reference to this clause, it was expected that RPL should have first approached MSEDCL and depending on the outcome, it would have approached the Commission. As per Section 158 of Electricity Act, 2003 the Commission would have taken the appropriate steps to resolve the matter if it so deemed fit. But when RPL approached the Commission for adjudication in the Original matter, MSEDCL had accepted the jurisdiction of the Commission without any objection. MSEDCL at this stage now cannot seek review on the issue of Jurisdiction; and in fact cannot approbate and reprobate at the same time. Also Section 86 (1) (f) of the Electricity Act, 2003, empowers the Commission to adjudicate upon dispute between licensee and generating companies, without any bifurcation/distinction between tariff and non-tariff issues. Issue relating to Jurisdiction is a Law point. There cannot be any estoppel against Law. Likewise jurisdiction cannot be conferred per se admission by the opposite party. Hence, MSEDCL’s contention that the Commission cannot adjudicate non-tariff issues between RPL and MSEDCL is not correct and hence rejected.

B. Review the approval for sale of un-availed generation capacity to third parties under clause 4.5.3 of PPA

10. MSEDCL in its review Petition has contended that the Commission’s approval of sale of un-availed generation capacity to third party is not correct as unscheduled power can never mean un-dispatched power. Un-dispatched power can only be known around 4 PM on a daily basis as per the Scheduling and Dispatch Code. The Commission has addressed the above contentions of MSEDCL in the impugned Order dated 27 February, 2018 as follows:

“13. The scheduling and despatch of power under the PPAs is governed by the IEGC and the Scheduling and Despatch Code formulated under Regulation 33 of the State Grid Code Regulations, 2006, which is referred to in the PPAs. While certain further revisions and reconciliations may take place, the Code essentially provides that MSLDC finalise the drawal schedule of Generators by 3 p.m. each day for the following day, based on a review of their Availability vis-a-vis the drawal schedules received from the Distribution Licensees. Hence, MSEDCL has argued that any third-party sale by RPL as a contracted Generator can be committed to, if at all, only on a day-to-day basis.

14. However, the Commission notes that, although there may be large variations in MSEDCL’s seasonal demand, it is usually more or less uniform during any particular season, although there may be exceptions and other eventualities relating to the availability of generation from different contracted sources from time to time. Thus, MSEDCL would have, as it is expected to, a fair assessment of its demand at least over the next few days, weeks or even months, as well as the respective positions of RPL and other Generators in the MOD Stack. If that were not so, MSEDCL would not have been in a position to intimate zero scheduling for certain Units of RPL for some periods, a practice of MSEDCL which also provides greater certainty to stakeholders.

15. The PPAs allow sale of contracted power by RPL to the extent that it is not despatched. They also provide for sharing of gains between RPL and MSEDCL depending on the rate at which it is sold to third parties. The intention behind these provisions is the utilisation of contracted and available generation resources which are not presently required, with possible benefits to both parties.

16. The Commission is of the view, therefore, that, while the actual scheduling is finalised only a before daily, upon a reasonable and prudent assessment that the despatch of power by a particular Generator will not be required for some time, the Distribution Licensee shall allow the Generator to sell that power to third parties and provide Open Access for the purpose. The Commission directs MSEDCL to act accordingly in terms of the PPA provisions and such assessment. Depending on the rate of such sale, MSEDCL may also reap some benefit in the interest of its consumers. Although that cannot be the determining factor in terms of the PPAs, the Commission notes that, in some cases of third-party sale proposed by RPL, MSEDCL had in fact foregone this benefit by withholding STOA permission.” (Emphasis added)

11. The Commission notes that in above mentioned Order, basic presumption is that Third Party Sale will reap some benefit to the MSEDCL. However, MSEDCL has contended that the Commission in its impugned Order has not addressed its concerned that there cannot be any Third Party Sale at a rate lower than the rate quoted in the PPA. The Commission notes that this issue raised by the MSEDCL in Original Case No. 19 of 2017 has not been addressed in the impugned Order. This is error apparent on face of

records which requires allowing review of impugned Order to address this aspect raised by MSEDCL.

12. The Commission notes that Clause 4.5.3 of the PPA reads as follows:

“If the Procurer does not avail of power up to the Available Capacity provided by the Seller corresponding to the Contracted Capacity, the Seller shall be entitled to sell such Available Capacity not scheduled by the procurer, to any person without losing the right to receive the Capacity Charges from the Procurer, to any person without losing the right to receive the Capacity Charges from the Procurer for such unavailed Available Capacity. In such a case, the sale realization in excess of Energy Charges, shall be equally shared by the Seller and the Procurer. In the event, the Seller sells such Available Capacity to any direct or indirect Affiliate of the Seller/ shareholders of the Seller without obtaining the prior written consent of the procurer, the Seller shall be liable to sell such Available Capacity to such entity at Tariff being not less than the Tariff payable by the Procurer. During this period, the Seller will continue to receive the Capacity Charges from the Procurer.”

13. As can be seen from above clause of the PPA, Third Party Sale is envisaged only at Energy Charge which is in excess of tariff payable by MSEDCL under the PPA. Also in case of sale to affiliate of RIPL, it cannot be lower than the tariff payable by MSEDCL. Thus, as per provisions of the PPA, Third Party Sale cannot be allowed at the rate lower than the Tariff (Energy Charge) Payable by the MSEDCL. Hence, the Commission is of the view that Third Party Sales allowed in impugned Order dated 27 February, 2018 can be permitted under following circumstances:

- a. Upon a reasonable and prudent assessment that the despatch of power by a particular Generator will not be required for some time, the Distribution Licensee shall allow the Generator to sell that power to third parties (as per para 16 of the impugned Order).
- b. Third Party Sale cannot be at the rate lower than the Tariff (Energy Charge) Payable by the Distribution Licensee under the PPA.
- c. On intimation by the Distribution Licensee, within 2 hours, Generator shall commence supply of capacity to Distribution Licensee which was sold to Third Party (as per para 18 of the impugned Order).

C. Changed demand-supply position:

14. MSEDCL has stated that the review petition is filed on discovery of new and important data which was not a part of the record when the impugned Order was passed. MSEDCL stated that the Commission has relied upon the data and circumstances which were for the period of 15 February, 2016 to 23 February, 2016. Now the circumstances have changed and MSEDCL is not in a position to issue any future standing instructions for

backing down of generating station of RPL. The Power demand scenario in last one and half year has tremendously changed due to various reasons. Hence, MSEDCL requested the Commission to review the impugned Order which has allowed third party sale to RPL. In this regards, the Commission notes that in impugned Order dated 27 February, 2018, the Commission has clearly recorded that third party sale is allowed only when contracted power is not despatched to the MSEDCL. Relevant paragraph is reproduced below:

“15. The PPAs allow sale of contracted power by RPL to the extent that it is not despatched. They also provide for sharing of gains between RPL and MSEDCL depending on the rate at which it is sold to third parties. The intention behind these provisions is the utilisation of contracted and available generation resources which are not presently required, with possible benefits to both parties.”

15. Thus under changed scenario, where MSEDCL has not issued backing down instruction to RPL, if there is no un-despatched power available, it is obvious that there would not be any third party sale. Hence the following Order.


ORDER

- 1. The Case No. 123 of 2018 is partly allowed.**
- 2. Third Party Sales are allowed under following circumstances:**
 - a. Upon a reasonable and prudent assessment that the despatch of power by a particular Generator will not be required for some time, the Distribution Licensee shall allow the Generator to sell that power to third parties.**
 - b. Third Party Sale cannot be at the rate lower than the Tariff (Energy Charge) Payable by the Distribution Licensee under the PPA.**
 - c. On intimation by the Distribution Licensee, within 2 hours, Generator shall commence supply of capacity to Distribution Licensee which was sold to Third Party.**

**Sd/-
(Mukesh Khullar)
Member**

**Sd/-
(I.M.Bohari)
Member**

**Sd/-
(Anand Kulkarni)
Chairperson**


**(Abhijit Deshpande)
Secretary**

