

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

APPEAL NO. 422 OF 2022
&
APPEAL NO. 169 OF 2023 & IA NO. 1920 OF 2021

Dated: 03.09.2024

**Present: Hon'ble Sandesh Kumar Sharma, Technical Member
Hon'ble Mr. Virender Bhat, Judicial Member**

APPEAL No. 422 OF 2022

IN THE MATTER OF:

RattanIndia Power Limited (Nashik)
Through its Authorized Representative
Having Registered Office at:
A-49, Ground Floor Road No. 4,
Mahipalpur, New Delhi 110037
Phone: +011 47099999

...Appellant

Versus

1. Maharashtra Electricity Regulatory Commission & Ors.
Through its Secretary,
World Trade Centre, No.1, 13th Floor,
Cuffe Parade, Colaba, Mumbai-400005
2. Maharashtra State Electricity Distribution Co. Ltd.
Through its Chief Engineer,
Hongkong Bank Building, M.G. Road, Fort,
Mumbai, Maharashtra-400001
3. Maharashtra State Load Despatch Centre
Through Chief Engineer
Thane-Belapur Rd. P.O. Airoli
Navi Mumbai, Mumbai, Maharashtra-400708Respondent(s)

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Mr. Tushar Srivastava
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Mr. Anant Singh
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Mr. Abhishek Nangia
Ms. Mehak Verma
Ms. Simran Saluja
Mr. Nihal Bhardwaj
Mr. Jayant Bajaj
Mr. Isnain Muzamil
Ms. Neha Das
Mr. Vineet Kumar
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Mr. Prithu Chawla
Mr. Sahil Sood
Mr. Udit Saxena for R-2

Mr. Akshay Arora
Mr. Praval Arora
Ms. Abhilasha Verma
Ms. Chesta Mehta Arora
Mr. Ripudaman Sharma
Mr. Sanath Parashar

Mr. Madhav Saraswat
Mr. Aditya for R-3

APPEAL NO. 169 OF 2023 & IA NO. 1920 OF 2021

IN THE MATTER OF:

Maharashtra State Electricity Distribution Company Limited
5th Floor, Prakashgadh, Plot No.G-9,
Anant Kanekar Marg, Bandra East,
Mumbai-400 051.

...Appellant

VERSUS

(1) Rattan India Power Ltd.
Through its Director
5th Floor, Tower B,
Worldmark 1, Aerocity
New Delhi-110037

(2) Maharashtra Electricity Regulatory Commission
Through its Secretary,
World Trade Centre, Centre No.1,
13th Floor, Cuffe Parade,
Mumbai-400005

(3) Maharashtra State Load Despatch Centre,
Through its Director,
Thane – Belapur Rd, MSEB Staff Colony,
TTC Industrial Area, Airoli,
Navi Mumbai,
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Mr. Akshay Arora
Mr. Praval Arora
Ms. Chesta Mehta Arora
Mr. Ripudaman Sharma
Mr. Sanath Parashar
Mr. Madhav Sarasvat for R-3

JUDGEMENT

PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER

1. The captioned appeals are cross-appeals, Appeal No. 422 of 2022 filed by Rattan India Power Ltd. (hereinafter "RPL") and Appeal No. 169 of 2023

filed by Maharashtra State Electricity Distribution Company Limited (hereinafter “MSEDCL”) against common Impugned Order dated 11.10.2021 passed by Maharashtra Electricity Regulatory Commission (hereinafter “MERC” or “Commission”) in Case No. 26 of 2021 regarding release of capacity charges against the declaration of availability of Unit-1 and Unit-4 of RPL’s Amravati Thermal Power Plant.

2. For the sake of this judgment, RPL is hereinafter referred to as the “Appellant” and the MSEDCL as the Respondent.

Description of Parties:

3. The Appellant RattanIndia Power Ltd. is a public limited company incorporated under the provisions of the Companies Act, 1956, *inter-alia*, a Generating Company within the meaning of Section 2(28) of the Electricity Act, 2003 (“Act”) and owns and operates a 1350 MW (5x270 MW) coal-fired Power Plant located at *Nandgaonpeth*, Amravati District, in the State of Maharashtra, the entire contracted capacity is being supplied to the MSEDCL.

4. The Respondent Maharashtra Electricity Regulatory Commission is the State Electricity Regulatory Commission for the State of Maharashtra exercising powers and discharging functions under the Electricity Act, 2003.

5. The Respondent MSEDCL, is a Distribution Licensee within the meaning of Section 2(17) of the Act operating in the State of Maharashtra.

6. The Respondent Maharashtra State Load Dispatch Centre (“MSLDC”) is the apex body for the integrated operation of the electricity grid in the State of Maharashtra and is constituted under Section 31 of the Electricity Act, 2003.

Factual Matrix of the Case(s): -

7. On 18.05.2009, MSEDCL initiated the process for procurement of 2000 MW (+/- 30%) of power on a long-term basis through Tariff Based Competitive Bidding process as per guidelines of the Ministry of Power (“MoP”), as per the bid conditions, Bidders had to offer a tariff for supply of power to the MSEDCL and the Bidder(s) offering the lowest Tariff were to be selected for entering PPA for a period of 25 years, accordingly, bidding documents i.e., Request for Proposal (“RfP”) and Model PPA were issued by the Respondent No. 2.

8. On 07.08.2009, the Appellant participated in the bidding process and submitted its bid for supply of power from its Project.

9. Subsequently, after emerging as a successful bidder, a Letter of Intent (“**Lol**”) was issued to the Appellant for the supply of 450 MW power to MSEDCL at a levelized tariff of Rs. 3.260/kWh, further, on 20.03.2010, the Appellant submitted an offer to Respondent No. 2 for supply of additional 750 MW power at a levelized tariff of Rs.3.260/kWh.

10. On 22.04.2010, Respondent No. 2 signed a PPA with the Appellant for procuring 450 MW of power on a long-term basis.

11. On 05.06.2010, Respondent No. 2 signed another PPA with the Appellant for procuring 750 MW of power on a long-term basis. Accordingly, an aggregated 1200 MW power was to be supplied by the Appellant to Respondent No. 2 at a levelized tariff of Rs. 3.260/kWh for a period of 25 years.

12. On 28.12.2010, the MERC approved the aforesaid PPAs and adopted a levelized tariff of Rs.3.260/kWh *vide* its Order in Case No. 22 of 2010 in accordance with the provisions of the Act and the Competitive Bidding Guidelines issued by the Central Government.

13. On 01.02.2012, the PPAs were amended by Addenda to incorporate the change in unit configuration of the Appellant's Project from 2 Units of 660 MW each to 5 Units of 270 MW each, having a net capacity of 1228 MW.

14. On 08.11.2017, the Fuel Management Division of CEA, issued a letter regarding the new methodology for monitoring of coal stock at coal-based thermal power plants ("TPP").

15. On 29.06.2018, the Appellant issued an email dated 29.06.2018 to Respondent No. 2, thereby, declaring full availability from Unit 1, Unit 2, Unit 3, and Unit 5 of the Project, *inter-alia*, the Appellant had declared the availability of Unit-1 from 30.06.2018 onwards.

16. Further, Respondent No. 3, in response to the email, stated that the availability declared by the Appellant is incorrect and requested the Appellant to withdraw the DC for Unit-1 since as per the coal stock report, the coal stock as of 28.06.2018 was 3.8 days which was allegedly very less as compared to norms prescribed by CEA for non-pit-headed power generating station.

17. Subsequently, the Appellant declared capacity for Unit-4 from 04.07.2018 which was also disputed by Respondent No. 2 MSEDCL.

18. Over the years, multiple emails were exchanged between the Appellant and Respondent No. 2 and 3, the table below mentions the communications presented on record by the parties:

Email By	Email to	Date	Context
RPL	CEA (Central Electricity Authority)	09.05.2018	Amravati presently operation 2 out of 5 unit due to coal shortage. Needs 19,440 Tonne of coal daily for full capacity. Requested to take up the matter with CEA and railways for ensuring sufficient coal supply and place Amravati under "Super Critical" Category
RPL	MOP (Ministry of Power)	30.05.2018	Amravati requires 4-5 rakes per day but is getting an average of 3/per day. Requesting to intervene and advise railways to place at least 4-5 rakes per day.
RPL	MSLDC	25.06.2018	Load Schedule: -Unit 2,3,5 given full schedule -Unit 4 given zero schedule due to bottom ash problem -Unit 1 technically available but given zero schedule due to coal shortage
RPL	MSEDCL	29.06.2018	RPL declared full availability to unit 1, 2, 3, 5
MSLDC	RPL	29.06.2018	Unit 1 was withdrawn for coal shortage reason from 01.05.18 when coal stock

			<p>was 1.14 days. Coal stock as per yesterday's report is 3.8 days which is below critical level maintained and is in non-adherence to CEA Guidelines. RIPL has not provided DC more than 750 MW (against PPA of 1200 MW) since last 60 days mainly on account of poor coal stock. Thus, DC declared by you is not correct and not acceptable. So withdraw your DC or at least do not schedule power from this unit.</p>
RPL	MSLDC	30.06.2018	<p>Load Schedule:</p> <ul style="list-style-type: none"> -Unit 1,2,3,5 given full schedule -Unit 3 under zero schedule as per SLDC instructions, capacity charges will be claimed -Unit 4 Technically available but given zero schedule due to coal shortage
RPL	MSEDCL MSLDC	30.06.2018	<p>We are facing coal situation but we have sufficient coal to run all 5 units for entire July'18. Our minimum DC is 759MW whenever 3 units were available. We are ready to run 4 units for the month. Please consider DC of 4 units.</p>
RPL	MSLDC	03.07.2018	<p>Load Schedule:</p> <ul style="list-style-type: none"> -Unit 1,2,3,4,5 given full schedule

			<p>-Unit 3 under zero schedule as per SLDC instructions, capacity charges will be claimed</p> <p>-Unit 1 & 4 under zero schedule from 30.06.18 and 04.07.2018, capacity charges will be claimed</p>
MSLDC	RPL	03.07.2018	<p>Email of 29.06.2018 forwarded to higher authority. Declaration of unit 1 is not resolved so unit 1 and 4 DC not acceptable. Unit 1 has low coal stock of 5.4 days on 02.07.2018. So, do not issue schedule for unit 4.</p>
RPL	MSEDCL MSLDC	06.07.2018	<p>We have operated on similar coal stock in April as well.</p> <p>Send us back down certificates</p> <p>Requested to Check and update daily status report as they are not showing the correct status of unit 1 and 4 which have DC on 30.06.18 and 04.07.2018 respectively.</p>
MSLDCL	RPL	24.07.2018	<p>-Since 8th June and further after 22nd June, there is considerable decline in MSEDCL Demand.</p> <p>-RPL Declared unit 1 Availability from 30th June and unit 2 on 4th July</p> <p>- unit 3 was under Zero schedule</p> <p>- Conclusion: In-spite of low coal stock, availability of all units was</p>

			declared to take undue advantage of low demand situation in June-July. - Requested RPL to withdraw DC
RPL	MSEDCL	01.08.2018	-requested for an acceptance of scheduling of Unit 1 from 30.06.2018 and Unit 4 from 04.07.2018 as well as to issue 'zero schedule instructions' for the same. -April'18, We were able to fulfil similar requirements - CEA norms not mandatory - Amravati has sufficient coal stock for 18 days (and if received any further coal in 15 days, can last even longer than 18 days) - Unit 1 and 4 can easily run for 40 days with the help of present stock and expected coal delivery.
MSEDCL	RPL	16.08.2018	MSEDCL Issued backing down certificates to RPL for July, 18 for Unit-1 to Unit-5
MSLDC	MSEDCL	16.08.2018	provided the working sheet regarding the day wise (15 min time block) DC and Scheduled Energy in respect of the Appellant's Project (Unit-1 to Unit-5) for the month of July 2018
RPL	MSEDCL MSLDC	25.10.2018 07.06.2019	requesting it to accept schedule of Unit-1 from 30.06.2018 and Unit-4

		13.08.2019 28.04.2020	from 04.07.2018 and issue zero schedule instructions.
RPL	MSEDCL	01.02.2021	Letter to MSEDCL for release of capacity charges on account of availability of Unit-1 from 30.06.2018 and Unit-4 from 04.07.2018 till 31.07.2018.
RPL	MSEDCL	25.02.2021	Reminder letter for payment of capacity charges

19. Afterwards, the Appellant moved to the Commission under section 86(1)(f) of the Electricity Act, read with Regulation(s) 92 to 94 of the MERC (Conduct of Business) Regulations, 2004, *inter alia* seeking directions against Respondent No. 2 and 3 for re-computation of the Plant Availability for the financial year 2018-19, issuance of revised backdown certificates and for releasing differential payments.

20. The Commission via Impugned Order dated 11.10.2021 partly allowed the petition allowing the DC for Unit-1 from 30.06.2018 to 31.07.2018 stating that the CEA Guidelines are merely directional and not binding but rejecting the availability of Unit-4 from 04.07.2018 to 31.07.2018 due to bottom ash problem. The commission held that:

“20.4 Analysis of non-acceptance of Declared Capacity/availability of Unit-4:

g. The Commission observes that the Daily System Reports of MSLDC from 22 June, 2018 to 1 August, 2018 shows Unit-4 for

RPL under forced shut down due to bottom ash problem and for the reasons stated above MSLDC reports can not be set aside or neglected.

h. Therefore, the Commission is not inclined to accept the request of RPL to declare the availability of Unit-4 from 4 July 2018 till 31 July 2018 as the said unit was under forced outage during this period due to bottom ash problem.

20.5 In view of above, the Commission has considered to grant relief in respect of Unit-1 only and thus rejects RPL's claims in respect to Unit..

...

Order:

- 1. Case No 26 of 2021 is partly allowed.*
- 2. Maharashtra State load Desptach Centre to revise availability of Unit-1 for the period of 30 June 2018 to 31 July 2018 and accordingly recompute availability for FY 2018-19. Based on such revised availability, Maharashtra State Electricity Distribution Co. Ltd. shall pay differential fixed cost to Rattan India Power Ltd along with applicable Late Payment Surcharge under the PPA.*
- 3. Maharashtra State Load Despatch Centre to exercise its powers as provided in the MYT Regulations, Grid Code and the PPAs so as to ensure efficient and assured power supply.*
- 4. Maharashtra State Electricity Distribution Co. Ltd. to take up the issue of coal shortage with its generators as per observations made in para 20.3 (g) to (n) and further to develop mechanism for sharing coal stock position by generators so as to plan for its day-to-day power procurement strategies in the most economical manner.”*

21. Thereafter, both the appellant as well as Respondent No. 2 approached this Tribunal against the order of the Commission regarding the declaration of the capacity of Unit-1 from 30.06.2018 to 31.07.2018 and Unit-4 from 04.07.2018 to 31.07.2018 respectively, and thereby payment of the differential amount of capacity charges accordingly. Hence, the appeals.

Issues:

22. Therefore, the following issues have to be adjudicated in the captioned appeals:

1. Whether the Commission erred in allowing the declaration of availability vis-à-vis Unit-1 of RPL's Amravati Thermal Power Plant.
2. Whether the Commission erred in rejecting the declaration of availability vis-à-vis Unit-4 of RPL's Amravati Thermal Power Plant.

Issue 1: Declaration of Availability of Unit-1

23. The Appellant, RPL argued that Unit-1 had enough coal, however, compared with the guiding norms of CEA, it was under coal shortage from 30.06.2018 to 31.07.2018, further added that Unit 1 was otherwise available and thus the Commission rightly allowed the declaration of capacity of Unit-1.

24. The major argument of the Appellant for DC of Unit-1 is that the Respondents have denied to accept the availability of Unit-1 because the Appellant failed to maintain the minimum coal requirements as per the *CEA Guidelines*, however, as per the Appellant, CEA Guidelines are merely guiding in nature and are not binding.

25. The Appellant further submits that the CEA Guidelines have been brought forth for the specific purpose of assessing the real-time coal stock in generating stations and thus have no bearing on the present case, additionally, the CEA Guidelines have no statutory force as the findings of the Supreme Court in the case of ***Gulf Goans Hotels Co. Ltd. v. UOI and Ors. (2014) 10 SCC 673.***

26. Furthermore, the Appellant argued that as per **Clause 8.6** of the PPA, the Respondent no. 2 is only entitled to dispute the invoices raised and not exercise the right of lien over the amount payable to the Appellant since the terms of the PPA are binding for Respondent no. 2.

27. The Appellant further submits that Respondent no. 2 has wrongfully withheld the money in violation of section 171 of the Indian Contract Act, 1872 as it cannot be withheld without a contractual provision, there is no such provision mentioned anywhere in the PPA, the Appellant relied on ***Board of Trustees of the Port of Bombay and ors. V. Sriyanesh Knitter, (1999) 7 SCC 359 (Para 17)***

28. The Appellant further submitted that the Respondent is liable to pay Late Payment Surcharge (“LPS”) in addition to the amount due as per Article 8.3.5 of the PPA which was rightly allowed by the Commission in its Impugned Order as well, the contents of LPS are stated as follows:

“8.3 Payment of Monthly Bill

...

8.3.5 In the event of delay in payment of a Monthly Bill by the Procurer beyond its Due Date, a Late Payment Surcharge shall be payable by such Procurer to the Seller at the rate of two percent (2%) in excess of the applicable SBAR per annum, on the amount

of outstanding payment, calculated on a day to day basis (and compounded with monthly rest), for each day of the delay. The Late Payment Surcharge shall be claimed by the Seller through the Supplementary Bill.”

29. The Respondent, on the other hand, submitted that the Appellant approached the Commission after a lapse of 2 years and 9 months, from the time when the availability of Unit-1 was declined by the Respondents which reflects a gross delay on the part of the Appellant.

30. According to the Respondent, ‘Availability’ as well as ‘Declared Capacity’ are two different terms and RPL is trying to read them interchangeably, further, submits that as per the CERC Tariff Regulations, while ‘Declared Capacity’ may be the capacity of the generating station in relation to any period of the day or the whole day; Availability is an aggregate of Declared Capacity for all days in a specific time period implying that a generating station despite declaring its capacity, may not be available for production of electricity if computed aggregately.

31. Further, the Respondent submitted that the Appellant has wrongly presented facts in front of the Commission as well as this Tribunal since as per the PPA, RPL was required to declare capacity for 1200 MW, however, for 60 days i.e. from 29.04.2018 to 29.06.2018, RPL did not declare capacity for more than 750 MW due to poor coal stock which RPL has itself admitted via letter dated 09.05.2018, further, submitted that RPL was unable to declare for full contracted capacity and has to operate their plant on the partial capacity of 2 units out of the 5 technically available units.

32. The Respondent also submitted that as per MSLDC's email dated 29.06.2018, RPL withdrew the DC of Unit 1 from 01.05.2018 onwards due to a coal shortage when it had coal stock for 1.14 days, on the other hand, when RPL provided Declared Capacity for Unit-1 from 30.06.2018, it had coal stock available for 3.8 days, there was thus, no substantial difference in the coal stock when RPL withdrew DC its Unit -1 on 1^a May 2018 vis-à-vis when it Declared Capacity from 30.06.2018.

33. As per the Respondent, if RPL's argument that Declared Capacity as per the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 ("CERC Tariff Regulations") is in relation to any period or whole of the day is to be accepted then RPL-

- a) ought not to have withdrawn its Unit -1 from 01.05.2018 onwards as it had coal stock available for 1.14 days; and
- b) should have disputed the DSR from 01.05.2018 onwards as even then it showed Unit-1 under zero schedule due to coal shortage.

34. The Respondent also submitted that this Tribunal in its earlier orders has observed that the CEA Guidelines serve as a guiding norm and thus hold inherent value.

35. According to the Respondent, RPL maliciously declared the availability during a low-demand season, thereby shifting the financial burden on the end consumers, and in such cases, the MSEDCL possesses the discretion to refuse to schedule if it determines that the declared availability is frivolous.

36. We have heard the contentions from both sides. The PPA defines “Availability based tariff” and “declared capacity” as follows:

“1. ARTICLE 1: DEFINITIONS AND INTERPRETATION

1.1 Definitions

The terms used in this Agreement, unless as defined below or repugnant to the context, shall have the same meaning as assigned to them by the Electricity Act, 2003 and the rules or regulations framed there under, including those issued/ framed by Appropriate Commission (as defined hereunder), as amended or re-enacted from time to time.

...

Availability based tariff OR ABT

shall mean all the regulations contained in the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004, as amended or revised from time to time, to the extent applied as per the terms of this Agreement;

...

Declared capacity

shall mean the Power Station's Net Capacity at the relevant time at the Interconnection Point (expressed in MW) as declared by the Seller in accordance with the Grid Code and dispatching procedures as per the Availability Based Tariff;”

37. The primary reason for MSEDCL to decline the declared capacity of RPL is that RPL failed to maintain the required coal stock as per the CEA Guidelines, the same was communicated to RPL vide emails dated 29.06.2018, 03.07.2018, and 24.07.2018.

38. This Tribunal has dealt with the issue of whether the CEA Guidelines are binding in nature or not, in its previous judgment of **RattanIndia Power Ltd. v. Maharashtra ERC, 2024 SCC OnLine APTEL 8** wherein this Tribunal held that the CEA Guidelines are not to be treated as mandatory, the Tribunal held that:

“54. Also reliance on the guidelines/norms specified by the Central Electricity Authority are the guiding norms and are not mandatory, further, the table as quoted in the Impugned Order, indicates that the Appellant has maintained the coal stocks with marginal deviations as per the CEA norms and even more than the norms for certain months, it is only for the month of April, 2016 and March, 2017, the opening coal stock was below the required level, however, any variation from the CEA norms cannot be taken as a default on the part of the Appellant, the distribution licensee is certainly mandated to comply with Clause 4.5.1 of the PPA, it is a settled law that mere guidelines issued by CEA in order to provide guiding norms, cannot be treated as mandatory till the same is adopted or incorporated under the legislation.”

39. It is a settled principle of law that a court is bound by its own earlier orders, the reliance is placed on the judgment of the Supreme Court in the cases of **Sub-Inspector Rooplal v. Lt. Governor**, [(2000) 1 SCC 644], and **Govt. of A.P. v. A.P. Jaiswal**, [(2001) 1 SCC 748], thus, the abovementioned ratio is applicable and binding in this case as well and CEA Guidelines cannot be treated as mandatory but only have a guiding effect.

40. Therefore, the Respondent's submission that RPL's declared capacity was declined because it was not in adherence to CEA Guidelines cannot be accepted.

41. The Appellant declared the capacity of Unit-1 from 30.06.2018 vide an email dated 29.06.2018, the argument of the Respondent regarding delay in filing of petition on the part of the Appellant cannot be accepted as the Appellant from time to time communicated the concern to the Respondent to a point when Respondents stopped responding to their emails sent on 25.10.2018, 07.06.2019, 13.08.2019 and 28.04.2020.

42. At the same time, the Appellant cannot be made to suffer the consequence of circumstances that were not in its control earlier i.e. the supply of coal in order to function at full capacity, by declaring the capacity of Unit-1, the Appellant presented that the plant is otherwise available for doing what is expected out of it had there been sufficient coal supply to fulfill its daily coal requirement, thus, the shortage of coal in the past cannot be considered denying RPL's entitlement when sufficient coal is available during the period of dispute.

43. Therefore, the Appellant is entitled to re-computation of availability after revision of availability of Unit-1 from 30.06.2018 to 31.07.2018 as Unit-1 was technically available and the coal shortage is only related to CEA Guidelines but was sufficient to meet the availability targets.

44. Additionally, when the invoices for capacity charges for availability of unit-1 were raised by the Appellant, the Respondent, as per the procedure laid down in clause 8.6 of the PPA, did not dispute them.

45. The Respondent has time and again functioned in complete disregard of the contents of PPA and cannot be allowed to take advantage of its wrong and thus is liable to pay the capacity charges along with LPS as per Article 8.3.5 of the PPA for the period under dispute.

46. **We affirm the Impugned Order to this extent, in respect of the availability of Unit 1, the Appeal on this issue is decided against MSEDCL.**

Issue 2: Declaration of Availability of UNIT-IV

47. Unlike Unit-1, the Respondent also declined availability to RPL's Unit-4 stating the shortage of coal, however, the Commission rejected the claim of the Appellant on account of the Bottom Ash Problem.

48. The Appellant submitted that in all the communications between RPL, MSEDCL, and MSLDC, Respondent no. 2 and 3 never mentioned that Unit-4 is being declined availability due to the Bottom Ash Problem, instead, they only focused on the fact that such availability cannot be accepted due to shortage of coal stock on part of the Appellant.

49. The Appellant relied on Regulation 51 of the **MERC Multi Year Tariff (MYT) Regulations, 2015** which states that in case of doubt with respect to the Declared Capacity, the Generator may be required to demonstrate the Declared Capacity of its generating station as and when asked by MSLDC i.e. Respondent No. 3.

50. Thus, the Respondent must have followed the same instead of rejecting the Appellant's Declared Capacity, to support the same, further, the Appellant relied on the Judgement of the Supreme Court in **Ramachandra Narayan**

Nayak v. Karnataka Neeravari Nigam Ltd. And Ors. (2013) 15 SCC 140 (Para 51) and Rithwik Energy Generation Pvt. Ltd. v. Bangalore Electricity Supply Company Ltd. & Ors., (2018) 17 SCC 223 (Para 17-21)

51. As per the Appellant, the Commission selectively relied on the email dated 03.07.2018 to hold that unit-4 was not available and ignored RPL's email dated 06.07.2018 wherein RPL requested MSEDCL to rectify the Daily System Report ("DSR")/ Dispatch Schedule Report as well as the report published by CEA.

52. The Appellant vehemently argued that the MSLDC failed in rectifying the DSR citing the shortage of coal as claimed by MSEDCL and shifted the onus on RPL instead.

53. It was the submission of the Appellant that the Commission erred in implying that the Appellant must supply power from an alternate source of power as per Article 4.6.1 of the PPA which provides as under:

"4.6 Alternative Source of Power Supply

4.6.1 During the Operating Period, if the Seller is unable to provide supply of power to the Procurer up to the Aggregate Contracted Capacity from the Power Station except due to a Force Majeure Event or due to a Procurer Event of Default, the Seller is free to supply power up to the Aggregate Contracted Capacity from an alternative generation source to meet its obligations under this Agreement. Such power shall be supplied to the Procurer at the same Tariff as per the terms of this Agreement and subject to provisions of Article 4.6.2. In case the transmission and other

incidental charges, including but not limited to application fees for open access, RLDC/SLDC charges, etc., applicable from the alternative source of power supply are higher than the applicable Transmission Charges from the Injection Point to the Delivery Point, the Seller would be liable to bear such additional charges.”

54. As per the Appellant, the article uses the words ‘seller is free to supply’ instead of ‘seller shall supply’ implying that there is no obligation on the seller/appellant to supply power from alternate sources, even when the Unit 4 was available, there is no reason to supply from alternate sources.

55. The Respondent, on the other hand, submitted that the availability of Unit-4 was not considered as it was under forced shutdown due to the Bottom Ash Problem from 22.06.2018 to 01.08.2018 as per the DSR published by MSLDC on its website, however, the Appellant vide its email dated 30.06.2018 stated that *“Unit 04 is technically available but given zero schedule due to coal shortage”*, no such schedule was approved by MSLDC.

56. The Respondents submitted that Regulation 51 of the Maharashtra MYT Regulations, 2015 is not mandatory in its operation as it does not impose any mandate for asking demonstration of Declared Capacity, since the regulation uses the word *“May”* indicating the discretion with MSLDC to ask for a demonstration of Declared Capacity, the MYT regulations are discretionary and not mandatory.

57. Additionally, the Respondent submits that Regulation 53.4.4 of the MERC State Grid Code Regulations, 2020 confers discretion upon MSLDC to refuse schedule/capability changes, further, Regulation 50.1.1 of the State Grid Code Regulations binds MSEDCL to follow the DSR prepared by MSEDCL

under Regulation 52.5(w) of the same regulations, the relevant provisions are as under:

“50. Roles and Responsibilities

50.1 Roles and Responsibilities of SLDC

50.1.1. In accordance with Section 33 of the Act, SLDC in the 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. Every licensee, generating company, generating station, substation and any other person connected with InSTS shall comply with the directions issued by the SLDC under subsection (1) of Section 33 of the Act. The SLDC shall comply with the directions of the RLDC.

...

52. General Principles of Scheduling and Despatch Code

52.5 Scheduling and Despatch Procedure and timelines for Day ahead Scheduling

(w) By 2300 hrs, SLDC shall release final despatch schedules on 15 minute time block basis to all Sellers, QCAs, RE Generators other than Wind and Solar generators connected to InSTS and drawal Schedules to Buyers for the next day, from 0000 hrs to 2400 hrs.

...

53. Principles of Intra-day operation

53.4 Revision of Schedule by Sellers

53.4.4 To discourage frivolous revisions, SLDC may, at its sole discretion, refuse to accept schedule/capability changes of less than two (2) percent of previous schedule/capability. The schedule

of thermal generating stations indicating fuel shortage while intimating the Declared Capacity to the SLDC shall not be revised except in case of forced outage of generating unit. Provided that, in case of gas based InSGS, for optimum utilization of gas, this shall be permitted, i.e. in case of tripping of a unit, this gas may be diverted to another unit using the same gas.”

58. We have heard arguments on both sides. Additionally, if the Respondent had reason to believe that the availability of Unit-04, as declared by the Appellant, is incorrect; they were given the liberty to ask demonstration of such declaration under Regulation 51 of the MYT regulations. Regulation 51 of Maharashtra MYT Regulations, 2015 states as follows:

“51. Demonstration of declared capacity—

51.1 The Generating Company may be required to demonstrate the declared capacity of its Generating Station as and when asked by the MSLDC.

51.2 In the event of the Generating Company failing to demonstrate the declared capacity, the Annual Fixed Charges due to the Generating Company shall be reduced as a measure of penalty.

51.3 The quantum of penalty for the first mis-declaration for any duration/block in a day shall be the charges corresponding to two days fixed charges.

51.4 For the second mis-declaration, the penalty shall be equivalent to fixed charges for four days and for subsequent mis-declarations in the year, the penalty shall be multiplied in the geometrical progression.

51.5 The operating logbooks of the Generating Station shall be available for scrutiny by the MSLDC, and these books shall keep record of machine operation and maintenance.”

59. The above-referred clause provides enough powers for the procurer, the MSEDCL to direct the Appellant to demonstrate the availability as and when it is felt necessary, any failure on the part of the Appellant will result in stringent penalties as incorporated therein.

60. The Respondent preferred to continue with its insistence on non-scheduling of power for the erroneous reason of shortage of coal which in turn was also accepted by the MSLDC.

61. The Respondents failed to place before us any rejection citing the Bottom Ash Problem.

62. The Respondent cannot be allowed to take advantage of its discretion when such discretion is exercised arbitrarily, if the Respondents were not in agreement with the declared capacity of the Appellants, such demonstration could have been asked for.

63. Secondly, if the Respondents are exercising their discretion with other such power plants before declining their availability but the Appellant is disallowed such opportunity, it may lead to arbitrary exercise of such discretion which cannot be permitted.

64. Thus, we cannot accept the argument of the Respondent concerning the exercise of discretion u/s 51 of the 2015 Regulations.

65. The availability of Unit-4 is challenged on the ground that it was facing the Bottom Ash Problem for the disputed period of availability i.e. from 04.07.2018 to 31.07.2018, it is important to put forth some facts straight to determine the issue.

1. On June 25, 2018, RPL sent a mail to MSLDC regarding original load schedule wherein it stated that “...B) Unit-4 given zero schedule due to Bottom Ash System Problem...”.
2. On June 30, 2018, RPL sent another mail to MSLDC regarding original load schedule wherein it stated that, “...C) Unit 04 is Technically Available but given zero schedule due to coal shortage...”
3. On July 03, 2018, RPL sent another mail to MSLDC regarding original load schedule wherein it stated that, “...A) Unit 01, 02, 03, 04 & 05 given full schedule...”

66. It is observed that on June 25, 2018, the Appellant conveyed the non-availability of Unit 4 due to the Bottom Ash Problem, however, vide email dated June 30, 2018, indicated the technical availability of Unit 4, and again reiterated on July 03, 2018, *inter-alia*, confirmed the original schedule for all the five units including the Unit 4.

67. We agree with the Appellant’s argument that when the Appellant declared availability for Unit-04, the Respondent never mentioned that the availability was being declined due to the Bottom Ash Problem.

68. This Tribunal vide judgment dated 06.02.2024 titled ***RattanIndia Power Ltd. vs MERC &ors.*** rendered in Appeal No. 41 of 2019 has held that the

generator is duty-bound to give availability to the procurer and the concerned SLDC, and the procurer is also contractually bound to provide a schedule to the generator and the SLDC MSEDCL has provided a schedule to MSLDC, failure to act in accordance with the relevant provisions in the Scheduling & Despatch Procedure and the PPA, shall attract necessary compensation to either party as per the PPA.

69. The argument for the Bottom Ash Problem was only brought forward in the proceedings before the Commission which led to the passing of the Impugned Order, however, as noted above, this argument must be rejected once the Appellant declared technical availability for Unit-04 on 30.06.2018, without any generation availability due to shortage of coal, however, Unit 4 was confirmed for full generation and despatch on 03.07.2018.

70. Once availability was provided by the generator, the MSEDCL, and the MSLDC ought to have considered it and given the requisite schedule, and ought not to have refused scheduling due to coal shortage.

71. As per the Appellant, the problem of bottom ash was resolved before 03.07.2018, however, the DSR continued reflecting the status of Unit-04 as under forced outage due to the Bottom Ash Problem, thus, the Appellant sent a communication to the Respondent to rectify the same on 06.07.2018, the content of the email states:

“Dear Sir,

As discussed please arrange to change the status of RPL Unit # 1 as it is given full schedule from dated 30.06.2018 @ 00:00 hrs. Unit # 04 was given full schedule from dated 04.07.2018 @ 00:00 hrs.

However, it is not reflecting in your daily report, so kindly update the status in your daily report.

Regards...”

72. The Unit Outage status of RPL’s Amravati plant for FY 2017-18 and FY 2018-19 continued reflecting RPL under forced outage from 22.06.2018 to 01.08.2018, even when it was available and giving availability, as given below:

Outrage Type	Name	Trip Date	Trip Time	Synch. Date	Synch. Time	Reason
FORCED	RPL(AMT) U-4	22.06.2018	17.31	01.08.2018	3.20	Bottom Ash Problem

73. The status of unit-04 shows forced outage for the entire month of July even to the fact that the Appellant is providing availability of Unit 4.

74. Therefore, the Respondent's contention has to be rejected on this count and the State Commission should have considered the same.

75. Accordingly, the Appellant is entitled to fixed cost as per the PPA along with carrying cost at the LPS rate.

ORDER

In light of the above, Appeal No. 422 of 2022 has merit and is allowed. The Appeal No. 169 of 2023 is dismissed as devoid of merit. The Impugned Order passed by the MERC in Case No. 26 of 2021 dated 11.10.2021 is *set aside* to the limited extent as concluded herein above. The RPL’s Unit-01 was available from 30.06.2018 to 31.07.2018 and RPL’s Unit-04 is declared available from

04.07.2018 to 31.07.2018 and thus MSLDC is directed to revise the availability for such period.

MSEDCL to pay the differential fixed cost to RPL along with the applicable late payment surcharge (LPS) as per PPA.

PRONOUNCED IN THE OPEN COURT ON THIS 03rd DAY OF SEPTEMBER, 2024.

(Virender Bhat)
Judicial Member

pr/mkj

(Sandesh Kumar Sharma)
Technical Member