



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

O.P.(SR). No: 74 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. GVK Industries Limited

... Petitioner

AND

1. Transmission Corporation of Andhra Pradesh Limited
2. Central Power Distribution Company of Andhra Pradesh Limited
3. Southern Power Distribution Company of Andhra Pradesh Limited
4. Northern Power Distribution Company of Andhra Pradesh Limited
5. Eastern Power Distribution Company of Andhra Pradesh Limited
6. State of Andhra Pradesh Principal Secretary (Energy)

... Respondents

This petition coming up for hearing on 02.06.2012 in the presence of Sri Mukesh, Advocate, on behalf of Sri L.Venkateswara Rao counsel for the petitioner and Sri P.Shiva Rao, counsel for the respondent, the Commission passed the following:

ORDER

The petitioner has filed a petition under section 86 (1) (b) and (1) (f) of the Electricity Act, 2003 for approval of the amendment to the Power Purchase Agreement dated 18.06.2003, including the additional fixed charge in pursuance of the order dated 05.12.2009 passed by the Commission.

2. The petitioner has stated in the petition as follows

- A. The petitioner is a registered company under the Companies Act 1956 and having its registered at 156 – 159 S P Road Secunderabad. It is a power generating company.

- B. The petitioner had entered into a PPA with Andhra Pradesh State Electricity Board (APSEB) the predecessor of the respondents on 31.03.1997 for setting up a power project of 220 MW and sale of energy to the APSEB following the policies of the Government of India and State Government due to scarcity of the power. The fuel is natural gas with a provision for alternate fuel.
- C. On 08.10.1999, the petitioner was allocated 1.10 MCMD of gas by the Government of the India based on recommendations of the State Government on 05.07.1999. The supply agreement has been entered with GAIL India Ltd (GAIL) on 05.10.1999.
- D. The GAIL has stipulated that petitioner project should be dual fuel firing facility and not merely a gas based project. It entered into an Agreement (GSA) with GAIL to that effect
- E. In pursuance of the agreement dated 18.06.2003 between the parties, the petitioner established plant by achieving financial closure by 19.01.2004. The project cost is Rs. 720 crores for a generating capacity of 220 MW and is located at Jegurupadu, East Godavari District.

Clause 1.1.27 reads as follows.

“Fuel – means Natural Gas that is intended to be used as primary fuel by one or more units of the project to generate power from the Project or in case of unavailability of primary fuel, Naphtha or Low Sulphur heavy stock and the like as Alternate Fuel”.

- F. The legislative developments and also about the fuel clause in the PPA in June, 2004 the State Government insisted on deletion of alternate fuel clause from the PPA in respect of the petitioner as well as other projects. It was opposed by the petitioner on the ground that the same was incorporated as per policy of Government of India apart from uncertainty in availability of gas, accordingly cannot be deleted.

- G. The discussions were held with the Government and the respondents on the issue and later APTRANSCO filed proceedings before the Commission for amendment of PPA for deleting the alternate fuel clause. The project has been completed and performance acceptance test was conducted on 22.01.2006 by informing and requiring them to depute their personnel by letter dated 25.11.2005 and 16.01.2006. A report has also been sent on 27.01.2006. The petitioner was entitled to synchronize and commission the project. It was not allowed to commission the project by requiring deletion of alternate fuel in the PPA.
- H. The State Government and DISCOMs considered different ways of resolving the issues while protecting the interest of the developer. By conciliatory approach the loss suffered by the project is to be compensated by limiting the sale of energy to 80% to the respondents and balance to be sold to third parties in the open market. The sale proceeds would constitute the compensation to the project for the loss suffered by it. The State Government issued policy direction on the said lines on 13.10.2009. The said policy was not agreed to by the Commission by its order dated 05.12.2009. However, suitable options were suggested by the Commission for compensating the loss incurred by the petitioner for the period from the project was ready till gas supply is made. The relevant portion of the Commission's order has been extracted in the petition which reads as follows.

“61. The Commission is agreeable to the first part of the above proposition. However, the approach contained in the above proposition need not necessarily be the sole method to achieve this objective. There are a number of implications in this approach. Quite apart from the issue of commensurateness of the financial benefits arising from an open ended permission, the proposed methodology is likely to severely aggravate the already scarce and precarious power supply position being faced by the state. In this overall scenario of shortage of power,

it would not appear desirable to forego 20% of PPA capacity of these four IPPs. It would be much better to evolve some mechanism to enable the IPPs to make good their likely foregone fixed charge entitlements without depriving the DISCOMs of this 20% PPA capacity. This could be achieved in the following three ways.

(a) One option for the DISCOMs could be to pay an additional rate per unit for the entire PPA capacity and adjust this quantum and the period of entitlement therefor to balance the foregone fixed charge entitlements amounts of the IPPs. In fact, a proposal to levy additional tariff of twenty four (24) paise per unit over the PPA tariff appears to have been one of the options posed before the committee appointed by the government. This option was somehow not accepted by the committee. Reconsidering this stand of the committee by the Government could result in a methodology by which the state would retain access to the full PPA capacity power while at the same time, the IPPs could protect their interests and the DISCOMs and the consumers of the state not be deprived of scarce power. An element of truing-up would be a necessary feature of this arrangement.

(b) Another option would be for the DISCOMs to retain access rights for entire 100% PPA capacity with the DISCOMs but pay a higher rate for 20% of the PPA capacity only and adjust the period this entitlement to achieve balance with the forgone fixed charge entitlements amounts of the IPPs. In this approach, the 20% PPA capacity methodology evolved by the government would continue to operate but in a modified manner. Truing-up would be an ingredient of this arrangement also. In this arrangement also the power requirements of DISCOMs and consumers in the state

would be taken care of while protecting the interests of the IPPs.

(c) Another option would be to permit the IPPs to sell 20% PPA capacity plus any tested capacity over and above capacity **in the** open market with a truing-up mechanism as discussed in the above paras built into the same.

In all the above options, the issue of future gas risk beyond 31-03-2009 would have to be appropriately addressed.”

“64. If the government feels that consent should be given to the IPPs to sell 20% PPA capacity plus any tested capacity over and above capacity **in the open market**, such an arrangement, indicated as option **(c)** in the discussion of issue **(iii)**, could be the next best option, provided a truing-up mechanism as discussed in the above paras is built into the same.x”

- I. The petitioner had questioned the said order of the Commission in W.P. No.27678 of 2009 before the Hon'ble High Court. The same has been disposed off on 28.02.2011. It extracted the finding of the High Court in the petition. Accordingly, the petitioner accepted that proposals at point (a) of the order of the Commission. Therefore, it made correspondence with the respondents along with another group company and insisted for amendments to the agreement based on the orders of the Commission. It also sought a clause relating to the Additional Fixed Cost (AFC) in the amendments. It also raised the following grounds in the petition.
 - i) The petitioner has now accepted the implementation of option (a) as contained in the order dated 05.12.2009 passed by the Commission in dealing with the deletion of alternate fuel clause and other amendments to the PPA and providing for a mechanism of compensating the petitioner and other project developers for the loss caused to them by reason of such deletion of the alternate fuel clause as well as for the loss of non commissioning and generation of

electricity from the date when the power plant was ready but could not be commissioned on account of the restriction on the use of alternate fuel clause and further on account of non availability of natural gas.

ii) In the order date 05.12.2009 the commission had also suggested that *“In all the above options, the issue of future gas risk beyond 31-03-2009 would have to be appropriately addressed.”* The petitioner’s proposal for incorporation of suitable clause in the proposed amendments for truing up the losses, if any, beyond 31.03.2009 for future fuel risk was also denied and Andhra Pradesh Power coordination committee advised the petitioner to approach the Commission.

iii) The petitioner had agreed to the terms and conditions of the PPA needing to be amended entirely as per the order dated 05.12.2009. This includes determination and fixing the additional fixed charge with truing up mechanism for being incorporated in the amendment agreement.

iv) Despite several requests made by and on behalf of the petitioner and some of the other project developers the respondents have not finalised many of the terms of the amendment including in regard to the additional fixed charge with truing mechanism.

v) The petitioner submitted the calculation through its letter no GVK / P – 2 / APPCC / 2010 about the loss on account of postponement of COD in terms of the Commission’s order dated 05.12.2009. The petitioner has opted for the first option under clause 61 (a) (at page 198 of the Commission’s order). This calculation of loss has reckoned the impact on account of the increase in capital costs and also the loss on account of postponement of revenues. The originally envisaged project cost was Rs. 720.36 crores with COD being 22.01.2006. The project has incurred additional costs due to increase in interest, preservation costs, insurance, pre operative expenses and additional payments to EPC contractors etc.

vi) These cost have primarily been incurred due to the non fulfilment of the obligation of the respondents under the PPA including supplying of 400 KV power for commissioning and also influencing GAIL for not

supplying gas for commissioning etc, which resulted in the postponement of COD and cost overruns in the project. Due to this, the revised project cost as noted by the Commission in the order dated 05.12.2009 is Rs. 966.91 crores. Thus, the increase in capital cost comes to Rs.246.55 crores.

vii) Further, the petitioner also suffered a loss due to the postponement of COD from 22.01.2006 to 14.04.2009 on account of capacity charges which they would have otherwise earned had the respondent abided by the terms of the PPA. The petitioner has calculated the net present value of capacity charges it would have earned had COD occurred on 22.01.2006 and also the net present value it would be earning from 05.06.2009 for a period of 15 years.

viii) The petitioner is limiting the additional claim on the basis that the plant will run at 85% PLF and the discounting factor reckoned is 12%. There is a difference in the net present value of capacity charges earned by the petitioner because of the postponement of the COD and this works out to Rs. 299.50 crores. Thus the total losses suffered by the petitioner both on account of increase in capital cost and also on account of postponement of revenues comes to Rs.546.05 crores (Rs. 246.55 crores + Rs.299.50 crores). The above quantified loss is required to be compensated by the respondents through option (a) as contained in the order dated 05.12.2009 of the Commission.

ix) The petitioner has calculated the additional fixed charge payable by the respondents over the period of the term of PPA with a discount factor of 12% at a PLF of 80% to recoup the above losses of Rs.546.55 crores which comes to Rs. 0.733 per unit.

- J. The dispute or difference between the parties with regard to the clauses in the PPA as well as the amendments necessitated by the exercise of option of the Commission's order are required to be decided by the Commission. The entire correspondence and the developments in the matter including the amendments proposed by the petitioner in terms of the order passed by the Commission are placed

before the Commission and the same have already been made available to the respondent.

K. The amendments to the Power Purchase Agreement are to be incorporated in terms of the letter sent by the petitioner dated. 30.12.2010, 04.01.2011, 28.03.2011, 02.05.2011, 25.06.2011 and 04.07.2011.

L. The issue in the petition had arisen due to unilateral decision of the Government and respondent to delete alternate fuel clause which was entered in the context of uncertainty of natural gas and insistence of the same by Government of India and GAIL. The State Government has already recognized loss suffered by deletion needs to be compensated, which was also recognized by the Commission in its order dated 05.12.2009. Despite efforts by the petitioner and agreeing to option (a) proposed by the Commission there has been no finalization of the amendments. As such it is suffering irreparably on account of delay in finalization of the amendments, it left with no option other than approaching the Commission alone for redressal of the issue.

3. Hence the petitioner prays that the Commission may please to Initiate the proceedings to approve the amendments to the PPA existing between the petitioner and the respondents including the additional fixed charge proposed by the petitioner in terms of the order dated 05.12.2009 and option (a) proposed therein and after hearing the parties, approve the same with such terms and conditions as the Commission considers appropriate consistent with the order dated 05.12.2009.

4. The petition has been heard by giving notice to the parties before admitting the same on maintainability of the petition. The counsel for the parties have made their submissions as hereunder :

i) The counsel for the petitioner argued that the amendment to the PPA in between petitioner and respondents including additional fixed charge proposed by the petitioner in terms of the order dated 05.12.2009 passed by the Commission.

- ii) The parties have accepted option (a) and it is consistent with the order dt. 05.12.2009.
- iii) As per the proposed option, the Additional Fixed Charges have to be approved after hearing both parties.

The learned counsel for the respondents is permitted to address his arguments on the aspect of admissibility.

- i) The counsel for the petitioner submitted that there is no cause of action for filing the petition.
- ii) The impugned order never stated that Additional Fixed Charges proposed by the petitioner has to be accepted.
- iii) The petitioner cannot compel the respondents to act to the tunes of the petitioner.

5. Now the point for consideration is, whether there is any cause of action to get the petition numbered and to proceed with further enquiry?

6. It is clear that the petitioner has submitted the unsigned proposed amendments keeping the blanks to be filled by the Commission. Such a scenario is nowhere mentioned in the order dated 05.12.2009, wherein the Commission suggested the three alternative options.

7. It is pertinent to note that the petitioner addressed a letter to the respondents on 04.07.2011 quoting the order of this Commission 20.06.2011. In which it is stated

“The Commission cannot consider the joint filing of request for consent with a blank space in the crucial ‘quantum of additional F.C’ clause, as a blanket acceptance in advance of any adjudicated figure to be filled in by the Commission, as a precursor to giving consent to the entire amendments package”.

In spite of such a letter, the proposed amendments have been submitted for consent with “blank” in the crucial column.

8. The Commission cannot take into account such incomplete amendment proposals. It is not for the Commission to fill up the blanks regarding the Additional Fixed Charges. It is not the intention of the impugned order dated 05.12.2009 to entertain such incomplete, mutually unresolved amendment proposals.

9. Furthermore, they have filed the proposed amendment with out putting signatures of the respective parties.

10. Viewed from any angle, the petition cannot be numbered for conducting an enquiry and the same is liable to be rejected. The petitioner is at liberty to approach for recovery of the Additional Fixed Charges, but not by asking the Commission to fill the blanks of the proposed amendments.

11. In the result, the petition filed by the petitioner is hereby rejected.

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**