

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. 4 of 2009

In the matter of
Petition of M/s Indo Rama Synthetics (India) Ltd., alleging wrongful action of
MSLDC of withdrawing standing clearance and imposing restraint on IEX from
accepting supplies from the Petitioner

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

Indo Rama Synthetics (I) Ltd
A-3, MIDC Industrial area
Butibori
Nagpur 441122

... Petitioner

Vs.

1. Maharashtra State Load Despatch Centre
Maharashtra State Electricity Transmission Co. Ltd
Thane-Belapur Road
P.O Airoli, Navi Mumbai 400708

2. Maharashtra State Electricity Distribution Co. Ltd
Plot No. G-9, Prakashgad
Bandra (East),
Mumbai 400 051

.... Respondents

ORDER

Dated: August 17, 2009

M/s. Indo Rama Synthetics (I) Ltd, submitted a Petition under affidavit before the Commission on April 13, 2009, under Section 86 (1)(f) of the Electricity Act, 2003 (“EA 2003”), submitting inter alia that the Maharashtra State Load Despatch Centre (“MSLDC”) has wrongfully sought to coerce the Petitioner to deliver power exclusively to MSEDCL, by withdrawing the Standing Clearance granted by it on February 28, 2009 and by directing the Indian Energy Exchange (IEX) not to permit the Petitioner to transact through IEX unless permitted by MSEDCL.



2. The prayers of the Petitioner are as follows:

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- (a). *quash and set aside the letters dated 09.03.2009 & 7.4.2009 issued by the Respondent;*
- (b). *allow the Petitioner to amend its schedule as and when required under the day-ahead scheduling procedure;*
- (c). *direct the Respondent to make good the loss suffered by the Petitioner.*
- (d). *Grant cost of this petition.*
- (e). *grant such further and other reliefs as this Hon'ble Commission may deem fit in the facts and circumstances of the case .”*

3. In its Petition, the Petitioner submitted that MSEDCL floated a tender bearing No. CE (PP)T-1/2009 dated January 22, 2009 under the Short Term Open Access Policy for Short Term Power Purchase. The Petitioner also participated in the same and was declared successful to sell 47 MW power to MSEDCL on 'Round The Clock' (RTC) basis. After negotiating the terms, the Petitioner entered into a Power Purchase Agreement (PPA) dated February 25, 2009, with usual clauses on compensation including Transmission Charges, Losses and Scheduling, to deliver upto 47 MW of power to MSEDCL over the period from March 1, 2009 to June 30, 2009 on RTC basis at a price of Rs. 7.14 per unit at 220 kV interconnection point at Butibori, Nagpur. The PPA also provided the consequences of failure of either party in scheduling at least 80% of the capacity approved during the concerned period i.e., March 1, 2009 to June 30, 2009 in the form of a 'take or pay' penalty calculated @ of Rs. 1.00 per unit for the difference (shortage) below 80%. The Petitioner accordingly made an application in the prescribed format on February 25, 2009 for booking corridor with MSLDC (Maharashtra State Load Despatch Centre), the Respondent No.1 herein.

4. The Petitioner filed a revised application for booking the corridor during the month of March 2009 on February 26, 2009 as one of its generating sets broke down. MSLDC issued a Standing Clearance dated February 28, 2009 permitting the injection of a maximum of 25 MW of power for the Power Exchanges (including the Indian Energy Exchange) during the period from March 1, 2009 to March 31, 2009 and as per the Standing Clearance the Petitioner supplied 1 MW of power to the IEX during the period March 1, 2009 to March 5, 2009. On March 6, 2009 and March 7, 2009 the Petitioner supplied 2 MW and 25 MW power to the IEX respectively.

5. The Petitioner filed declarations under the day ahead scheduling procedure on March 6, 2009, for injecting 24 MW power on March 7, 2009 and on March 7, 2009, for injecting 22 MW of power. Further, in response to the day ahead declarations filed, the Petitioner received a letter dated March 9, 2009 from the MSLDC coercing the Petitioner to deliver power to MSEDCL, by withdrawing the Standing Clearance granted by MSLDC on February 28, 2009 and directing IEX not to permit the Petitioner to transact



through IEX unless permitted by MSEDCL. Further on request of the Petitioner a Standing Clearance dated March 20, 2009 has been issued by MSLDC, permitting the injection of 2 MW of power for the Power Exchanges (including the IEX) during the period from March 1, 2009 to March 31, 2009 and this Standing Clearance was extended for a period from April 1, 2009 to April 8, 2009 on request made by the Petitioner.

6. After scrutiny of the Petition the Commission, vide its Notice dated April 21, 2009 scheduled the hearing in the matter on April 29, 2009 in the presence of consumer representatives authorized on a standing basis under Section 94(3) of the EA 2003. The Petitioner was also directed to serve a copy of its Petition, along with its accompaniments, to the Respondents and to the four authorized consumer representatives.

7. At the hearing held in the matter on April 29, 2009, the Petitioner submitted that the restraint imposed by MSLDC on the Petitioner was ex-facie illegal. The PPA between the Petitioner and MSEDCL is a self contained independent commercial contract which did not provide an exclusive supply to MSEDCL or give any right of refusal to MSEDCL. Further, in the PPA there is only a penalty clause (i.e. Rs. 1.00 per unit for the difference below 80%) and there is no clause in the PPA which could prevent the Petitioner to sell the Power to any other third party. The Petitioner contended that SLDC cannot enforce a contract between a Licensee and a Generating Company by directing one of the parties to the PPA to obtain consent of the other before permitting change in the access granted by it.

8. The Petitioner submitted that the directives of MSLDC was contrary to the day ahead scheduling procedure as per Clause 4.2.3 of the Procedure for reservation of Intra-State Transmission Capacity for short term Open Access Users. Clause 4.2.3 is mentioned below:

“4.2.3 Such a consumer shall be permitted to schedule his requirement on a day ahead basis.”

9. The Petitioner further submitted that the MSLDC has no power under Section 32 or Section 33 of EA, 2003 to withdraw the Standing Clearance at the instance of MSEDCL as a measure to coerce the Petitioner, to supply power continuously to MSEDCL. The Petitioner expressed its doubts about the scope of the power of MSLDC under Section 32(2) of EA 2003 in the manner exercised in the present case and further submitted that the MSLDC is not a Law enforcing agency who can pressurize a generator to perform its contract with MSEDCL.



10. Shri S. G. Kelkar, MSLDC submitted that the Commission has issued an Order in Case Nos. 54 and 59 of 2007 dated December 17, 2007, wherein the Commission has directed MSLDC to take appropriate actions strictly in accordance with Section 32(2)(a) of the EA, 2003. MSLDC further submitted that as per Section 32(2)(a) the SLDC is responsible for optimizing the scheduling and despatch of electricity within a State, in accordance with the contracts entered into with the licensees or the generating companies operating in that State. Section 32(2)(a) of the EA, 2003 was referred to as below:

*“32. The State Load Despatch Centre shall-
(a) be responsible for optimum scheduling and despatch of electricity within a State, in accordance with the contracts entered into with the licensees or the generating companies operating in that State;”.*

11. Certain clauses of the Power Purchase Agreement (PPA) entered into between the Petitioner and MSEDCL were referred to by MSLDC as under:

“2). Scheduling: MSEDCL shall give requisition for and upto the contract cited quantum. Copy of daily requisition shall be forwarded to MSLDC with copy to THE PETITIONER on daily basis. The scheduling and dispatch of the power shall be coordinated by both parties with MSLDC as per the relevant provisions of IEGC and within the framework of ABT and the decisions of MSLDC and MSPC.”

12. The Petitioner submitted that it was committing breach of contract and was ready to pay for that but MSLDC has no role to enforce the contract as the contract is not an exclusive contract.

13. MSLDC submitted that they need consent from the buyer whenever power would be scheduled as per the regular procedure and as per the statutory provisions under the EA, 2003. MSLDC added that on March 6, 2009 the Petitioner requested to modify the schedule without taking consent from MSEDCL and on March 7, 2009 again requested to modify the schedule which shows that the Petitioner was taking an undue advantage of the Standing Clearance issued by the MSLDC which does not mean that the Petitioner could sell power as per its own wish.

14. The Commission directed the parties to submit their written submissions on the issues/ queries raised by the Petitioner. Subsequently, the Petitioner submitted its written submission dated May 6, 2009 and in its submission the Petitioner submitted that MSLDC is not a party to the contract entered between the Petitioner and MSEDCL and this PPA is not a tripartite one. Further, it was contended that MSLDC and MSEDCL are two distinct and different entities and have separate statutory functions, roles and obligations.



15. The Petitioner referred to an Order issued by the Central Electricity Regulatory Commission (“CERC”) in Petition No. 153/2008 (Global Energy Limited versus Karnataka SLDC & Ors) dated February 3, 2009 in which the CERC directed that applications for open access on the State grid for transmission of electricity made by any person, whether a generating company or a licensee or a consumer, shall be considered by the SLDCs and decided strictly in accordance with the provisions of CERC (Open Access in Inter-State Transmission) Regulations, 2008. Further, SLDC should provide the use of transmission facilities for use by other licensees to the extent of availability of surplus capacity with the transmission licensee.

16. The Petitioner further submitted that it is the obligation of MSLDC to provide open access on its network and can be denied only on the ground of non-availability of surplus capacity.

17. MSLDC filed its written submission dated May 8, 2009 and in its submission MSLDC submitted that Section 32(a) of the EA, 2003 contemplated that SLDC shall be responsible for optimum scheduling and despatch of electricity within the State, which can be done only in accordance with the contracts entered into with the licensees or the generating companies operating in the State. Further, it was submitted that SLDC is a statutory body created under Part V of the EA, 2003 and its statutory functions are provided under Section 32 of the EA, 2003.

18. MSLDC added that its main function is to ensure integrated operation of the power system in the State. While undertaking its functions, MSLDC provides access to intra-State/ inter-State transmission system.

19. It was further contended by MSLDC that Section 32(2)(a) of the EA, 2003 provides for optimum scheduling as per contracts between generators and distribution companies. The scheduling is mandatory and it has to be in pursuance of the contracts between the parties. While discharging this legal obligation, MSLDC has to ensure that the party approaching for access is not contravening the legal contract.

20. MSLDC referred to an Order of this Commission dated December 17, 2007 passed in Case Nos. 54 and 59 of 2007 in which the Commission directed MSLDC to take appropriate actions strictly in accordance with Section 32(2)(a) of EA 2003 and to act in accordance with the Energy Purchase Agreement. It was further contended by MSLDC that an illegal act of breach of contract can not be permitted even if the wrong doer is ready to compensate in terms of money. MSLDC added that if the party to the PPA is deprived of the legitimate available quantity of the energy, mere financial compensation can never meet the ends of justice. It is only the Commission which can interfere with the PPA with in the limited scope as per the provisions of EA 2003.



21. MSLDC thereafter referred to an Order passed by this Commission dated June 27, 2006 in Case No. 58 of 2005 in which the Commission directed MSLDC to formulate detailed procedure for grant of short term open access. Accordingly, MSLDC has formulated the procedure in September 2008 which is in accordance with MERC (Transmission Open Access) Regulations, 2005 and MSLDC is following the same procedure by taking consent of seller and purchaser while granting open access as per agreement.

22. MSEDCL submitted an affidavit on 30th July 2009, stating therein that the Petitioner through its bid had offered to supply 47 MW power to MSEDCL on Firm RTC basis from 1.03.2009 to 30.06.2009 @ Rs. 7.14/kWh. MSEDCL had accepted the offer and placed order on them vide letter No.MSEDCL/ PP/ IRLS/ 5738 dated 21.02.2009. The Petitioner had informed vide letter dated 27.02.2009 regarding break down of one of its generators due to which his injection capacity had reduced by 12 MW and requested to reduce the contracted quantum for 1.03.2009 to 8.03.2009 to 34 MW. Considering the genuineness of the request MSEDCL agreed to its request. Through its letter dated 6.03.2009 and 7.03.2009, the Petitioner informed that it will inject only 24 MW and 22 MW respectively on the 7th and 8th March 2009, without citing any reasons for the reduction in the quantum. MSEDCL, vide letter No. CE/PP/Indorama/ 7109 dated 7.03.2009 objected to such wilful and unilateral reduction by the Petitioner, and it was further advised that 47 MW power from the Petitioner as per contract should be scheduled for MSEDCL on first charge basis and balance if any only be scheduled to other utility. MSEDCL had no other alternative but the above, as it is clear from the letter No. THE PETITIONER/ BTB/ MSEDCL/013 dated 19.03.2009 that the intention of the Petitioner was not bonafide but that it wanted to sell power to other utilities without honouring the contract with MSEDCL. The Petitioner had informed MSEDCL that it will inject only 25 MW and 22 MW on 07.03.2009 and 08.03.2009 respectively without citing any reason for the reduction in the quantum of supply to MSEDCL. It is clear from the statement of the Petitioner that the Petitioner has been supplying/selling power to the IEX during 01.03.2009 to 04.03.2009. In fact the Petitioner has sold as much as 25 MW to IEX on 07.03.2009 and 08.03.2009. It has been contended by MSEDCL that the Petitioner's action of selling power to other utility is unlawful. It was subsequently learnt that the Petitioner has once again given less schedule for MSEDCL for 09.04.2009 to 30.04.2009. MSEDCL once again took up the matter with the



Petitioner vide letter No. CE/PP/Indorama/10113 dated 08.04.2009 wherein it was clarified as follows-

“The Clause no. 4 of Annexure to the Order dated 21.02.2009 shall be applicable on a monthly basis only if Indorama is unable to supply the contracted quantum due to loss of generation i.e. failure of generator. The said clause shall not be applicable in case power is scheduled to other utilities when contracted quantum of 47MW is not scheduled for MSEDCL. You shall be solely responsible for any dispute arising out of default by you in this aforesaid respects”.

It is stated in the aforesaid affidavit filed by MSEDCL on 30th July 2009, that the intention of MSEDCL in providing the aforesaid clause was to facilitate revision in schedule i.e., Open Access in case of generator failures. Objection raised by MSEDCL is for and in the interest of the consumers of MSEDCL, whereas the intention of the Petitioner is malafide in not honouring its contract with MSEDCL but to sell power in the market. Vide the aforesaid affidavit, MSEDCL has requested the Commission to direct the Petitioner to book the corridor as per the contract with MSEDCL and to supply on first charge basis.

23. Having heard the parties and after considering the material placed on record, the Commission is of the view that the specific function of the MSLDC which has been in controversy in the present case is as contained in Section 32(2)(a) as follows -

“(2) The State Load Despatch Centre shall -

*(a) be responsible for optimum scheduling and despatch of electricity within a State, **in accordance with the contracts entered into with the licensees or the generating companies operating in that State;**”*
[Emphasis added]

Grant of open access by MSLDC has to be therefore in accordance with the PPA that has been executed between the Petitioner and MSEDCL. The quantum of power that has to be permitted to be injected into the grid to supply to MSEDCL is contained in the PPA which needs to be taken into account by MSLDC. MSLDC is not concerned with the stand of the Petitioner as to whether the Petitioner can by-pass the PPA provisions by



making payment of penalty to MSEDCL. This is for the Petitioner to take up with MSEDCL and only thereafter when such issues are resolved between the Petitioner and MSEDCL, in a documented form, can the MSLDC give an effect to it. Admittedly, no such resolution has been arrived at, in which case, MSLDC cannot go by the stand taken by the Petitioner. MSLDC has to go by the contract between the Petitioner and MSEDCL. MSLDC is to grant open access, scheduling and despatch of electricity in accordance with the contracts entered into with the licensees or the generating companies as stated clearly in Section 32(2)(a). As per Section 32 (1) the State Load Despatch Centre is the apex body to ensure integrated operation of the power system in the State. In terms of Section 32 (2)(d) MSLDC is to exercise supervision and control over the intra-state transmission system. The following provisions are also relevant -

“33. (1) The State Load Despatch Centre in a State may give such directions and exercise such supervision and control as may be required for ensuring the integrated grid operations and for achieving the maximum economy and efficiency in the operation of power system in that State.

(2) Every licensee, generating company, generating station, substation and any other person connected with the operation of the power system shall comply with the direction issued by the State Load Despatch Centre under subsection (1).”

Thus, MSLDC is not a powerless body. In view thereof, the Commission is not inclined to interfere into the decision taken by MSLDC. As to whether the PPA between the Petitioner and MSEDCL is an exclusive one or not and as to whether the Petitioner could wriggle out of the PPA by making payment of penalty, is neither an issue for MSLDC to decide or can be a subject matter of the present proceedings. In this regard, the Commission observes that the reference to Section 86(1)(f) under which the present proceedings have been filed, is misplaced. Section 86(1)(f) reads as follows -

“86. (1) The State Commission shall discharge the following functions, namely: -

.....

(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;”



The dispute brought out in the present case does not pertain to a dispute between a licensee and generating company, rather it is a dispute between a generating company and SLDC. This is not covered under Section 86(1)(f).

As to the grievance of the Petitioner *qua* the MSLDC, the following provisions of Procedure for Short-term Open-Access are relevant to be noted -:

“4.21. An applicant seeking short-term open access shall ensure that the buyer and seller are in agreement with the proposed transactions. Any disagreement between them may lead to cancellation of the proposed open access.”

“5.5 The open access users shall co-ordinate with the concerned buyer/seller in case of revision and send a consolidated request to the MSLDC. MSLDC shall entertain the request for revision only on bonafide ground and the same shall be implemented from the sixth time block considering the block in which request for revision is received as first time block. The decision of MSLDC regarding acceptance of the request shall be final and binding”

The Commission observes that MSLDC has to control the STOA contracts as per the procedures formulated as above. As stated above, it is for the Petitioner to resolve its issues with MSEDCL in a documentary form and only after presenting the same to MSLDC can the MSLDC consider change in open access, if any. Admittedly, the Petitioner has not done so. In the circumstances, the Commission is not inclined to interfere in the matter. Accordingly, the case stands dismissed.

Sd/-
(S.B. Kulkarni)
Member

Sd/-
(A. Velayutham)
Member

Sd/-
(V. P. Raja)
Chairman



(P.B. Patil)
Secretary, MERC