Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 6 of 2009

In the matter of
Petition filed by M/s. Ind-Bharat Energies (Maharashtra) Ltd., seeking termination of Biomass Energy Purchase Agreement dated 18.10.2006

Shri. V.P. Raja, Chairman
Shri. S. B. Kulkarni, Member
Shri. V. L. Sonavane, Member

M/s. Ind-Bharat Energies (Maharashtra) Limited
……Petitioner

V/s

1. Maharashtra State Electricity Distribution Company Limited

2. Maharashtra State Electricity Transmission Corporation Ltd.

……Respondents

ORDER

7th January, 2010

M/s. Ind-Bharat Energies (Maharashtra) Ltd., filed a Petition under affidavit on 13.4.2009 seeking adjudication of a dispute under Section 86(1)(f) of the Electricity Act, 2003 ("EA 2003") with the Respondents. The Petitioner states that it is a generator of electricity having set up a 20 MW power plant at Kharab Kandgaon village, Nanded District, and thus a generating company within the meaning of Section 2(28) of the EA, 2003. The Petitioner states that it entered into a Biomass Energy Purchase Agreement dated 18.10.2006 ("BEPA") with Respondent No. 1. The BEPA provided for various conditions precedent as set out in Article 3 thereof, which were required to be fulfilled and complied with.

Accordingly, the Petitioner was required to furnish a Bank Guarantee to secure the penalty amount for non-compliance of use of fossil fuel as mentioned in the BEPA in terms of Clause 3 of Article 3 of the BEPA which provides as follows:

> *"**3. Conditions Precedent***
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> *The obligations under this Agreement are subject to the satisfaction in full of the following conditions precedent:*
>
> *1. ……*
>
> *2. ……*
>
> *3. Project holder shall have provided a Bank Guarantee for penalty amount on non-compliance on use of fossil fuel. (Amount equivalent to annual generation corresponding to 80% PLF multiplied by penalty of Rs. 0.30 per unit) as specified under Article – 11, Section 4 of this agreement."*

The Petitioner furthermore refers to clause 9 of Article 3 of the BEPA which stipulates that "*Non-fulfillment of Conditions Precedent within twelve (12) months from the date of signing of this agreement, shall terminate this agreement automatically unless agreed in writing by MSEDCL".* The Petitioner's contention is that, by not furnishing the bank guarantee as referred to in Clause 3 of Article 3 of the BEPA, the BEPA did not come into operation and effect as it stood automatically terminated in terms of Clause 9 of Article 3 of the BEPA. Thus, upon the automatic termination, the Petitioner had no obligation to supply electricity to Respondent No. 1 under the BEPA. That thereafter the Petitioner communicated this position to Respondent No. 1 vide its letter dated 6.10.2008 and asked Respondent No. 2 to synchronize its grid with the plant of the Petitioner by 8.10.2008. However, Respondent No. 2 called upon the Petitioner to obtain a confirmation in writing from Respondent No. 1 that the said BEPA stood automatically terminated. The Petitioner contends that this pre-condition imposed by Respondent No. 2 was without any basis and was patently incorrect and illegal. The Petitioner asked Respondent No. 2 to withdraw the said requirement, but Respondent No. 2 refused to synchronize the plant with the grid operated by Respondent No. 2. The Petitioner took up the matter with Respondent No. 1 and asked it to communicate its consent to SLDC, MSETCL for short-term power purchase for the initial 15 days of the generation enabling the Petitioner to synchronize the power plant. Vide letter dated 10.11.2008, Respondent No. 1 disputed the claim of the Petitioner that the BEPA stood automatically terminated and called upon the Petitioner to commission its plant and start commercial operation of the plant as per the BEPA.

2. Petitioner states that even if it is assumed (without admitting) that the BEPA was in operation, Respondent No. 1 was obliged under Clause 4.2 (10) *"to co-ordinate with MSETCL to complete the construction of transmission facility including equipments at inter-connection points, if required, within MSETCL grid system prior to Schedule Date of Commencement"* and *"to enter into energy transmission and wheeling agreement with the project holder for sale to third party"*. According to the Petitioner, there is an event of default on the part of MSEDCL under Clause 16.3 of the BEPA for failing to comply with its obligations under Article 4.2 and for which the remedy under Clause 16.4 is that the Petitioner is entitled to sell energy to third party consumers.

3. While the aforesaid difference was existing between the parties, in the meantime, to curtail operational losses, the Petitioner offered to deliver power generated by it to the grid of Respondent No. 2 on commercial terms to be agreed upon mutually later, which the Respondents refused to accept by not permitting it to connect to the grid.

4. On being aggrieved, the Petitioner filed a Writ Petition No. 2585 of 2008 in the Bombay High Court. In the meanwhile, Respondent No. 1 vide its letter dated 31.12.2008 permitted the plant to be synchronized for effecting sale for the time being to Respondent No. 1 on the tariff as approved by the Commission in its Order dated 8.8.2005 (Case No. 37 of 2003) whereunder the Commission had determined the tariff, procurement process and related dispensation for the purchase of power by Licensees in Maharashtra from generating stations in the State using biomass as fuel. Respondent No. 1 also vide its letter dated 31.12.2008 extended submission of Bank Guarantee by the Petitioner within one month, i.e. before 31.01.2009. Accordingly, Respondent No. 2 synchronized the plant with its grid on 8.1.2009 and the Petitioner has been supplying to Respondent No. 1 on a short-term basis. Subsequently, the Writ Petition was withdrawn by the Petitioner with liberty to approach this Commission in terms of Hon'ble High Court's order dated 27.1.2009.

5. That thereafter, the Petitioner raised its bills on Respondent No. 1 vide its letter dated 18.2.2009. Due to inadvertent errors in calculation, Petitioner raised another bill vide its letter dated 19.2.2009. In reply, Respondent No. 1 vide its letter dated 6.3.2009 took the stand that the Petitioner was locked in a long term energy purchase agreement and that therefore the energy bills would be paid as per the terms of the BEPA.

6. In the aforesaid background the Petitioner has prayed as under:

"

*(a) This Hon'ble Commission be pleased to hold and declare that the said BEPA is terminated and accordingly this Hon'ble Commission be pleased to order and declare that the Respondent No. 2 is entitled to supply power generated by it under the Open Access Regulation to a distribution licensee of its choice.**

(b) This Hon'ble Commission be pleased to direct the Respondent No. 2 to continue the synchronization of the Petitioner's plant with the Respondent No. 2's grid without insisting that the Petitioner should supply power only to Respondent No. 1 as per BEPA.

(c) This Hon'ble Commission be pleased to order and direct the Respondent No. 2 to pay a sum of Rs. 2436.48 Lac as losses and damages suffered by the Petitioner from October 2008 till the January 7, 2009 (date that the Respondent No. 2 synchronized the plant of the Petitioner with its grid at Mukhed Sub/st, Mukhed, Nanded District); and

(d) The Hon'ble Commission be pleased to order and direct the Respondent No. 2 to pay a sum of Rs. 2,74,27,125/- as losses and damages suffered by the Petitioner from January 7, 2009 (date the Petitioner synchronized its plant with the grid of the Respondent No. 2 at Mukhed Sub/st, Mukhed, Nanded District) till the disposal of this Petition on account of the Petitioner having been compelled to supply electricity to the Respondent No. 1 despite the termination of the BEPA."

* *Prayer (a) has a typographical error. The word "the Respondent No. 2" should be read as 'Petitioner'.*

7. In one of the grounds, the Petitioner states that the action of the Respondents to compel the Petitioner to supply under the BEPA at extremely low rates was causing tremendous economic hardship to the Petitioner, considering the present market scenario, wherein the price of the Biomass fuel has increased significantly, high interest cost and other constraining factors such as non-availability of biomass, etc. These would not enable the Petitioner to service its loans, but if the Petitioner is allowed to sell power in the open market, then the Petitioner would be able to effectively service its loans and get a minimal return on its equity investment. In light thereof, it is unreasonable, unjustified and illegal for the

Respondent No. 1 to force and coerce the Petitioner to sell power to Respondent No. 1 and it is equally illegal for the Respondent No. 2 to insist that the Petitioner obtains a written confirmation from the Respondent No. 1 that the BEPA stands automatically terminated. In any event it is submitted that it is commercially unviable for the Petitioner to supply electricity to Respondent No. 1 under the BEPA due to phenomenal increase in the cost of biomass fuel.

8. A hearing was held on 7.5.2009. Sh. Gaurav Joshi, Advocate appeared for the Petitioner. Sh. R.G. Sonawane, and Sh. U.V. Deo appeared for Respondent No. 1.

9. Respondent No. 2 filed its reply on 1.7.2009 essentially contending that the Petitioner was not complying with the requirements put forth by the MSLDC for processing the application of the Petitioner for short term open access. On 6.1.2009, the STU granted connectivity and MSLDC gave permission to the Petitioner to synchronize its plant on the same day and therefore there was no delay on the part of the SLDC. The Petitioner synchronized its plant on 8.1.2009.

10. Respondent No. 1 filed its reply on 29.7.2009. It is contended therein that the BEPA is in line with the Commission's Order dated 8.8.2005 in terms of its tenure for 13 years as a long term power purchase; two part tariff subject to Rankine Cycle Technology; termination of the agreement on non-fulfilment of the conditions precedent within 12 months from the date of signing of the agreement and other conditions. By not fulfilling a condition precedent (CP") deliberately, the Petitioner cannot legally claim automatic termination of the BEPA. The Respondent No. 1 in this regard has relied on the order of the Commission dated 25.5.2009 (Case No. 48 of 2008 - M/s. Rake Power Ltd.) wherein it was held that *"The words* ***"unless agreed in writing by MSEDCL"*** *means that it is for MSEDCL to avoid termination of the EPA despite non-fulfilment of conditions precedent by the Petitioner. MSEDCL is entitled to waive any conditions precedent.* ***Condition No. 3 (9) does not entitle the Petitioner to terminate the EPA.****"* Respondent No. 1 also submitted that the concern regarding increased cost in biomass may be worked out between the Petitioner and Respondent No. 1, for which Respondent No. 1 will extend its support. As such, increase in the cost of biomass fuel cannot be the cause of automatic termination. Moreover, as against the stipulation of termination of the agreement for non-fulfillment of CPs within 12 months from the date of signing of the agreement, the Petitioner has informed regarding termination vide their letter dated 6.10.2008 i.e., almost 24 months from the date of signing of the

agreement. The claim for termination is illegal because it has been raised after availing all sorts of co-operation, co-ordination from the Respondents including erection for evacuation arrangements, availing back up power, permission for synchronization prior to installation of check meter, testing trails etc. Thus there is clearly a malafide intention on the part of the Petitioner. Moreover, termination of the BEPA on non-fulfillment of a CP is not in larger interest of both the parties. The stand of Respondent No. 1 is that the BEPA has not been terminated and continues to be in operation for which the Petitioner has been requested from time to time to start commercial operation and the delivery of power to the grid of Respondent No. 2 on commercial terms to be agreed upon mutually later cannot curtail the operation of the BEPA. In any case sale of power to third party by terminating the BEPA to make additional profit is not sustainable. As regards the permission by the SLDC to grant open access to the Petitioner the SLDC is bound under Section 32 of the EA 2003 to act "*in accordance with the contracts entered into with Licensees or the generating companies operating in the State"*. As regards the damages as claimed it is not for the Petitioner to so claim but it is for Respondent No. 2 to claim damages from the Petitioner for non-supply as per the BEPA since October 2008 thereby forcing the Respondent No. 1 to purchase power at high cost. On this basis Respondent No. 1 has stated that the present petition should be dismissed with costs and in any case the Petitioner has no right to sell power to third parties in view of the continuation of the BEPA with Respondent No. 1.

11. A hearing was held on 15.9.2009. Sh. Gaurav Joshi, Advocate appeared for the Petitioner. Sh. Ravi Parkash, Advocate appeared for Respondent No. 1. Contentions raised in the petition and reply were reiterated by the parties.

12. The Petitioner filed its written submissions on 23.9.2009 alongwith an affidavit dated 19.9.2009 furnishing details of financial closure as per the Commission's directions given during the aforesaid hearing held on 15.9.2009. In its submissions, the Petitioner referred to its contention as raised in the hearing on 15.9.2009, when it had contended that where the terms of a contract are clear and unambiguous, the contract must be strictly construed on the basis of the words used in the contract and not on the basis of the surrounding circumstances, i.e., the conduct of the parties or the history behind the signing of the agreement. To support its aforesaid argument, the Petitioner relied upon and submitted copies of the following judgments:-

(a) *Smt. Kamala Devi v/s Seth Takhatmal and anr. [AIR 1964 SC 859];*

(b) *Central Bank of India Ltd. v/s Hartford Fire Insurance Co. Ltd. [AIR 1965 SC 1288];*

(c) *State of Gujarat (Commr. of Sales Tax, Ahmedebad) v/s Variety Body Builders [AIR 1976 SC 2108];*

(d) *Navnital & Co. and ors. v/s Kishanchand & Co.*

In the light of the above referred judgements, the Petitioner submitted that these judgements have consistently laid down that contracts are to be strictly construed and interpreted in accordance with the terms used and agreed upon by the parties.

13. Respondent No. 1 also submitted its written submissions on 3.11.2009, wherein Respondent No. 1 referred to Clause 3(3) of the BEPA, which provides that the BEPA shall terminate automatically on 17.10.2007, if the Petitioner fails to furnish the Bank Guarantee within 12 months. In this context, MSEDCL stated that the Petitioner continued its commissioning activities of its 20 MW Biomass based plant. In this regard, Respondent No. 1 referred to a letter from SE (TQA) Ref No. 284 dated 4.9.2008 in terms whereof "*for start up power the project holder is requesting the power from MSEDCL itself with Contract Demand of 1500 KVA, which is sanctioned by SE O&M Vide L. No. 4203 dated 23.07.08.".* Respondent No. 1 provided start up power on 23.7.2008 required for testing and commissioning of the plant which is clearly borne out from the letter of MSEDCL Ref No. 29269 dated 21.7.2008. Respondent No. 1 also permitted synchronization by installing main meter for recording sale of units to Respondent No. 1. As such it has been said that the power evacuation arrangement has been completed within two years as per Article 4.1(iii) of the BEPA. Respondent No. 1 submitted that the Petitioner have enjoyed all the facilities from MSEDCL/MSETCL until the commercial operation of the plant. Therefore, the plea of the Petitioner for automatic termination of the BEPA cannot be sustained on the basis of Clause 3(3) of the BEPA. Respondent No. 1 submitted that the Petitioner has submitted its petition for automatic termination after almost 24 months, contrary to the period of 12 months as per

Clause 3(3) of the BEPA, thereby signifying that they must have been exploring on their right to terminate the BEPA as and when they intend on the basis of non-fulfillment of conditions precedent at their end. Respondent No. 1 also referred to Clause 11(4) of the BEPA, where the Petitioner was under an obligation to provide a Bank Guarantee, being a project holder intending to use fossil fuel before commissioning of their plant. In spite of failing to fulfill this obligation, the Petitioner has raised the issue of automatic termination. The Petitioner, in its petition has claimed automatic termination on the ground that *"plant has become commercially unviable due to unprecedented and phenomenal increase in the cost of biomass"*. In this regard, the Respondent No. 1 referred to the fact that the Commission has already determined an interim rate of Rs. 4.28/- per unit in its order in Case No. 83 of 2008 to make the biomass based IPP projects in the state viable.

14. Having heard the parties and after considering the materials placed on record, the Commission is of the view that the declaration sought by the Petitioner in its prayers for the automatic termination of the BEPA on the basis of the wordings in Clause (3) read with Clause (9) of Article 9 of the BEPA requires to be examined as herein below:

> *"**3. Conditions Precedent***
> *The obligations under this Agreement are subject to the satisfaction in full of the following conditions precedent:*
>
> *1. ……*
> *2. ……*
> *3. Project holder shall have provided a Bank Guarantee for penalty amount on non-compliance on use of fossil fuel. (Amount equivalent to annual generation corresponding to 80% PLF multiplied by penalty of Rs. 0.30 per unit) as specified under Article – 11, Section 4 of this agreement."*

> 9. *"Non-fulfillment of Conditions Precedent within twelve (12) months from the date of signing of this agreement, shall terminate this agreement automatically unless agreed in writing by MSEDCL".*

The objective of Clause (3) of Article 9 is that the Petitioner must use non-fossil fuels. And failure to adhere thereto would make the Petitioner liable to penalty. This is for the reason that in terms of Article 1(1) "*The EPA shall be applicable to "Rankine Cycle technology" based biomass energy generation projects / facility located in Maharashtra, harnessing biomass in Maharashtra, and commissioned in the state for sale of electricity to MSEDCL".* Article 4.1 provides "*Project holder's obligations ..(x) Project holder shall submit the monthly fuel usage statements for verification by MSEDCL alongwith the monthly energy bills and shall also submit the statement to MEDA for record, monitoring and verification."* Article 6.2 (1) provides that *"The Facility should be designed to operate on Rankine Cycle based technology".* In terms of Article 11(1) "*The Facility should be designed to use and should use non-fossil fuels available within Maharashtra such as crop residues, agro-industrial residues, forest residues, etc., and other biomass fuel types".* For evacuation of power, Article 8.3 of the BEPA requires the Petitioner to provide an interest free advance to MSEDCL / MSETCL equivalent to 50% of the costs of works. Article 8.4 provides "*However, MSEDCL shall have the right to withhold or delay or deduct or partly pay the installments if there is a default by Project holder as set out in Article 16, Section 16.1".* In terms of Article 16.1" *The occurrence of any one of the following shall constitute an event of default of the Project holder ("Project holder Event of Default") (i) Project holder fails to comply with the conditions of fossil fuel usage during any year as mentioned under Article 11 of this agreement".* The context of Clause (3) of Article 9 of the BEPA is borne out from a reading of the aforesaid clauses with the following clauses of the BEPA-

(i) Article 11(4) – "*Before commissioning of the project, such Project holders who are proposing to use fossil fuels shall furnish a Bank Guarantee covering the penalty amount (i.e amount equivalent to annual generation corresponding to 80% PLF, multiplied by penalty of Rs. 0.30 per unit) to MSEDCL .*

(ii) Article 11(5) – "*Non-compliance of the condition of fossil fuel by a Project holder during any year (as outlined in clause 2 and 3) shall attract a penalty at the rate of 30 paise per unit corresponding to the entire energy sale by such Project to MSEDCL during that year. Further in case of non-compliance beyond one year, MSEDCL shall have the right to terminate the agreement. MSEDCL shall invoke the bank guarantee at the occurrence of default for the second time, alongwith termination of the EPA".*

Thus it was essential for the Petitioner to have furnished a Bank Guarantee for penalty amount on non-compliance on use of fossil fuel. The non-fulfillment of this "Conditions Precedent" within twelve (12) months from the date of signing of this agreement would terminate the BEPA automatically subject to the same being agreed in writing by MSEDCL. The words "*unless agreed in writing by MSEDCL"* as appearing in Clause (9) of Article 3 means that the termination of the BEPA is subject to confirmation in writing by MSEDCL. This also means that MSEDCL has the right to waive any "Conditions Precedent" which has not been fulfilled by the Petitioner within twelve (12) months from the date of signing of the BEPA. Admittedly, MSEDCL has not confirmed that the BEPA stands terminated due to non-fulfillment of the condition to furnish a Bank Guarantee as referred to in Clause (3) of Article 9. In fact, MSEDCL has opposed the termination on the ground of non-fulfillment of the said condition by the Petitioner. MSEDCL also vide its letter dated 31.12.2008 extended submission of the said Bank Guarantee by the Petitioner within one month, i.e. before 31.01.2009. The judgments relied upon by the Petitioner lay down that clear language in a document would need to be read as it is and one would have to give effect to the plain meaning of such words. The Commission is of the view that the aforesaid findings are in consonance with the principles laid down in the said judgments. Thus, the words "*unless agreed in writing by MSEDCL"* as appearing in Clause (9) of Article 3 cannot be rendered illusory by permitting the Petitioner to give it a go by. The words "*unless agreed in writing by MSEDCL"* are to be strictly construed in accordance with the principles laid down in the said judgments quoted by the Petitioner. In view of the above, the Commission holds that the BEPA does not stand terminated on the basis of Clause (3) of Article (9) thereof as MSEDCL has not agreed in writing to the same. On the other hand, MSEDCL extended the date for the submission of the said Bank Guarantee by the Petitioner within one month, i.e. before 31.01.2009. In terms of Article 12.1(b) read with Article 16.4, the Petitioner is entitled to sell to third party consumers in case of any default by MSEDCL which occurs and is continuing. In this petitioner has not claimed in breach of contract.

15. Article 12.1(a) of the BEPA provides that "*The Project holder undertakes not to sell any energy (all of which is committed to MSEDCL) to any other person barring the condition mentioned in clause b of this article*". However, clause (b) which provides for default on the part of MSEDCL and that too being continuous in nature, is not the case of the Petitioner. The Petitioner's stand is that the BEPA stood automatically terminated due to non-fulfillment of the condition to furnish bank guarantee under clause (3) of Article 9. On this the Commission has already given its finding in the above paragraph. Furthermore, the

Commission notes from the Petitioner's letter dated 9.10.2008 (Exh-B) that the plant has "*..become commercially unviable due to unprecedented and phenomenal increase in the cost of biomass. In order to make it commercially feasible power project we have decided to operate the power plant as an Independent Power Plant (IPP) on Merchant basis*". In the petition, the Petitioner states that the action of the Respondents to compel the Petitioner to supply under the BEPA at lower rates was causing tremendous economic hardship to the Petitioner, considering the present market scenario, wherein the price of the Biomass fuel has increased significantly etc. It was stated that these would not enable the Petitioner to service its loans, but if the Petitioner is allowed to sell power in the open market, then the Petitioner would be able to effectively service its loans and get a minimal return on its equity investment. The Commission is of the view that these are not legally tenable grounds for seeking termination of the BEPA with Respondent No. 1. Both parties have consciously taken certain risks while executing the BEPA. There must be sanctity of contract. In light of the above, the Commission is of the view that the Petitioner must honour the terms of the BEPA. In the circumstances, prayers sought by the Petitioner are rejected.

With the above findings, the present petition stands disposed of.

Sd/-	Sd/-	Sd/-
(V. L. Sonavane)	(S. B. Kulkarni)	(V. P. Raja)
Member	Member	Chairman

(Sanjay Sethi)
Secretary, MERC