

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
BHOPAL**

Sub: In the matter of petition under Section 86(1)(f) read with Section 86(1)(e) of the Electricity Act, 2003 and Section 7.01 of the Power Purchase Agreement dated 05.06.2014 for directions to MPPMCL to discontinue billing Petitioner for import of Power Supply under Regulation 10 of the MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) Regulations, 2010 and to instead net-off the imported power against exported power against exported power in terms of Section 7.01 of the PPA.

Petition No. 09/2018

ORDER

(Date of Order : 06.12.2018)

M/s. Renew Solar Energy (TN) Pvt. Ltd.

138, Ansal Chambers II, Bikaji Cama Place, Delhi -110066

- **Petitioner**

Vs.

M.P. Power Management Company Ltd.,

Shakti Bhawan, Rampur, Jabalpur – 482008

- **Respondent**

Shri Parinay Deep Shah, Advocate appeared on behalf of the petitioner.

Shri Sanjay Kanoje, DGM and Shri Manoj Dubey, Advocate appeared on behalf of the respondent.

2. The petitioner, M/s. Renew Solar Energy (TN) Pvt. Ltd. has filed this petition under Section 86(1)(f) read with Section 86(1)(e) of the Electricity Act, 2003 and Section 7.01 of the Power Purchase Agreement dated 05.06.2014 for directions to MPPMCL to discontinue billing Petitioner for import of Power Supply under Regulation 10 of the MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) Regulations, 2010 and to instead net-off the imported power against exported power against exported power in terms of Section 7.01 of the PPA.

3. In this petition the petitioner has prayed to:

- (a) Direct MPPMCL to allow the petitioner to raise bills in terms of Section 7.01 of the PPA which provides for billing on the basis of net-off of the import-export of auxiliary consumption power;
- (b) Direct MPPMCL to stop separately charging the petitioner for the power being imported for auxiliary consumption;
- (c) Set aside and quash the bills which have already been raised by MPPMCL on the petitioner with the direction to net-off and past imported power against the export power in the future bills.

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4. During the motion hearing held on 13.03.2018, the petitioner stated the contents of the petition. The Commission admitted the petition for further hearing and directed the petitioner to provide a copy of the petition to the respondent. The respondent was directed to ensure filing of the reply in hard copy by 10.04.2018, with a copy to the petitioner. The next date of hearing was fixed on 24.04.2018.

5. During the hearing held on 24.04.2018, the respondent submitted that they have not received the copy of the petition and they would need 10 days time to file reply. However, the petitioner submitted that they have served the petition to the respondent. Having heard the petitioner and the respondent, the Commission directed the petitioner to provide a copy of the petition to the respondent. The respondent was directed to ensure filing of the reply in hard copy by 10.05.2018, with a copy to the petitioner. The next date of hearing was fixed for 15.05.2018.

6. During the hearing held on 15.05.2018, the respondent submitted the reply vide letter dated 14.05.2018 and a copy was handed over to the petitioner on 15.05.2018. The petitioner sought time to file its written submission. The Commission observed that in spite of the directions to the respondent in the last daily order to ensure filing of the reply in hard copy by 10.05.2018, the respondent submitted reply vide letter dated 14.05.2018. Hence, the Commission directed the respondent to ensure to avoid such delay in future. Having heard the petitioner and the respondent, the Commission directed the petitioner to file its written submission, in hard copy by 30.05.2018, with a copy to the respondent. The case was listed for hearing on 05.06.2018.

7. During the hearing held on 05.06.2018, the petitioner submitted its rejoinder dated 04.06.2018 and a copy was handed over to the respondent on 05.06.2018. The respondent sought time to file its written submission. The Commission directed the respondent to file its written submission in hard copy by 30.06.2018, with a copy to the petitioner. The case was listed for hearing on 10.07.2018.

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8. During the hearing held on 10.07.2018 the petitioner reiterated the contents of the petition, submitted some documents and sought one week's time to file a written brief with a copy to the respondent. The respondent also agreed to submit the brief within a week's time after receipt of the petitioner's brief with a copy to the petitioner. The Commission considered their request and directed them to file written submissions accordingly.

9. M/s. Urja Law Chambers, the counsel for the petitioner vide their letter dated 16.07.2018 submitted the written submissions. They have broadly submitted as under:

“(i) The respondent is in default of Article 7.01 of the PPA which provides as follows:

“Every month, SLDC/RLDC shall intimate to the concerned Transco/ Discom (in whose area the drawl point is situated), the net power (kWh) delivered at Delivery Point (Export Units – Import Units = Net Power kWh) for the purpose of billing for sale by the Seller to the grid.”

(ii) Until April, 2016 the Petitioner was raising bills against the Respondent, for power supplied, on basis of Article 7.01 of the PPA i.e. net energy supplied. However, since May 2016, Respondent abruptly directed the Petitioner to raise bills on the basis of Gross Energy supplied, in complete contravention of Article 7.01 of the PPA.

(iii) The Respondent has incorrectly assumed that the Solar Plant of the petitioner shuts down during night hours when the solar radiation is not available and requires start up power to start generation of electricity. It is submitted that the solar power plants are always available to generate electricity and without the requirement of drawing any power, commences generation of electricity whenever solar radiation is made available. The petitioner's plant is not drawing power (during night hours) for synchronizing. Further, non-generation during night hours cannot be considered as an emergency/ shutdown for the solar plant. Thus, Regulation 10 of the MPERC RPO Regulations is inapplicable to the case of the petitioner. Power drawn during night hours cannot be billed in

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accordance with Regulation 10 since it does not fall within the three categories of Regulation 10, and thus must be billed in terms of Article 7.01 of the PPA.

- (iv) The Commission has already held in Petitions Nos. 20 & 42/2016, that power required by Wind Energy Plants for startup frequently, cannot be considered underdrawl of power during shut down or emergency periods. The same reasoning also applies in the case of the Petitioner i.e. power is required by the Petitioner daily during night hours when the plant is not generating and as such the same cannot be considered to be drawl of power during shutdown or such other emergency.*
- (v) The present petition is regarding projects developed under the FIT regime and not pursuant to a competitive bidding process. It is submitted that drawl of power in relation to projects developed under the FIT regime have to be dealt with in accordance with the applicable solar tariff order.*
- (vi) The respondent chose to sign the PPA which clearly provides for billing of net power. Thus, it is evident that the respondent waived off its right, allegedly provided under Regulation 10 of MPERC RPO Regulations, by signing the PPA.*
- (vii) It is submitted that the decision of the Respondent to bill the petitioner on basis of Gross Energy has been taken on a whim and has no basis in law. Therefore, the same merit to be disallowed.*

In the alternate

It is prayed that even if the respondent is allowed to charge the petitioner at temporary tariff for drawl of power, same must be covered under the Change in Law under Article 10.6 of the PPA. Accordingly, the excess amount that has to be paid should be allowed to be passed through by the Commission.”

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10. The Respondent, MPPMCL vide its letter dated 25.08.2018 has broadly submitted as under:

“(i) *The petitioner has made several averments and has claimed reliefs which may affect the interest of the respective Discom. The respective Discoms are separate legal entities and not consenting witnesses to the PPA. The energy which is drawn by the petitioner from the grid is the energy belonging to the Discom. The answering respondent is merely the procurer of power generated by the petitioner. The issue of netting-of the energy bills cannot be dealt without hearing the respective Discom, which may be the affected party. Hence, it is submitted that, in absence of the respective Discoms as a party to present petition, the same is not maintainable for non-joinder of affected and necessary party. The answering respondent had made a clear objection to this effect in its reply. Thereafter, the petitioner filed its rejoinder, merely reiterating the contents of the petition and without countering the specific reply/ objections made by the answering respondent. Even after being pointed out, the petitioner willfully chose to exclude and keep out the interested party, viz. the Discoms. Hence, the present petition is liable to be dismissed on this sole ground of non-joinder of necessary party.*

(ii) *A plain reading of Section 86(1)(e) of the Act very clearly suggests that it provides for promotion on following counts:*

(a) By providing suitable measures for connectivity with the grid;

(b) Sale of electricity to any person; and

(c) Specify for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee.

Open access and wheeling are covered under (a) and (b) above are regulated by separate regulations which are not in issue in this petition. Under (c), Minimum Purchase Obligations have also been prescribed by way of separate Regulations and which are not the subject matter of instant petition. Issues and disputes over methods of billing or netting off the bills are not one of the measures of promotion provided u/s. 86(1)(e) of the Act. Therefore, in the particular facts and circumstances of the Petitioner's case, the

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- present petition is not maintainable u/s. 86(1)(e) of the Electricity Act, 2003.*
- (iii) *The aforesaid Article 7.01 of the PPA nowhere provides that the Petitioner is required to submit bills on net-off basis of the power exported less the power imported by it. Further, since SLDC / RLDC are not consenting parties to the said PPA, the same are not obliged to provide such net-off power to the Petitioner. Therefore, in ordinary course, the Petitioner has to base its bills, for the power exported, on the basis of joint meter readings as provided in the PPA. Similarly the power imported needs to be billed separately by the respective DISCOM on the basis of joint meter reading. It is pertinent to mention here that the respective SLDC / RLDC is also not a consenting witnesses of parties to the PPA. The PPA alone, therefore, does not bound the SLDC/RLDC in any manner. Therefore, heavy reliance placed on Article 7.01 of the PPA in so far it provides for “Every month, SLDC/RLDC **shall intimate** to the concerned Transco/Doscom (in whose area the drawl point is situated), **the net power** (kwh) delivered at Delivery Point (Export Units – Import Unit = Net Power Kwh) for the purpose of billing for sale by the Seller to the grid.” is of no much avail to the Petitioner. The said provision of the PPA has to be read in harmony with the Regulations framed. Article 6.02 of the PPA provides for separate reactive energy and other charges payable by the Petitioner to the Seller. Therefore also, Article 7.02 needs to be read in harmony with Article 6.02 of the PPA.*
- (iv) *The Net Power i.e. Export Units less Import Units are obtained by the respective DISCOMS and/or MPPMCL only for the purpose of cross check and reconciliation of the power exported/sold and imported by the Petitioner.*
- (v) *The Petitioner does not have a banking arrangement with the answering Respondent. So, the power injected into the grid, while Petitioner is on-bar cannot be banked by it for auxiliary consumption while it is off-bar or while it is not generating electrical energy. Therefore, even in view of the provision of Article 7.01 of the PPA, the Petitioner is not entitled to net-off billing.*
- (vi) *Regulation 10 of the MPERC (Cogeneration and Generation of Electricity from*

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Renewable Sources of Energy) (Revision-1) Regulations, 2010 clearly provides as under:

“The Generator/Co-generation from Renewable Sources would be entitled to draw power exclusively for its own use from the Distribution Licensee’s network during shutdown period or during other emergencies. The energy so consumed would be billed at the rate applicable to Temporary Connection under HT Industrial Category.”

- (vii) *The above provision provides, legally, for the DISCOMS to raise separate bills for power drawn by the Petitioner for any purpose, be it auxiliary purpose, at the rates applicable to Temporary Connection under HT Industrial Category.*
- (viii) *When there exist separate tariffs for power drawn and power exported by the Generator, then it is impossible to bill both powers on one tariff, i.e., by netting of the power on the basis of net-data provided by SLDC.*
- (ix) *Article 14.01 (3) and (4) of the PPA bridges / harmonises the inconsistency between its Article 07.01 and Regulation 10 of the MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) (Revision-1) Regulations, 2010. The Petitioner has founded the Petition in ignorance to the provisions of Article 14.01 (3) and (4) of the PPA which provides as under:*
- 1. The **Seller shall be liable to** comply and implement the conditions imposed by the State Government/Central Government/CERC/MPERC/SERC as the case may be, which may be imposed from time to time.*
 - 2. **Compliance with Law:** Despite anything contained in this Agreement but without prejudice to this Article, if any provision of this Agreement shall be in deviation or inconsistent with or repugnant to the provisions contained in the Electricity Act, 2003, or any rules and regulations made there under, such provision of this Agreement shall be deemed to be amended to the extent required to bring in to compliance with the aforesaid relevant provisions as amended from time to time.”*

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In view of aforesaid clear legal provision, Article 07.01 of the PPA has to be read as deemed to amended by the provisions of Regulation 10 of the MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) (Revision-1) Regulations, 2010.

(x) *In view of all that is stated above, the Petition is liable to be dismissed:*

(a) *For being defective for non-joinder of necessary parties;*

(b) *For being not maintainable u/s. 86(1)(e) of the Electricity Act, 2003;*

(c) *For want of banking arrangement of the Petitioner for drawl of power for auxiliary and other use during shutdown period or during the period it is not generating power for reasons, whatsoever may be;*

(d) *In view of aforesaid clear contractual position as provided in Article 07.01 of the PPA having over ridden by the legal position as provided in Regulation 10 of the MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) (Revision-1) Regulations, 2010.”*

11. Having heard the petitioner and the respondents and on considering their written submissions, the Commission has noted that the main issue is regarding billing of drawl of power by the petitioner from the grid. The Commission has also noted that the Hon’ble APTEL passed an order on 23.04.2015 in Appeal No. 297/2013 (GMR Gujarat Solar Power Pvt. Ltd. Vs GERC & Others) wherein this issue was discussed in detail and after considering all aspects and held that:

“The Appellant is entitled to be charged for import of power at temporary HTP category tariff as determined by the State Commission in retail supply tariff order from time to time....”

12. The Regulation 10 of MPERC (Cogeneration and generation of electricity from renewable sources of energy) (Revision-I) Regulations, 2010 provides for import of power from the grid as under:

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“10. Drawing Power during shut down by Generator/Co-generation from Renewable Sources: The Generator/Co-generation from Renewable Sources would be entitled to draw power exclusively for its own use from the Distribution Licensee’s network during shutdown period of its Plant or during other emergencies. The energy consumed would be billed at the rate applicable to Temporary Connection under HT Industrial Category.”

13. Further as per Article 14.01(4) of the PPA, the provision of the Regulations shall prevail over the provision of the PPA. The aforesaid Article of the PPA is as under:

“4. Compliance with Law: Despite anything contained in this Agreement but without prejudice to this Article, if any provision of this Agreement shall be in deviation or inconsistent with or repugnant to the provision contained in the Electricity Act, 2003, or any rules and regulations made there under, such provision of this Agreement shall be deemed to be amended to the extent required to bring in to compliance with the aforesaid relevant provisions as amended from time to time.”

14. The Commission also noted that the export of power from solar power plant being the infirm power cannot be equated to the firm import temporary power drawn by the petitioner from time to time. The tariffs for export and import of power are different at the point of connection. The import of power is required by the plant at the time when the generation is not available for in house requirement of power and, therefore, power available at the point of connection is used by the plant as a temporary measure till the generation is available for in house requirement and export to the grid. Also, the tariff determined by the Commission from time to time for solar energy based power generation is the maximum tariff for the purpose of export of power to the licensee only by the developer/generator and is subject to the bidding. Also, the tariff for import of power by the developer/generator is governed through retail supply tariff order. As such, the question of considering the difference of tariff between import and export of power under

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“change of law” does not arise. Therefore, the Commission is of the view that the petitioner may be billed as per the extant provisions of the MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) Regulations, 2010 as amended.

15. In view of the above, the Petition No. 09/2018 stands disposed of.

Ordered accordingly.

(Mukul Dhariwal)
Member

(Dr. Dev Raj Birdi)
Chairman