



ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION
4th & 5th Floors, Singareni Bhavan, Red Hills, Hyderabad - 500004

O.P. No.56 of 2011

Dated 16.11.2012

Sri A.Raghotham Rao, Chairman
Sri C.R.Sekhar Reddy, Member
Sri R.Ashoka Chari, Member

Between:

M/s. Hyderabad Chemicals Limited &
Its sister concern M/s Hyderabad Chemical Products Limited
A-24 / 25, APIE, Balanagar, Hyderabad
rep by its Managing Director

... Petitioner

AND

Central Power Distribution Company of A.P. Ltd.,
Mint Compound, Hyderabad
rep by its Chairman & Managing Director

....Respondent

This petition has come up for hearing on 21.07.2012 in the presence of Sri. Koka Srinivasa Kumar, Advocate for the petitioner and Sri. P. Shiva Rao, Advocate for the respondent, the Commission passed the following:

ORDER

The above mentioned petitioner filed a petition u/s 62(1) clause (a) r/w Section 86 (1)(b) and (f) of the Electricity Act, 2003 seeking adjudication of dispute between the petitioner and the respondent and to determine tariff, fixing the same at Rs.3.50 per unit as per the earlier order of the Commission.

2. The averments mentioned in the said petition, in brief, are as follows:

a) The petitioner is a company registered under Companies Act 1956 and has its Corporate Office in Balanagar at Hyderabad and the wind project at Kadavakallu village in Ananthapur district. The objectives and activities of company include manufacture of agro chemicals and formulations apart from setting up of wind mill projects for clean and green energy. The petitioner along with its sister concern has

established of wind project of total capacity of 4.5 MW, after obtaining necessary permissions and sanctions from the concerned agencies.

b) The petitioner entered into a Power Purchase Agreement (PPA) with the respondent on 09.06.2006. The tariff agreed in the PPA is Rs. 2.70 per unit against the rate of Rs. 3.37 per unit as determined by the Commission in its order dated 20.03.2004 in R.P.No 84 of 2003 in O.P.No. 1075 of 2000. The parent company, inter-alia, entered into an agreement with its sister concern, 0.75 MW wind developer for having common 33 kV line for evacuation of power at 33 kV level for interconnecting to 132 / 33 kV Sub-station with necessary metering arrangements.

c) The wind power association had obtained clarification from the Commission that the tariff applicable for the projects coming up between 01.04.2004 to 31.03.2009, the rate determined by the Commission is applicable. Therefore the petitioner established the wind project and synchronized the project with the grid on 31.03.2005. The respondent did not enter into an agreement, but suggested that it should go for open access as it is not willing to purchase power from the project.

d) Having no alternative, had approached this Commission seeking directions to the respond to enter into a PPA and also pay for the energy supplied by it. However the same was dismissed holding that the Commission cannot interfere in the matter as there is no PPA between the parties.

e) The petitioner was under severe constraint and was suffering losses apart from pressure from the bankers who had funded the project. Therefore, it agreed for tariff of Rs 2.70 per unit even though it was not viable. By virtue of the above position between the contracting parties, an unequal bargaining power prevailed over the petitioner. The respondent being in a dominant position to control the transaction, obtained an unfair advantage over the petitioner, by the said position and got the contract concluded for tariff of Rs. 2.70 per unit, thus establishing undue influence and hence there was no free consent to the contact.

f) The tenure of the PPA is for 20 years and during the first 10 years, the purchase price is fixed as Rs. 2.70 per unit and thereafter, the purchase price would be reviewed. Considering the huge investment in the project and unviable tariff of

Rs.2.70 per unit, the petitioner has been facing financial distress after commissioning the project. In addition, multiple barriers faced during the project implementation stage, the project also faces an investment barrier. The internal Rate of return is one of the most commonly used tool to establish project's viability. Even with a buy-back price of Rs.3.37 per unit as per the tariff order of APERC dt. 20.03.2004 in R.P.No. 84 of 2003 in O.P.No. 1075 of 2003, the equity IRR worked out to be only 12.94% over a period of 20 years and 7.01% for a period of 10 years. With a buy-back price of Rs 2.70 per unit the equity IRR over a period of 10 years (as per the existing PPA, respondent shall be paying Rs.2.70 per unit for 10 years and thereafter it will be reviewed and hence 10 years period was considered for calculation) is abnormally low and is not even 1%.

g) The cost of spares over the years has also risen. In most of the cases, the spares have to be imported, which again adds to the cost. The operational expenses have steeply increased. Thus, considering all these factors, it is evident that it is unviable to run the project at low tariff of Rs. 2.70 per unit. It is ironical that while Developers who commissioned the project before March 2005, are getting Rs.3.37 per unit and the developers who would commission the project now would get the price as fixed by the Commission i.e., Rs.3.50 per unit. It was only the petitioner (4.5 MW) and other developers with total installed capacity of 1.35 MW have signed PPA for a very low tariff of Rs. 2.70 at that time.

h) There was no addition in Wind Power capacity in A.P. till the year 2010 because of unviable tariff of Rs.2.70 per unit fixed during 2004-05. The petitioner seeks practical decision from the respondent which would help in ensuring existence of the project rather than its extinguishment. The respondent may appreciate that the average buy-back price in India is not less than Rs 3.50 per unit for wind power projects. The petitioner submitted a representation dt. 24.11.2010 for modifying the agreement to change the tariff under the PPA at Rs. 2.70 per unit to Rs.3.50 per unit, as fixed by APERC by reviewing the said purchase price under special provision of the agreement laid down under Article 11. In spite of receiving said letter, respondent neither called the petitioner for discussion nor communicated with the petitioner. The respondent sent a letter dt. 22.12.2010 informing the petitioner that it did not consider the request of the petitioner to review the purchase price. The respondent did not

give reasons for rejecting the request of the petitioner and such an order is arbitrary on the part of the respondent.

i) The petitioner had earlier approached the Energy Department, GoAP and submitted representation on 25.07.2009 with a request for fixation of price at par with new projects pleading that the rate of Rs.2.70 per unit is grossly un-remunerative. The Energy Department of GoAP has directed the petitioner to approach the Commission and to file a petition for necessary relief vide its letter dt. 26.04.2010. The inaction of the respondent has left no choice except to approach the Commission to modify the tariff rate fixed under PPA dt. 09.06.2006.

3. On 21.01.2012, the respondent filed the counter. The material averments of the counter are briefly as follows:

a) APERC issued Renewable Power Purchase Obligation (RPPO) Order in O.P. No. 9 of 2005 on 27.09.2005 fixing percentage of power to be purchased from NCE sources by the licensees at 5%. The validity of the order was for the control period from 2005-06 to 2007-08. As per para (21) of the said order, the ceiling for tariff for purchase of power from NCE sources is as per order dated 20.03.2004 in R.P. No. 84 of 2003 on O.P.No.1075 of 2000. In compliance of the RPPO order dated 27.09.2005 and considering the wind power tariff in neighbouring states at that point of time, the respondent negotiated power purchase price with the petitioner and entered into two separate PPAs with M/s. Hyderabad Chemical Limited (HCL) and its sister concern i.e., Hyderabad Chemical Products Limited (HCPL) on 09.06.2006 for 3.75MW and 0.75MW capacity wind power plants located at kadavakallu in Ananthapur District at a negotiated tariff of Rs.2.70 per unit for the first 10 years of operation. APERC granted consent to the said PPAs on 24.06.2006. Since then the plants have been in operation and the payments are being made as per PPA, i.e, at the rate of Rs.2.70 per unit. The petitioners have been receiving the same without any demur.

b) The GoAP issued wind power policy vide G.O.Ms.No.48 dated 11.04.2008 which was subsequently amended by G.O.Ms.No.99, dated 09.09.2008, wherein the tariff for the wind power projects was fixed as Rs.3.50 per unit for the first 10 years of operation subject approval of APERC. The Commission vide order dated 01.05.2009

accepted the tariff for the wind power projects as Rs.3.50 per unit for the first 10 years of operation for the projects which have entered PPAs between 01.05.2009 to 31.03.2014. Thereafter, the petitioner and its sister concern vide letter 24.11.2010 requested CMD of the respondent company to review power purchase price fixed under PPA dated 09.06.2006 i.e, Rs.2.70 per unit to Rs.3.50 per unit. But since there is a concluded contract i.e., PPA dt.09.06.2006, the respondent rejected the said request.

c) HCL and HCPL are two separate legal persons, and one petition is not maintainable for two legal persons. On this ground the petition is liable to be rejected as the same is contrary to the Rules of procedure.

d) Admittedly, the project was established for captive purpose and the supply to respondent is only surplus power. Therefore, the petitioner is precluded from comparing with other projects who are established mainly to supply power to respondent.

e) The PPA was signed and after getting consent of Commission, it was executed by the parties with free will and volition. It is absolutely false to say that the petitioner was compelled to sign PPA with tariff of Rs.2.70. The petitioner was always at liberty to go for open access as per the prevailing open access rules of 2005. Not availing the said avenue clearly shows that the petitioner having examined the pros and cons took decision as per its wisdom considering the transaction as beneficial to them and thus entered into PPA with their eyes wide open. Thus it is incorrect to state that there was unequal bargaining between the parties.

f) The petitioner is precluded from comparing with other developers who have established their projects at different periods and entered into contracts considering the circumstances prevailing then. It is incorrect to state that this Commission has powers to declare the concluded contract as void on the ground of compelling circumstances preceding the execution of PPA. Having given approval for the PPA, this Commission has no jurisdiction to entertain the said claim of compelling

circumstances at the time of entering PPA and to declare the PPA as not valid on that ground.

g) The representation of the petitioner to increase the tariff is not permissible under law and therefore, the same was rejected by the respondent. There is no cause of action to file this petition. The alleged cause of action is imaginary and speculative in nature. The petition is barred by law of limitation.

h) Apart from this petitioner, four others have entered PPAs during that period with tariff of Rs.2.70 per unit.

i) It is prayed that the Commission may be pleased to dismiss the petition.

4. On 02.06.2012, the petitioner filed the rejoinder, projecting the following grounds:

a) The Commission has fixed tariff for the sale of power to the respondent by all existing as well as new projects commissioned during 01.04.2004 to 31.03.2009 as Rs.3.37 ps as per its order dated 20.03.2004 in RP No. 84 of 2003 in OP No. 1075 of 2000. In spite of fixing the tariff at Rs.3.37 during the relevant period of the commissioning of the project, respondent created compelling circumstances for the petitioner to enter into PPA dt.09.06.2006 after 15 months fixing a tariff of Rs.2.70, which is not viable for the project. The price fixed by the Commission does not leave any scope for negotiation and any negotiation supposed to be undertaken by the respondent amounts to arm-twisting.

b) Even if the tariff in neighbouring states prevailing at that point of time is considered, tariff of Rs.2.70 ps is not viable to the project.

c) The contention that one petition is not maintainable for two legal persons, is not correct. As the relief sought by the petitioners is one and the same, a common and joint petition is maintainable.

d) The capacity was set up initially 2.25 MW for captive consumption and as well as sale to APTRANSCO. Subsequently additional capacity of 4.50 MW wind power

project was commissioned only for the sale to APTRANSCO. So respondent's contention that as the project is for captive consumption, the order dated 20.03.2004 cannot be relied is false and misleading.

e) Petitioner brought to the notice of the respondents through letters dated 17.05.2006 and 08.06.2006, which reveal that due to tremendous financial constraint petitioners have come forward to sign PPA even though Rs.2.70 per unit is not viable.

f) The Respondents did not come forward to enter into PPA for long time. Left with no other alternative, petitioner agreed to negotiated tariff and then only respondents came forward to enter into PPA. Petitioners did not receive amount for the power supplied prior to entering into PPA. PPA is executed after 15 months of setting up of the project and it clearly shows that compelling circumstances prevailed at the time of execution of the PPA. It is not correct to say that respondent was very reluctant to enter into PPA, respondent was only dodging the issue anticipating that petitioner would come forward to sign the PPA with negotiated tariff due to financial losses.

g) The petitioner submitted number of letters to the respondent stating that there is pressure from bankers and petitioner is facing financial constraints. The circumstances which led to enter into PPA with respondent with the tariff Rs.2.70 when the Commission declared Rs.3.37 is material enough to support petitioner claim that there is no free will and consent to enter into PPA.

h) The Commission has fixed tariff at Rs.3.37 keeping in view of the cost of spares and operational expenses. The petitioner who is paid a tariff of Rs.2.70 fixed by the respondent without considering the tariff fixed by the Commission, is justified in seeking the tariff as fixed by the Commission.

i) The contention that the petition is barred by the law of limitation is legally untenable and respondent is put to strict proof of the same.

5. The learned advocate for the petitioners argued that the petitioners started wind power projects and entered into PPA on 09.06.2006 and they were compelled to enter into PPA @ Rs.2.70ps per unit though it was Rs.3.50ps per unit to the other developers and that the Commission itself passed several orders granting Rs.3.50ps per unit. It is also further contended that they were addressing letters for revision of tariff of the PPA and the respondent did not adhere to the request and that they were compelled to approach the Commission for revision of the tariff on par with the other developers who were granted Rs.3.50ps per unit by the Commission. Hence, they prayed the Commission to revise the tariff @ Rs.3.50ps per unit. It is also pointed out by the counsel for the petitioners that the Commission has got powers to revise the tariff even though, there is no mutual consent by looking into other circumstances and the rates prevailed at that time and also in the interest of developers.

6. The learned advocate for the respondent argued that the very petition is not maintainable as two projects jointly filed the petition and there is no such procedure. It is also further contended that there is no coercion or undue influence as such and the petitioners voluntarily entered into PPA with a ceiling limit of Rs.2.70ps per unit and having come to know about the order passed in IA 84/2003 in O.P.1075/2000 passed by the Commission in the year 2004. It is also further contended that the petitioners are estopped from raising such contentions having entered into PPA at Rs.2.70 per unit and that the claim is bared by limitation.

7. Now, the point for consideration is, “whether the petitioners are entitled for revision of tariff @ Rs.3.50 per unit as prayed for”?

8. The petitioners filed the above said petition u/s 86(1)(f) of EA 2003. The tariff is already fixed by them by mutual consent and executed the PPA on a stamped paper on 09.06.2006 and obtained consent from the Commission u/s 21(4)(b) of APER Act, 1998.

9. It is also necessary at this juncture that after receiving the letter from the Commission, both parties executed final agreement on a non-judicial stamp paper worth Rs.100/- on 09.06.2006 in accordance with the procedure and thereupon

concluded PPA duly signing by both parties voluntarily within the stipulated time prescribed by the Commission.

10. One of the petitioner has addressed letters to the respondent for revision of tariff and they in turn addressed letter to the Energy department and the Energy Department convened a meeting and advised the respondent to file petition before APERC in the matter as per the proceedings dated 26.04.2010. The respondent did not move for revision. Their silence on that aspect shows that they are not willing to revise the tariff as sought by the petitioners.

11. It is the respondent who has addressed letters to the Government to consider the request made by the petitioners for revision of tariff on the letter addressed by the petitioners on 25.07.2009 from MD, M/s. HCL. The petitioners approached the Commission and requested to revise the tariff but the respondent did not agree for revision of the tariff as it has a ceiling limit fixed at the time of entering into PPA. The respondent has not approached the Commission for consent and they have not accepted the rate as requested by the petitioners and there upon the petitioners approached the Commission for revision of tariff.

Article 2.2 of the PPA reads as follows:

“The Company shall be paid the tariff for the energy delivered at the interconnection point for sale to APCPDCL at Rs.2.70ps (Rupees two and seventy paise only) per unit or the Tariff fixed by APERC from time to time, whichever is lower during the Agreement period. Notwithstanding the tariff indicated above there will be a special review of purchase price on completion of 10 years from the date of commissioning of the project, when the purchase price will be reworked on the basis of Return on Equity, O&M expenses.”

Art. 2.2 states that the tariff may be fixed by the Commission from time to time or negotiated tariff. It is no where mentioned that the tariff is to be fixed by the Commission alone, it may be negotiated by the parties and obtain consent of the Commission u/s 21(4)(b) of APER Act, 1998. The counsel for the petitioner submitted that it was an enabling provision and the Commission has got absolute power to fix the tariff.

He has also relied upon a ruling reported in 2012 ALR (APTEL) 0429 *Konark Power Projects Ltd., Karnataka v. Bangalore Electric Supply Company Ltd and KERC, Karnataka*. In this it was held that

“The State Commission has power to modify the Tariff for concluded PPA in larger public interest. The guiding principles laid down in Section 61 of 2003 Act would indicate that the Commission has to maintain a balance so that the generators also may not suffer unnecessarily. In the context of prevailing power situation in the country, it would not be desirable to keep any generating unit out of service for want of “just” Tariff. The matter was remanded to the State Commission with the direction to the Appellant to place all the material before the State Commission to enable it to decide the issue in the proper perspective.”

In the above said decision basing on the Regulation permitted by KERC ie., (Power Purchase from Renewable Sources by Distribution Licensee and Renewal Energy Certificate Framework) Regulations, 2011. These Regulations has repealed the 2004 Regulations. Regulation 9 of the new Regulation deals with determination of tariff for electricity from renewable sources of energy. As per the Regulation 9(1), the Commission has power to determine at any time tariff for purchase of energy from renewable sources of energy by distribution licensee either suo motu or on an application by a generator or by distribution licensee. There is no such regulation or provision in APERC enabling the Commission to fix the tariff either suo motu or on an application by a generator or by a distribution licensee.

The above said ruling is not applicable to the facts of this case.

12. As per S.86(1)(b) of EA 2003, the State Commission upon an application regulate electricity purchase and procurement process of the distribution licensee by approving the PPA entered into between generating companies and the distribution licensees, the sale and purchase of electricity including price is recommended by the State Commission. Hence, the approval of State Commission is necessary to ensure a transparent and a fair procedure is adopted.

13. The petitioners in their petition mentioned that they were in severe constraint and were suffering loss apart from pressure from the bankers who have funded the project and agreed for the tariff @ Rs.2.70ps per unit even though it is not viable. It is also contended that the respondent being in a dominant position to control the transactions obtained an unfair practice on the petitioners and the respondent got contract concluded for the tariff of Rs.2.70ps per unit, and there is undue influence in obtaining contract and there was no free consent to the said contract.

14. The petitioners are aware and mentioned in the petition about the awards passed by the Commission in RP 84/2003 in 1075/2000 @ Rs.3.37 per unit. So it is not a case that he is not aware of the same. The petitioners are aware about the rate as per the orders of the Commission and entered into PPA @ Rs.2.70 per unit. It is the ceiling limit that they have fixed. S.19 (A) of Indian Contract Act deals with the consent to an agreement caused by coercion, fraud or undue influence and when the agreement itself is voidable at the option of the party whose consent was so obtained it can be cancelled or accepted. Art. 59 of the Limitation Act deals with cancellation or setting aside of an instrument or decree or for the rescission of the contract and the limitation fixed is three years. It is neither for cancellation nor for setting aside an instrument executed by the parties whose consent was obtained by using undue influence. The approach made by the petitioners is only to modify the tariff accepted during the negotiations. The other terms and conditions of the document are not disputed. Therefore no such provision is incorporated either in the Contract Act or in the Limitation Act fixing the limitation period for modification of the tariff fixed in the contract.

15. The onus of proving undue influence is on the petitioners. No material is placed before the Commission that coercion or undue influence is exercised by the respondent in obtaining the consent of the petitioners. Except making a bald statement of undue influence exercised by the respondent being in a dominant position, there is no other material placed before the Commission to substantiate the circumstances. What is the loan he has obtained and with where and what are the circumstances which forced in obtaining consent. Whether the alleged loans are prior to the PPA or after PPA by the petitioners etc., particulars are not placed before the Commission. What are the circumstances which forced him to accept the ceiling limit of tariff of Rs.2.70 per unit, though the prevailing rate even as per the Commission's order is Rs.3.37per unit.

16. It is not the case that the contract is concluded in one day. At the first instance they have to submit their draft PPA to the Commission. The Commission after verifying the same will order the parties to prepare a regular PPA on a non-judicial stamp paper worth Rs.100/-. After submitting the stamped PPA, the Commission will pass an order u/s 21(4) of APER Act, 1998. At any stage of the

proceedings, the party may decide before order is passed u/s 21(4) of APER Act. The petitioners have not explained as to why they have not rescinded the contract. The petitioners have not informed about the prevailing rate and the rate now thrust upon to the Commission before passing the order of consent u/s 21(4) of APER Act, 1998. They ought to have placed the things before the Commission or at least semblance of protest for the rate. The Commission may be in a position to consider that protest and may arrive at a conclusion that the consent might have obtained by using force. The burden cast upon the petitioners is not discharged by establishing the alleged undue influence exercised by the respondent. Therefore, the petitioners are not entitled to the relief as claimed in the petition.

17. Furthermore, the Commission is not competent to fix the tariff when the other party is not agreeable for the same. The party has to take its own steps to rescind the contract by approaching the competent civil court provided the claim is not barred by time.

18. The PPA is a contract between the parties. If there is any dispute in between the parties in connection with terms and conditions of the PPA, then the Commission is competent to enter into and settle the disputes in between the parties u/s 86(1)(f) of EA 2003, but not by fixing the tariff contrary to the terms of the PPA on the request made by one of the parties.

19. In addition to this, the petitioners have filed a single petition by clubbing two organisations i.e, Hyderabad Chemicals Ltd and Hyderabad Chemical Products Ltd. These are two separate and independent entities and have entered into two separate PPAs. Therefore, filing a single petition before the Commission to fix the tariff other than the ceiling limit fixed in the contract is not sustainable. They ought to have filed separate petitions. The joint petition filed by the parties by clubbing the causes of action is nothing but mis-joinder of causes of action. Even on this technical ground also, the petition is not maintainable under law.

20. The petitioners having failed in establishing undue influence the petition is not sustainable. At the same time clubbing of two companies with separate causes of action in a single petition is also unknown to law.

21. In the above said circumstances, we are of the considered opinion that the petition is not maintainable on facts and also under law and the same is liable to be dismissed.

22. In the result, the petition is dismissed. No order as to costs.

This order is corrected and signed on this 16th day of November, 2012.

**Sd/-
(R.ASHOKA CHARI)
MEMBER**

**Sd/-
(C.R.SEKHAR REDDY)
MEMBER**

**Sd/-
(A.RAGHOTHAM RAO)
CHAIRMAN**