

ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION

4th & 5th Floors, Singareni Bhavan, Red Hills, Hyderabad – 500 004

O.P. No.58 of 2011

Dated 31-08-2012

Present

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

Between

M/s. Gayathri Sugars Ltd
B-2, Floor, 6-3-1090, TSR Towers,
Raj Bhavan Road, Somajiguda
Hyderabad – 500 082

..... **PETITIONER**

AND

1. Government of Andhra Pradesh
Represented by Principal Secretary
Department of Power
Secretariat, Hyderabad

2. Andhra Pradesh Northern Power Distribution Co. Ltd
Represented by General Manager
Warangal

..... **RESPONDENTS**

This petition coming up for hearing on 19.05.2012 in the presence of Sri S.Rambabu, Advocate for the petitioner and Sri P.Shiva Rao, Advocate for the respondents having stood over for consideration to this day, the Commission delivered the following:

ORDER

This petition is filed under Article 11 of the PPA dated 12-05-2006 by the petitioner seeking adjudication of the dispute between the petitioner and the respondents with prayer to direct the respondents to

- i) to implement the guidelines issued by this Commission to determine the tariff payable to the petitioner;
- ii) to determine the tariff payable to the petitioner for the power supplied from the date of the commercial operation to till date.

- iii) to direct the respondents to implement the tariff order determined by this Commission vide order dated 31.03.2009 in O.P. No. 5 of 2009.
- iv) Pass such other and further order(s) as this commission may deem fit just and proper in the interest of justice.

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

- a) The petitioner, M/s. Gayatri Sugars Limited, Nizamsagar's Unit previously known as M/s. GSR Sugars Pvt., Ltd is a company incorporated under the Companies Act, 1956 having its registered office at B-2, 2nd floor, 6-3-1090, T.S.R. Towers, Raj Bhavan Road, Somajiguda, Hyderabad and that it set up a Sugar plant along with Co-generation power plant of 16.25 MW.
- b) The petitioner approached the 2nd Respondent and offered to sell the power. The 2nd Respondent agreed to purchase the power. The petitioner strongly believed that the 2nd respondent will treat all power producers equally and with that hope made all arrangements to establish the power plant. It is pertinent to mention that all the power producers shall sell the generated power to the 2nd Respondent only as per the Electricity Act.
- c) The Commission prescribed the method for fixing tariff and the 2nd Respondent fixed the tariff based on the said two-tier method prescribed by the Commission.
- d) The 2nd Respondent determined the fixed costs for 10 years from the date of commercial operation i.e., from 16-05-2007 to 16-05-2017 and 5 years for the variable costs i.e. up to the year 2009 - 2010. However, the rates offered by the 2nd Respondent are much lower than the tariff assessed based on the guidelines determined by this Commission. Moreover, the 2nd Respondent also imposed Ceiling limit for the tariff i.e., Rs.2.63 per kWh. The said ceiling is unknown to the guidelines prescribed by this Commission and contrary to the law of the land. Thus, the Respondent has not honoured the guidelines determined by the Commission.
- e) The actions of the Respondents are wrong and contrary to the fundamental rights guaranteed under Article 14 read with Article 301 of the Constitution of India. The Petitioner agreed to execute the contract under the compelling situations as the Petitioner had executed agreements with the farmers for supply of sugarcane and with the contractors for the supply, erection and

commission of the plant. The banks also agreed to sanction loan only upon execution of Agreement with 2nd Respondent. The petitioner was also not allowed to sell the power to any 3rd party agency.

- f) The Commission has given the guidelines to fix the tariff based on fixed and variable costs. Thus, the production cost of power per unit will be the same in any Co-generation unit. Therefore, discretion to fix the tariff less than the assessed tariff rate by the Commission is per-se wrong and contrary to the Articles 14 and 301 of the Constitution of India and the respondents actions are not in the best interest of the industries of sugarcane and co-generation units.
- g) The petitioner struggled to supply the power at the rates prescribed in the Agreement. The Petitioner approached the 2nd Respondent requesting for revision of tariff as per this Commission orders dated 20-03-2004 and 31-03-2009 and requested the 2nd respondent to treat the Petitioner on par with other competitors in the market. But, the petitioner received no response from the Respondents.
- h) The Commission in the matter of R.P.No. 84/2003 in O.P.No.1075/2000 held to assess the variable cost, once in every five years. the control period should be for 5 years. This implies that the tariff cannot be either less or more than what is assessed based on the formula/method determined by the Commission. But the Respondents actions are contrary to the said Commission's Order.
- i) It is further submitted that the Commission in its order dated 27-09-2005 in the matter of O.P.No.9 of 2005, held that in case of purchase of electricity other than through long term PPA's, the ceiling tariffs shall be the total tariffs (fixed+variable), as worked out for each source of energy (co-generation, Mini-Hydel etc.) on the basis of the aforementioned order of the Commission.
- j) The Commission held in its order dated 31-03-2009 in O.P.No.16 of 2008 as under:

“Ceiling tariffs in the earlier RPPO Order:

The general opinion expressed is that the objective of encouraging RP will be defeated if scope for a negotiated tariff is made available by prescribing a ceiling concept”.

- k) The Commission by considering all the variable items determined the variable cost payable to the co-gen unit from the FY 2009-10 to 2013-2014 and directed the Respondents to implement the same, vide order dated 31-03-2009. But, contrary to this order, the Respondents refused to apply the aforementioned variable costs to the Petitioner. Thereby, the very object of this Commission is being defeated. The comparison of the rates determined by this Commission and the rates offered by the Respondents by applying variable cost is as follows:

N th Year of operation	Fixed Cost determined by the Commission in Rupees per unit	Fixed cost awarded by the Respondents to the Petitioner in Rupees per Unit	Financial Year wise variable cost determined by the Commission in Rupees per unit	Financial Year wise Variable cost considered by the 2nd Respondent in Rupees per Unit	Tariff payable to the Petitioner (in Rupees per unit) as per guidelines of this Commission (2+4)	Tariff being paid to the Petitioner in Rupees per unit (3+5)	Difference amount in Rupees (6-7)
1	2	3	4	5	6	7	8
1 st year (2007-08)	1.72	1.57	1.18	1.14	2.90	2.63	0.27
2 nd year (2008-09)	1.67	1.52	1.24	1.19	2.91	2.63	0.28
3 rd year (2009-10)	1.63	1.48	1.68		3.31	2.63	0.68
4 th year (2010-11)	1.59	1.44	1.76		3.35	2.63	0.72
5 th year (2011-12)	1.55	1.39	1.85		3.40	2.63	0.77
6 th year (2012-13)	1.51	1.35	1.94		3.45	2.63	0.82
7 th year (2013-14)	1.47	1.31	2.04		3.47	2.63	0.84

- l) The 2nd Respondent fixed the tariff payable to the Petitioner by keeping a ceiling of Rs.2.63 per kWh per unit. The petitioner agreed to the said rate reluctantly under compulsion and undue influence as the Petitioner was under pressure to comply its other contractual liabilities.
- m) The 2nd Respondent is well aware that, fixing a ceiling on tariff is unconstitutional and detrimental for healthy functioning of an organization and also contrary to the Electricity Act and orders of this Commission.
- n) The Petitioner supplied about 4,21,01,000 units of power till date and it received only Rs.11,07,25,630/- whereas as per this Commission guidelines, the petitioner is entitled for Rs.12,89,59,030/-. Therefore, the balance amount payable to the Petitioner by the 2nd Respondent is Rs.1,83,33,400/- and

interest @ 18% p.a from the respective due dates. The said tariff is being offered to several organizations such as Empee Sugars, NDSL etc. Thus, the petitioner is requesting the Respondents to apply the same tariff to it on par with all other organizations and to pay the due amount.

- o) Contrary to the tariff orders issued by the Commission, which are equal to all cogeneration plants (as the variable costs will be equal to all the plants) 2nd respondent has imposed on the petitioner, the tariff without considering fixed as well as variable costs as per the procedure prescribed by the Commission.
- p) As per the Agreement in question, the tariff has to be negotiated from the year 2009-10. Therefore, the Petitioner is entitled for the revised tariff from the year 2009-10. The Commission has fixed the variable cost as follows:

Financial year	Variable Cost
2009-10	1.68
2010-11	1.76
2011-12	1.85
2012-13	1.94
2013-14	2.04

- q) In view of the above read with this Commissions report, the Petitioner is entitled for the tariff mentioned below:

As per APERC Order Dated 30.03.2004

Year of Operation	Fixed cost Rs/unit	Financial Year	Variable Cost/unit	Total
1 st	1.72	2007-08	1.18	2.90
2 nd	1.67	2008-09	1.24	2.91
3 rd	1.63	2009-10	1.68	3.31
4 th	1.59	2010-11	1.76	3.35
5 th	1.55	2011-12	1.85	3.40
6 th	1.51	2012-13	1.94	3.45
7 th	1.47	2013-14	2.04	3.47
8 th	1.43	<i>Variable cost Highlighted is taken from 2009 order</i>		
9 th	1.35			
10 th	0.90			

- r) The Commission has held that, the objective of encouraging RP will be defeated if scope for a negotiated tariff is made available by prescribing a ceiling concept. Hence, the imposition of ceiling on tariff payable to the producer is contrary to the object of the Electricity Act and also contrary to law of the land.
 - s) The petitioner's cash flow is seriously effected due to imposition of ceiling on tariff by the 2nd respondent the petitioner is incurring losses every year and the same may lead to closure of the petitioner's project.
 - t) The Petitioner submitted a representation vide letter dated 01-04-2011 to the Respondents requesting to reconsider the tariff as well as reimburse the due amounts. The respondents failed to consider the said application and rejected the Application without assigning any reasons.
3. On 07.01.2012, 2nd respondent filed its counter. The contentions of the said respondent are briefly as follows:
- a) The petition filed by the petitioner is not maintainable under law.
 - b) Grant of reliefs claimed by the petitioner in its petition amounts to ignoring the PPA dated 12.05.2006 which was approved by the Commission. As the PPA is concluded contract, the petitioner cannot be permitted to claim any relief which is contrary to such concluded contract.
 - c) The petitioner agreed to supply power at a mutually agreed price. The contention of the petitioner that it agreed to execute the contract under compelling circumstances is baseless besides being false.
 - d) In Appeal No. 47 of 2009 where similar ground of compelling circumstances was raised and the Hon'ble ATE in its order dated 19.04.2010 held that rectification of PPA can be sought u/s 26 of the Specific Relief Act and the proper forum for such rectification is Civil Court exercising ordinary civil jurisdiction and that same cannot be dealt in a summary proceedings by the Commission. Therefore, based on the said order, this petition reserves to be dismissed.
 - e) In compliance of the orders of the Commission dated 27.09.2005 in O.P. No. 9 of 2005, 2nd respondent negotiated with the petitioner within the guidelines framed by the Commission and both the parties mutually agreed for tariff which is within the ceiling limits of the tariff determined by the Commission

throughout the agreement period. As such there is a concluded contract which is approved by the Commission. The respondent is not concerned with claims contrary to such mutually agreed contract.

- f) The respondent has not acted contrary to the Act or / on the guidelines. Grant of approval in the Commission goes to show that the actions of the respondents are in accordance with the guidelines framed by it. Draft PPA was submitted to the Commission for approval and after obtaining grant of required approval by the Commission, PPA in executed. Hence it is not correct to the state that the respondent has not complied with guidelines issued by the Commission. PPA was executed with due concurrence of Commission
- g) Subsequent to entering into PPA, the petitioner never raised any objection and on the other hand it has been receiving money every month promptly. It shows that there is no infirmity in the PPA at the tariff.
- h) During the year 2006 2nd respondent negotiated with the petitioner like other DISCOMs with NCE Power Developers in the State and arrived at mutually agreed rate. It is not correct to state that entering into PPA at mutually agreed price is contrary to the provisions of the Constitution of India. The petitioner did not raise any objection with the respondent at the time of entering into the PPA or with APERC when the same is being considered for approval. It is not correct to state petitioner was not allowed to sell power to third party.
- i) The 2nd respondent can negotiate with developers for determining mutually agreed tariff which should be within the ceiling limits determined by the Commission and action taken by it is not contrary to the orders of the Commission. Negotiation of tariff is as per law. If higher rates are paid by the respondent, it will escalate retail tariff to the detriment to the consumers at large. The petitioner is not entitled for Rs. 1,83,33,400/- or any part thereof. The claim made by the petitioner is baseless.
- j) It is not correct to state that orders dated 31.03.2009 is applicable to the petitioner. The said order applies to developers who have entered into PPA without mutually agreed tariff. The very comparison is neither warranted nor permissible
- m) To the representation dt. 01.04.2011 of the petitioner 2nd respondent sent reply dt. 21.04.2011 clearly stating that revision of tariff of power purchased is

not possible as per Schedule – I – A of the PPA. There is no merit in the claim of the petitioner as the same is contrary to the terms of concluded contract.

n) It is therefore prayed that the petition filed by the petitioner may be dismissed.

4. On 02.03.2012, the petitioner filed its rejoinder mentioning the following grounds.

- (a) The actions of the respondent No.2 are in violation of EA 2003, principles of administrative law and in violation of S.14 of Indian Constitution.
- (b) The respondent No.2 never brought to the notice of the Commission towards imposition of the ceiling limit. The petitioner strongly believes that the Commission probably due to oversight approved PPA. The respondent No.2 evaded the procedure and imposed a ceiling limit.
- (c) The Commission never permitted the respondent No.2 to fix the tariff less than the total tariff fixed plus variable cost as determined by the Commission. Moreover, fixing of tariff for the long term PPA is not at all permitted. The respondent No.2 failed to give valid and scientific reason for fixing the ceiling limit and how it is going to compensate the fixed and variable costs of the investor in non-renewable energy.
- (d) The respondents never permitted u/s 61 of the EA 2003 to impose ceiling limit. The petitioner requested the respondents to fix the tariff as per the Act and rules made there under. Hence, they are not empowered to impose the ceiling limit on the tariff.
- (e) The long term tariff PPAs shall be as per the guidelines to be issued from time to time.
- (f) The contention that the tariff payable to the petitioner is not more than 263 paise per unit for 18 years is incorrect. The respondent No.2 also failed to differentiate the petitioner from other power producers from non-renewable sources of energy. No reasonable explanation is given by the respondent No.2 for imposing the ceiling limit on tariff payable by the petitioner.
- (g) The respondent No.2 being State organization duty bound to treat all the co-generation plants equally and pay the tariff considering the fixed and variable costs. No other method is prescribed.

- (h) The petitioner made several attempts and requested the respondents to treat them on par with others and to comply the guidelines issued by the Commission.
- (i) The jurisdiction of the Commission is wide and the dispute in question is within the jurisdiction of the Commission. Therefore, the Commission may pleased to direct the respondents
 - (i) to implement the guidelines issued by the Commission and to determine the tariff payable to the petitioner from the date of the commercial date of operation of the project
 - (ii) to implement the tariff order determined by the Commission on 31.03.2009 in OP 5 of 2009
 - (iii) to pass such other orders by the Commission which may deem fit and proper in the interest of justice.

5. On 19.05.2012 heard the counsel at length for the parties concerned and on merits of their respective contentions raised in the petition, counter and the rejoinder, mentioned supra. Thereafter, petitioner filed 'written submissions' on 28.05.2012 together with application for receiving additional documents.

6. The learned advocate for the petitioner vehemently argued on several points and also submitted his written submissions reiterating the same grounds as hereunder:

- (a) The actions of the respondent No.2 are in violation of EA 2003, principles of administrative law and in violation of S.14 of Indian Constitution.
- (b) The Commission has to determine the two tier method to evaluate the tariff payable to the power producers i.e., (i) formula to arrive the fixed costs based on the capital investment and (ii) formula to arrive the variable cost based on the costs of the inputs to be used by the industry for generating power and it is not the scientific method but the respondent No.2 refused to honour the same without assigning any scientific and reasonable explanations.
- (c) The petitioner is of the firm view that they are not entitled for the tariff as determined by the Commission from time to time in terms of the Act and the respondent No.2 is not empowered to deviate the orders of the Commission. The respondents shall offer the tariff on par with others as the State shall not

deny to any person equality before law or the equal protection of the laws within the territory of India.

- (d) The petitioner is not entitled to sell the power to any third party. The Commission also held that all the power producers are not permitted to sell the generated power to third parties.
- (e) The respondent No.2 never brought to the notice of the Commission towards imposition of the ceiling limit. The petitioner strongly believes that the Commission probably due to oversight approved PPA.
- (f) The petitioner signed the PPA believing that the respondent No.2 will treat the petitioner on par with other co-generation plants. The respondent No.2 failed to establish that they obtained the permission from the Commission about Schedule- IA and also failed to establish how they can deviate the orders of the Commission.
- (g) The contention of the respondent No.2 with regard to ceiling limit basing on the order dated 27.09.2005 is not correct.
- (h) The Commission never permitted the respondent No.2 to fix the tariff less than the total tariff fixed plus variable cost as determined by the Commission. Moreover, fixing of tariff for the long term PPA is not at all permitted.
- (i) The contention of the respondent No.2 is that the ceiling limit is as per the agreement dated 12.05.2006 is wrong and contrary to clause 7 of the PPA. The respondent No.2 specifically assured that they will amend the agreement from time to time as per the guidelines issued by the Commission (clause nos. 7 and 12.2 of the PPA).
- (j) The last two lines of schedule –IA will prevail over the special clause i.e, how to compensate the variable cost from the period from 2009-10. The said contention is totally wrong and contrary to the agreement. When there is any ambiguity in the agreement the principle '**contra proferentem**' will apply. Even if the ceiling limit is accepted it shall not be accepted beyond 2008-09 financial year.
- (k) The respondents accepted the PPA without ceiling limit for other generating companies except the petitioner herein.
- (l) The respondents never permitted u/s 61 of the EA 2003 to impose ceiling limit. They have to fix the tariff as per the Act and rules.

- (m) The long term tariff PPAs shall be as per the guidelines to be issued from time to time.
- (n) The tariff payable to the petitioner is not more than 263 paise per unit for 18 years is incorrect. No reasonable explanation is given for imposing the ceiling limit on tariff payable to the petitioner.
- (o) The respondent No.2 being State organization duty bound to treat all the co-generation plants equally and pay the tariff considering the fixed and variable costs.
- (p) The petitioner made several attempts and requested the respondents to treat them on par with others and to comply the guidelines issued by the Commission.
- (q) The Commission has jurisdiction to reopen the PPA for the purpose of encouraging and promoting renewable energy projects by its order dated 28.09.2006 in the matter of M/s. Rithwik Energy Systems Limited vs. Transmission Corporation reported in 2008 ELR APTEL 237.

Hence, the Commission may please to direct the respondents

- (i) to implement the orders/guidelines issued by the Commission from time to time to determine the tariff payable to the petitioner.
- (ii) To determine the tariff payable to the petitioner for the power supplied from the date of the commercial operation to till date.
- (iii) To implement the tariff order determined by the Commission vide order dated 31.03.2009 in OP No.5/2009
- (iv) In the alternative direct the respondents to pay the variable costs as determined by the Commission from the financial year 2009-10
- (v) To pass such other and further order(s) as the Commission may deem fit just and proper in the interest of justice.

7. On the other hand, the learned advocate for the respondents addressed his arguments as hereunder:

- (i) The relief now sought by the petitioner is nothing but by-passing the PPA entered by both parties on 12.05.2006.

- (ii) The petitioner also failed to consider that the Commission has already approved the PPA and it is a concluded contract and the petitioner is not entitled to claim any relief contrary to the said contract.
- (iii) The price agreed is by mutual consent and they have signed voluntarily on the PPA.
- (iv) In pursuance of the mutual consent, the said agreement has been entered into and there are no compelled circumstances or using undue influence exercised on the petitioner.
- (v) The Hon'ble ATE passed its order dated 19.04.2010 to approach competent civil court u/s 26 of Specific Relief Act incase of rectification in PPA and the same cannot be entertained by the Commission which a summary proceedings.
- (vi) The respondent No.2 negotiated with the petitioner within the guidelines framed by the Commission and both the parties mutually agreed for tariff and it is well within the ceiling limit of the tariff determined by the Commission.
- (vii) The petitioner is estopped from claiming contrary to the terms of the agreement and that the respondents never acted contrary to the Act or against to the guidelines issued by the Commission from time to time.
- (viii) The petitioner never raised any objection subsequent to the signing of the PPA and after considerable length of time, the petitioner has been receiving the money and the silence on the part of the petitioner for a long period discloses that there is no infirmity in the PPA in the aspect of tariff.
- (ix) The respondent negotiated in the year 2006 with the petitioner as in the case of other non-conventional energy power developers and agreed to the terms incorporated therein and he cannot compare with other developers having signed on the agreement itself, which contains the ceiling limit and negotiation of tariff is in accordance with law.
- (x) The petitioner is not entitled to the amount of Rs.1,83,33,400/- or any part therein as the claim is baseless.
- (xi) The petitioner cannot compare with the developers who have entered PPA without any mutual agreed tariff.
- (xii) The Commission is conducting enquiry on summary basis and it has no powers to invoke the provisions of Constitution of India and the learned

advocate vehemently argued on the aspect of S.14 of Constitution of India claiming equality but this is not the platform to canvass the same.

- (xiii) The petition filed by the petitioner is devoid of merits and the same is liable to be dismissed.

8. From the above said discussion, the following are the issues coming up for consideration by the Commission:

- (i) whether the Commission is competent to differ with the terms of the agreement (PPA) by reviewing the ceiling limit as claimed by the petitioner?
- (ii) Whether the petitioner is entitled for a sum of Rs.1,83,33,400/- as claimed?
- (iii) To what relief?

Issue No.1:

9. The petitioner filed the above said petition under Article 11 of PPA and section 64 of EA 2003. Article 11 prescribes a procedure to resolve any dispute arising under the said agreement dated 12.05.2006. If the dispute is not resolved in terms of the above provisions or even otherwise any party may approach the Commission to adjudicate upon the dispute in terms of S.86(1)(f) of EA 2003. Here in this case, the petitioner has not filed any petition u/s 86(1)(f) of EA stating that the above said dispute raised by the petitioner-company is not resolved as contemplated under Art.11 clause 1,2,3 and thereby the petitioner approached the Commission invoking Art.11 (4) of the said PPA.

10. S.64 prescribes a procedure for determination by the Commission in respect of tariff order. It provides that every applicant who seeks determination of tariff under S.62 shall file application along with requisite fee and publish the same in two leading newspapers circulating in India. The Commission shall publish a draft tariff order inviting suggestions / objections. The Commission shall within 120 days from the date of receipt of application either issue a tariff order or reject the same for reasons mentioned therein. A copy of the said order shall be sent to the appropriate government or authority and the concerned licensee by the Commission within

7days of making the order. The said clause also provides that the tariff order shall continue to be in force for a specific period unless the same is amended or revoked.

11. Here in this case, the petitioner has not approached the Commission for fixation of tariff invoking S.64 of EA 2003, since the tariff is already fixed by them by mutual consent and obtained consent on 04.05.2006 of the Commission u/s 21(4)(b) of APER Act, 1998. On 12.05.2006, the PPA was executed on stamp paper and the same has attained finality. Any dispute with regard to non-implementation or violation of agreed clause of PPA can be placed before the Commission for adjudication u/s 86(1)(f) of EA 2003 but such is not the issue in the present case. In the present case, the counsel for the petitioner has contended that the petitioner was not treated on par with other generators and that a ceiling has been fixed under Schedule-IA of PPA. Though, he pleaded in the petition that it was obtained under duress but he did not attack the same on that ground.

12. The PPA was sent to the Commission for grant of consent and the same was communicated on 04.05.2006. There was no grievance brought with regard to draft PPA at that time. If brought to the notice of the Commission during that period, the Commission might have taken the same into account before giving consent u/s 21(4) of APER Act, 1998. But when once consent has been granted and communicated to the parties, the petitioner cannot raise any grievance in respect of mutually agreed provisions of the PPA or to seek changes in the terms and conditions thereof.

13. It is also necessary at this juncture to mention here that after receiving the Commissions consent letter dated 04.05.2006, both the petitioner and the respondent No.2 executed final agreement on 12.05.2006 on a valid stamp paper in accordance with the procedure and thereby concluded PPA duly signing by both the parties voluntarily within the stipulated time prescribed by the Commission. When the draft PPA has attained finality after following due process of law, the Commission cannot accept representation of the counsel for the petitioner to direct respondent No.1 to amend clause 2.2 of PPA dated 12.05.2006.

14. The counsel for the petitioner strongly contended that the respondent may be directed by the Commission to implement the tariff order determined by the

Commission as per the order dated 31.03.2009 in OP No. 5/2009. The above said order is passed by the Commission on 31.03.2009 as there was a need for revising various parameters towards fixation of variable costs. Accordingly, in the above said OP No. 5/2009, the Commission accepted Rs.950/MT as appropriate fuel cost for determination of variable cost. Accordingly, the fixation was made for the years 2009-10 to 2013-14. The above said order is passed in the matters where there is no ceiling limit. It has not dealt the issue of ceiling limit as one of the issues or aspects to be considered by the Commission. So, the principle enunciated in the above said decision is not applicable to the facts of the case on hand. The analogy projected may be that variable costs to those generators is varied and increased and the same is to be applied to the petitioner. This cannot be considered by virtue of the ceiling limit. Whether it can be considered on the ground of equality is another aspect to be looked into by the Commission.

15. The counsel for the petitioner invited our attention to clause 7 of PPA. The respondent No.2 assured that they will amend the agreement from time to time as per the guidelines issued by the Commission. He has also invited our to clause 12.2 of PPA. Both the clauses are extracted as hereunder:

“7. The terms and conditions of the Agreement are subject to the provisions of the Electricity Act, 2003 (36 of 2003) as amended from time to time and also subject to regulation by the Andhra Pradesh Electricity Regulatory Commission”.

“12.2 No oral or written modification of this agreement either before or after its execution shall be of any force or effect unless such modification is in writing and signed by the duly authorized representative of the Company and the APNPDCL, subject to the condition that any further modification of the Agreement shall be done only with the prior approval of the Andhra Pradesh Electricity Regulatory Commission. However, the amendments to the Agreements as per the respective orders of APERC from time to time shall be carried out. All the conditions mentioned in the Agreement are with consent of APERC”.

Article 2.2 reads as follows:

“2.2 The Company shall be paid the tariff for the energy delivered at the interconnection point for sale to Discom at the rates specified in Schedule –IA or the tariff as fixed by APERC from time to time or negotiated tariff, whichever is lower during the agreement period. Notwithstanding the tariff indicated above there will be a special review of purchase price on completion

of ten 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 and the Variable Cost.”

Schedule –IA reads as follows:

“Notwithstanding the above, the tariff comprising both fixed cost and variable cost shall not exceed Rs.2.63 per KWh.”

16. Article 2.2 clearly says that the tariff may be fixed by the Commission from time to time or negotiated tariff. It is nowhere mentioned that the tariff is to be fixed by the Commission alone. It may be negotiated by the parties by mutual agreement and obtain the consent of the Commission u/s 21(4) of APER Act, 1998. The above clauses as pointed out by the counsel for the petitioner are only enabling provisions which may enable the parties to amend the provisions from time to time by mutual consent. If the agreement is not arrived by both the parties and one party requests for amendment and if other party denies, he may approach the Commission in accordance with the procedure contemplated under the Act but not by ignoring the terms and conditions of PPA with a request to fix the tariff on par with other generators in whose case there is no ceiling limit. In this case, there is a ‘ceiling limit’ in the PPA mutually agreed by the parties and the same is approved and accepted by the Commission.

The Counsel for the petitioner relied upon a ruling rendered in GMR Industries Ltd. Vs Andhra Pradesh Electricity Regulatory Commission in 2007 ELR APTEL 101. In this it was held that

“Any contract which is not based on free volition of the parties and has been induced by force or coercion is void. To constitute an agreement the contracting minds of both the parties must be ad-idem. They must be free to execute or not to execute the agreement.”

He has also relied upon another ruling reported in Rithwik Energy Systems Limited vs. Transmission Corporation of A.P.Ltd. in 2008 ELR APTEL 237. In this it was held that

“According to Article 9.2 of the PPA, modification of any clause of the PPA cannot be given effect to unless it is incorporated in the agreement. It is not in dispute that clause 1.4, as modified by the APERC has not been incorporated in the PPA. Therefore, clause 1.4 approved by the APERC, by its letter dated November 15, 2003 cannot be acted upon.”

He has also relied upon another ruling reported in 1967 LAWS (SC) – 3 -34. In this it was held that

“The question is whether this guarantee is enforceable that depends upon the terms under which the guarantor bound himself. In case of ambiguity when the other rules of construction fail, the court interpret the guarantee central proferentem that is against the guarantor where that is possible. In the instant case, the guarantor bound himself to pay on demand the sum of Rs.18,24,006 only in the event of writ petition being dismissed. The guarantor put a limit on the guarantee. Thus the last date for enforcement of the guarantee was 15.04.1965. The contention of the bank that the guarantee is no longer enforceable is therefore right. The bank would be bound legally to pay it over but the guarantee cannot be enforced. In the result the two notices of motion must fail and they are dismissed. The cost of the hearing shall be borne by the State of Maharashtra.”

He further relied upon a ruling reported in General Assurance Society Limited vs. Chandmull Jain in 1966-LAWS(SC)-2-18. In this it was held that

“The reason of the rule is that where parties agree upon certain terms which are to regulate their relationship it is not for the court to make a new contract. However reasonable if the parties have not made it for themselves. The assurers were therefore within their right under condition 10 of the policy to cancel it. As the policy was not ready they were justified in executing it and canceling it.”

17. The ruling 2007 ELR APTEL 101 is not applicable to the facts of the case, since the petitioner has not pleaded that he was either induced or coerced at the time of entering into the agreement. Similarly, 2008 ELR APTEL 237 is also not applicable to the facts of the case as the said decision stands on a different pedestal.

18. The other decisions are also not applicable to the facts on hand since the PPA is entered into by both parties fixing the ceiling limit under Schedule –IA for a period of 20 years. Whereas, other decisions are on different lines and also under different Acts and the facts of the cases are also different from the facts of this case.

19. As per S.86(1)(b) of EA 2003, the State Commission upon an application, can regulate electricity purchase and procurement process of the distribution licensees 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.

20. The reading of different subsections of 21 of APER Act, 1998 it is clear that obtaining consent from the State Commission is mandatory and it is not a mere empty formality. S.62 of EA 2003 empowers the Commission to determine the tariff for supply of electricity by a generating company to a distribution licensee. The petitioner herein though filed a petition u/s 64 of EA 2003 they never followed the procedure under the above said section including filing of application under sub-section (1) and publication of petition under sub-section (2), etc. Even on that aspect also the petitioner cannot seek for determination of its tariff by the Commission u/s 62 of EA 2003 apart from ineligibility by virtue of 'ceiling limit'.

21. Though, the petitioner has mentioned in the petition a ground that the "petitioner agreed the said rate reluctantly under compulsion, undue influence as the petitioner was under pressure to comply his other contracted liabilities." But he has not attacked on that ground and he has not mentioned the same in the very prayer made in the petition. The petitioners contextual submission is comparison with other co-generators to whom the Commission has been passing orders with regard fixing the tariff without looking into the plea raised by the petitioner. The silence on the part of the petitioner receiving the payments at the rate of 263 paise per unit as per the PPA for quite a long time accepting the terms of PPA without any demur, they are estopped from claiming that they have reluctantly under compulsion, undue influence accepted the same.

22. The contention of the petitioner is that he has to be treated on par with other generators and he has also filed several PPAs of other generators. The Commission is fixing up the tariff of other co-generators where there is no ceiling limit. This analogy taken by the counsel for the petitioner cannot be looked into and cannot be considered. If it is a case of rectification of PPA by substituting or deleting the word 'ceiling limit', the petitioner can approach a competent civil court u/s 26 of the Specific Relief Act, which reads as follows:

"26. When instrument may be rectified – (1) When through fraud or a mutual mistake of the parties, a contract or other instrument in writing and being the

articles 628 of association of a company to which the Companies Act, 1956 (1 of 1956) applies) does not express their real intention, then –

(a) either party or his representative in interest may institute a suit to have the instrument rectified; or

(b) the plaintiff may, in any suit in which any right arising under the instrument is in issue, claim in his pleading that the instrument be rectified; or SSR Page 21 of 36 Judgment in Appeal No. 47 of 2009

(c) a defendant in any such suit as is referred to in clause (b)

(d) may, in addition to any other defence open to him, ask for rectification of the instrument.

(2) If, in any suit in which a contract or other instrument is sought to be rectified under subsection (1), the court finds that the instrument, through fraud or mistake, does not express the real intention of the parties, the court may, in its discretion, direct rectification of the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

(3) A contract in writing may first be rectified, and then if the party claiming rectification has so prayed in his pleadings and the court thinks fit, may be specifically enforced. SSR Page 22 of 36 Judgment in Appeal No. 47 of 2009

(4) No relief for the rectification of an instrument shall be granted to any party under this section unless it has been specifically claimed.

Provided that where a party has not claimed any such relief in the pleading, the court shall, at any stage of the proceeding, allow him to amend the pleading on such terms as may be just for including such claim.”

23. The above said provision clearly indicates that the party has to approach a competent Civil Court for rectification after satisfying the requirements of S.26 and the proper forum for such rectification is Civil Court exercising ordinary civil jurisdiction and that same cannot be dealt with in a summary proceedings by the Commission. S.26 of the Specific Relief Act refers to suits only. This principle is rendered by Hon'ble APTEL in a decision between Velagapudi Power Generation Ltd vs, M/s. SPDCL & others in O.P.No. 47/2009 dated 19.04.2010.

24. The petitioner has approached the Commission u/s 64 of the Act to fix the tariff ignoring the very ceiling limit fixed in the PPA as if it is not there in the PPA. The Commission has no power or jurisdiction to alter or delete any of the terms in the contract / PPA entered into between the parties by mutual consent. If there is any dispute either on payment or implementation of PPA then only it can extend its helping hand to the person who is suffering at the hands of the licensee or vice

versa, but not by amending the contract as sought by the petitioner or act contrary to the terms of the contract.

25. The counsel for the petitioner vehemently argued about the equality before law under Art.14 of Constitution of India. This Commission is not a constitutional court which can invoke Art.14 of the Constitution of India. It is only a Quasi-Judiciary and the scope of enquiry of the Commission is also very limited. The procedure to be adopted by the Commission is a summary procedure. It has got power to fix the tariff if the party approaches u/s 64 of the EA 2003, when there is no mutual agreement on the tariff and adjudicate the disputes between the parties under S.86 of the EA 2003. It is nowhere mentioned that it can ignore the terms and conditions of PPA and fix the tariff, contrary to the terms of the contract. The Commission is not competent to differ with the contract and it cannot review the ceiling limit incorporated into the PPA with mutual consent between the two parties to the PPA. Hence, this issue is answered against to the petitioner.

Issue No.2:

In view of the finding on issue No.1, the petitioner is not entitled for the amount of Rs.1,83,33,400/- and this issue is answered against to the petitioner.

In the light of the above said discussion, we are of the considered opinion that the petition filed by the petitioner is not maintainable under law and the same is liable to be dismissed.

Issue No.3:

In the result, the petition is dismissed.

This order is signed on this 31st day of August, 2012

Sd/-
(R.Ashoka Chari)
Member

Sd/-
(C.R.Sekhar Reddy)
Member

Sd/-
(A.Raghotham Rao)
Chairman