



**ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION**  
**4<sup>th</sup> & 5<sup>th</sup> Floors, Singareni Bhavan, Red Hills, Hyderabad 500 004**

I.A. No.4 of 2013  
in  
O.P. No.72 of 2012

Dated: 08.02.2013

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

Between

1. Central Power Distribution Company of AP Ltd (APCPDCL)
2. Southern Power Distribution Company of AP Ltd (APSPDCL)
3. Northern Power Distribution Company of AP Ltd (APNPDCL)
4. Eastern Power Distribution Company of AP Ltd (APEPDCL)
5. Andhra Pradesh Power Co-ordination Committee (APPCC)

...Petitioners  
(respondents in main O.P.)

AND

M/s GMR Vemagiri Power Generation Limited (GVPGGL)

... Respondent  
(petitioner in main O.P.)

This petition has come up for hearing on 29.01.2013 in the presence of Sri P.Shiva Rao, Advocate for the petitioners and Sri Gopal Jain, Advocate for the respondent, the Commission passed the following:

**ORDER**

This petition is filed under clause 55 of APERC Conduct of Business Regulations (CBR) r/w order 11 Rule 7 of CPC by the petitioner. The case of the petitioner is briefly as follows:

- (i) (a) The respondent has claimed alleged losses of Rs.447crs on the assumption that the understanding of the parties arrived at in 2008 evolving formula permitting 20% of the capacity of the PPA to sell to 3<sup>rd</sup> parties. As a matter of fact the said proposal is preceded by the understanding of both parties has been rejected by the Commission vide its orders dated 05.12.2009.
- (b) The respondent approached the petitioner subsequent to the said orders dated 05.12.2009, with a proposal to adopt option 'A' as evolved by the said order dated 05.12.2009 by the Commission, but both parties could not arrive at any consensus agreement. However, for some amendments parties arrived at consensus. But the crucial aspect of arriving at a figure of alleged loss/compensation of the petitioner is concerned, there was no agreement. With the said incomplete agreement the proposals were submitted by both parties seeking consent of the Commission vide OP(SR) No. 35/2011 and OP(SR) No.11/2012. The Commission considering the said incomplete agreements in its order dt.27.08.2012 in OP(SR) No.11/2012 filed by the petitioner herein at para '9' held that

**As regards the prayer of the petitioner at para 7(ii) above, seeking a direction to the respondents to pay AFC @ Rs.0.439 paise/kWh for the balance period of the PPA and for this purpose to effect necessary amendments to the PPA, it is apparently a follow up action in terms of the order dated 05-12-2009 of the Commission. On this point, the respondents have contended that, there is no cause of action for entertaining this request in as much**

**as, the only way of recovery of losses in the instant case is by way of extension of agreement and not through payment of AFC as sought in the prayer. The commission's view is that, even in terms of order dated 05-12-2009, any such cause of action would arise only if the amendments package is suitably worked out and specific PPA amendment proposals are filed before the Commission. In the absence of filing of such an amended package, there is no cause of action to entertain the prayer of the petitioner as made at para 7(ii).**

- (c) In the application filed by these respondents vide orders dated 27.08.2012 in OP(SR) No. 35/2011 it is held at para '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".....**

**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.**

- (ii) In view of the said facts, it is clear that understanding arrived at between the parties at several stages from the year 2008 onwards lost its validity. Thereby the parties are relegated back to the extent PPA including the amendment dated 02.05.2007. Therefore, the claim of the petitioners needs to be based on the terms of the said agreement, and not otherwise.

If the supply of Fuel is less than the projected supply till March 2008 and / or shortfall in supply of 1.64 MMSCMD of gas in April 2008, as set forth above, DISCOMs agree that the company may claim compensation from DISCOMs for loss in Capacity Charges incurred by the Company on account of such shortfall of Fuel. In order to compensate the company for such loss in capacity charges, the following shall apply.

- (a) The compensation shall be limited to the loss in capacity charges incurred by the company till such date the supply of 1.64 MMSCMD of gas is delayed beyond 01.04.2008. Upon supply of 1.64 MMSCMD of gas for a full month, for the first time, the company shall not make any further claims of loss in capacity charges incurred whether there has been a shortfall in gas supply or not.
- (b) This claim for loss in capacity charges shall include the loss in capacity charge incurred upto the month in which 1.64 MMSCMD of gas is received. The claim shall also include operations in supply of gas till end of March 2008.

- (c) The parties shall within 90 days of the claim being made by the company and only by way of increasing the term of the agreement beyond 23 years, till such time the company receives 1.64 MMSCMD of gas for a full month for the first time, the company shall not be deemed to be in default or breach of this agreement for any shortfall in generation.
- (iii) (a) As stated supra, since the respondent admittedly received gas 1.64MMSCMD in the month of April 2009 the respondent ought to have made its claim in the month of July 2009. But the respondent never made such claims with the petitioners. The respondent in respect of the alleged claim, have approached this Commission only on 09.04.2012. As such except in respect of claim for the month of April 2009, for the earlier period upto March 2009 the claim is barred by law of limitation.
- (b) Therefore irrespective of the eligibility of the compensation or otherwise of the respondent, their very claim is barred by law of limitations, as the claim is made after three years of date of cause of action. Consequently, the petition needs to be dismissed on that ground at the threshold.
- (iv) The respondent claims the loss/compensation on the ground that there was no supply of gas as projected at para 5.2 'A' of the PPA, but the said gas supplies are indisputably have not been made by M/s. GAIL to the company as obligated under the fuel supply agreement entered by and between the respondent on one part and M/s. GAIL on other part. Therefore, primarily, as per law that governs the subject agreement as per the GOI notification dt.06.11.1995 the

Discoms are not liable for any of alleged losses due to non supply of gas, even otherwise, whether or not there is adequate / projected gas supplies and that if there is no such gas supply for what reason it was not supplied are facts which are well within the knowledge of M/s. GAIL, but not with the knowledge of Discoms. In view of the said fact the claim of the respondent about the non receipt of the gas from M/s. GAIL, and to deal with the consequence of claim of losses as specified in clause 5.2'A' of the PPA, cannot be finally adjudicated, in the absence of GAIL before this Commission. Hence, M/s. GAIL is necessary party to this petition. Consequently, the petition is liable to be dismissed for non joinder of the necessary parties.

- (v) The respondent in their petition nowhere stated the basis for alleged losses of Rs.447 crs, and the details of the losses. The respondent ought to have specified the terms of the extent PPA which gives cause of action to make such claim of losses. In the absence of said pleadings, the petition has no cause of action to file this petition.
- (vi) The petition is also bad for want of better particulars about the basis and the details of claim, with reference to the terms of extent PPA, and the quantification of the losses. The approval of the said claim of Rs.275 crs by the said committee per say cannot be considered here, as the alleged losses have been already factored into while extending the PPA terms of the project for 8 more years and also permitting the respondent to sell the excess capacity of the project to 3<sup>rd</sup> parties. In consequence of said benefit of permitting excess capacity, the respondent sold the excess capacity of the power to Discoms and gained good amount of money besides having the advantage of 8 years more agreement period. As such, the respondent is precluded from claiming of the said losses once

again so as to make the claim of losses to Rs.447 crs. It is on record that the respondent sold his excess energy of 17.625MW to the petitioner as 3<sup>rd</sup> party sale and the petitioner have paid an amount of Rs.16,08,26,292/-. Apart from this, the petitioner had received an amount of Rs.115 crs towards fixed charges during the operation of the plant with diverted gas of M/s. Lanco for the period from 07.02.2008 to 22.04.2009.

- (vii) In view of the aforesaid facts, the O.P.No.72 of 2012 deserves to be dismissed at threshold without undertaking the exercise of merit or otherwise of claim made by M/s. GMR.

It is prayed that Commission may be pleased to reject the petition as barred by law.

2. The case of the respondent is briefly as follows:

- (i) This application is entirely misconceived and an abuse of process.
- (ii) These proceedings have been initiated in the light of the order dt.05.12.2009 by this Commission.
- (iii) (a) The Government of Andhra Pradesh permitted setting up of gas based power generation project at Vemagiri of E.G. Dist. A power purchase agreement was entered on 31.03.1997. In the month of July 2004, APSEB (predecessor-in-interest of the petitioner) filed an application before this Commission for deletion of usage of alternate fuel from the definition of fuel in the subsisting PPA. The respondent submitted proposal to the Government of A.P. for deletion of alternate fuel provisions from the PPA. Pursuant to the approval of Government of A.P. and consent granted by this Commission amendment agreement was executed

between the respondent and the AP Discoms on 02.05.2007. Under the said amendment inter alia the term of the PPA was extended to 23 years and usage of fuel other than natural gas was deleted.

- (b) In light of the clarification submitted by Andhra Pradesh Power Co-ordination committee there did not remain any dispute with regard to the fact that the respondent had suffered losses due to non-availability of natural gas for operating the power station established by them and the said losses were proposed to be recovered by allowing the respondent to sell 20% of contracted capacity under the PPA plus any tested capacity over and above the contracted capacity under the PPA to third parties.
- (c) This Commission did not grant its consent to the proposed amendments instead gave three options to the parties to recover the losses incurred by the generating companies including the respondent.  
From the paragraphs 61 & 65 it is clear that a mechanism to ensure additional revenues to the respondent has been evolved with appropriate true-up mechanism to ensure recovery of loss that have already been suffered.
- (d) It was in this context that the respondent entered into discussions with the petitioners to adopt option "A" as evolved by this Commission, initialed the draft of the proposed amendment to the PPA. The initialed PPA was filed before this Commission for consent. It is submitted that petitioner and the respondent intended that the quantum of the loss that the respondent is entitled to recover and the additional capacity charge that payable



to the respondent would be determined by this Commission.

- (e) The order dt.05.12.2009 passed by this Commission was accepted by the parties thereto and thus has achieved finality. The order was given effect to and accordingly the amendments to the PPA had been agreed upon and initialed. The present proceedings (OP No.72/2012) are consequential in nature and are based on the order dated 05.12.2009 passed by this Commission. Resultantly, the case of the respondent OP No. 72/2012 falls within the contractual agreement between the parties and the binding direction given by this Commission in its order dt.05.12.2009.

- (f) The relevant extract of the order dt.05.12.2009 is extracted hereunder for ready reference:

**60. The basic principle underlying G.O.135 is that the DISCOMs are not in a position to make lumpsum payment of fixed charge entitlements that might have become due under the terms of the existing PPAs in the context of alternate fuel clause and that a mechanism has to be evolved to enable the IPPs to receive their entitled payments and that permitting free sale of 20% PPA capacity plus any tested capacity over and above the PPA capacity is the suggested mechanism to achieve this objective.**

Further, the blanks in the proposed amended draft of the PPA were left for the reason that the quantum of loss and additional fixed charges that the respondent would be entitled would be determined by this Commission.

- (g) The claim of the respondent is based on the acknowledged loss suffered by it and one of the options suggested by this Commission in its order dt.05.12.2009 to recover the same. Since the order has become final

and binding there cannot be any circumstance that the same can be said to have lost its validity.

- (h) The law of limitation does not apply to proceedings before a quasi judicial Tribunals such as this Commission. Further, in any event, the reliance on clause 5.2A of the PPA to submit that the claim had to be made on or prior to July 2009 is misplaced. Clause 5.2A of the PPA details the procedure to be followed by the parties in the event projected supply of gas is less than the quantities mentioned in the PPA.
- (i) The claim of the respondent relates to non supply of gas but is based on clause 5.2 of the PPA and not clause 5.2A of the PPA.
- (j) The loss suffered by the respondent stands acknowledged and therefore the Discoms are now estopped from alleging that there is no cause of action for the instant claim.
- (k) The O.P.No.12 of 2009 were filed before this Commission after the alternate fuel provision had been deleted and the term of the PPA had been extended to 23 years. In that petition it is acknowledged that the generating companies (including the respondent herein) have suffered losses and to allow the generating companies to recover such losses, it was proposed to allow the respondent to sell 20% of contracted capacity under the PPA plus any tested capacity over and above the contracted capacity under the PPA to third parties. The respondent could recover the losses acknowledged therein. In view of the order dt.05.12.2009 the respondent has not made any third party sale and the allegation of the petitioners in this regard is

misconceived. The supply of gas to the respondent since the date of grant of permission for open access has been not sufficient to operate the plant at 80% PLF. The entire power generated by the respondent has been sold to the Discoms/petitioners at the tariff under the PPA. There has not been any excess recovery by the respondent which can be said to have offset the loss suffered by the respondent.

- (l) This Commission considered the maintainability of O.P.No.70/2012 and admitted the petition. The instant application is abuse of the process of law and should be dismissed.
- (m) The claim of the respondent will recover the losses that have been acknowledged on more than one occasion and is proposed to be recovered in accordance with option suggested by this Commission in order dt.05.12.2009. Therefore, it is specious to suggest that OP No. 70/2012 should be dismissed without a decision on merits.
- (n) In the light of the above it is prayed that the Commission may be pleased to dismiss IA 4 of 2013 with costs and the Commission may proceed to examine the merits of OP No. 72 of 2012.

3. The material grounds mentioned in the rejoinder filed by the petitioner are briefly as follows:

- (i) There is no legally enforceable direction against the Discoms, in the order dt.05.12.2009 in OP 9 to 12 of 2009 passed by Commission. An advise was given by the Commission to the parties to the effect that if the parties i.e., that if both parties consensually came to an understanding on any one of the options suggested, then the Commission would consider the

same. That does not mean that the parties in variably are bound to enter into an agreement with any one of the three options suggested. Further there is a clear observation of Commission in the order dt.05.12.2009, that the case of M/s GMR Vemagiri Power Ltd. stands on different footing than the three other cases, as the said company has different amendment agreement dt.02.05.2007.

- (ii) Merely because the respondents after 02.05.2007 found that the methodology adopted in amendment dt.02.05.2007, is not their satisfaction it cannot make the APERC consented amendment as nonest and cannot seek a different methodology detrimental to Discoms and particularly without consent of Discoms.
- (iii) Although Discoms, during the proceedings of 80:20 proposal submitted certain clarifications, at the requirement of commission the same cannot have any binding effect even after such proposal was rejected by the competent Authority. The parties in this case are bound by the amendment agreement dt.02.05.2007 and nothing more than that. The admissions if any made in the earlier different proceedings does not bind the Discoms.
- (iv) Any claim/request is necessarily to be examined on the basis of the said contract and not based on any other proposals which were not materialized at all. And not converted in the form of valid agreement.
- (v) The respondents are precluded from canvassing any of the statements/observations made during the process of GOMS No. 135 or in the proceedings seeking for approval of 80:20 issue.
- (vi) It is a clear misconception of law to say that law of limitation does not apply to proceedings before the Commission.

- (vii) These Discoms are not responsible for non supply or short supply of gas. Instead of going against the concerned who are responsible for short supply of gas, the respondents are unnecessarily harping on Discoms who have no role in fuel risk of generators.
- (viii) The O.P. Nos.9 to 12 of 2009 on the file of Commission were filed after deletion of alternate fuel. In fact OP Nos. 9 to 12 are nothing to do with amendment agreement dt.02.05.2007 wherein alternate fuel clause was deleted.
- (ix) The orders concerned to admission of O.P.72/2012, is nothing to do with rejection of them in OP on merits, on the ground of barred by limitation and no cause of action. The law on this aspect is very much settled by superior courts.
- (x) Hence, it is prayed that the Commission may be pleased to allow the I.A.4 of 2013 and reject O.P.72/2012, with costs.

4. The learned advocate for the petitioner made oral submissions and also submitted written submissions as hereunder:

- (i) The respondent-company claimed Rs.447 crs towards alleged losses, toto seeking direction to the Discoms to increase the tariff and therefore there is no cause of action as per the terms of the PPA. Except the said PPA amended on 02.05.2007 there is no other valid enforceable agreement to give rise cause of action for such claim.
- (ii) As per S.21(5) of A.P.E.R.Act, 1998 any agreement which is not approved by the Commission is void.
- (iii) The respondent attempting to rely on certain terms of arrangement or letters from GoAP and they cannot be relied upon since the approval is rejected by the Commission by order dt.05.12.2009 and no further arrangement is been arrived at and consequence of the same. There is no

enforceable agreement to enable the respondent for claiming damages, excepting the clause 5.2A which entitles for increase of term of PPA, if there is any loss due to short fall of gas.

- (iv) The claim made by the petitioner is barred by limitation as the period is more than 3 years prior to filing of O.P.72/2012.
- (v) The contention of the respondent that the law of limitation shall not apply to the proceedings before the Commission is not correct. Whether there is a cause of action and whether the claim is barred by limitation or not shall be dealt along with merits and as per the settled position of law and when there is no action, the proceedings need to be snubbed at the threshold. Like wise the limitation issue also.

5. The learned advocate for the respondent made oral submissions by narrating the following points:

- (i) The Commission did not grant its consent to the proposed amendments but instead gave three options to the parties to recover the losses incurred by the generating companies including the respondent.
- (ii) It is very clear from the above said order that a mechanism to ensure additional revenues to the respondent has been evolved with appropriate true-up mechanism to ensure recovery of losses that have already been suffered.
- (iii) The order dt.05.12.2009 passed by this Commission was accepted by the parties thereto and thus has achieved finality. The order was given effect to and accordingly the amendments to the PPA had been agreed upon and initialed. The present proceedings (OP No.72/2012) are consequential in nature and are based on the order dated 05.12.2009 passed by the Commission.

- (iv) The law of limitation does not apply to proceedings before a quasi judicial Tribunals such as this Commission. Further, in any event, the reliance on clause 5.2A of the PPA to submit that the claim had to be made on or prior to July 2009 is misplaced. Clause 5.2A of the PPA deals with the procedure to be followed by the parties in the event projected supply of gas is less than the quantities mentioned in the PPA.
- (v) The losses that have been suffered by the respondent are acknowledged at more than one occasion and the parties intended that the final amount recoverable by the respondent would be determined by the Commission.
- (vi) The loss suffered by the respondent stands acknowledged and therefore the Discoms are now estopped from alleging that there is no cause of action for the instant claim.
- (vii) The Commission has already considered the maintainability of O.P.No.72/2012 and admitted the petition. This petition is abuse of process of law and the same is liable to be dismissed.

6. Now, the point for consideration is, whether the petition O.P.No. 72/2012 is liable to be rejected as prayed for?

7. Originally, the petition was heard at the SR stage and the Commission passed its order dt.27.08.2012 and directed the registry to number the same and posted the matter for further hearing. The Commission passed its order as hereunder:

**In view of the foregoing, the petition is partly admitted i.e., to the extent of the prayer at para 7(i) supra. Prayers at paras 7(ii) and 7(iii) do not arise at present as discussed above. Office is directed to number the petition as allowed supra and post the matter to a suitable date.**

As per the above said order, the Commission has already taken cognizance to the extent of issue at Para 7(i) i.e., **whether the Petitioner is entitled to the compensation of Rs.447 crores (on**

**NPV basis as on COD) towards loss of Capacity Charges for the period up to 10.04.2009;**

8. Now, the respondent in main O.P. and petitioner herein has taken the issue that there is no cause of action for filing the petition. It appears that both the parties have signed on the proposed amendments with certain blanks. The Commission had already arrived and taken a decision to conduct an enquiry on the quantum of losses alleged to have been sustained. The petitioner claims that the claim is barred by limitation.

9. The learned advocate for the petitioner relied upon a ruling reported in [2004] 1 Supreme 1051 Union of India vs West Coast Paper Mills Ltd. In this it was held that

**Limitation period of filing of – Date of commencement – once an appeal is filed before the Supreme Court and the same is entertained – Judgment of the High Court or the Tribunal is in jeopardy – subject matter of the lis unless determined by the last court, cannot be said to have attained finality – Grant of stay of operation of the judgment may not be of much relevance once the Supreme Court grants Special leave and decides to hear the matter on merit.**

He has also relied upon another ruling reported in 2009 ELR (SC) 246 to the effect that every power purchase plan be it for short term, medium term and long term shall be presented to the regulatory commission and the Commission may approve or reject such plan.

10. The learned advocate for the respondent relied upon a ruling reported in (2004) 11 SCC 456 L.S.Syntheitics Ltd vs Fairgrowth Financial Services Ltd and Anr. In this it was held that

**The provision of Limitation Act, 1963 have no application in relation to the proceedings under the said Act.**

He has also relied upon another ruling reported in (2006) 3 SCC 100 Mayar (HK) Ltd and Ors vs Owners and Parties, Vessel MV Fortune Express and Ors. In this it was held that



**A cause of action is a bundle of facts which are required to be proved for obtaining relief and for the said purpose, the material facts are required to be stated but not the evidence except in certain cases where the pleadings relied on are in regard to misrepresentation, fraud, willful default, undue influence or of the same nature.**

He further relied upon a ruling reported in (2011) 8 SCC 656 State of Jharkhand and Ors. etc. vs Shivam Coke Industries, Dhanbad, etc.

In this it was held that

**We would however agree with the position that such a power cannot be exercised by the revisional authority indefinitely. In our considered opinion, such extraordinary power i.e., suo motu power of initiation of revisional proceeding has to be exercised within a reasonable period of time and what is a reasonable period of time would depend on the facts and circumstances of each case.**

11. This petition is filed by the petitioner (respondent in main O.P.) claiming that there is no cause of action. Having acknowledged the same, they cannot now contend that the claim is barred by time. Furthermore, though acknowledgment is given and that acknowledgment cannot be decided in I.A. Like wise, the parties are at liberty to agitate the same in the main petition itself. Similarly, having signed in the amendments he cannot now contend that there is no cause of action for the Commission for quantification for the losses alleged to have sustained. Whether there are any losses as alleged and whether the same can be quantified or not are to be settled by the Commission u/s 86(1) of EA 2003 after conducting a detailed enquiry in the main O.P.No.72/2012.

12. No doubt, the parties are at liberty to move the court to decide a particular issue as a preliminary issue, but the present issue is not something that can be so canvassed. The present issue is something that can be canvassed before the Commission in the main petition itself.

13. As per the decision reported in 2006(3) SCC 100, the cause of action is bundle of facts which are to be proved for obtaining the relief. It is also clear from the above said ruling that the court has to look into the material facts mentioned in the main petition itself. The main petition claiming alleged loss of Rs.447crs is projecting bundle of facts which are yet to be proved. So, it cannot be said that there is no cause of action.

14. So far as the aspect of limitation is concerned, the petitioner in the main petition claimed losses sustained yet to be quantified by the Commission. This petition is filed basing on the options provided by the Commission in its order dt.05.12.2009. So the matter is pending before the Commission till that date. The petitioner filed in pursuance of the order dt.05.12.2009. The respondent claims that law of limitation does not apply to the special courts. Whether the claim is barred by limitation or not cannot be decided in this interlocutory application. The petitioner is given liberty to canvass the same in the main petition 72/2012 itself.

15. In the light of the above said discussion, we are of the considered opinion, that the petition is not sustainable at this stage and the same is liable to be dismissed.

16. In the result, the petition is dismissed.

This order is corrected and signed on this 8<sup>th</sup> day of February, 2013.

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

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

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