

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No 166/MP/2012**

**Coram:  
Shri V. S. Verma, Member  
Shri M Deena Dayalan, Member**

**Date of Hearing: 20.6.2013  
Date of Order: 30.7.2013**

**In the matter of**

Petition under Section 79 of the Electricity Act, 2003 for appropriate directions for resolving Fuel related aspects relating to 1967.08 MW Gas Power Project of Ratnagiri Gas & Power Pvt. Ltd.

**And in the matter of**

Ratnagiri Gas and Power Pvt. Ltd, Noida, U.P  
Vs

**...Petitioner**

1. Maharashtra State Electricity Distribution Company Limited, Mumbai
2. Electricity Department, Govt. of Goa, Panaji
3. Electricity Department, Administration of Daman & Diu, Daman
4. Electricity Department, Administration of Dadra and Nagar Haveli

**.....Respondents**

**Parties Present**

Shri M. G. Ramachandran, Advocate, RGPPL  
Shri S.K. Samui, RGPPL  
Shri M. Sarkar, RGPPL  
Shri Samir Malik, RGPPL  
Shri Rohit Chhabra, NTPC  
Ms. Jyotermayee Raj, NTPC

**ORDER**

The petitioner, Ratnagiri Gas & Power Pvt. Ltd. (RGPPL) has filed the present petition under Section 79 of Electricity Act with the specific prayers noted as under:



*“In view of the above submissions, RGPPL respectfully prays as under:*

- a) The Hon’ble Commission may be pleased to resolve the issues arising out of the non-availability of domestic gas of the required quantum and the reservations of beneficiaries to allow RGPPL to enter in to contracts for available alternate fuel i.e. RLNG and consequences thereof.*
- b) Revise the “Normative Annual Plant Availability Factor” for RGPPL for full fixed cost recovery at the actually achieved NAPAF level till fuel supply is restored to the allocated/ contracted quantity with consequential orders of the payment of fixed charges.*
- c) Direct beneficiaries to pay the fixed charges due to RGPPL;*
- d) Pass any other order in this regard as the Hon’ble Commission may find appropriate in the circumstances pleaded above.”*

2. The matter was heard on 22.1.2013 and orders were reserved by the Commission. However, as one of the Members of this Commission had demitted office before passing orders in the matter, the petition was again listed for hearing on 20.6.2013 and orders were reserved. During the hearing, the learned counsel for the petitioner prayed that the order may be passed taking into consideration the documents available on record and the submissions of the parties. Accordingly, we proceed to consider the issues raised by the parties in the petition.

### **Submissions of Petitioner**

3. RGPPL owns a generating station located in Ratnagiri District of the State of Maharashtra with an installed capacity of 1967.08 MW (under commercial operation) and an LNG terminal of 5.0 MMTPA capacity (under revival stage). Ministry of Power has allocated 95% of capacity of the generating station to the State of Maharashtra and the balance capacity has been allocated to the State of Goa and the Union Territories of Daman & Diu and Dadra and Nagar Haveli. The

share allocated to the State of Maharashtra is supplied to Maharashtra State Electricity Distribution Company Limited (MSEDCL) and for this purpose RGPPL and MSEDCL entered into a Power Purchase Agreement (PPA) dated 10.4.2007 for sale and purchase of electricity from the generating station.

4. The Commission had approved tariff of the generating station for the period 2009-10 to 2013-14 vide its order dated 18.8.2010 in Petition No. 283/2009. In the said order dated 18.8.2010, the Commission considered the net generation and the Normative Annual Plant Availability Factor (NAPAF) for recovery of full Annual Fixed Charges (AFC) at the levels given below after taking into account the allocation of domestic gas by the Central Government to RGPPL:

<b>Year</b>	<b>Net Generation (MU)</b>	<b>NAPAF (%)</b>
2009-10	8227	49.90
2010-11	11000	66.72
2011-12 to 2013-14	13188	80.00

5. The domestic gas allocation under the contracts entered into by RGPPL with the designated suppliers is as under:

<b>Supplier</b>	<b>Allocation Date</b>	<b>Allocation Quantity</b>	<b>Contract Date</b>	<b>Date of Commencement of Supply</b>
RIL	May 2008	7.6 MMSCMD	21.7.2009	30.9. 2009
ONGC/ GAIL	30.9.2011	0.9 MMSCMD	9.12.2011	30.1.2012

6. It is pertinent to mention that the Central Government while allocating domestic gas had accorded priority to RGPPL by treating it at par and clubbing it with the Fertilizer Units.

7. RGPPL has stated that it had been getting contracted quantity of natural gas from RIL till about September, 2011, after which there has been a continuous reduction in the supply and the current supply is of the order of 3.3 MMSCMD. It has been stated that RIL has attributed this shortfall to low yield from KG D6 gas fields and has effected *pro rata* reduction in supply of gas at par with other power sector customers. RGPPL has brought out that it has been insisting on full supply of 7.6 MMSMD from KG D6 gas at par with fertilizer units in accordance with the decision of EGOM (on utilization of gas) arrived at in its meeting held on 28.4.2008. Accordingly, it took up the issue of short supply of domestic gas with the Central Government and the matter was also placed before the Empowered Group of Ministers (EGOM) in its meeting on 24.2.2012. Thus, according to RGPPL, despite vigorous efforts made it has not been able to get the supply of the requisite quantum of domestic gas because of the extraordinary circumstances and for reasons beyond its control.

8. In view of the steady decline in supply of domestic gas since September, 2011 and in order to make up for the consequential shortfall in generation of power during 2011-12, RGPPL in December, 2011 entered into an arrangement with GAIL for supply of RLNG under spot cargo on a reasonable endeavor basis (take and pay contract). For reason of short supply of domestic gas, RGPPL has submitted, it had been offering capacity based on availability of fuel i.e. gas and RLNG in accordance with the PPA read with the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 (the 2009 Tariff Regulations). However, MSEDCL has been raising objections to the payment of

capacity charges to RGPPL corresponding to the availability declaration on RLNG. The details of the actual Plant Availability Factor (PAF) achieved by the generating station since 2009, as submitted by RGPPL, are tabulated as below:

Year	Net Generation (MU)	Actual Plant Availability Factor (%)
2009-10	8227	49.90
2010-11	11706	68.92
2011-12	11461	68.72
2012-13 till June, 2012	2236	52.92

9. RGPPL has clarified that the Annual Plant Availability Factor (APAF) achieved excludes the power which could be generated using RLNG on account of unavailability of domestic natural gas and supplied to MSEDCL as MSEDCL did not agree to schedule such power.

10. RGPPL has submitted that non-availability of the generating station to the extent of the specified NAPAF for want of domestic gas and the need to use RLNG as the primary fuel is not for any reasons attributable to it. In the circumstances, RGPPL was unable to achieve 80% NAPAF for the year 2011-12 and onwards as decided by the Commission in its order dated 18.8.2010 *ibid* and is on account of *Force Majeure* circumstances beyond its control for which it has relied upon Article 10 of the PPA. RGPPL has claimed that it has informed the System Operator, WRLDC, the increased availability based on RLNG in the absence of adequate quantum of APM gas in line with the clause 6.4.16 of IEGC from 16.12.2012, onwards.

11. In view of difficulties faced by RGPPL in declaring its available capacity, it feels a need to resolve the matters relating to use of RLNG as primary fuel for generation and supply of electricity in order to ensure recovery of full fixed charges, so essential for viability of the project which was revived and put to beneficial use in abnormal circumstances. RGPPL has accordingly sought revision of APAF for recovery of fixed charges to the actual APAF achieved for the period during which RGPPL has been unable to achieve the prescribed APAF. It has been submitted that the Commission in the past had granted relief in respect of Kawas GPS and Gandhar GPS of NTPC Limited on the similar ground of non-availability of adequate fuel (gas) required to achieve the target availability.

#### **Submissions of Respondent, MSEDCL**

12. The respondent, MSEDCL in its reply has submitted that RGPPL has sought intervention of the Commission so as to resolve the issues arising out of non-availability of fuel and the consequential reservation of the beneficiaries to permit RGPPL to declare capacity on alternate fuels and the consequences thereof. It has been stated that under the PPA, in terms of Article 4.3, the primary fuel for the generating station is Natural Gas and/or RLNG and the provision mandates that the capacity of the generating station is to be declared on LNG/RLNG the arrangement for which is to be made by RGPPL as per MSEDCL's requirement. MSEDCL has pressed into service Article 5.9 of the PPA, according to which RGPPL is required to obtain the approval of MSEDCL prior to entering into any contracts for gas supply or gas transportation. MSEDCL has submitted that RGPPL has to seek approval of MSEDCL before entering into any gas supply/ gas transportation agreement as regards the contracting terms and price of the gas

supply/transportation agreements having commercial implications for MSEDCL. MSEDCL has pointed out that RGPPL did not seek approval of MSEDCL prior to executing the alternative fuel supply agreements and is liable for breach of contract. MSEDCL has submitted that in the teeth of the express contractual terms, RGPPL is not entitled to claim AFC.

13. As regards RGPPL's effort to invoke the *Force Majeure* clause of the PPA, MSEDCL has submitted that the non-availability of fuel cannot be a ground for invoking *Force Majeure* clause in view the exclusion provided under Article 10.4 (a) of the PPA, according to which unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts, Fuel or consumables for the project are excluded from the purview of *Force Majeure* events. MSEDCL, relying upon Article 10.5 of the PPA, has pointed out that a notice of *Force Majeure* with full particulars of the *Force Majeure* event is a necessary precondition to claiming relief under that Article, but RGPPL has never issued notice under Article 10.5 of the PPA. On RGPPL's plea of *Force Majeure*, it has lastly been submitted that in terms of Article 10.7 of the PPA too, no relief can be given to RGPPL as RGPPL is in breach of its obligations under the PPA.

14. On the question of relaxation of NAPAF, MSEDCL has stated that NAPAF has been considered by the Commission in order dated 18.8.2010 after examining in detail the circumstances necessitating relaxation of normative APAF of 85%. It has been pointed out that the Commission had agreed to relaxation in NAPAF as a one-time dispensation and no further request for relaxation can be entertained and consequences of any shortfall in performance are to be borne by RGPPL. In this

regard, special emphasis has been laid on para 29 of the order dated 18.8.2010, extracted below:

*"29. In view of our observations in para 25 above and in exercise of our power under Regulation 44 of 2009 regulations, we are relaxing the norms of NAPAF for gas based generating stations as specified under Regulation 26(i)(a) of 2009 regulations in respect of the generating station as a special onetime dispensation and allow the following NAPAF for different years of the tariff period 2009-14, for the purpose of recovery of full annual fixed charges:*

Financial year	Net generation	NAPAF (%)
2009-10	8227	49.90
2010-11	11000	66.72
2011-12 to 2013-14	13188	80.00

*Further, relaxation in the NAPAF as allowed above, is subject to the condition that the generating station shall be entitled to incentive corresponding to 50% of the availability in excess of 85% till such time the shortfall in availability from the 80% availability during the years 2009-10 and 2010-11 is made good. We would also like to make it clear that relaxation in NAPAF is a onetime dispensation and no further request for relaxation shall be entertained and consequences of any shortfall in performance shall be borne by the Petitioner. "*

15. MSEDCL has further submitted that relaxation permitted by the Commission in respect of Kawas GPS and Gandhar GPS of NTPC has to be seen in the light of the facts of those cases and cannot be relied upon as precedent for other cases. Even otherwise, it has been submitted, the power to relax may not be exercised in a manner so as to defeat the express contractual rights of the parties and more so, when there is an admitted breach of the contractual terms by the petitioner. The power to relax may only be used within the four corners of the statutory provisions keeping in mind the contractual rights of the parties.

16. MSEDCL has lastly stated that even in terms of Article 5.2(i) of the PPA, full capacity charge is payable at 80% of 2150 MW (i.e. 1720 MW) declared capacity on annualized basis and for declared capacity lower than this is to be recovered on



*pro rata* basis after COD of Block(s)/Station and MSEDCL is required to pay capacity charges in proportion to the allocation of power from RGPPL.

### **Response of other respondents**

17. The other respondents have not filed any replies.

### **Decision with Reasons**

18. We have very carefully considered the issues raised. We have also considered the submissions of the parties made during the course of hearing as also the written arguments filed.

19. Article 4.3 of the PPA relating to declared capacity or capability provides as under:

#### **“4.3 Declared Capacity:**

*Primary fuel for RGPPL is LNG/Natural Gas and/or R-LNG. Normally capacity of the station shall be declared on gas and/or R-LNG for all three power blocks. However, if agreed by MSEDCL, RGPPL shall make arrangements of Liquid fuel (s) for the quantum required by MSEDCL. In such a case, the capacity on liquid fuel shall also be taken into account for the purpose of Availability, Declared Capacity and PLF calculations till the time Liquid fuel (s) stock agreed/requisitioned by MSEDCL is available at site”.*

20. Article 4.3 of the PPA, thus, has the following provisions regarding declared capacity, namely:

- (a) The primary fuel to be used for generation and supply of electricity can be LNG/Natural Gas and/or RLNG and normally capacity is to be declared on gas and/or RLNG.
- (b) When MSEDCL agrees to supply of power by burning liquid fuel, capacity declared against liquid fuel counts towards APAF and consequently for recovery of fixed charges.

21. Article 5.9 of the PPA provides thus:

**"5.9 Gas Supply Agreement (GSA)/Gas Transportation Agreement (GTA)**

*Gas Supply Agreement is presently for 1.5 MTPA R-LNG up to September 2009 being sourced through Petronet LNG Ltd and re-gasified at their Dahaj terminal with supply through GAIL/Off-takers.*

*The conditions of GSA/GTA having commercial implications (for example bearing on Plant availability, contracted quantity, price components, Take or Pay provisions, penalties and damages etc.) shall be signed separately with MSEDCL as a supplementary agreement. The total required Gas/LNG is envisaged to be procured through short term contracts/long term contracts through GAIL and under the directions of GOI, the details of which shall be furnished in due course. RGPPL shall be required to obtain approval of MSEDCL on contracting terms and price before entering into the GSA/GTA contract."*

22. The salient features of Article 5.9 of the PPA dated 10.4.2007 are:
- (a) That it notes and agreed by the parties, the arrangement already made by RGPPL and in force up to September 2009 for supply of gas.
  - (b) The total requirement of Natural Gas/LNG is envisaged to be procured through short-term /long-term contracts through GAIL and under the directions of the Central Government.
  - (c) The conditions of GSA/GTA having commercial implications, such as having bearing on plant availability, contracted quantity, price components, 'take or pay' provisions, penalties and damages, etc., are to be separately signed between RGPPL and MSEDCL.
  - (d) For entering into the GSA/GTA contract for gas supply beyond the arrangements existing at the time of execution of the PPA, the contracting terms and price have to be agreed to between RGPPL and MSEDCL.
23. The 2009 Tariff Regulations notified by the Commission in exercise of its power under the Electricity Act, 2003 do not lay down any restriction in regard to

the source of fuel or price of fuel to be used by the generating station and full recovery of fixed charges for availability of the generating station at or above the threshold levels, irrespective of whether availability is declared on natural gas or RLNG or liquid fuel. Therefore, the generating company may make declaration of its capacity based on Natural Gas or RLNG or liquid fuel. The beneficiaries have the option to dispatch or refuse to dispatch the capacity on natural gas, RLNG or liquid fuel. In this context the scheduling procedure specified under IEGC Regulations, 2010 in clauses 6.4.9 and 6.4.16 (extracted below) need also to be noticed.

*" 6.4.9 The ISGS, other generating stations and sellers shall be responsible for power generation/ power injection generally according to daily schedules advised to them by the RLDC/SLDC on the basis of the contracts /requisition received from the SLDCs/Buyers/Power Exchanges.*

.....

*6.4.16 The ISGS shall make an advance declaration of ex-power plant MW and MWh capabilities foreseen for the next day, i.e. from 0000 hrs. to 2400 hrs. During fuel shortage condition, in case of thermal stations, they may specify minimum MW, maximum MW, MWh capability and declaration of fuel shortage. The generating stations shall also declare the possible ramping up/ ramping down in a block. In case of gas turbine generating station or combined cycle generating station shall declare the capacity for units and modules on APM gas, RLNG and liquid fuel separately, and the shall be scheduled separately."*

24. As already seen, as per Article 4.3 of the PPA, the primary fuel for operation of the generating station is LNG/Natural Gas and/ or R-LNG. Article 4.3 of the PPA further provides that normally capacity of the generating station shall be declared on gas and/or RLNG. However, if it is agreed by MSEDCL, RGPPL should make arrangements of liquid fuel for the quantum of electricity required by MSEDCL on liquid fuel. In such a case, the capacity on liquid fuel has to be taken into account for the purpose of Available Declared Capacity and APAF calculations. It is significant to notice that agreement with MSEDCL is not only for declaring capacity

based on LNG/Natural Gas and/or RLNG, but also for use of liquid fuel as and when agreed upon and in such a case, the capacity declared against liquid fuel is taken into consideration towards NPAF. There is no provision under the PPA to stop RGPPL to declare capacity based on RLNG as the primary fuel. Once RGPPL declares its capacity based on RLNG, MSEDCL in its discretion may either agree to dispatch or decline it. In the former situation, MSEDCL becomes liable to pay fixed charges as well as the variable charges. However, in the latter case, MSEDCL cannot repudiate its liability to pay the fixed charges as the consent of MSEDCL is not needed for declaring capacity or availability on RLNG which is one of the primary fuels under the PPA. Any other interpretation would render Article 4.3 of the PPA redundant.

25. According to RGPPL, it had made all efforts within its power and control to source natural gas required for the operation of the generating station at the full capacity, but without any fruitful results. Therefore, RGPPL entered into contract for purchase of RLNG on 'take and pay' basis. MSEDCL has relied upon Article 5.9 of the PPA which *inter alia* provides that contracting terms and price of gas supply to RGPPL have to be agreed to between RGPPL and MSEDCL. Therefore, MSEDCL is not agreeable to requisition power generated by using RLNG or to compute the capacity so declared towards NPAF. In our view, the interpretation placed by MSEDCL on Article 5.9 is not sustainable since it negates the provisions of Article 4.3 of the PPA. It is established principle of interpretation of contracts that the contract is to be read as a whole and the different provisions of the contract are to be harmoniously interpreted so that effect is given to each one of them and no part of the contract becomes *otiose*. This principle needs to be adhered to while

interpreting Articles 4.3 and 5.9 of the PPA. When Article 5.9 is so interpreted it would mean that consent of MSEDCL on the contracting terms of supply of gas and its price is needed to enable it examine the implications on payment of variable charge. The agreement between RGPPL and MSEDCL on the contracting terms and price for supply of fuel to RGPPL, as provided under Article 5.9 is not a necessary condition for declaration of capacity of the generating station under Article 4.3 of the PPA. The declaration of capacity under Article 4.3 of the PPA is independent of the provision of Article 5.9 and is not dependent on any other factor, such as price of fuel, etc. The recovery of fixed charges is to be governed by the declared capacity of the generating station. It is true that making arrangement for supply of fuel for the generating station is the responsibility of RGPPL. RGPPL has made arrangements for supply of RLNG since it was not able to arrange supply of domestic gas because of the overall shortage of gas in the country. MSEDCL in its discretion may not schedule the capacity declared on RLNG since it has implications on the variable charges. However, it cannot disown its liability to pay the fixed charges when RGPPL declares capacity based on RLNG as the primary fuel in accordance with Article 4.3 of the PPA.

26. In the light of the above discussions, any declaration of capacity by RGPPL based on RLNG as the primary fuel qualifies for the computation of availability of the generating station for recovery of the fixed charges and accordingly the fixed charge recovery be made by the petitioner based on availability after accounting for declaration of capacity on RLNG.

27. In view of the above finding, we do not consider it necessary to get into the issues of relaxation of NAPAF already approved by the Commission or the admissibility of invoking *Force Majeure* clause by RGPPL.

28. The petition stands disposed of accordingly.

Sd/-  
**(M. Deena Dayalan)**  
Member

Sd/-  
**(V. S. Verma)**  
Member