

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No.183/MP/2013

Coram:

**Shri Gireesh B. Pradhan, Chairperson
Shri M.Deena Dayalan, Member
Shri A.K. Singhal, Member**

Date of Hearing: 29.5.2014

Date of Order: 03.7.2014

IN THE MATTER OF

Petition under Section 79(1)(b) and (f) and other applicable provisions of the Electricity Act, 2003 and Regulations of the Central Commission in respect of sale and purchase of power from the Gas Power Station (1967.08 MW) of the petitioner to Maharashtra State Electricity Distribution Company Ltd

AND IN THE MATTER OF

Ratnagiri Gas and Power Private Ltd
2nd Floor, Block-2, IGL Complex, Plot No.2B
Sector, 126, Expressway Noida-201304 (U.P)

.....**Petitioner**

Vs

Maharashtra State Electricity Distribution Company Ltd
5th Floor, Prakashgarh, Plot No. G-9,
Bandra (East), Mumbai-400051

....**Respondent**

Parties Present:

Shri M.G.Ramachandran, Advocate, RGPPL
Shri J.S.Chordia, RGPPL
Shri Arshad Jilani, RGPPL
Shri Vikas Singh, Sr. Advocate, MSEDCL
Ms. Deepeika Kalia, Advocate, MSEDCL
Shri Desh Raj, Advocate, MSEDCL

ORDER

This petition has been filed by the petitioner, Ratnagiri Gas and Power Private Ltd (RGPPL) praying for the following reliefs:



"(a) Entertain the petition and adjudicate on the dispute sought to be raised by the Respondent in regard to its liability to pay capacity charges, energy charges and other charges under the Power Purchase Agreement dated 10.4.2007 read with the CERC Tariff Regulation, 2009 and various other tariff orders;

(b) Declare that the Respondent shall be liable to pay the capacity charges, energy charges and other charges as per declaration of availability made by the petitioner, both on domestic gas and /or on RLNG that may be available in terms of the Power Purchase Agreement dated 10.4.2007 as per the existing schedule done by the respondent;

(c) Declare that the petitioner shall be entitled to the capacity charges as deemed generation charges in respect of the quantum of power declared available by the petitioner on RLNG not scheduled by the Respondent;

(d) Direct the respondent to pay the amounts outstanding to the petitioner with Delayed Payment Surcharge immediately to sustain the operation of the petitioner company;

(e) Pass ad-interim exparte orders in terms of prayers (a) to (d) above; and

(f) Pass such further order or orders as this Hon'ble Commission may deem just and proper in the circumstances of the case."

2. The petitioner, in this petition has submitted that in terms of the provisions of the Power Purchase Agreement (PPA) dated 10.4.2007 and also as per the 2009 Tariff Regulations notified by the Commission, it is entitled to recover the Annual Fixed Charges based on the capacity declared available, notwithstanding the scheduling by the respondent. It has also submitted that bills have been raised on the respondent for payment of monthly charges in terms of the 2009 Tariff Regulations, the tariff orders issued by the Commission from time to time, the provisions of the PPA dated 10.4.2007 and declaration of availability made by the petitioner, but the respondent has not been making the payments due to the petitioner. The petitioner has also submitted that it is entitled to claim the capacity charges in respect of the declaration of availability made on RLNG by the petitioner during 2011-12, in terms of the order of the Commission dated 30.7.2013 and the same is additionally payable as per Regional Energy Accounts.

3. The Commission admitted the petition and ordered notice on the respondent with directions to complete pleadings in the matter. Accordingly, the respondent has filed its reply and the petitioner has filed its rejoinder to the same. Pursuant to the hearing on 27.2.2014, the respondent

has filed additional affidavit raising preliminary objections on the maintainability of the instant petition.

4. During the hearing on 29.5.2014, the learned Senior counsel for the respondent submitted that the petition is not maintainable since the findings of this Commission in order dated 30.7.2013 with regard to the payment of fixed charges to the petitioner is a subject matter in Appeal No. 261/2013 filed by the respondent before the Appellate Tribunal for Electricity (Tribunal). He also added that since the prayer for declaration and adjudication by this Commission with regard to payment of fixed charges is already pending before the Tribunal for consideration, the present petition is not maintainable in law. The learned counsel for the petitioner objected to the above and clarified that the reliefs sought for by the petitioner in this petition are different from the issues pending before the Tribunal. He accordingly prayed that the Commission may adjudicate the disputes as regards the liability of the respondent to pay capacity charges, energy charges and other charges under the Power Purchase Agreement dated 10.4.2007 and the 2009 Tariff Regulations and various other tariff orders of the Commission.

5. Heard the parties and examined the documents available on record. We now examine the question of 'maintainability' of the petition in the background of our order dated 30.7.2013 and the pendency of appeal before the Tribunal. The petitioner had filed Petition No.166/MP/2012 before the Commission for appropriate directions for resolving the fuel related aspects relating to this generating station with the following prayers:

"(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."

6. We notice the similarity in the prayers made by the petitioner in Petition No. 166/MP/2012 as above and the present petition. While in the earlier petition the petitioner had sought the intervention of the Commission for resolving the issues arising out of the non-availability of domestic gas, the recovery of full fixed charges based on available alternate fuel, i.e RLNG and for direction to beneficiaries to pay fixed charges, the petitioner in the present petition has sought the adjudication of disputes relating to the liability of the respondent to pay capacity charges etc in terms of the PPA, the Tariff Regulations and the orders of the Commission. In our view, the relief sought for in the present petition are similar to the reliefs prayed for in the earlier petition. The Commission in order dated 30.7.2013 had granted the following reliefs to the petitioner.

"25.....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 APAF. 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."

7. The Commission having decided in order dated 30.7.2013 that the petitioner is entitled for recovery of fixed charges based on availability after accounting for declaration of capacity on RLNG, the prayer of the petitioner seeking declaration that the respondent MSEDCL is liable to pay capacity charges etc is barred by *resjudicata*. The petitioner in this petition has submitted that it is entitled to payment of capacity charges etc in terms of the provisions of the PPA, the 2009 Tariff Regulations and orders of the Commission. It is also pertinent to mention that the respondent has challenged the Commission's order dated 30.7.2013 before the Tribunal in which the petitioner has been impleaded as the respondent. The Tribunal while disposing of the I.A No.348/2013 (in Appeal No. 261/2013) filed by the respondent MSEDCL for stay of operation of the order dated 30.7.2013 has observed that the question as to whether the Commission has correctly interpreted the provisions of the PPA or not could be decided only after hearing the parties. Thus, the Tribunal having been seized of the issue in the said appeal, there is no reason for the petitioner to seek the intervention of the Commission for a declaration that the respondent is liable for payment of capacity charges based on declaration of availability as per terms of the PPA. The prayer of the petitioner is not maintainable.

8. One more prayer of the petitioner is for a direction to the respondent to pay the amounts outstanding to the petitioner along with delayed payment surcharge to sustain operation of the plant. In this connection, it is noticed that during the hearing of the Appeal No.261/2013 on 28.4.2014, the petitioner sought the permission of the Tribunal to file appropriate application for non-payment of amounts by the respondent MSEDCL and the Tribunal has accordingly granted liberty to the petitioner for the same. We find no reason to consider the prayer of the petitioner since the petitioner is already pursuing the remedy before the Tribunal for ensuing payment of the outstanding dues by respondent, MSEDCL.

9. Based on the above discussions, we find no merit in the submissions of the petitioner and the petition is accordingly rejected as not maintainable.

Sd/-
[A.K.Singhal]
Member

Sd/-
[M.Deena Dayalan]
Member

Sd/-
[Gireesh B. Pradhan]
Chairperson