

RECORD OF PROCEEDINGS

DATE OF HEARING : November 6, 2007 at 11.00 hrs

CASE No. : 54 of 2007

PETITIONERS : Purti Sakhar Karkhana Ltd. (“the Petitioners”)

RESPONDENTS : 1. Tata Power Company Limited (“TPC”)
2. Reliance Energy Limited (“REL”)
3. Reliance Energy Trading Company Limited (“RETCL”)
4. Maharashtra State Electricity Transmission Company Limited (“MSETCL”)
5. Maharashtra State Electricity Distribution Company Limited (“MSEDCL”)

MATTER : Petition filed by Purti Sakhar Karkhana Ltd. seeking directions upon MSETCL and MSEDCL not to deny Transmission Open Access to the Petitioner for transmission of energy generated at their co-generation unit in the matter of implementation of the agreement between Petitioner and RETCL.

CORAM : Chairman and Members

The Petitioners filed a Petition on September 18, 2007 seeking directions upon MSETCL and MSEDCL not to deny Transmission Open Access to the Petitioner for transmission of energy generated at their co-generation unit in the matter of implementation of the agreement between Petitioner and RETCL. Subsequently, the Petitioners filed a Petition on November 2, 2007 seeking interim reliefs, during the pendency of proceedings initiated through the earlier Petition filed on September 18, 2007. The Commission scheduled an admissibility hearing in the matter for November 6, 2007 in the presence of consumer representatives authorised on a standing basis under the Electricity Act, 2003 (“EA 2003”). Notices were issued accordingly.

2. At the admissibility hearing held in the matter on November 6, 2007, Shri. Pradeep Sancheti, Counsel, appeared on behalf of the Petitioners, along with Shri. P.K. Kukde. Shri. Vikas Singh, Additional Solicitor General of India, appeared for MSEDCL. Shri. M.R. Khadgi (Chief Engineer) and Shri. Jayant R. Kulkarni (Executive Engineer) appeared on behalf of Maharashtra State Load Despatch Centre (“SLDC”). Shri. Mahendra Kumar (Chief Executive Officer) appeared on behalf of RETCL.

3. Shri. Vikas Singh submitted that the interim application filed by the Petitioners has been served upon MSEDCL on November 5, 2007 at about 17.00hrs and thus

MSEDCL would require reasonable time to reply to the same. The reply of MSEDCL to the main Petition has been filed before the Commission on November 5, 2007. Shri. Pradeep Sancheti submitted that MSEDCL has not served a copy of their reply on the Petitioners.

4. Shri. Pradeep Sancheti referred to the order passed by the Chief Engineer, Maharashtra State Load Despatch Centre, (“SLDC”) dated November 3, 2007. Vide the said order, the facility for supplying power through transmission open access shall be available for the Petitioners from November 4, 2007 to November 6, 2007. However, the Petitioners have received a further order from the SLDC dated November 6, 2007, whereby transmission open access as was granted vide the earlier order dated November 3, 2007 stands as discontinued, precisely with effect from 10.00hrs on November 6, 2007. It was submitted that the said order of SLDC has held that transmission open access shall resume as per the orders/ directions of the Commission, if at all, during the hearing in the present matter as scheduled for November 6, 2007. Shri. Vikas Singh strongly contended that MSEDCL had no part to play in the issuance of the said orders by SLDC.

5. The Commission enquired of Shri. M.R. Khadgi (Chief Engineer)-SLDC, that under which provision of law/rule/regulation or under which direction/order the permission to supply power through transmission open access was granted in favour of the Petitioners (as per the order dated November 3, 2007) and thereafter withdrawn (as per order dated November 6, 2007). Shri. Kadgi submitted that the initial permission vide order dated November 3, 2007 was provided on the consent of the buyer (TPC/RETCL) and the seller (the Petitioners) for transmission of energy generated by Petitioners through open access. The said permission has been revoked vide order dated November 6, 2007, on receipt of a written letter from MSEDCL citing various reasons in terms of an existing agreement, as mentioned thereunder, seeking the discontinuance of transmission open access in favour of the Petitioners. The Commission noted that it is dismal to observe the justification advanced by SLDC for discontinuing/revoking permission to the Petitioners to supply energy through transmission open access, on the written plea of MSEDCL, which is not a party to the transmission open access arrangement between TPC/RETCL and the Petitioners. The Commission further observed that the quantum of power available for the open access buyer is predetermined and allocated, and the sudden discontinuance/revocation of actual generation need to be adequately justified by SLDC.

6. Shri. Vikas Singh submitted that on July 21, 2007, MSEDCL had sent a letter to SLDC informing that the Petitioners have executed an Energy Purchase Agreement (“EPA”) for operation for a period of 13 years (2007 to 2020). It was submitted that accordingly, supply from the generation unit of the Petitioners should not have been provided in the first place to RETCL and TPC, in violation of the terms and conditions of the said EPA.

7. Shri. M.R. Khadgi filed certain data/energy flow statements while the hearing was in session. Shri. Vikas Singh challenged the veracity of the contentions as raised by SLDC under point nos. 1 and 2 of the said data as filed. It was submitted that the said contentions are totally wrong and misconceived. It was observed by the Commission that

the data as filed by SLDC are extracts from actual records. The authenticity of the same can therefore not be established unless the full data is submitted. Shri. Vikas Singh filed a compilation of certain documents while the hearing was in session. Shri. Singh referred to page 7 of the said compilation which is a letter dated August 17, 2007 issued by the Superintending Engineer, Nagpur Rural Circle-MSEDCL to the Chief Engineer (Commercial)-MSEDCL. The said letter documents the internal information of MSEDCL that "power supply bill for the period 06-04-07 onward" has not been submitted by the Petitioners till August 17, 2007.

8. The Commission enquired of the Petitioners for their records on the supply of energy to MSEDCL through transmission open access, and whether the internal information of MSEDCL as shown by Shri. Vikas Singh coincides with that of the Petitioners. Shri. P.K. Kukde, Director-Purti Sakhar Karkhana Ltd, submitted that as per their records, the generation unit of the Petitioners was commissioned on March 18, 2007 and power was supplied to MSETCL from March 18, 2007 to March 31, 2007 as 'testing and commissioning energy'. It was submitted that MSETCL was kept informed of a power purchase agreement ("PPA") that the Petitioners have executed with RETCL (copies of the said PPA was already deposited with MSETCL and MSETCL). It was submitted that from April 1, 2007 to April 10, 2007, the Petitioners failed to supply surplus power to Noida Power Transmission Company Limited as the meters planted by MSETCL on the generating set of the Petitioners were not ABT meters but ToD meters. Thus, during the said 10 days during which period ABT metering was put in place by MSETCL, the Petitioners supplied power to MSEDCL (inspite of the PPA that the Petitioners have entered into with RETCL, to supply power to Noida Power Transmission Company Limited). Shri. Vikas Singh submitted that the said submissions of Shri. Kukde are on an erroneous footing. Shri. Kukde has suppressed the fact that the Petitioners supplied power to MSEDCL from March 17, 2007 to April 10, 2007. Secondly, considering that an EPA has been executed by the Petitioners with MSEDCL in 2002, it would be absolutely incorrect to describe the flow of energy from March 18, 2007 to March 31, 2007 as 'testing and commissioning energy'.

9. The Commission observed that the duty of projecting accurate records on the flow of energy vests with SLDC. On an enquiry made by the Commission, Shri. Jayant R. Kulkarni (Executive Engineer)-SLDC, submitted that the data as filed by Shri. M.R. Khadgi has been extracted from records denoting incidence of STOA sale of energy to any licensee from April 1, 2007, whether for synchronizing or testing purposes. Shri. Vikas Singh submitted that considering the submissions of Shri. Kulkarni, the data as submitted by Shri. M.R. Khadgi does not merit consideration. On an enquiry made by the Commission, Shri. Kulkarni submitted that SLDC has no data on the flow of power from the Petitioners to MSEDCL as readily available. The Commission enquired of Shri. Kulkarni that considering the same, how were MSEDCL billed for the generation of energy from the Petitioners, considering that such generation of power was not appropriately accounted for? The Commission further enquired for any other data/ energy accounting statements that have recorded incidences of sale of generated power from generating units to distribution licensees, or sale of power intra-distribution licensees. It was submitted that data denoting sale of power from April 2007 onwards is readily

available. Data recording the incidences of sale of power in the month of March 2007 are not readily available but may be submitted before the Commission in due course. The Commission directed that the same be submitted expeditiously.

10. Shri. Jayant R. Kulkarni submitted that the permission to the Petitioners to transmit power to RETCL was provided by SLDC as per the oral consent of Shri. A.D. Palamwar, Director (Operations), MSEDCL. The Commission observed with dismay that SLDC has not followed due process of law in first granting the Petitioners the open access and thereafter discontinuing / revoking the same without proper justification. The Commission opined that Generation should not be stopped under any circumstances. It needs to be ensured that generation from said cogeneration project is injected into the Grid, the accounting of the same to the credit of appropriate party can be determined subsequently, pursuant to outcome of this Petition.

11. On the issue of admissibility of the present petition, Shri. Pradeep Sancheti referred to Clause 7.4 of the EPA executed by and between the Maharashtra State Electricity Board (“MSEB”) and the Petitioners on September 2, 2002. The said clause provides that the ‘developer of the co-generation projects can be allowed to sell the energy generated by the co-generated project, to third parties from the beginning itself, if they choose to do so.’ Counsel submitted that the Petitioners thus were entitled to sell energy to third-parties and MSEB was relieved from the obligation from generating energy from the Petitioners. Shri. Sancheti further submitted that the said EPA was entered into in pursuance of directions issued by the Commission, under the combined Order dated July 15, 2002 (in the matter of MSEB’s Application dated August 16, 2001 and Case No.s 8, 9, 10, 15, 17, 18, 19, 20 and 21 of 2001 for purchase of power from bagasse based co-generation projects, and in the matter of aiding the State Government in formulation of Policy). Counsel referred to paragraphs 25, 26, 27.1, 27.2, 27.3.4, 27.3.13, 27.4.3 of the said Order dated July 15, 2002, and submitted that as per the specific directions contained under the cited paragraphs (especially paragraph 27.4.3), the Petitioners’ right to sell power to third-parties was agreed upon under the EPA. Counsel referred to the letter dated February 23, 2007 as sent to MSEDCL (Annexure D to the main Petition) whereby the intention of the Petitioners to sell energy to RETCL has been communicated (with copy of power sale agreement enclosed) even before actual sale. Counsel submitted that even if it is to be assumed that third-party sale caused a breach of contract, MSEDCL should have initiated appropriate proceedings at the relevant point of time, considering that third-party sale is being conducted by the Petitioners ever since March 2007. Shri. Sancheti further submitted that the basis of filing of an interim application under the present proceedings lies in the letter dated October 31, 2007 received from MSETCL (Annexure A to the interim application). Vide the said letter, MSETCL has sought the Petitioners to obtain specific directions from the Commission on the incidence of sale of energy to RETCL.

12. Counsel Shri. Sancheti referred to Sections 39 and 40 of the EA 2003 which requires MSETCL to provide “non-discriminatory open access” to generators. Counsel further referred to Section 60 of the EA 2003 and submitted that the action of MSEDCL in restraining third-party generation through the office of MSETCL is reflective of abuse of the rule of law, and abuse of dominant position. Shri. Sancheti submitted that neither

the principles of equity, nor urgency, nor the plain reading of the EPA dated September 2, 2002 read with the Order dated July 15, 2002 can disallow or create a fetter on the Petitioners from causing third-party sale of energy.

13. Counsel Shri. Vikas Singh submitted that the EPA was entered into by MSEB with the Petitioners on the issuance of an NOC dated September 14, 2001 under Section 44 of the Electricity (Supply) Act, 1948 (Page 56 in the compilation filed by MSEDCL). It is provided under Clause 5 therein, that surplus power shall not be sold by the Petitioners to any third-party, except when MSEB declines to buy power or defaults in making payment of bills. Referring to Clause 7.4 of the EPA, it was submitted that as contained therein, so far as third-party sale is concerned, 'there will be no liability on the part of the MSEB to compulsorily off-take the energy generated'. It was submitted that the said paragraph has clarity on certain issues. Firstly, the Petitioners *can* sell to a third party on the permission of MSEB and not *shall* sell to a third party, as directed under the Commission's Order dated July 15, 2002. Secondly, the intention of the parties should not be interpreted from the said Order but rather from the said EPA which has been entered into by and between both parties. Thirdly, on the permission obtained from MSEB for third-party sale, MSEB shall not be obligated with compulsory energy off-take. Referring to Clause 8.4 of the said EPA, Counsel submitted that the Petitioners were 'entitled' to third-party sale on any default done by MSEB in terms of the EPA. Counsel, in this regard, referred to the notice dated July 26, 2007 (page 9 in the compilation filed by MSEDCL) whereby the Petitioners were directed not to sell power to RETCL. Counsel submitted that as per the instructions received from MSEDCL, MSEDCL was not aware of any actual third-party sale by the Petitioners and thus, no proceedings have been initiated by MSEDCL on that account.

14. Counsel Shri. Vikas Singh submitted that if reliefs as sought under the present Petition and the interim application are allowed, an undesirable precedent will be established whereby any developer of bagasse based co-generation projects shall be free to sell power to any third-party and flout terms and conditions entered into with distribution licensees under PPAs. Such an act would have the effect of requiring MSEDCL to procure electricity from expensive sources and thereby increase tariff and would thus fail to safeguard the interests of consumers.

15. Shri. Pradeep Sancheti submitted that the NOC dated September 14, 2001 granted by MSEB under Section 44 of the Electricity (Supply) Act, 1948 is not needed for third-party sale after the expiry of two years thereof, as contained in the later part of the said NOC (Page 60 in the compilation filed by MSEDCL). It was submitted that no such NOC is required under the EA 2003 regime. On the issue of the direction of the Commission under the Order dated July 15, 2002 that third-party sale of generated power *should* be allowed vis-à-vis the terminology adopted under Clause 7.4 that such sale *can* be allowed, Counsel submitted that the correct interpretation should be acquired from the words "if they choose to do so" at the end of the relevant sentence. The said words establish the choice of the Petitioners for third-party sale. Had the choice of the Petitioners for third-party sale been exercisable on express permission from MSEB, MSEB should have been well within the law to impose arbitrary conditions on the

Petitioners thereby negating the exercise of the choice for third-party sale. Such an event would be contrary to the spirit of the EA 2003 so far as open access is concerned. Counsel submitted that Clauses 7.4 and 8.4 of the EPA are mutually exclusive. The said clauses operate in different parameters. Clause 8.4 provides that should MSEB default on the terms and conditions of the EPA, MSEB shall facilitate an energy wheeling agreement that the Petitioners may enter into with a third-party purchaser. Clause 7.4 on the other hand operates in the event the Petitioners desire to start initial generation of the co-generation plant through third-party sale.

16. Per contra, Shri. Vikas Singh submitted that the initial supply from the generation units of the Petitioners have been done by the Petitioners to none other than MSEDCL. Counsel referred to the letter dated August 17, 2007 issued by the Superintending Engineer, Nagpur Rural Circle-MSEDCL to the Chief Engineer (Commercial)-MSEDCL (page 7 in the compilation filed by MSEDCL). The said letter records that MSEDCL has been billed by the Petitioners for the first course of generation from the generation units of the Petitioners.

17. Shri. Mahendra Kumar, CEO-RETCL, sought for an interim relief for supply of power from the Petitioners till disposal of the present proceedings. The Commission observed that such an interim relief cannot be granted. The Commission further observed that it is SLDC who shall decide as to whom the power would flow to, as SLDC has been directed to ensure transmission open access to the Petitioners.

18. The Commission directed that generation should not be stopped under any circumstances. It needs to be ensured that generation from said cogeneration project is injected into the Grid, the accounting of the same to the credit of appropriate party can be determined subsequently, pursuant to outcome of this Petition. The Commission directed all the Respondents, and SLDC to file written reply and adjourned the matter to November 21, 2007. The present matter was therefore adjourned with the above directions.

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List of Persons present at the hearing held on November 6, 2007

1. Shri. M. Kumar, RETCL.
2. Shri. K.S. Karkharia, REL.
3. Shri. G.S. Limaye, MSETCL.
4. Shri. S.N. Dive, Purti Sakhar Karkhana Ltd i Sakhar Karkhana Ltd.
5. Shri. P.K. Kukde, Purti Sakhar Karkhana Ltd.
6. Shri. R.M. Chinchwadkar, Purti Sakhar Karkhana Ltd.
7. Shri. Nitin Mudholkar, Purti Sakhar Karkhana Ltd.
8. Shri. Sumit Pedgaokar, Purti Sakhar Karkhana Ltd.
9. Shri. Pradeep Sancheti, Counsel, Purti Sakhar Karkhana Ltd.
10. Shri. M.R. Khadgi, SLDC.
11. Shri. B.H. Gujrathi, SLDC.
12. Shri. J.R. Kulkarni, SLDC.
13. Shri. Surendra Khot, REL.
14. Shri. G. Srinivasa Rao, REL.
15. Shri. Vijayanand Semlethe, REL
16. Shri. P.S. Pandya, RETCL.
17. Shri. V.H. Wagle, TPC.
18. Shri. P.K. Anvekar, TPC.
19. Shri. C.A. Narayan, TPC.
20. Shri. V.H. Thakuria, TPC.
21. Shri. Vikas Singh, Addl Solicitor General of India, Counsel for MSEDCL.
22. Shri. Abhisek Khare, Advocate for MSEDCL.
23. Shri. Ravi Prakash, Advocate for MSEDCL.
24. Smt. Neelam Singh, Advocate for MSEDCL.
25. Shri. D.J. Lal, MSEDCL.
26. Shri. A.D. Kharpede, MSEDCL.
26. Shri. S.K. Dhabade, MSEDCL.
27. Shi. V.N. Deo, MSEDCL