



ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION

4th Floor, Singareni Bhavan, Red Hills, Hyderabad 500004

TUESDAY, THE FOURTH DAY OF AUGUST
TWO THOUSAND AND TWENTY

:Present:

Justice C.V. Nagarjuna Reddy, Chairman
Sri P. Rajagopal Reddy, Member
Sri Thakur Rama Singh, Member

R.P.No.1 of 2019 in O.P.No.30 of 2018 & R.P.No.3 of 2019 in O.P.Nos.28 & 29 of 2018

R.P.No.1 of 2019 in O.P.No.30 of 2018

Between:

1. M/s. Tirumala Cotton & Agro Products Pvt Ltd
2. M/s. Ravali Spinners Pvt Ltd. ... **Petitioners**

A N D

1. M/s. Transmission Corporation of Andhra Pradesh Ltd.
2. Southern Power Distribution Company of Andhra Pradesh Ltd.
3. Eastern Power Distribution Company of Andhra Pradesh Ltd. ... **Respondents**

R.P.No.3 of 2019 in O.P.Nos.28 & 29 of 2018

Between:

1. M/s. Tirumala Cotton & Agro Products Pvt Ltd
2. M/s. Ravali Spinners Pvt Ltd. ... **Petitioners**

A N D

1. Southern Power Distribution Company of Andhra Pradesh Ltd.
2. Eastern Power Distribution Company of Andhra Pradesh Ltd. ... **Respondents**

Both the Review Petitions have come up for hearing finally on 12-06-2020 in the presence of Sri M. Sridhar, learned counsel representing Sri Challa Gunaranjan, learned counsel for the petitioners and Sri P. Shiva Rao, learned Standing Counsel for the respondents at the web hearing. After carefully considering the material available on record and after hearing the arguments of the learned counsel for both parties, the Commission passed the following:

COMMON ORDER

Both these Review Petitions raise a similar grievance viz., that the tariff determined -- Transmission tariff in RP 1, Wheeling tariff in RP 3 -- for the 4th Control Period i.e., 2019-20 to 2023-24 need downward revision in respect of the petitioners' wind power projects for captive use.

2. The brief facts leading to the filing of these petitions are that the 1st petitioner who has a unit for manufacturing and sale of cotton and agro products at in Guntur District, commissioned two wind power projects of 2.1 MW each in Kadapa and Anantapur District on 06-07-2013 & 19-12-2013 respectively for captive consumption. Similarly, the 2nd petitioner, who has a unit for manufacturing and sale of cotton yarn in West Godavari District, commissioned a wind power project of 4.2 MW capacity in Uravakonda, Anantapur District on 15-10-2013. The petitioners are stated to be having Power Purchase and Wheeling Agreements with the respondents and also selling part of or their surplus power to the respondents or in the IEX.

3. The petitioners went on to explain the background in which distributed generation by private players came to be the favored policy and submitted that the Government of Andhra Pradesh policy measures, that were drawn up in consonance with the MNES (Ministry for Non-conventional Energy Sources) guidelines, provided for sale of electricity to third parties, wheeling by State Utilities, banking and purchase of energy. The petitioners cited Government Orders that were issued in 1997 & 1998 and also the Wind Power Policies that were issued in the years 2008 & 2015. They went on to state that the 2015 Wind Power Policy provided for among others, exemption from transmission and wheeling charges for

sale of energy by Wind Power developers to third parties or for captive consumption, for a period of 10 years and that the Commission has determined, transmission and wheeling tariffs for the 3rd Control Period i.e., from 2014-15 to 2018-19 in tune with the Government policy.

4. The petitioners went on to state that the Commission, while determining transmission and wheeling tariffs for the 4th Control Period i.e., from 2019-20 to 2023-24, has specified that all the open-access users shall pay transmission and wheeling charges based on contractual capacities approved by the Commission in the orders; and that the wheeling and transmission users are mandated to bear the wheeling and transmission losses based on contracted capacity in kW at entry point. Finally, they stated that the orders determined these charges without any reference to or considering NCE developers who used open access either for captive purpose or for 3rd party sale, as a class.

5. The petitioners further stated that the Commission determined the transmission and wheeling charges in accordance with Regulation 5 of 2005 as amended by Regulation 1 of 2019 but directed that the levy of the charges shall be on contracted capacities rather than on the system demand or the units wheeled; that considering contracted capacities in respect of NCE developers adversely affects them as their capacity utilization factor (CUF) is very low and varies seasonally without there being any correlation to the contracted capacity; and that NCE developers are to be treated as a class for differential treatment in tune with the object and legislative mandate contained in Section 86(1)(e) of the Electricity Act, 2003.

6. The petitioners also pleaded that for reviewing the orders on various grounds, the foremost among which are:

- a. that the orders suffer from error and mistake apparent from the record for non-consideration of relevant material;
- b. that the levy of transmission and wheeling charges based on contracted capacities instead of on injected quantities, is unreasonable and irrational as some of the existing wheeling agreements provide for wheeling in terms of energy wheeled and not in terms of capacity;
- c. that since the PLF/CUF of the wind power plants varies from location to location, levying transmission and wheeling charges even on plants having identical installed capacities but located at different places results in illogical levies and therefore should be levied on actual generation and wheeling;
- d. that relevant factors like load flow and direction, consumption by nearby loads, savings to the licensees in transmission and distribution losses, capacity and use of transmission and distribution assets, etc., should have been given due credit while determining the charges;
- e. that it is not apparent whether or not the orders are applicable to NCE open access users;
- f. that the tariff determination deviated from the mandate of the National Tariff Policy and the National Electricity Policy by not

taking sensitivity to distance, direction and quantum of power flows into consideration;

- g. that the determined transmission and wheeling charges are onerous; and
- h. that NCE projects cannot be shown differential treatment for conferring incentives based on their period of commencement.

7. The petitioners in RP 3 also pleaded that their power plant entry points are at 132 kV and their drawal points are at 33 kV potential. This is attracting a levy of both transmission and wheeling charges, which is very onerous.

8. The matters were placed in the public domain on 29-08-2019 & 31-08-2019 respectively by the Commission. In response to the public notice, objections were received from the following:

- a. Small Hydro Power Developers Association (RP 3)
- b. M/s Southern Rocks & Minerals (Both RPs)
- c. FAPCCI (RP 1)
- d. AP Chambers of Commerce & Industry Federation (Both RPs)

9. Small Hydro Power Developers Association reiterated the same points that are raised in the petitions and supported the cause of the petitioners.

10. M/s. Southern Rocks & Minerals, submitted that the transmission and wheeling charges bills raised on them for two months viz., April & May 2019 for settling 1,44,428 kWh injected energy having a notional value of Rs. 9,09,896/- attracted charges of Rs. 8,90,703/- which are almost equal to the total value of the units injected into the grid for captive consumption and thus are prohibitively expensive.

11. FAPCCI submitted that the transmission tariffs levied on NCE developers, which translated to 4 or 5 times more than those that are leviable on conventional generators, belies the expectations that are raised by the proclamations of encouragement to NCE developers by the Governments at the Centre and State. They questioned why a simple formula like the actual kVAh per month divided by 720 hours could not be used for NCE generators for calculating their MD charges. They noted that there is a policy discontinuum, insofar as incentives to NCE generators are concerned, between April 2013 and 13th February 2015 and looked up to the Commission to address this aspect.

12. AP Chambers of Commerce & Industry Federation also stated in their objections that calculating transmission and wheeling charges on installed capacities is making the charges onerous in the light of the NCE developers having very less CUF/PLFs like 23 to 24% for Wind, 17 to 18% for Solar and about 10% for Mini Hydel; that imposing the transmission and wheeling charges even as the G.O. Ms. Nos. 8 & 9 of 2015 which exempted wheeling and transmissions charges for 5 years i.e., up to 2020 is illogical and irrational; that the DISCOMs are enjoying “invisible advantage” (sic) in view of the minimum billing demand charges that are paid by the captive users availing Open Access; and that the transmission and wheeling charges now determined will make every NCE generator’s operations unsustainable. They finally prayed that the Commission should exempt the NCE generators from the transmission and wheeling charges in tune with the existing solar and wind policies; and even if such charges have to be imposed, then NCE generators should be treated as a separate class, the obvious inference being that they should be given a

concessional dispensation. In their submissions dated 18-06-2020 & 19-06-2020, they furnished year-wise unit cost analysis for NCE generators as under.

Solar at 33/11kv	2020-21/RS,3.83	2021-22/RS,4.02	2022-23/RS,4.22	2023-24/RS,4.43
Wind at 132/33kv	2020-21/RS,1.08	2021-22/RS,1.14	2022-23/RS,1.19	2023-24/RS,1.25
H del at 33/11kv	2020-21/RS,1.86	2021-22/RS,1.95	2022-23/RS,2.05	2023-24/RS,2.15

They further showed that the transmission/wheeling charges being levied on them are much more than the value of the units being produced by them; that the per kV wheeling charges at 33 kV level are about 4 to 5 times the charges leviable on energy being wheeled from thermal stations; that the charges being levied on a net potential of about 85 MW are highly disproportionate and that the neighboring states like Tamilnadu and Karnataka are levying only 50% and 25% respectively and requested that the charges be reconsidered. They furnished extracts from the publicly available records to show that the transmission/wheeling charges in the various states viz., Tamilnadu, Karnataka, MP, & Gujarat are way below than what are applicable in the case of AP and that the methodology adopted has taken into account energy injected rather than installed capacity of the NCE sources.

13. Responding to the petitions, APTRANSCO & DISCOMs in their counter stated that the petitioners are, in the name of review, canvassing grounds of Appeal and that the same cannot be allowed; that the Governments encouraged NCE developers at the nascent stage and in tune with the Governments' policies, the Commission also has given exemption for transmission charges in the 3rd Control Period; that the Commission, keeping in view of the huge capacity addition that happened, consciously decided not to continue the exemption during the 4th Control period; that the Open Access Generators / Consumers have no vested right to claim

exemption eternally; that the petitioners, despite being aware of this situation, did not seek continuation of exemption during the public hearings; and that as APTRANSCO & the DISCOMs had to provide transmission / wheeling capacity to the optimum capacity agreed, irrespective of whether only 10% or 100% of it is used, they are entitled to seek full cost recovery as per the provisions of the Electricity Act, 2003.

14. The Petitioners in their rejoinders have stated that as the GoAP declared the incentives following the Tariff Order for the 3rd Control Period, which categorically exempted the charges, and the Commission, in turn, amended the Regulation 1 of 2016 in tune with the Government's policy intent -- all developments which were never part of the ARR filings -- were under the bonafide belief that the Commission would continue the incentives; and that they were never called upon to submit any objections on the method and manner of determining the transmission and wheeling charges, and hence had no idea about the method and manner of determining the charges.

15. In the light of the rival contentions, the point arising for consideration is whether the petitioners made out a case for review, and if so to what relief are they entitled?

16. Before discussing the points raised by the learned counsel for the petitioners, it is necessary to deal with the scope of review. Section 94 (1)(f) of the Electricity Act 2003 (for short "The Act") confers power of review of its decisions, directions and orders on the Commission. However, neither the Act nor the Rules framed thereunder indicated any parameters for exercise of this power. In the absence of any indicia, it is not only apt but also permissible to follow the law laid down by the constitutional courts in this regard.

17. In *Sow Chandra Kanta & Another vs Sheik Habib* (1975 SCC(4) 457) the Hon'ble Supreme court held that a review of a judgement is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. In *P.N. Eswara Iyer vs The Registrar, Supreme Court of India* (1980 AIR 808) a constitution bench of the Supreme Court reaffirmed the ratio in *Chandra Kanta* (1 supra). In *Shri Ravinder Kumar vs Kamal Sen Gupta* (2008)8, the Hon'ble Apex Court held that unlike in appeal, scope of review is grossly circumscribed to such cases where review seeker has made a discovery of a new and important matter of evidence, which, after exercise of due diligence, was not within his knowledge and could not be produced by him when the decree or order where some mistakes or errors apparent on the face of the record have been made or when the court has overlooked some obvious facts on the basis of which decision could be made. The court further held that for a review, one of the above three considerations should be established.

18. In *Devender Pal Singh vs State of NCT of Delhi* (2003) 2 SCC 501, the Apex court held that review is not a rehearing of appeal all over again and that scope of interference is very limited to aspects such as miscarriage of justice.

19. Keeping in view the limited scope of interference in review jurisdiction as per the dicta laid down by the authoritative pronouncements of the Supreme Court as discussed above, we shall now consider the submissions of the learned counsel.

20. The submission of the learned counsel for the petitioners are twofold, viz., 1. that the tariff order overlooked the government policies providing for incentives and 2. that prescription of transmission and wheeling charges based on

contracted capacity instead of on the system demand or units wheeled is arbitrary and irrational.

21. As regards the first submission, we have carefully examined various government orders and the Regulations made by this Commission on incentives to the wind power developers. The first of the GOs in this regard is GO Ms No 48 Energy (RES) Department, dt: 11-04-2008 as amended by GO Ms No 99 Energy (RES) Department, dt: 09-09-2008. A perusal of these GOs shows that various incentives to NCE developers were declared by the then Government of AP. One such incentive is an exemption from transmission and wheeling tariff for a period of five years. Interestingly, the period of five years expired in April 2013 and the petitioner No 1's units were commissioned on 06-07-2013 and 19-12-2013, while the second petitioner's unit was commissioned on 15-10-2013. Thus, none of the petitioners' units is covered by the said GO.

22. The Government of AP issued GO Ms No. 9 Energy, Infrastructure & Investment (PR.II) Department dt: 13-02-2015 which also declared certain incentives to wind developers. This GO came into force w.e.f the date of its issue. It is stated therein that it remains applicable for five years or till a new policy comes into force. It also envisaged that the units which are commissioned during the operational period of the GO are eligible for the declared incentives which include, exemption from payment of transmission and wheeling charges. Following the Government's said policy, this Commission issued Reg.1 of 2016, providing for incentives to the eligible units. As noted above, as the petitioners' units were commissioned much earlier than the operational period, neither the GO nor the Regulations 1 of 2016 apply to them. Similarly, GO Ms NO.1 of 2019 also does not

apply to the petitioners for the same reason, viz., that they were commissioned before commencement of the said GO.

23. In the light of the facts discussed above, it is clear without any cavil of doubt that the tariff in question for the fourth control period does not come into conflict with either Government policies or the Regulations framed by this Commission. Consequently, recovery of transmission and wheeling charges from the petitioners under the tariff order in question is legal and proper. Hence, the tariff order for the fourth control period does not fall in any of the conditions laid down in the judicial pronouncements as discussed above.

24. As regards the second submission of the learned counsel that prescription of charges on the contracted capacities, rather than on the units wheeled, the respondents sought to justify such prescription by offering their own justification. The Commission having already issued the tariff order, adjudication of this issue requires rehearing, which we are afraid is beyond the scope of review. Such an exercise could be undertaken only by the appellate body. Therefore, without expressing any opinion on the submissions of either party on this aspect, we leave the petitioners free to agitate this issue in the appeal, if they choose.

25. For the aforementioned reasons, the two Review petitions are dismissed, subject to the observations made above.

Sd/- Thakur Rama Singh Member	Sd/- Justice C.V. Nagarjuna Reddy Chairman	Sd/- P. Rajagopala Reddy Member
--	---	--