

ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION, HYDERABAD

O.P.(SR).No: 71 of 2011

Dated. 27.08.2012

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

Between:

M/s. GMR Vemagiri Power Generation Ltd  
Skip House, 25/1, Museum Road, Bangalore

...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 through its Principal Secretary (Energy)

...Respondents

This petition coming up for hearing on 13-07-2012 in the presence of Sri Gopal Jain, Sri S.Niranjan Reddy and Sri Avinash Desai, counsel for the petitioner and Sri P. Shiva Rao, counsel for the respondents, the Commission passed the following:

**ORDER**

The petitioner filed this petition dated 16.08.2011 under section 86 (1) (b) of the Electricity Act, 2003 read with Section 21(4) of APER Act, 1998 seeking consent of this Commission to the amendments to the PPA filed by the DISCOMs on 20.05.2011, which had been initialled by both the parties.

2. The averments of the petitioner as in the petition are as hereunder:
  - (i). *The Commission passed a common order on 05.12.2009 in the matter of PPA amendments filed by four IPPs contemplating sale of 80% of the PPA*

capacity to APDISCOMs and 20% to third parties. The relevant paras of the said order are extracted as hereunder:

*“Para 68.....the Commission is not going into the merits of these issues since consent is not being given to the package of amendments in their present form. For the same reasons, and since the working out of the modalities of any possible revised amendments formulation is being left to the parties to the PPA, the Commission is not going into the details of financial implications of the amendments, technical amendments or detailed analysis of judicial decisions relied upon by the respective parties.”*

*“Para 69.... the Commission hereby rejects the request of the petitioners for consent to the amendments except to the extent of clause 3.3 (case ii)” i.e., usage of Reliance Gas without Gail Invoice.*

*(ii). Further APERC while rejecting the proposal opined that, in the overall scenario of shortage of power, it is not desirable to forego 20% of PPA capacity of the four IPPs. Further Hon’ble Commission opined that 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 the 20% PPA capacity and suggested the following three options:*

*(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.”*

*(iii). As suggested in the order of APERC, the applicant vide letter dated 03.05.2012 exercised option (a). The applicant furnished preliminary draft amendments to the PPA dated 02.05.2007 along with loss calculations in view of foregone fixed charges for the period from 16.09.2006 (Actual COD of the Project) to 31.03.2009.*

*(iv). As per the procedure of APDISCOMS, the above said proposals of the applicants were submitted to GOAP vide letter dated 18.10.2010 for necessary directions. The Government vide letter dated 17.02.2011 communicated the approval as follows: -*

*“I am to inform that the Government have examined the proposal of APPCC/APDISCOMS and conveys approval to you to proceed accordingly”.*

(v). *As per the directions of GoAP, the present amendment proposals of the Applicant as accepted by both parties were initialled on 15.04.2011 by the Applicant and APDISCOMs.*

(vi). *Accordingly, the APPCC filed the petition before this Commission seeking consent to the proposed amendments to the PPA. Till date the Applicant has not received any communication from the Commission in this regard. The delay in giving consent to the proposed amendments is causing irreparable financial loss.*

(vii). *The amendment to the petition as filed by the APPCC is acceptable to both the parties as the same was mutually agreed upon. In view of this, the applicant prays that the Hon'ble Commission should give its consent to the said proposed amendments to the PPA filed by the APPCC.*

(viii). *It will suffer irreparable financial loss unless this Commission gives its consent to the proposed amendments to the PPA filed by the APPCC.*

(ix). *Hence, the applicant prays that this Hon'ble Commission be pleased to give its consent to the amendments to the PPA as proposed by the parties. To pass such other order or orders as this Hon'ble Commission deems fit and proper.*

3. The respondent(s) herein i.e., APTRANSCO & others filed OP(SR) 35/2011 against GMR VPGL whereas the said GMR VPGL filed OP(SR)71/2011 against APTRANSCO & others. The relief sought in both the petitions is almost similar in nature i.e., seeking consent of the Commission to the amendments of the PPA as proposed by the parties.

4. The learned counsel for the petitioner argued that they have filed the petition seeking consent of the Commission for the proposed amendments to the PPA based on “**option-a**” of the order dated 05.12.2009 and that they are entitled for an amount of Rs.447 crores towards loss of capacity charge apart from fixed charges. He has argued that the respondents are objecting to the proposed amendments without assigning any reasons. The learned counsel for the petitioner has argued that the

Petitioner is not agreeable to the extension of period of PPA by 2½ years as proposed by the respondents at the stage of initialling the draft amendments. However, he has argued that the difference in approach between the petitioner and the respondent on this issue of extension of time of PPA by 2½ years need not come in the way of the present petition.

5. The respondent has been informed about the filing of the petition. On the date of hearing on the aspect of admission, the counsel for the respondent has appeared and submitted that the respondent had never accepted that they are liable to pay loss of capacity charges. The counsel for the respondent has further argued that the petitioners are not giving consent for extension of the period together with true-up mechanism and has argued that the claim made by the petitioner claiming loss of capacity charges and additional fixed charges cannot be accepted. The counsel for the respondents has argued that the proposed amendments cannot be considered as amendments based on consent given by the respondent and that the respondents have given consent only to the extension of period of 2½ years of PPA together with true-up mechanism but not for the other aspects contained in the amendments and hence, the petition cannot be numbered and the claim made by the petitioners cannot be accepted.

6. Now the issue that arises for consideration is

***“Whether the petition of the petitioner seeking consent of this Commission to the amendments to the PPA can be admitted and numbered”.***

As relates to this issue and upon scrutiny of the Amendment Agreement to the Power Purchase Agreement (PPA), the Commission has noted that there is no “consensus ad-idem” on certain crucial issues and infact there were some crucial blanks left un-filled in the Agreement, some of which are extracted hereunder:

Sl.No.	Clause	Relevant Text
3	3.2	<p><b>COMPUTATION OF CAPACITY CHARGE:</b></p> <p>.....</p> <p>.....</p> <p>.....</p> <p><u>(ii). Additional Fixed Charges (AFC) of Rs.xxx per unit of cumulative available energy which shall be fixed for xxx term of the agreement.</u></p> <p><u><b>Explanation:</b> Notwithstanding anything stated in this agreement above, as directed by GoAP vide letter dated 17-02-2011, the losses of the company shall be ascertained by APERC and to make good of the same, it is agreed to increase the capacity charges to the extent of Additional Fixed Charges at the rate and period for truing-up which shall be determined by APERC.</u></p>
7	6.1	<p><b>Term of the Agreement:</b></p> <p>Subject to the terms stipulated herein, this agreement shall continue in force until the completion of period of 15 (Fifteen) years from the project COD.</p> <p><b>Note:</b> The APDISCOMs claimed extension of 2 ½ years period on the ground that, they were put to loss, since the project was idle after COD due to non-availability of gas. But the company did not agreed for the said claim.</p>

In view of the lack of agreement between the parties as above, the aspect of consent to the Amendments to the PPA cannot be taken up by the Commission straight-away. However, as agreed between the parties and as a first step, the losses of the company are to be ascertained by the Commission, by way of adjudication. It is only after this stage, that the method of recovery of such foregone capacity charges and the issue of consent for any PPA Amendments can be taken up in terms of Commission's Order dated 05-12-2009. The Commission has

accordingly decided to undertake the exercise of ascertaining the losses of the company, if any in the first instance. In fact, Commission has admitted O.P.(SR). No. 11 of 2012 on the same issue vide its Order's dated 27-08-2012. As such, the office is directed to admit the petition to the extent of adjudicating on ascertaining the losses of the company, if any, and number the same, duly, tagging it with O.P.(SR).No.11 of 2012 and also post the matter to a suitable date.

***This order is corrected and signed on this 27<sup>th</sup> day of August, 2012***

Sd/-  
**(R. Ashoka Chari)**  
Member

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

Sd/-  
**(A. Raghotham Rao)**  
Chairman