



ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION
4th & 5th Floors, Singareni Bhavan, Red Hills, Hyderabad 500 004

O.P. (SR) No.87 of 2010

&

I.A. (SR) No.88 of 2010

Dated 15.04.2013

Present

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

Between

M/s. Singaraya Hills Green Power Genco Pvt.Ltd.,
40-1-23 / 1, 4th Floor, Surya Towers, M.G. Road,
Vijayawada – 520 010.

.... Petitioner

And

1. Southern Power Distribution Company of AP Ltd (APSPDCL)
2. Andhra Pradesh Power Co-ordination Committee (APPCC)
3. Transmission Corporation of AP Ltd (APTRANSCO)
4. Tata Power Trading Company Ltd.

... Respondents

This petition coming up for hearing on 20.08.2011. Sri P.Ramesh Babu, CEO for the petitioner present. The Commission passed the following:

ORDER

This petition is filed by the petitioner under Section 86 (1) (f) of Electricity Act, 2003 and the case of the petitioner is briefly as follows:

- i) The petitioner herein is a NCE Generating Company which set up its Biomass power plant in the district of Prakasam within the jurisdiction of SPDCL in furtherance to APERC policy, on NCE sector, declared in O.P. No. 1075 of 2000.
- ii) As per the directions issued by APERC through its order in O.P. No. 1075 of 2000, the petitioner shall sell its entire energy to APTRANSCO and accordingly the petitioner entered into PPA with the then APTRANSCO vide agreement dated 3rd January 2004 and APERC vide letter No.APERC/Dir-Engg/DD-Trans/F-PPA(BM)/D.No.959/2004 dt.01.06.2004 has issued consent under Section 21 (4) of APER Act, 1999 to the agreement dated 03.01.2004. Subsequently PPA was transferred from

APTRANSCO to SPDCL and the petitioner entered into amended PPA with SPDCL on 30.11.2005.

- iii) As per the order of the APERC in OP. No. 1075 of 2000 and PPAs, the petitioner shall sell all its energy to SPDCL only and SPDCL shall purchase the same from the petitioner at the tariff determined by APERC as per law without any demur.
- iv) In furtherance to said PPA, SPDCL vide its letter dated 27.10.2006 permitted the petitioner for erection of 7.36 KM of 33 kV interlinking line between the Biomass Power Plant and interconnection point at Y.Palem Substation on turnkey basis on payment of Rs.4,34,853/- to SPDCL towards supervision charges and accordingly the petitioner completed the laying of above transmission line at its cost. Subsequently, SE/Operation Circle/Ongole vide its letter dated 08.01.2007 directed the petitioner to extend the said line up to and quite opposite to the proposed 33 kV switch yard and accordingly the petitioner modified the same to the satisfaction of the officials of APTRANSCO / SPDCL by incurring additional cost.
- v) On completion of the erection of interlinking 33 kV transmission lines, the petitioner requested the SPDCL to accord its permission for import of power from the interconnection point at Kesanapalli 33/11 kV substation from 22.10.2007. Thus the plant was completed and ready to proceed further to synchronize by 22.10.2007.
- vi) As there is delay in giving import by the SPDCL and also as the foreign consultants / engineers are awaiting for trial runs and performance tests of the plant, the petitioner completed the preliminary test runs by the use of diesel generators etc., by incurring huge cost and completed the initial tests and again requested the SE/O/ONG/SPDCL to depute MRT team to install energy meters in substation and also requested the CMD, SPDCL to sanction for import of power from SPDCL with effect from 15.12.2007 vide petitioner's letter dated 10.12.2007.

- vii) As on that date, the PPAs already entered and duly consented by APERC are in force and according to the said PPAs, the SPDCL has to purchase the power from the petitioner as per the tariff determined by the APERC.
- viii) But with utter disregard to the Contract Act (which controls the agreements) and the consented PPAs (which controls the power purchase price), SPDCL has taken a totally a new turn and informed the petitioner through its letter dated 19.12.2007.
- a) That power purchase rate is to be arrived prior to according permission for synchronization of any power plant with grid; and
- b) Insisted the petitioner to come forward with concrete proposals to negotiate power purchase price; and
- c) To enter into amendment to PPA with APSPDCL on purchase rate and finally informed that further course of action in giving permission to import power for full load trials will be taken after finalization of power purchase rate.
- ix) As the plant is commissioned and the repayment of even principal loan instalments being started and the interest being accumulated on the loan given by commercial banks, it has become imperative to the petitioner to start the commercial operation of the plant in any way. Under those circumstances, the petitioner again requested the SPDCL to take the power as per the rate fixed by APERC in RP. No. 84 of 2003 i.e., Rs. 3.08 per unit, which rate is subject to the outcome of the final disposal of CA No. 2926 of 2006.
- x) In spite of petitioner giving consent to the rate permitted by the APERC, the following communication was received from SPDCL through its letter dated 18.01.2008.
- “In the reference 2nd cited, APSPDCL has offered a negotiated tariff of Rs. 2.90 paise per unit and requested your willingness on the subject matter.*
- In the reference 3rd cited, you have proposed a tariff of Rs.3.08 paise per unit which is not acceptable to APSPDCL.*

Hence it is to inform that the rate proposed by APSPDCL is to be accepted from your side to proceed further”.

- xi) Though the above communication shows that highhandedness of the SPDCL, which is being controlled by APPCC which in turn by APTRANSCO, yet the petitioner even came down to the pathetic stage of supply of power to the SPDCL at free of cost for permitting the petitioner to conduct full load trials as the foreign service engineers who have erected and commissioned the plant have to leave India within seven days from then, but in vain.
- xii) As the petitioner is entangled between the banks and SPDCL / APPCC, and even in spite of fact of undertaking given by the petitioner that it will supply power at free of cost during trial runs, as SPDCL is not accepting for giving back power unless the petitioner accept the rate at which SPDCL wish to purchase the power, petitioner approached the Hon'ble High Court of AP vide W.P. No. 4740 of 2008 for redressal of its grievance under Article 226 of Constitution India and obtained interim direction.
- xiii) The Hon'ble High Court passed the interim order after filing of counter affidavit by the Discom and after hearing both the parties on 24.03.2008. But in spite of the same, the respondents therein have not responded positively till a telegram was given on 15.04.2008.
- xiv) The petitioner vide its letter dated 21.04.2008, agreed to the conditions stipulated in SPDCL letter dated 15.04.2008 and submitted an undertaking to that effect expecting the early release of back power to the petitioner. At the time of submitting the said undertaking, SPDCL insisted orally to give simultaneous undertaking that the petitioner shall withdraw the writ petition and in view of the then compelling circumstances, the petitioner agreed for the same also and given undertaking accordingly.
- xv) The demands of undertakings one after another are nothing but contemptuous actions against the order of Hon'ble High Court dated 23.04.2008.

- xvi) Finally, after great struggle, the main and check meters are fixed on 11.08.2008 at the sub-station and SE/O/Ongole issued a letter on 12.08.2008 to that effect and thereafter synchronized with the grid on 13.08.2008 at 19.35 hrs.
- xvii) In view of the above, the petitioner entered into a PPA with M/s. Tata Power Trading Company Ltd (TPTCL) including an amendment agreement.
- xviii) While the interconnection facility is being provided, TPTCL informed the petitioner to participate in the proceedings of purchase of Electricity by APPCC and accordingly through TPTCL, the petitioner participated in the said proceedings on 02.07.2008 through TPTCL and offered to supply the power at Rs. 4.29 per kWh. APPCC accepted the offer of the petitioner, which offer and acceptance became an enforceable contract, and accordingly APPCC issued an order on 15.07.2008 for purchase of 7 MW power for the period from 05.07.2008 to 31.03.2009 at a purchase rate of Rs. 4.29 per kWh and the petitioner has been supplying the power accordingly.
- xix) In continuation to the same, APPCC issued an extension order to the above order i.e., extending the period of supply from 01.04.2009 to 30.04.2009 at the same rate as above vide its letter dated 31.03.2009.
- xx) The above extension order was further extended upto 31.05.2009 at the same rate vide APPCC letter dated 30.04.2009.
- xxi) The above supply is further continued to 31.03.2010 at a duly negotiated rate of Rs. 4.15 per kWh i.e., from 01.06.2009 to 31.03.2010 vide APPCC acceptance order dated 11.06.2009.
- xxii) In continuation to the above two years continuous supply of power, on 20.03.2010, APPCC invited the petitioner for participating in tender for the supply of power upto 7 MW for the period commencing from 01.04.2010. On that day, there were two types of invitations available to the participants.

First Type: Supply from 01.04.2010 to 31.05.2010 (upto two months) with purchase rate ranging from Rs. 6.50 and above per unit with penalty clause i.e., if the supply is less than 80% of the contracted supply, the supplier has to pay a penalty of Rs.1 per unit to APPCC.

Second Type: Supply for full one year i.e., from 01.04.2010 to 31.03.2011 at a purchase price of Rs. 4.50 per unit without any penalty clause.

xxiii) Biomass power plants are subjected to various forced shut downs due to various reasons like choking of super heater coils, clinker formation on travelling grate and various other difficulties like break down of drives / RAVs etc., the minimum 80% supply cannot be guaranteed. Therefore, considering all these difficulties and to have a peaceful operation of one full year without any time to time fluctuations in purchase rate and tension of maintaining the 80% minimum generation etc., the petitioner chosen to opt to second type of offer i.e., for full year supply at lower rate of Rs. 4.5 per unit without any penalty clauses which was mutually discussed and on agreed terms and conditions between the petitioner and APPCC and submitted its offer vide its letter dated 30.03.2010.

xxiv) On 31.03.2010, APPCC, represented by its CE / Commercial, called the petitioner and advised to submit a letter to the effect that the above rate is inclusive of trading margin of 4 paisa per unit and that the said offer is through TPTCL. Accordingly, the petitioner submitted a letter dated 31.03.2010.

xxv) APPCC represented by its CE / Commercial accepted the above offer and issued acceptance order dated 31.03.2010 for the supply of power upto 7MW from 01.04.2010 to 31.03.2011 @ Rs. 4.50 per unit.

xxvi) The petitioner respectfully submits that the above facts clearly show that APPCC acting on behalf of SPDCL entered into a contract with the petitioner through TPTCL on 31.03.2010 for the purchase of NCE power of 7 MW during the period from 01.04.2010 to 31.03.2011 at Rs. 4.50 per unit (kWh) without any penalty clauses. But subsequently, the Respondent No. 2 has arbitrarily / unilaterally modified the contract dated 31.03.2010 without the free consent of the contracting party by taking

undue advantage of its dominant position and also imposed onerous conditions on the petitioner to frustrate the contract.

- xxvii) Therefore the petitioner pray that the Commission be pleased to declare that the action of the APPCC, acting on behalf of SPDCL, modifying the contract dated 31.03.2010 is arbitrary, illegal and consequently reinstate the contract dated 31.03.2010 and therefore direct the APPCC / SPDCL to pay to the petitioner at Rs.4.50 per unit instead of Rs.4.25 per unit for the energy supplied by the petitioner from 15.08.2010 with interest at 18% on the differential amount.
- xxviii) APPCC is itself not clear, as is evident from its correspondence, as to who is vendor in the present case. Thus by confusing so, without furnishing the required information unambiguously, cancelled the above contract unilaterally and arbitrarily with retrospective effect i.e., w.e.f. 24:00 hrs of 10-10-2010 vide its letter dated 12.10.2010.
- xxix) A copy of the APPCC letter dated 12.10.2010 addressed to TPTCL duly intimating to TPTCL that as the "company" is not vendor registered, the contract stands cancelled and any power exported w.e.f. 24:00 of 10.10.2010 will not be considered for payment.
- xxx) Under these circumstances, the petitioner has no other go except to claim damages in respect of the illegal actions committed by the respondents from the date of illegal cancellation of contract till restoration of the situation to its original status.
- xxxi) Basing on the letter dated 29.07.2010 TPTCL asked the petitioner to attend (a) vendor registration of the firm (b) Installation of ABT compatible meters with 15 Min. time block (c) furnishing the day-a-head schedules to APSLDC.
- xxxii) So far as the allegation of installation of ABT compatible meters with 15 Min time block concerned, the petitioner respectfully submit that the said allegation is baseless, arbitrary and intentional.

- xxxiii) APPCC is a government organization and claims to be representative of APTRANSCO / DISCOMs etc. Hence, it is a State within the meaning of Article 12 of the Constitution of India. Hence, all its actions shall be fair and frank. It is expected to disclose all the rules, regulations, guidelines etc., said to have been framed by it, which affects the rights of the parties dealing with it, atleast on demand. But so far, except saying that it has framed certain guidelines, which are, according to it “mandatory” did not disclose those “mandatory guidelines” to the petitioner though APPCC demand the petitioner to follow the said “mandatory guidelines”.
- xxxiv) CE/ IPC is directly working under the control of APTRANSCO and no way connected to the purchase orders issued by APPCC, which APPCC is said to be working on behalf of the DISCOMs. Hence, directions issued by CE / IPC, which amounts to directions issued by APTRANSCO, to the affect that the purchase order issued is liable for cancellation etc., is ultra-vires his powers and functions and further amounts to encroaching the jurisdiction of DISCOMs by APTRANSCO through APPCC.
- xxxv) The petitioner respectfully submit that APPCC or any other authority ought to have furnished the information requested by the petitioner before proceeding further or taking any drastic action, as the commodity involved is “electricity” which has to be inevitably pumped into the grid as being generated.
- xxxvi) Without furnishing the said information, taking any action behind the back of the petitioner is arbitrary, illegal and unconstitutional.
- xxxvii) TPTCL forwarded a copy of the cancellation order of APPCC dated 12.10.2010 through the said email dated 19.10.2010. On perusal of the same, the petitioner surprised to note that the cancellation order was issued on 12.10.2010 but the same has come into effect 2 days prior to the date of issue of such letter, notwithstanding the fact that such information was received by the petitioner on 19.10.2010.
- xxxviii) Though TPTCL concur with the petitioner on the highhandedness / illegal actions of the APPCC, yet it has not taken any precautionary measures to

prevent damage / loss to the petitioner in spite of receiving a letter dated 03.10.2010 from the petitioner. Hence, all the respondents are jointly and severally liable to pay the damages to the petitioner @ Rs. 3 lakhs per day towards the losses, direct and or indirect, mental agony, dislocation of works, waste of valuable time of the executives of the petitioner company in initiating and continuing these proceedings etc., arising out of the illegal actions of the respondents.

xxxix) SPDCL is also accounting the power purchased from the petitioner under RPPO order issued by the Commission from time to time and submitting the same information to APERC through its quarterly returns.

xl) Hence, the petitioner is not falling in OA regulations.

xli) Therefore, respondents have no authority to recover / demand / OA ? Transmission charges from the petitioner. But the respondents have been collecting/ recovering / demanding OA / Transmission charges from the petitioner from 01.04.2009 till date at the rates as applicable to OA customers.

2. Therefore, the petitioner herein prays that the Commission may be pleased to allow the petition and grant the following reliefs.

- i). Declare that the action of 2nd respondent in insisting the petitioner / TPTCL to give undertaking to supply the power at reduced rate with compensation clauses etc., under the guise of calling for information vide its letter dated 04.08.2010 and all its subsequent communications are arbitrary, illegal besides coercive and therefore the said letters are void and hence set aside the said letter dated 04.08.2010 and its consequent exchange of communications and also set aside the revised purchase order dated 14.08.2010 and consequently direct the respondents to continue to take the power as per the contract dated 31.03.2010 @ Rs. 4.50 per unit (kWh) and also pay the difference amount of Rs. 0.25 per unit from 15.08.2010.
- ii). Declare that the action of the 2nd respondent in cancelling the purchase order behind the back of petitioner is arbitrary, illegal and therefore set aside the letter dated 12.10.2010 issued by 2nd respondent and direct the respondents

to take the power as per the contract dated 31.03.2010 @ Rs. 4.50 per unit (kWh).

- iii). Declare that the action of the 2nd and 3rd respondents in insisting the petitioner to get the vendor registration is not in accordance with the provisions of APER Act, 1999, Electricity Act, 2003 and the Regulations of APERC and that they have no authority whatsoever to frame regulations / guidelines to compel the state generators particularly NCE projects to get register themselves with the 3rd respondent by making payment of application fee of Rs.5000/- every year and such collection of annual payment has no approval of APERC by way of approving the ARR and further declare that the cancellation of pre-concluded contract on the subsequent alleged mandatory requirement of vendor registration is arbitrary, illegal and without any force of law.
- iv). Direct the respondents jointly and severally to pay to the petitioner damages of Rs.3 lakhs per day from 24:00 hrs of 10.10.2010 as requested in this petition till the restoration of taking of supply as per the contract dated 31.03.2010.
- v). Declare that collection / adjust / recovery / seeking reimbursement of OA / Transmission / SLDC operating / Surcharges etc., from the petitioner's NCE Biomass power plant / its monthly bills by the respondents is arbitrary, illegal and not as per the Regulations framed by the APERC and consequently direct the respondents with joint and several liability to refund all the above said charges collected / recovered / adjusted including the security deposit etc., with interest @ 2% per month @ monthly rests.
- vi). And grant such other relief or reliefs as the Commission deem fit and proper in the interest of justice.

3. The counsel for the petitioner submitted his written submissions on the maintainability of the petition. He claims that the petition is maintainable u/s 86(1)(f) of the EA 2003 as it deals with the adjudication of the disputes between the parties by the State Commission, S.2(39) defines licensee, S.14 & 12 defines different kinds of

licences and grant of licences to various categories respectively. According to S.2(39) of EA 2003, TPTCL is a licensee and under S.14, the appropriate Commission may grant licence under S.15 on an application made by the party. S.12 deals with the persons authorized to transmit, supply, etc, electricity. The conjoint reading of S.12 and 14 shows that the persons intending to trade the electricity requires a licence issued under S.14. It is an undisputed fact that TPTCL is doing trading of electricity within the State to the knowledge of the Commission. In the website of CERC, the TPTCL has been issued with the Inter-State licence under F category w.e.f 09.06.2004 for trading electricity. TPTCL is also a licensee meeting the requirements under S.86(1)(f) of the Act.

4. The licensee within the scope of S.86(1)(f) does not mean distribution and transmission licensees but also licensees who are granted licences under S.14 read with S.12 of the Act which requires licence even to a trader and TPTCL is also issued with a licence by the appropriate Commission. S.9 of the Electricity Rules, 2005 says that no separate licence is required for an Inter-State trading licensee to do intra-State trading. Hence trader is also licensee within the scope of S.14 of the Act and also within the ambit of S.86(1)(f) of the Act. TPTCL is also made a party to the dispute and therefore the petition is maintainable and the Commission may pleased to number the main petition for hearing.

5. Now, the point for consideration is, whether the petition filed by the petitioner can be numbered for further hearing as prayed for?

6. While addressing the above issue, it needs to be first established as to whether there is any privity of contract between the Petitioner and the Respondents No. 1 to 3. This can only be decided after hearing all the parties concerned. In view of the above, we are of the considered opinion that the petition can be numbered by giving opportunity to hear all the parties concerned. Accordingly, the office is directed to number the petition and post the matter for hearing on a suitable date.

This order is corrected and signed on this 15th day of April, 2013.

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

Sd/-
(A.Raghotham Rao)
Chairman