

ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION, HYDERABAD

O.P.(SR).No: 35 of 2011

Dated 27.08.2012

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

Between:

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)

...Petitioners

AND

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

...Respondent

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

ORDER

The petitioner filed this petition dated 20.05.2011 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 annexed thereto, which had been initialled by both the parties.

2. The averments of the petitioner as in the petition are as hereunder:

(i). *The Commission had earlier 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 vide the same order 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 of 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 by option (a) in the order of APERC, M/s. VPGL vide its letter dated 03.05.2010 furnished preliminary draft amendments to the PPA dated 02.05.2007 along with alleged loss calculations towards foregone fixed charges for the period from 16.09.2006 (Actual COD of the Project) to 10.04.2009 on which they got gas supply.

(iv). As per the internal procedure of APDISCOMs, the above said proposals of M/s. GMR Vemagiri 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: -

- (a) The recommendation of APPCC to adopt “option-a” as specified by APERC in its order dated 05.12.2009 stating that the 20% of capacity of project also be given to APDISCOMs by increasing the tariff on entire capacity of project including other 80%*

subject to ascertainment of losses by APERC and truing-up for initiating the proposed amendments is confirmed.

- (b) The view of the APDISCOMs that the fuel risk would be vested with IPPs only as approved by GoAP during the earlier amendments, is confirmed and earlier views are reiterated.*
- (c) Consented the APDISCOMs view that in order to consider the losses of M/s. Vemagiri, the term of the PPA of M/s. Vemagiri need to be extended by 2 ½ (Two and Half) years (on par with the other IPPs with regard to avail the power to APDISCOMs for total term of the PPA period), only after ascertaining of the losses of the Company by APERC, thereby cheaper power would be available to APDISCOMs by paying OFC component.*
- (d) Consented the DISCOMs view to deduct the fixed cost component which is being received by M/s. Vemagiri through sale of excess capacity of 17.625 MW to APDISCOMs from April 2009 till to date for arriving the actual losses of the company.*

GoAP requested APPCC to take necessary action accordingly.

(v). APPCC requested Vemagiri to include a clause for extension of PPA term by 2½ (Two and Half) years as approved by GoAP. In this connection M/s Vemagiri stated that they do not accept any further amendments relating to extension of PPA term, considering the idle period of the project.

(vi). On the representation of M/s. Vemagiri letter dated 15.02.2011 with regard to extension of PPA term of 2½ (Two and Half) years, it was informed that, it is proposed to canvass the claim of extension of the PPA term by 2 ½ years by APDISCOMs before APERC. However it is proposed to initial the Amendment agreement with M/s. GMR Vemagiri, for obtaining consent of Hon'ble Commission with other agreed conditions, leaving the claim of APDISCOMs about the necessity of extension of PPA term by 2 ½ years and the claim of alleged losses of M/s. GMR, to the adjudication of APERC.

(vii). As per directions of GoAP, the present amendment proposals of M/s. VPGL as accepted by both parties were initialled on 15.04.2011 by M/s. VPGL and APDISCOMs, except the term of the agreement and claims of alleged losses by GMR.

(viii). M/s. Vemagiri had declared COD on 16.09.2006 but could not generate power till April 2009 (except for a small period when the Lanco gas is diverted to Vemagiri) due to non-availability of natural gas. As per the existing PPA, the company is not entitled for deemed generation with alternate fuel. In fact, APDISCOMS also suffered losses due to purchase of power from Open Market to meet this deficit since the company could not generate power due to non-availability of natural gas from COD till March/April 2009.

The actual losses if any, incurred by VPGL need to be ascertained by APERC as directed by GOAP from COD 16.09.2006.

(ix). In the light of the above and as directed by GoAP, the Applicants pray the Hon'ble Commission to ascertain the losses of M/s. Vemagiri if any, and to fix up the rate of additional fixed charges and the period for truing-up to make good of the alleged losses if any, after duly considering the claim of APDISCOMS for extension of PPA period. It is also requested to issue consent to effect the proposed amendments as agreed by APDISCOMS and M/s. Vemagiri.

3. The petitioner 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. While that is so, at the time of hearing of the petitions, the counsel for the petitioner filed a memo stating that in view of the petition filed by the GMR VPGL, the application filed by them becomes in-fructuous and sought permission to withdraw the said petition. But on 11.05.2012, the counsel for the petitioner filed another memo withdrawing their memo dated 05.05.2012.

5. At the time of the hearing, the learned counsel for the petitioners submitted that even though the petitioners have filed the petition seeking consent of the Commission for the proposed amendments to the PPA in terms of “**option-a**” of the order dated 05.12.2009, their contention is that the respondents are not entitled for the amount of Rs.447 crores towards loss of capacity charge apart from fixed charges. It is also further contended by the petitioners that the proposal made by them is only for extension of time for a period of 2½ years. It is also contended by the petitioners that at one stage they thought that this petition is in-fructuous in view of O.P. (SR) No.71/2011 and filed a memo to that effect to withdraw the same but subsequently they had withdrawn the said memo to avoid legal complications in future.

6. 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 they had never accepted that they are not entitled to capacity charges and also submitted that they have never given consent for extension of the period of PPA together with true-up mechanism. The counsel for the respondent contended that the claim made by the petitioners that the respondent had accepted extension of time in lieu of capacity charges and additional fixed charges is incorrect. The counsel for the respondent has stated that they had never accepted the extension of PPA for 2 ½ years and that initialling of the PPA amendments cannot be treated as consent given by them for such extension of period of PPA.

7. 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 regards the issue of consent to the proposed amendments to the PPA, 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>COMPUTATION OF CAPACITY CHARGE:</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>Explanation: 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>Term of the Agreement:</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>Note: 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 indicated 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 or the issue of consent to the proposed amendments to the PPA can be taken up in terms of Commission's Order dated 05-12-2009. The

Commission has accordingly decided to take up at this stage, the exercise of ascertaining the losses of the company, if any. 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 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 27th day of August, 2012

Sd/-
(R. Ashoka Chari)
Member

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

Sd/-
(A. Raghotham Rao)
Chairman