Before the Appellate Tribunal for Electricity (Appellate Jurisdiction)

Appeal No. 123 of 2010

Dated_16th May, 2011

Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice P.S. Datta, Judicial Member

In the matter of:

M/s Indo Rama Synthetics (I) Ltd.,
A-31, MIDC Industrial Area,
Butibori, Nagpur -441 122 ...Appellant

Versus

1. Maharashtra Electricity Regulatory Commission
   13th Floor, Centre No. 1, World Trade Centre
   Cuffe Parade,
   Colaba, Mumbai-400005.

2. The Chief Engineer
   (The Secretary, MSPC),
   Office of the Chief Engineer,
   State Load Despatch Centre,
   Maharashtra State Electricity Transmission Co. Ltd.
   Thane- Belapur Road
   P.O. Airoli
   Navi Mumbai 400708

3. The General Manager
   (Chairman MSPC)
   BEST Undertaking, BEST Bhawan,
   Shahid Bhagatsing Road,
   Electric House, Coloba,
   Mumbai -400 001

4. The Sr. Vice President
(Member MSPC)
Reliance Energy Ltd.,
Corporate Office,
Near Western Express Highway,
Prabhat Colony,
Mumbai -400 055

5. The Managing Director
(Member MSPC)
Maharashtra State Electricity Distribution Co. Ltd.,
Prakashgad, Bandra (East),
Mumbai -400 051

6. The Vice President
(Member MSPC)
Tata Power Ltd.,
Mumbai Corporate Centre,
34, Sant Tukaram Marg,
Carnac Bunder,
Mumbai -400 009 …Respondents

Counsel for Appellant(s) : Mr. Neil Hildrith

Counsel for the Respondent(s): Mr. Mullapudi Rambabu for R-2
Mr. Abhishek Mitra for R-5

JUDGMENT

HON'BLE MR. RAKESH NATH, TEHNICAL MEMBER

This Appeal has been filed by M/s. Indo Rama Synthetics (I) Ltd. challenging the order dated 29.03.2010 passed by the Maharashtra State Electricity Regulatory Commission regarding compensation to the appellant for inadvertent injection

of 1.607 million units of electricity into the network of the transmission licensee from its captive power plant. The State Commission is the respondent no. 1. The second respondent is the State Load Dispatch Centre being operated by the State Transmission Utility. The respondents 3 to 6 are the distribution licensees.

2. The brief facts of the case are as under:

2.1. The appellant has a captive power plant having generating capacity of 82.5 MW (52.5 MW Diesel Generating sets and 30 MW coal fired). After meeting its own requirement the appellant has excess power of 22 to 24 MW, which the appellant sells through the trading licensees.

2.2. The appellant had entered into a contract dated 19.4.2007 with Tata Power Trading Co. Ltd. for sale of 22 MW power for a period of two years. The appellant

had received approval of the transmission licensee for supply of power to the respondent no. 3 through the trading licensee from 1.4.2008 to 30.6.2008 between 09:00 to 24:00 hrs. except Sundays and holidays and for sale of 22 MW power to Andhra Pradesh through the trading licensee from 1.5.2008 to 31.5.2008 from 00:00 hrs. to 09:00 hrs. on all days except Sundays and holidays and between 00:00 to 24:00 hrs. on Sundays and holidays. However, during the period from 1.5.2008 to 8.5.2008 the appellant also simultaneously scheduled 22 MW power to the JSW, another company besides Tata Power Trading Company due to which the appellant had to pay charges for the Unscheduled Interchange (UI).

2.3. Thereafter, from 1.6.2008 to 8.6.2008 and during 00:00 hrs. to 09:00 hrs. on weekdays and round the clock on Sundays and holidays the appellant injected

1.607 million units into the grid without any schedule and agreement for sale of power and without booking transmission corridor for transmission of power.

2.4. However, on 8.6.2008 the appellant stopped the injection of power. For injection of about 1.607 million units the appellant has claimed to have incurred Rs. 121.25 lakhs, including the administrative charges. The appellant raised the claim for these charges on the transmission licensee which was denied.

2.5. The appellant filed a petition before the State Commission seeking compensation for 1.607 million units of energy injected into the grid inadvertently. However, the State Commission only allowed compensation at the lowest variable cost of the power station of the state owned generating company by its

order dated 29.3.2010. Aggrieved by the order of the State Commission, the appellant has filed this appeal.

3. The learned counsel for the appellant, assailing the order of the State Commission, has submitted the following:

3.1. The power injected by the appellant was duly consumed by the pool members of the Maharashtra State Power Committee who were benefitted by the sale of such power to their consumers.

3.2. Reliance Infrastructure Ltd. had offered to purchase the unscheduled power of 1.607 MU @ Rs. 4.5 per unit provided the State Load Dispatch Centre and the other distribution licensees agree for the same. However, no response was given by the SLDC in this regard thus denying opportunity to the

appellant to get same relief in the form of some amount of compensation.

3.3. The appellant had sought claim of Rs. 121.25 lakhs for 1.607 million units inadvertently injected into the grid @ Rs. 7.55 per unit. The State Commission has wrongly allowed the compensation at the lowest variable cost of the State owned generating station, as applicable for the period under consideration, which amounts to only about Rs. 11 lakhs. This has caused huge financial loss to the appellant.

3.4. The State Commission has wrongly relied on clause 15.1.3 of the Final Balancing & Settlement Code for granting the compensation while the said code had not come into operation when power was injected by the appellant. The State Commission also

failed to consider the commercial rate of power at that time which according to the agreement reached between the appellant and the trading licensee was Rs. 8.90 per unit and would have entitled the appellant to the compensation of Rs. 1.43 crores.

3.5. The State Load Dispatch Centre (SLDC) despite having knowledge that the appellant was inadvertently injecting power into the grid failed to intimate the appellant of such error. Thus, it is inferred from the action of the SLDC that power was needed by the distribution licensees.

3.6. The State Commission has erred in holding that there was no contract for supply of power. It is settled law that contract can also arise out of conduct. In this case the SLDC had admitted the receipt and use of electricity and therefore, it becomes ipso facto liable for

payment because it was never the intention of the appellant to supply power without payment. The price for the injected power should be fair commercial price which has to be allowed to the appellant as compensation. Moreover, all supplies of goods, including electricity, are entitled to be for commercial consideration unless and until the parties are able to prove that the case falls under Section 70 of the Contract Act, 1872. Since the present case does not fall thereunder, the absence of written or formal contract is irrelevant.

3.7. Under Section 72 of the Contract Act, 1872, the appellant is entitled to receive the price of the inadvertent power provided to the grid from the parties which have been benefitted from such supply of power.

3.8. The Tariff Regulations, 2005 and Final Balancing & Settlement Code of the State Commission are arbitrary and discriminatory and in violation of Article 14 and 19 (1)(g) of the Constitution of India and deserve to be struck down.

4. Reply has been filed only by the respondent no.2/ State Load Dispatch Centre stating the following:

4.1. According to Section 32(2)(a) of the 2003 Act, the State Load Dispatch Centre is responsible for optimum scheduling and despatch of electricity within the state in accordance with the contracts entered into with the licensees or the generating companies operating in the state. Admittedly, there was no contract or agreement in this case.

4.2. According to clause 40.3 of the Tariff Regulations, 2005, the generating company is not entitled to UI charge for generation in excess of the declared capacity of the generating station. Such excess generating has to be credited to the share of the distribution licensee proportionately. Accordingly, in this case also the energy injected by the appellant was also allocated amongst the distribution licensees of the state without any commercial obligation to ensure accounting of the injected power.

4.3. SLDC was not aware of the injection of power during the period from 1.6.2008 to 8.6.2008 by the appellant due to non-installation of the Remote Terminal Unit for communication of data to the SLDC by the appellant at its power plant.

5. We have examined the submissions made by both the parties and considered the contentions of the learned counsel for the parties. After careful consideration of the contentions of the parties, we have framed the following questions for consideration:

i) Is the appellant entitled to compensation for the energy injected by the appellant into the grid allegedly by inadvertence without any schedule/contract?

ii) If the answer to the first question is in affirmative then what should be the amount of compensation?

6. The first issue is regarding entitlement of the appellant to the compensation for the alleged inadvertent injection of power into the grid without any schedule/contract.

6.1. We shall first examine the relevant sections of the Act and the Regulations. Section 32(1) and (2) of the Electricity Act, 2003 relating to function of the State Load Dispatch Centre (SLDC) is reproduced below:

> "*32. Functions of State Load Despatch Centres-*
>
> *(1) The State Load Despatch Centre shall be the apex body to ensure integrated operation of the power system in a State.*
>
> *(2) The State Load Despatch Centre shall -*
>
> *(a) be responsible for optimum scheduling and despatch of electricity within a State, in accordance with the contracts entered into with the licensees or the generating companies operating in that State."*
>
> *(b) monitor grid operations;*
>
> *(c) keep accounts of the quantity of electricity transmitted through the State grid;*
>
> *(d) exercise supervision and control over the intra-state transmission system; and*
>
> *(e) be responsible for carrying out real time operations for grid control and despatch of*

electricity within the State through secure and economic operation of the State grid in accordance with the Grid Standards and the State Grid Code".

Thus the SLDC is responsible for optimum scheduling and dispatch in accordance with the contracts.

6.2. The Regulation 40.3 of the Tariff Regulations, 2005 of the State Commission is reproduced below:

"40.3. Where the declared capacity of the generating stations is on the lower side and actual generation is more than the declared capacity, then any charges for unscheduled interchange due to the Generating Company on account of such extra generation shall be reduced to zero and the amount shall be credited to the account of the Distribution Licensee in proportion to the share of the Distribution Licensee in the installed capacity of such generating station ."

Admittedly, no schedule of power was given by the SLDC to the appellant. The appellant or the trading licensee also did not have any contract for sale of power to any person during the period 1.6.2008 to 8.8.2008 during 00:00 to 09:00 hrs. on week days and round the clock on Sundays and holidays. However, as the energy was injected by the appellant the same had to be accounted for by the SLDC to balance the energy account. Accordingly, the SLDC rightly booked the injection of energy during the above period proportionately to the distribution licensees without any commitment for compensation.

6.3. Clause 15.1.3 of the Final Balancing & Settlement Code in case of short term contracts for merchant generation is reproduced below:

> *"15.1.3. Applicability of UI charges to Merchant Generator*
>
> - *……*

- ……
- *Case of Inter-State sale: In case of over-generation, the generator shall be compensated at the lowest variable cost of the State owned generating stations. Further, in case of under-generation, the generator shall be liable to pay at state SMP applicable for the relevant time –block."*

6.4. After referring to the above Regulations the State Commission in the impugned order has concluded as under:

"30. Thus, even in cases where valid contract exists, the over-generations shall be compensated at the lowest variable cost of the State owned generating stations. Due to the peculiar circumstance of this case, in the absence of valid contract or confirmation of the schedule for power off –take for the duration (00:00 hrs to 09:00 hrs from June 1,2008 to June 8, 2008), the Commission hereby rules that the injection may be compensated at the lowest variable cost of the

State owned generating stations, as applicable for the period under consideration. Further, as regards allocation of injected power, the Commission hereby rules that such quantum of injected power shall be allocated amongst the State Pool Participants in proportion to their drawal, as recorded in the Minutes of 5th Meeting of the Meeting of the Maharashtra State Power Committee (MSPC). However, this order shall not be quoted as any kind of precedent by anybody including open access generators injecting power without any contract/ schedule at the time when such power is not needed".

Thus the State Commission, due to circumstances of the case, allowed the compensation to the appellant considering clause 15.1.3 of the Final Balancing & Settlement Code, while stating that this order would not be quoted as a precedent.

7. In this connection, we would like to refer to the submissions of the SLDC before the State Commission

which have been recorded in para 20 of the impugned order and observation of the State Commission in para 28 which we are reproducing below:

"20. SLDC, MESTCL, further, submitted that, since the petitioner injected the energy without any contract/schedule or knowledge of SLDC, MSETCL the question of making payment for the same does not arise If such transaction is permitted, it will result in creation of wrong precedence and result in more such cases. Further, SLDC, MSETCL added that in future, a number of open access generators, who are unable to sell their costly off peak power especially during night hours, will simply inject the power without any contract/ schedule at the time when such power is not needed. Considering the above fact, SLDC, MSETCL requested the Commission, not to consider the present Petition".

"28. The Commission notes as per MSLDC's submission that the energy injection of 1.607 MU under consideration pertains to the period June 1,2008 to June 8, 2008 for the duration 00:00 hrs. to 09:00 hrs. for which no contract was valid or no

intimation was provided to MSLDC for scheduling such power, the fact which has not been denied by the Petitioner. The Commission opines that any injection, without valid contract and/or complying with scheduling requirements as per prevalent procedures for scheduling and dispatch, (however, unintentional and caused due to technical operational misunderstanding as submitted by the Petitioner) would not in principle be in the interest of disciplined operations of the grid which is of paramount concern from the perspective of reliable and safe operations of the Grid. Accordingly, the Section 32(2) mandates the SLDC to be responsible for optimal scheduling and dispatch of electricity within State, in accordance with the Contracts entered into with the licensees or generating companies operating in that State".

We are in agreement with the contentions of the SLDC and the observation of the State Commission in the impugned order. Admittedly, in this case power has been injected by the appellant primarily during the off

peak hours. Moreover, the power generated by the appellant on liquid fuel is expensive. The expensive power was injected by the appellant without any schedule, contract or agreement or knowledge of the SLDC and the distribution licensee. The appellant has also not been able to cite any sections of the 2003 Act, rules or regulations which would entitle him to any compensation for the injection of power without any schedule and agreement.

8. Unlike other goods electricity can not be stored and has to be consumed instantaneously. The generating plants, interconnecting transmission lines and sub-stations form the grid. State grids are interconnected to form Regional Grids and interconnected regional grids form the National Grid. The SLDC prepares the generation schedule one day in advance for the intra-state generating station and

drawal schedules for the distribution licensees based on the agreements between the distribution licensee and the generators/trading licensees, declared capacity by the generators and drawal schedule indicated by the distribution licensees. The generators and the licensees are expected to follow the schedule given by the SLDC in the interest of grid security and economic operation. If a generator connected to the grid injects power into the grid without a schedule, the same will be consumed in the grid even without the knowledge or consent of the distribution licensees. However, such injection of power is to be discouraged in the interest of secure and economic operation of the grid. In the present case, the expensive power was injected by the appellant without the knowledge or consent of the distribution licensee or agreement and without any schedule from SLDC. Admittedly, the

appellant's power was high cost power for which none of the distribution licensees had any agreement with the appellant. Therefore, there is no substance in the contention of the appellant for compensation.

9. The learned counsel for appellant has argued that the SLDC failed to intimate the appellant to stop the injection of power and, therefore, inferred that the power was needed by the distribution licensees. The respondent SLDC has already denied having any knowledge of injection of power in real time as no telemetered data has been provided by the appellant. In our opinion, the appellant itself has to be vigilant and non-interference by SLDC in real time during the relevant period can not be construed to be the confirmation of requirement of power of the appellant by the distribution licensees and authority to inject power into the grid. Moreover, SLDC is an

independent entity and can not authorize injection of power on behalf of the distribution licensees.

10. The appellant has referred to Sections 70 and 72 of the Indian Contracts Act, 1872 which are reproduced below:

> *"70. Obligation of person enjoying benefit of non-gratuitous act*
> *Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such another person enjoys the benefit thereof, the letter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."*
> "72. Liability of person to whom money is paid, or thing delivered, by mistake or under coercion
> *A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it."*

11. In our opinion the Section 70 and 72 of the Indian Contracts Act, 1872 will not be applicable in the present case. The present case is governed by the Electricity Act, 2003 which is a complete code in itself. In the electricity grid, the SLDC, in accordance with Section 32 of the Act is responsible for scheduling and dispatch of electricity within the state, to monitor the grid operations, to exercise supervision and control over the intra-state transmission system and to carry out grid control and dispatch of electricity through secure and economic operation of the State Grid. All the generators have to generate power as per the schedule given by the SLDC and the grid code in the interest of secure and economic operation of the grid. Unwanted generation can jeopardize the security of the grid. Moreover, in this case the injection of electricity was without the consent or knowledge of the

distribution licensees and the energy generated by the appellant was booked to the distribution licensees for balancing the energy generated/injected with energy consumption in the energy accounting. Accordingly, the decision in Haji Mohammed Ishaq WD. S.K Mohammed and others vs. Mohamad Iqbal and Mohamed Ali & Co. reported in (1978) 2 SCC 493 relied upon by the appellant will also not be of any relevance.

12. We have noticed that the appellant on an earlier occasion had also scheduled double of the amount of available power to two trading licensees simultaneously and had to pay unscheduled Interchange charges for the shortfall in supply with respect to the schedule. Thus, the appellant signed agreement to sell the available power simultaneously

with two parties. In the present case, as also on the earlier occasion the appellant has not been vigilant.

13. Thus, we do not find any substance in the claim of the appellant for compensation for the power injected into the grid without any schedule and agreement.

14. In view of our findings in the first question, the second question regarding the amount of compensation is also answered in the negative against the appellant. However, the State Commission has allowed compensation at the lowest variable cost of the state owned generating stations for the relevant time block to the appellant according to the clause 15.1.3 of the Final Balancing & Settlement Code with the direction that this order shall not be quoted as any kind of precedent. According to the learned counsel

for the appellant, this Code was made effective after the period when the power was injected by the appellant and thus this code was not applicable. In our opinion, the State Commission has used provisions of the Code which was effective when the petition was considered by the State Commission so as to give some compensation to the appellant. Clause 15.1.3 was applicable to the merchant generator for excess generation but the same was referred to by the State Commission considering the circumstances of the case. However, the distribution licensees have not disputed the compensation granted by the State Commission. Thus, we do not want to interfere with the findings of the State Commission in this regard.

15. The appellant has also prayed for striking down the provisions of the Tariff Regulation, 2005 and Final Balancing & Settlement Code of the State Commission.

However, this Tribunal is not the correct forum to challenge the Regulations of the State Commission.

16. In view of above we do not find any substance in the appeal and, therefore, we dismiss the same without any cost.

17. Pronounced in the open court on this **16th day of May, 2011.**

(Justice P.S. Datta)
Judicial Member

(Rakesh Nath)
Technical Member

REPORTABLE / NON-REPORTABLE

vs