

Before the  
**MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**  
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**Case No. 48 of 2008**

In the matter of  
**Petition of M/s. Rake Power Ltd., seeking adjudication of dispute, grant of  
compensation, third party sale, and open access**

**Shri V. P. Raja, Chairman  
Shri A. Velayutham, Member  
Shri S. B. Kulkarni, Member**

M/s. Rake Power Ltd  
Sy. No. 429, 432, and 433  
Vill: Pargowari (V)  
Teh: Ramtek, Dist: Nagpur

.... Petitioner

Vs.

1. Maharashtra State Electricity  
Distribution Co. Ltd,  
Prakashgad, 5<sup>th</sup> Flr,  
Bandra (E), Mumbai 400051
2. State Load Despatch Centre  
Thana – Belaspur Road  
P.O. Airoli

..... Respondents

**ORDER**

**Dated: May 25, 2009**

M/s. Rake Power Ltd., a generating company having a 10 MW Biomass based power project at Vill: Pargowari (V), Teh: Ramtek, Dist: Nagpur, submitted a Petition on 11.7.2008 raising a dispute with Maharashtra State Electricity Distribution Co. Ltd (“MSEDCL”), that arising out of an Energy Purchase Agreement dated 7.10.2006 (“EPA”) executed between the Petitioner (as generator/supplier) and MSEDCL



(as off-taker). The Petitioner has submitted that the Petition invokes the provisions of Section 86(1)(f) of the Electricity Act, 2003 (“EA 2003”) read with Clause No. 20.2 of the said EPA seeking adjudication of the dispute by this Commission.

2. The prayers made by the Petitioner are -

*“(a) award an amount of Rs. 3.93 Crores being damages in favour of the Petitioner and against the Respondents as on 21.5.2008 with a further awarded of Rs. 7,02,000/- per day for the period for which the amount remain unpaid along with interest of Rs. 16% per annum on the unpaid amount;*

*(b) direct the Respondent MSEDCL to allow the Petitioner to engage the third party sale of power with immediate effect in terms envisaged under the EPA dated 7.10.2006;*

*(c) to pass such other or further orders as this Hon’ble Commission may deem appropriate;*

*(d) ad-interim directions”*

\*\* The prayers have some typographical errors. In prayer (a), the words “*further awarded*” should be read as “*further award*”. “*Rs. 16%*” to read as “*16%*”. In prayer (b), the words “*engage the third*” should read as “*engage in third*”.

An application for ex-parte ad-interim directions seeking third party sale of power and open access, has also been filed.

3. The Petitioner has alleged that despite a notice given by them vide their letter dated 13.12.2007 informing MSEDCL regarding Petitioner’s ability to draw start-up power and synchronisation of the power plant to the 132/33 kV Mansar Sub-station, MSEDCL failed to act on it. A reminder vide letter dated 10.3.2008 was also not replied. However, on 3.4.2008, the Petitioner did receive a sanction order for start up power from MSEDCL, although, according to the Petitioner this was only a paper sanction since the Petitioner did not receive any start up power. It is the contention of the Petitioner that such inaction and consequent delay by MSEDCL constituted a breach of the EPA which entitled the Petitioner to terminate the EPA which the Petitioner did in terms of its letter dated 14.5.2008. The Petitioner has also stated that such a delay on the part of MSEDCL has caused losses and damages to the Petitioner on a day-to-day basis. It has also been alleged that the Petitioner was harassed by MSEDCL which sought a security deposit from the Petitioner for start-up power of an amount of Rs. 6,21,300/- which demand ultimately MSEDCL withdrew. Nonetheless, some harassment was caused to the Petitioner. It has also been alleged that MSEDCL did not co-operate with the Petitioner



when the Petitioner requested the presence of representatives of MSEDCL during testing of the power plant. Till date the power plant could not be tested due to the non-co-operation by MSEDCL. It has also been alleged that the Petitioner did not get any support from MSEDCL for synchronisation of the power plant with the grid as MSEDCL indicated to the Petitioner that it was required to obtain NoC from Chief Engineer (State Transmission Utility), MSEDCL and Chief Engineer (SLDC) and required the Petitioner to comply with other procedures required for connection to the intra-state transmission system. It has also been alleged that MSEDCL has not provided any Letter of Credit as mentioned in the EPA.

4. In the circumstances, the Petitioner wrote a letter dated 14.5.2008 to MSEDCL stating that MSEDCL has not properly responded for the past one month to the request of the Petitioner for allowing synchronisation, and consequently, by invoking "*Clause 16.3 MSEDCL Events of default*" of the EPA against MSEDCL, the Petitioner is entitled to sell the energy generated to any other third party by terminating the EPA (pre-commercial operations termination). Consent of MSEDCL was sought by the Petitioner in terms of the letter dated 14.5.2008 to the proposal contained therein. In response, MSEDCL vide its letter dated 22.5.2008 has denied the allegations made by the Petitioner regarding inaction, delay and non-co-operation on the part of MSEDCL and further assured that CE(SLDC) and MSETCL have been requested by letter dated 14.5.2008 to expedite the steps to co-ordinate for early commissioning of the power plant. According to MSEDCL, it is making all efforts to meet its obligations contained in the EPA. In its letter dated 22.5.2008, MSEDCL has contended that without informing about any default related to technical arrangements, i.e., power evacuation arrangements at the end of MSEDCL and being under a contractual obligation under the EPA, request made by the Petitioner for third party sale is not legally justified and hence not considered. Furthermore, MSEDCL requested the Petitioner to co-operate with it and MSETCL and ensure that power is fed to MSEDCL as per the EPA.

5. It is the Petitioner's contention that MSEDCL has failed to satisfy the conditions precedent contained in Clause No. 3 (7) of the EPA that requires "*Connectivity permission from the MSETCL /MSEDCL and EHV evacuation approval including approval of the single line diagram of proposed connectivity with MSEDCL's system and protection logic and any other statutory permissions as may be required*". Clause No. 3 (9) of the EPA states that non-fulfilment of conditions precedent within 12 months from the date of signing of the EPA shall terminate the EPA automatically unless agreed in writing by MSEDCL.

6. The Petitioner states that pursuant to its aforesaid letter dated 14.5.2008 to MSEDCL, terminating the EPA, the Petitioner signed a PPA on 27.5.2008 with M/s. Global Energy Limited, and has filed an application seeking open access to allow such sale of power.



7. Throughout the Petition, the Petitioner has stressed for compensation for its losses and has described it as being compensatory in nature, which has been calculated on the basis as follows – 56 days

9MW x 1000 x 24 Hrs x 56 days = 12096000 Units x Rs. 3.25 = Rs. 3,93,12,000/-

8. At the hearing held on 20.8.2008, the Petitioner requested for an adjournment in order to make an endeavour to resolve the dispute amicably in the first instance. MSEDCL sought 15 days time to file reply. The Petitioner sought one week's time to file rejoinder.

9. Subsequently, vide letter dated 15.11.2008, the Petitioner sought to justify its proposed sale of 50% (at about 4.5MW) of the energy generated from its power plant and related PPA with M/s. Global Energy Limited citing one Government of Maharashtra Order / Resolution No. 2007/693/Urja 07 dated 14.10.2008. According to the Petitioner, the said Order / Resolution, facilitates Biomass Generation projects to sell 50% of the energy generated to third parties through open access.

10. MSEDCL filed its reply on 11.12.2008 disputing the allegations contained in the Petition as factually incorrect and has stated that the Petitioner has tried to mislead the Commission by placing perverse interpretations of law. MSEDCL has also stated that the purported termination of the EPA is illegal and invalid. Thus, as contended by MSEDCL, the claim for damages and losses are irrelevant and illegal. MSEDCL has also stated that opening of the LC is not a mandatory condition. MSEDCL has stated that the power plant of the Petitioner was synchronised on 23.5.2008 and commercial operation came into force on 25.7.2008. The delay in synchronisation is stated to be solely on account of the Petitioner since the Petitioner had itself vide its letter dated 13.12.2007 undertaken to carry out the work of power evacuation arrangement and commissioning, and which was taken up in the month of March 2008. In this regard, MSEDCL has relied upon an undertaking dated 13.2.2008 given by the Petitioner on stamp paper to the CE (Distribution), MSEDCL, to the effect that the Petitioner will invest in all the expenditure towards the construction of 33kV line and Bay expansion at Sub Station (Mansar Village) to evacuate the power generated by the Petitioner's 10MW Biomass based power project. In the document stamped with non-judicial stamp paper, the Petitioner also undertook that for early completion of evacuation work without delay the Petitioner would invest 100% expenditure against the evacuation work instead of 50% interest free advance. The Petitioner sought permission to take up the evacuation work by investing 100% amount (total estimated cost) by paying 1.3% supervision charges on normative basis to MSEDCL and reimburse in 5 equal instalments from one year after commissioning of the project. In the reply, MSEDCL has stated that such sanctions were given by MSEDCL and accordingly the Petitioner started the works in March 2008 and on 23.5.2008 the works related to evacuation of power, metering arrangements, protective devices of the system and requirements stipulated by Transco and O&M authorities, was completed.



MSEDCL states that it co-operated with the Petitioner in this regard and also released start up power on 22.4.2008. In the circumstances, it has been stated by MSEDCL, that the purported action of terminating the EPA and signing the PPA by the Petitioner with M/s. Global Energy Ltd., is not justified and is illegal.

11. MSEDCL has stated in its reply that without prejudice to the outcome of the present petition, the Petitioner started feeding power from 25.7.2008 to MSEDCL and submitted their invoices as per the tariffs mentioned in the EPA for the energy so fed, which have been paid by MSEDCL. Thus, commercial operation of the plant has been commenced. It has been alleged that the Petitioner has been representing that it shall withdraw its Petition subject to the entitlements being met in terms of the said Government of Maharashtra Order / Resolution No. 2007/693/Urja 07 dated 14.10.2008 for sale of 50% power to third parties and grant of open access. MSEDCL has stated that synchronisation of the plant was subject to the Petitioner obtaining NoC from Chief Engineer (State Transmission Utility), MSEDCL and Chief Engineer (SLDC); complying with statutory requirements regarding grid connectivity; fulfilment of initial capacity test (which the Petitioner did not comply with and did not operate for 72 consecutive hours nor did the plant run above 95% of the contracted capacity). Also, there was 'Y' Phase temper observed. Hence, MSEDCL did not give its consent for termination of the EPA and sale to third party, as the total responsibility of start up power and synchronisation of the plant vested with the Petitioner.

12. The Petitioner filed its rejoinder on 2.3.2009. It has been admitted therein that start up power was released on 22.4.2008 however the same was not given within a reasonable period of time. On 14.5.2008, connectivity was granted subject to compliance with some formalities. The Petitioner states that the allegations made against it by MSEDCL in its reply are an after thought. The Petitioner states that MSEDCL is guilty of putting onerous requirements on the Petitioner and thereby delaying the commissioning of the power plant by idling of the infrastructure. Regarding the LC, it is stated that under the EPA the Petitioner is not required to request the Respondent to open the LC which is required to be for an amount of the average monthly bill. The Petitioner states that it has also suffered actual damages in terms of additional claim of interest by the bankers for the delayed period. Regarding the undertaking dated 13.2.2008 given by the Petitioner on stamp paper to the CE (Distribution), MSEDCL, the Petitioner states that circumstances forced it to take on itself such an onerous obligation though in that it never accepted any responsibility to undertake the works itself.

13. On 19.1.2009, the Petitioner filed its further rejoinder wherein Clause No. 10.1 (Synchronisation) of the EPA has been relied on to highlight the responsibilities of MSEDCL in regard to synchronisation of the plant with the Grid. The Petitioner has denied all allegations and contentions of MSEDCL taken under its reply as filed.



14. At hearing held on 21.1.2009, after the matter was heard for some time, Counsel for the Petitioner sought two weeks time to make further submissions. Respondent did not have any objection to the same.

15. A further hearing was held on 15.4.2009. Counsel for the Petitioner relied on Clause No. 4.2 (Obligations of MSEDCL) which required MSEDCL to co-ordinate with MSETCL to complete the construction of transmission facility including equipments at inter-connection points, if required, within MSETCL grid system, prior to schedule date of commencement. However, as per the Petitioner, MSEDCL failed to discharge this primary obligation. MSEDCL did not even co-ordinate with MSETCL to assist the Petitioner in obtaining approval for inter-connection facilities as required under Clause No. 4.2(5) of the EPA. As per Clause No. 4.2(6) of the EPA, MSEDCL was required to provide start up power as and when necessary and requested for. MSEDCL did not even open LC as required under Clause No. 4.2(8). Petitioner reiterated the submission made in the Petition regarding the delay and harassment caused to it to obtain the said requirements. The Petitioner stated that its plant was ready by January 2008 when appropriate test was conducted. On an enquiry from the Commission, Counsel for the Petitioner confirmed that the plant was operating as of date and feeding electricity into the grid. Per contra, Counsel for the Respondent submitted that the Petitioner's letter dated 14.5.2008 show that the grievance is regarding not responding "*for the past one month*" and any obligation therefore on MSEDCL has to be reckoned from 14.4.2008 and not from 10.1.2008. This, according to Counsel for the Respondent, cannot allow the invocation of "*Clause 16.3 MSEDCL Events of default*" of the EPA against MSEDCL. Moreover, as per Clause No. 16.4, MSEDCL Event of Default must not only occur but also be continuing. According to Counsel for the Respondent, there is not any single correspondence between 10.1.2008 and 14.4.2008 showing that MSEDCL has failed to comply with its obligations. According to Counsel for the Respondent, the Petitioner could not establish any failure on the part of MSEDCL. Counsel for the Petitioner submitted that the present petition deals with the past conduct of the Respondent.

16. Subsequently on 21.4.2009, the Petitioner filed a brief supplementary submission referring to one Appeal No. 95 of 2008 in the matter of M/s. Yash Agro Limited wherein the Appellate Tribunal for Electricity has given its judgement dated 24.3.2009. According to the Petitioner, the said case is similar to the present case of the Petitioner on the issue of grant of open access. The Petitioner requested that the said judgment be taken into account while disposing of the present case.

17. Having heard the parties and after considering the materials placed on record, the Commission is of the view that the question is as to whether it would be judicious and in the interest of justice to both the parties to pass an order which would have the affect of sanctioning the termination of the EPA because of the apparent 'teething problems' of



obtaining of start up power and synchronisation faced by the Petitioner, although there is disputed position regarding the onus of making the provision of start up power and synchronisation with the grid. MSEDCL has disputed that it is guilty of delay in this regard. The Petitioner stated that its plant was ready by January 2008. The Petitioner has confirmed that the plant is operating as of date and feeding electricity into the grid, however, the gravamen is that start up power was required to be provided on 10.1.2008 but was supplied only on 22.4.2008, thereby causing loss of energy generation to the Petitioner for about three months. The Petitioner has also apparently suffered some amount of harassment at the hands of MSEDCL due to the alleged poor co-ordination between MSEDCL and MSETCL for evacuation arrangements. On the other hand, there is an undertaking dated 13.2.2008 given by the Petitioner on stamp paper to the CE (Distribution), MSEDCL, to the effect that the Petitioner will invest in all the expenditure towards the construction of 33kV line and Bay expansion at Sub Station (Mansar Village) to evacuate the power generated by the Petitioner's 10MW Biomass based power project. In the document stamped on a non-judicial stamp paper, the Petitioner also undertook that for early completion of evacuation work without delay the Petitioner would invest 100% expenditure against the evacuation work instead of 50% interest free advance.

18. The question is as to whether in these circumstances, it would be justifiable to pass an order permitting termination of the EPA. The delay, if any, by MSEDCL, though disputed cannot be denied, however at the same time it cannot be made a ground for termination of the EPA. As per Clause No. 16.4, MSEDCL Event of Default must not only occur but also be continuing. This is not the case. The present petition deals with the past conduct of the Respondent.

19. The Commission is of the view that support placed by the Petitioner on Clause No. 3 (Conditions Precedent) of the EPA is misplaced because all the Conditions Precedent in Clause No. 3 are for the Petitioner to comply. This is clear from a plain reading of Clause No. 3 (Conditions Precedent). Clause No. 3(9) states that non-fulfilment of conditions precedent within 12 months from the date of signing of the EPA shall terminate the EPA automatically unless agreed in writing by MSEDCL. The words "*unless agreed in writing by MSEDCL*" means that it is for MSEDCL to avoid termination of the EPA despite non-fulfilment of conditions precedent by the Petitioner. MSEDCL is entitled to waive any conditions precedent. Clause No. 3 (9) does not entitle the Petitioner to terminate the EPA. However, Clause No. 5.3 (Pre-commercial operations termination) entitles either party to terminate the EPA if regulatory approvals contemplated by Clause No. 3 are not granted. It is the Petitioner's contention that MSEDCL has failed to satisfy the conditions precedent contained in Clause No. 3(7) of the EPA that requires "*Connectivity permission from the MSETCL /MSEDCL and EHV evacuation approval including approval of the single line diagram of proposed connectivity with MSEDCL's system and protection logic and any other statutory*



*permissions as may be required*". MSEDCL has stated that synchronisation of the plant was subject to the Petitioner obtaining NoC from Chief Engineer (State Transmission Utility), MSEDCL and Chief Engineer (SLDC); complying with statutory requirements regarding grid connectivity; fulfilment of initial capacity test (which the Petitioner did not comply with and did not operate for 72 consecutive hours nor did the plant run above 95% of the contracted capacity). Also, there was 'Y' Phase temper observed. However, now the plant is synchronised. Moreover, Clause No. 8.1(b) (Interconnection) states that "*project Holder shall make all arrangements at its cost for paralleling / connecting the Facility with MSEDCL / MSETCL's System at the Point of Delivery / metering point in consultation with an authorised officer of MSEDCL / MSETCL, as may be designated by MSEDCL / MSETCL on this behalf*". Clause No. 10.1(2) (Synchronisation) states that "... a unit may be synchronised to MSEDCL / MSETCL system when (a) it has been completed in accordance with the Technical Specification and the Functional Specification; (ii) it meets all connection conditions prescribed in any Grid Code then in effect and meets all other Indian Legal requirements for synchronisation to the MSEDCL / MSETCL System; and (c) is capable of being operated safely". MSEDCL was required to extend assistance to the Petitioner in this regard as is stipulated in Clause No. 10.1(4) to (7).

20. As per Clause No. 4.1(ix), it is for the Petitioner to undertake at its own cost construction / up gradation of (a) inter connection facilities and (b) the transmission lines as per the specifications and requirements of MSEDCL upto the point of delivery, as notified to the Petitioner. As per Clause No. 4.2(6), MSEDCL was required to provide start up power as and when necessary and requested for. The allegation is that start up power was required to be provided on 10.1.2008 but was supplied only on 22.4.2008, thereby causing loss of energy generation to the Petitioner for about three months. MSEDCL did not even open LC as required under Clause No. 4.2(8).

21. Clause No. 16.4 (Remedies for MSEDCL default) states that "*If any MSEDCL Event of default occurs and is continuing*" the Petitioner shall be entitled to sell to third parties, claim compensation for monetary damages, injunctive relief, etc. However, it is an admitted position that MSEDCL Event of default is not continuing. The present petition deals with the past conduct of the Respondent.

The compensation claimed for losses calculated on the basis as follows – 56 days  
 $9\text{MW} \times 1000 \times 24 \text{ Hrs} \times 56 \text{ days} = 12096000 \text{ Units} \times \text{Rs. } 3.25 = \text{Rs. } 3,93,12,000/-$  has neither been backed by any documentary proof nor has it been substantiated or corroborated with any reliable documentary proof during the hearing in this case. As such, prayer (a) cannot be granted in these proceedings, however, the Petitioner is at liberty to take appropriate steps in accordance with law in this regard.

22. In view of the above, the prayers made in the Petition stand dismissed. No order as to costs. However, the Commission directs MSEDCL to open the Letter of Credit as



contemplated in the EPA. MSEDCL is directed to provide all assistance that is required as contemplated under the EPA to the Petitioner to enable the Petitioner to supply all the power generated to MSEDCL. As regards Government of Maharashtra Order / Resolution No. 2007/693/Urja 07 dated 14.10.2008, the Commission is of the view that the same has no bearing on the present case as the same is not issued under any provisions of the Electricity Act, 2003.

23. As regards the judgement dated 24.3.2009 of the Appellate Tribunal for Electricity in the matter of M/s. Yash Agro Limited as cited by the Petitioner in its supplementary submission filed on 21.4.2009, the Commission is of the view that the same has no bearing on the present case as the facts are entirely different, and also the issue dealt with in the judgement dated 24.3.2009 was whether the Appellants had a right to third party sale without obtaining any 'No-Objection Certificate' (NoC) from the MSEDCL for sale of power generated by their respective plants. This is not the issue in the present case. With the above findings and directions, the present Case No. 48 of 2008 stands disposed of.

Sd/-  
(S. B. Kulkarni)  
Member

Sd/-  
(A. Velayutham)  
Member

Sd/-  
(V. P. Raja)  
Chairman



(P.B. Patil)  
Secretary, MERC

