



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

O.P. No.9 of 2011
Dated 07-02-2013

Present

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

Between

M/s Lanco Kondapalli Power Limited,
(formerly Lanco Kondapalli Power Pvt. Ltd),
Plot No. 4, Softsol Building,
Software Units Layout,
HITEC City, Madhapur,
Hyderabad – 500081.

...Petitioner

AND

1. Andhra Pradesh Power Coordination Committee,
Vidyut Soudha,
Khairatabad, Hyderabad – 500082
Rep. by its Chief Engineer (Commercial) ...Respondent No. 1
2. M/s. Transmission Corporation of
Andhra Pradesh Ltd., Vidyut Soudha,
Khairatabad, Hyderabad – 500082
Rep. by its Chairperson & Managing Director ...Respondent No. 2
3. Central Power Distribution Company of
Andhra Pradesh Ltd., represented by its
Managing Director, 11-5-423/1/A,
First Floor, Singareni Collieries Bhavan,
Lakdi-ka-pul, Hyderabad – 506001 ...Respondent No. 3
4. Southern Power Distribution Company of
Andhra Pradesh Ltd., represented by its
Managing Director, Upstairs,
Hero Honda Showroom, Renigunta Road,
Tirupati – 517501 ...Respondent No. 4
5. Northern Power Distribution Company of
Andhra Pradesh Ltd., represented by its
Managing Director, 11-5-423/1/A,
First Floor, 1-7-668, Postal Colony,
Hanamkonda, Warangal – 506001 ...Respondent No. 5

6. Eastern Power Distribution Company of Andhra Pradesh Ltd., represented by its Managing Director, Sai Shakti, Opp Saraswati Park, Daba Gardens, Visakhapatnam – 530020

...Respondent No. 6

This petition is coming up for hearing on 27.09.2012 in the presence of Sri Challa Kodandaram, Senior Advocate for the petitioner and Sri P.Shiva Rao for the respondents. The Commission passed the following:

ORDER

The petitioner filed this petition under section 86(1) (f) of the Electricity Act, 2003 and regulations 8(1) and 55(1) of the Andhra Pradesh Electricity Regulatory Commission (Business Rules of the Commission) Regulations 1999.

1. The material averments of the petition are briefly as follows:-

a) The petitioner is a company incorporated under the provisions of the Companies Act, 1956 and is a generating company within the meaning of the Act. The petitioner has set up a 368.144 MW Combined Cycle Power Project at Kondapalli Industrial Development Areas (IDA), Krishna District, Andhra Pradesh.

b) R1 was constituted for coordination of 4 DISCOMs as per the terms of constitution of the committee. All the four Distribution Companies i.e., respondents 3 to 6 herein were bound by a common contract with respect to, inter-alia, generators of electricity.

c) The Respondent No. 2 is a company incorporated under the provisions of the Companies Act, 1956 and governed by the provisions of A.P. Electricity Reforms Act, 1998 and Electricity Act, 2003.

d) The Respondent No. 2 (formerly Andhra Pradesh State Electricity Board) had entered into a Power Purchase Agreement (the “PPA”) with the Petitioner on 31st March 1997, wherein the Respondent had agreed to purchase all the available capacity and corresponding electricity generated by the project in accordance with the terms and conditions of the said PPA.

e) The petitioner has successfully implemented the project and has been supplying energy generated from the project to the respondents in accordance with the terms of the PPA.

f) As per Article 3.7 of the PPA, if the project achieves a Plant Load Factor (Incentive) of PLF(I) greater than 80% for a Tariff Year, i.e., each year from the commercial operation of the project, then the respondents shall pay to the petitioner an incentive calculated in accordance with the said Article. Article 3.7 of the PPA.

g) “Article 1.45 Plant Load Factor (incentive) or PLF(I): means the ratio, expressed as a percentage of the number of kWh of generation as computed at the generator terminals in any Tariff year by adding the Auxiliary Consumption to the Net Electrical Energy’s metered at the interconnection point, to the maximum of kWh energy that could theoretically be generated by the project during that Tariff year based on 8760 hours multiplied by the installed capacity computed at the generator terminals.

$$\frac{NEE \times (1) / [1 - (A/100)]}{8760 \times IC \times 1000}$$

Where:

NEE:	Net Electrical Energy (kWhr)
A :	Auxiliary Consumption (%)
IC :	Installed Capacity (MWs)”

“Article 1.58 Tariff Year: means prior to project COD, the period between the COD of the first generating Unit and the project COD and thereafter each period of one year from the project COD.”

“Other Fixed Charges (OFC) of Rs. 0.4776 per unit of Cumulative Available Energy which shall be fixed for the term of this Agreement.”

h) Article 3.2 of the PPA further provides that for the purposes of monthly billing, the Capacity Charge including the Other Fixed Charges will be calculated in accordance with Article 5.2(b) of the PPA.

i) The petitioner has for the Tariff Year 2009 achieved a PLF(I) of 83.98%, i.e. 3.98% higher than a PLF(I) of 80%. Consequently, the petitioner

submitted a supplementary bill dated 29.01.2010 to the Respondent No. 1 claiming Rs. 9,80,81,976/- towards incentive payment for the period 01.01.2009 to 31.12.2009 calculated in accordance with Article 3.7 of the PPA. However, the respondents paid only Rs. 46,24,702/- through RTGS mode on 01.03.2010 as against the total claim of Rs. 9,80,81,976/-.

j) The petitioner vide its letter dated 11.03.2010, 29.03.2010 and 16.04.2010 to the Respondent No. 1 informed Respondent No. 1 that the methodology adopted by it in arriving at the incentive amount was not in conformity with the terms of the PPA and requested Respondent No. 1 to process the invoice for the entire incentive amount in accordance with the Supplementary Bill.

k) In accordance with the provisions of the Act, the Commission is the appropriate authority to adjudicate upon disputes between the licensees and generating companies. Therefore, on the facts of the present case, this Regulatory Commission, may, in exercise of its powers under Section 86(1)(f) of the Act, make an order directing Respondents to make payment of the balance incentive amount which is due to the petitioner under the terms of the PPA.

l) It is clear from the provisions of Article 3.7 of the PPA that the incentive payment is not calculated as “per unit” charge. Article 3.7 very clearly states that the incentive payment is computed as a percentage of the Other Fixed Charge in such Tariff Year. According to the illustration provided in Article 3.7, for a PLF(I) of 85%, the incentive is 10% (i.e. $2 \times (85-80)\%$) of the Other Fixed Charges. This illustration makes it clear that the incentive payment is not expressed to be a charge per unit of electricity produced but is a percentage of the Other Fixed Charge payable in that Tariff Year.

m) The payment of Other Fixed Charges in any particular Tariff Year is calculated as per Article 5.2(b) of the PPA. The correct calculation of the incentive payment should therefore be as follows:

Incentive Payment = $(2 \times 3.8758)\%$ of the Other Fixed Charge payable in the Tariff Year.

The Other Fixed Charge payable for Tariff Year 2009 is Rs. 123,21,85,625

Therefore Incentive Payment = $(2 \times 3.8758)\%$ of Rs. 123,21,85,625/-

= Rs. 9,80,81,976/-.

n) Under Article 5.5 of the PPA, the respondents are required to pay the Supplementary Bill within thirty days from the date of furnishing of the same together with interest.

o) The Working Capital Interest rate applicable to the petitioner differs from time to time. However, it has always been 12% per annum or higher.

2. Hence it is prayed that the Commission may be pleased to:

- a) declare that the petitioner is entitled to be paid “Plant Load Factor (Incentive) or PLF(I)” of Rs.9,80,81,976/- as per the provisions of Power Purchase Agreement dated 31.03.1997 and consequently direct the Respondents to pay the balance amount of Rs. 9,34,57,274/- as claimed vide Supplemental Bill No. 1 for the period from 01.01.2009 to 31.12.2009.
- b) declare that the petitioner company is entitled to be paid interest of Rs.47,93,205/- for delay in payment of “Plant Load Factor (Incentive) or PLF(I)” for the Supplementary Bill No. 1 dated January 29, 2010 in terms of Power Purchase Agreement dated 31.03.1997 from 01.03.2010 till the date of filing of this Petition and consequently direct the respondents to pay the same;
- c) declare that the petitioner company is entitled to be paid interest on the amount payable on the date of filing of this petition from the date of this petition till realization.

3. The material averments of the counter filed by the respondents are briefly as follows:

- a) The petitioner filed this petition with erroneous computation by misinterpreting the PPA provisions (Article-3.7) stipulated for Incentive Payment, which is not tenable at law.
- b) As per the Article-3.7 of the PPA, incentive clause stipulates that, “in case the project achieves a PLF(I) greater than 80% for a Tariff Year, then the

Board will pay to the Company an incentive for the additional units of actual generation in excess of a PLF (I) of 80% as a percentage of the other Fixed Charge, in such a Tariff Year as given below:

PLF (I) (%)	Incentive (%)
80%	Nil
Above 80% up to 85%	2% for every 1% increase in PLF (I) (i.e. for a PLF (I) of 85%, the incentive will be 10% of the Other Fixed Charge (OFC).
Above 85% up to 90%	3% for every 1% increase in PLF (I) (i.e. for a PLF (I) of 90%, the incentive will be 10% + 15% = 25% of the Other Fixed Charge).
Above 90%	Same as for 90% i.e. 25% of the Other Fixed Charge."

c) The petitioner (M/s Lanco) submitted supplementary bill in January, 2010 for Rs. 9,80,81,976/- claiming towards incentive payment for the period 01.01.2009 to 31.12.2009 for achieving generation of 83.98% PLF(I).

d) The petitioner misinterpreted the formula specified above for computation of incentive as percentage (%) of Other Fixed Charge (OFC) in such tariff year, and claimed as below:

OFC Paid by A.P. DISCOMS in the Tariff Year	Rs. 123,21,85,625
Actual percentage (%) of PLF achieved	83.98%
Excess PLF achieved over and above 80%	3.98%
As per the provisions of PPA 2% for every 1% increase in PLF i.e. the incentive will be 2% of the OFC is 2x3.98%	7.96%
Claim of LANCO (7.96% x 123,21,85,625)	Rs. 9,80,81,976.00

e) The respondents scrutinized the supplementary bill of the petitioner and worked out the incentive payable as per Article-3.7 of PPA, which already stated at Para-3 ante that for every 1% increase in PLF over and above 80%, 2% of the OFC stated at Article-3.2 which is to be paid at the rate of Rs. 0.4776/unit payable for the additional units generated beyond 80% PLF. Accordingly, the incentive has been worked out and paid incentive amount of Rs. 46,24,702/- to the petitioner, as shown hereunder.

Units at 80% PLF	2579953152 (kWh)
Actual units generated by M/s Lanco at 83.8758% (kWh)	2704945088 (kWh)

Additional units achieved above 80% PLF	124991936 (kWh)
Incentive rate for PLF of 83.8758%	$(3.8758 \times 2 \times \frac{0.4776}{100}) = 0.037/\text{unit}$
Incentive amount payable for additional (kWh) (units) (124991936x0.037)	Rs. 46,24,702/-

f) As per Article-3.7, the predominant factor to be taken into consideration is (i) arriving at additional units of actual generation in excess of 80% (ii) the second aspect is the rate at which the incentive is to be calculated for the so arrived additional units. For this, the rate of incentive shall be 2% for every 1% increase in PLF that works out to 7.96% which needs to be multiplied by the OFC rate i.e. 0.4776 rupees/unit. This is the methodology that is contemplated in Article-3.7 & Article-3.2. Therefore, the methodology adopted by A.P.DISCOMS is in accordance with the Article 3.7 of the PPA of M/s. LANCO.

g) It is stated that the interpretation given by APPCC/Commercial to the Article 3.2 (ii) was not correct and that upon correct interpretation, the incentive payable works out to Rs. 0.75 per unit, whereas M/s GVK Industries Limited & M/s Spectrum Power Generation Limited were being paid Rs. 0.80 per unit (approx.) towards incentive, and it was also further stated that, if the interpretation given by APPCC is not reviewed, the petitioner threatened to resort to take appropriate measures including limiting the plant generation only upto the threshold PLF 80% level.

h) Primarily, M/s Spectrum & M/s GVK are capital cost based projects, while, M/s LANCO is a tariff-based project. Secondly, the fixed cost are being paid to M/s Spectrum & M/s GVK upto 68.5% PLF only, while M/s LANCO is being paid fixed charges upto 80% PLF. However, to encourage the IPPs to generate more energy beyond threshold PLF, an incentive provision is stipulated in the PPA at Article-3.7 as explained above. M/s LANCO, having received entire fixed costs upto 80% PLF, is precluded from comparing the rate of incentive that is being paid to M/s GVK & M/s Spectrum.

i) The said Konaseema PPA (445 MW) got consented by APERC. As per the Amended and Restarted PPA at Para (26) at Page (8), the committed

incentive energy over and above 80% PLF shall be payable at the rate of 6.99 paise / kWh (i.e. 10% of OFC of Rs. 0.699 / unit).

j) The contention of M/s LANCO that they would limit generation upto threshold 80% PLF, would attract the default provisions as set out in Article-9 of the PPA and remedy for APDISCOMs against such default is also provided in the same Article by way of specific performance of the Agreement i.e. insisting the petitioner to generate upto its optimum capacity else would be liable for damages.

k) With regard to the contention of Petitioner at Para-12 that, 'the adopted methodology is not in line with the 'PPA' is not correct and hereby denied.

l) The methodology adopted by M/s LANCO is inconsistent with the parameters to be considered to arrive at the incentive payable to it. Inasmuch as, primarily in the calculation of incentive by M/s LANCO there is no component of number of units (kWh) of energy for which incentive need to be calculated and paid, that apart, the petitioner has not worked out the unit rate at which incentive is payable. Thus, M/s LANCO lost sight of the important components to be factored in the methodology of payment of incentive.

m) The provisions of the PPA, which are contrary to the statutory provision, cannot be given effect to. This is a well-established law as held in (2000 Vol-3 SCC 379-India Thermal Power Ltd. V/s State of Madhya Pradesh"). Hence, relevant provisions in regulations issued by CERC & APERC have been extracted for better appreciation of the case.

n) As could be inferred from the above, the incentive allowed is between 1 paise to 21.5 paise / kwh for the generation beyond the normative PLF.

o) In the Regulation No. 1 of 2008 issued by this Commission at Article 15-Incentive, the following is stipulated.

"15.1 Thermal generating stations

- (i). Target Plant Load Factor for incentive shall be 80%.
- (ii). Incentive shall be payable at a flat rate of 25.0 paise/kWh for ex-bus scheduled energy corresponding to scheduled generation in

excess of ex-bus energy corresponding to target Plant Load Factor.”

p) It could be seen from the above, a flat rate of 25 paise/kWh is fixed over and above normative PLF. But certainly not exorbitant rate of about 75 paise / kWh as interpreted and claimed by M/s LANCO. Thus, it could be seen from the above that the averment of the petitioner that incentive of around 75 to 80 paise per kWh is being paid to other IPPs, is totally baseless and misrepresentation of facts.

q) In the light of the above, the petition filed by M/s LANCO Kondapalli is misconceived, misinterpretation of relevant clauses of PPA and the same is liable to be dismissed as it is devoid of merits and the same is liable to be dismissed with costs.

4. The material averments of the reply to the counter filed by the respondents are briefly as follows;

a) The Respondent is trying to justify their action by misinterpreting the provisions of PPA between the parties.

b) The contention of the respondents that the rate of incentive shall be 2% for every 1% increase in PLF that works out to 7.96%, which needs to be multiplied by the OFC rate i.e., 0.4776 rupees/unit is erroneous and without any basis.

c) The purpose of providing incentive is to encourage higher production and not to penalize the IPP for achieving higher production.

d) The Respondents have availed a rebate of about Rs. 84.24 lakhs on the units of energy produced over and above 80% PLF and whereas, the incentive according to the Respondents is only Rs. 46.24 lakhs. Hence it amounts to disincentive for achieving higher production, which is not the purport of the PPA between the parties and also any statutory notification.

e) The Judgment of Hon'ble Appellate Tribunal for Electricity in Appeal No. 77 and 86 of 2006 is not applicable to the present lis. The claim of the petitioner is not contrary to the Notifications of Government of India.

f) The norms for calculation of Tariff under Central Electricity Regulatory Commission (CERC) Notification dated. 29.03.2001 and the Regulation 1 of 2008 of this Commission are entirely different and the same are not applicable to the PPA between the parties as the project of the petitioner is selected through tariff based competitive bidding process. The criteria for fixation of tariff under those Regulations are different. The method adopted by the Respondents for payment of incentive to the petitioner in the present case is neither in conformity with the said Notification of CERC or the Regulation of this Commission nor in accordance with the terms of PPA.

5. The learned advocate for the petitioner argued mainly on the following grounds:

(i) Article 3.7 of PPA clearly and abundantly establishes that the incentive payable by the respondents is as a percentage of Other Fixed Charges (OFC) in such tariff year and not the rate of OFC and that the contention of the respondents that the rate of incentive shall be 2% for every 1% PLF that works out to 7.96% which needs to be multiplied by the OFC rate i.e., 0.4776 rupees/unit is erroneous and without any basis.

(ii) If the project achieves a PLF (I) greater than 80% for a tariff year i.e., each year from the commercial operation of the project, then the respondents shall have to pay the petitioner incentive calculated in accordance with Article 3.7 of the PPA.

(iii) The monthly billing, the capacity charge including OFC will be calculated in accordance with Article 5.2(b) of the PPA; and that Article 3.2 of PPA provides the procedure for billing methodology.

(iv) The calculation of incentive is shown in the table and the petitioner is entitled to a sum of Rs.9,80,81,976/-. The contention of the respondents that

the rate of incentive shall be 2% for every 1% increase in PLF that works out to 7.96%, which needs to be multiplied by the OFC rate i.e., 0.4776 rupees/unit is erroneous and without any basis.

(v) The purpose of providing incentive is to encourage higher production and not to penalize the IPP for achieving higher production.

(vi) The Respondents have availed a rebate of about Rs. 84.24 lakhs on the units of energy produced over and above 80% PLF and whereas, the incentive according to the Respondents is only Rs. 46.24 lakhs. Hence, it amounts to disincentive for achieving higher production, which is not the purport of the PPA between the parties and also any statutory notification.

Therefore, the claim made by the petitioner is in accordance with the procedure and the same is liable to be paid.

6. On the other hand, the learned advocate for the respondents projected his arguments on the following grounds:

- (a) The predominant factor to be taken into consideration is (i) arriving at additional units of actual generation in excess of 80% (ii) the second aspect is the rate at which the incentive is to be calculated for the so arrived additional units. For this, the rate of incentive shall be 2% for every 1% increase in PLF that works out to 7.96% which needs to be multiplied by the OFC rate i.e. 0.4776 rupees/unit.
- (b) To encourage the IPPs to generate more energy beyond the threshold PLF and incentive provision is stipulated in the PPA at Art.3.7. The petitioner having received the entire fixed charge of 80% PLF is precluded from receiving incentive that is being paid to M/s. GVK and Spectrum as they are gas based projects and the petitioner is a cost based project.
- (c) If the petitioner limits the generation up to threshold, they are liable to pay damages. The methodology adopted by the petitioner is inconsistent with the parameters to arrive at incentive payable to it.

- (d) when the provision of PPA is contrary to statutory provision, the same cannot be given effect.

In the light of the above said facts and circumstances, the petition filed by the petitioner is misconceived and the same is liable to be dismissed with costs.

7. Now, the point for consideration is whether the petitioner is entitled for a sum of Rs.9,80,81,976/- towards incentive together with interest as prayed for?

8. Before answering the above said point, it is necessary at this stage to extract the relevant provisions of PPA.

Article 3.7 Incentives:

In case the project achieves a PLF(I) greater than 80% for a tariff year, then the Board will pay to the company an incentive for the additional units of actual generation in excess of a PLF(I) of 80% as a percentage of the Other Fixed Charge in such tariff year as given below:

PLF (I) (%)	Incentive (%)
Above 80% upto 85%	2% for every 1% increase in PLF(I) (i.e., for a PLF(I) of 85% the incentive will be 10% of the Other Fixed Charge)
Above 85% upto 90%	3% for every 1% increase in PLF(I) (i.e., for a PLF(I) of 90% the incentive will be 10%+15% = 25% of the Other Fixed Charge)
Above 90%	Same as for 90% i.e., 25% of the Other Fixed Charge”

9. As per the wording of the incentive Article 3.7 of the PPA, it is very clear that the admissible incentive amount of a particular tariff year during which a PLF(I) of greater than 80% is achieved, is to be computed for the additional units of actual generation in excess of the generation corresponding to 80% PLF(I). The expression “... an incentive for the additional units of actual generation in excess of a PLF(I) of 80%” makes it very clear that the incentive is only for the additional units in excess of PLF(I) of 80%.

10. As per Article 3.7 of the PPA, the incentive is for the units in excess of PLF(I) of 80%. The number of units eligible for incentive in a particular tariff year is known.

The quantum of incentive for such additional units will get determined if the “per unit rate of incentive” is applied on the number of units eligible for incentive.

The methodology proposed by the petitioner will not result in computing the incentive for the additional units of generation “in excess of” 80% PLF (I) but will result in incentive being worked out on the units of generation “upto” 80% PLF, since, OFC of the relevant tariff year itself is calculated for the units of generation upto 80% PLF. The methodology sought by the petitioner cannot fulfil the requirement of incentive being “for additional units of actual generation in excess of PLF(I) of 80%”. It has to be noted that the wording in Article 3.7 is “.... incentive for additional units”. The entire Article 3.7 has to be read in totality and interpreted harmoniously to provide incentive only for eligible units in excess of 80% PLF(I).

11. The methodology adopted by the respondents is based on adopting the per unit rate of Other Fixed Charges (OFC) of Rs.0.4776 per unit as prescribed in Article 3(2)(ii) as the basis for applying the percentage given in Article 3.7 to arrive at the quantum of incentive for the “additional units in excess of PLF(I) of 80%”. The computation of the respondent is as follows:

Units at 80% PLF	2579953152 (kWh)
Actual units generated by M/s Lanco at 83.8758% (kWh)	2704945088 (kWh)
Additional units achieved above 80% PLF	124991936 (kWh)
Incentive rate for PLF of 83.8758%	= $[(3.8758 \times 2 \times (0.4776/100))]$ Rs./unit = 0.037 Rs./unit
Incentive amount payable for additional (kWh) (units) (124991936 x 0.037)	Rs. 46,24,702/-

This methodology is appropriate since, the OFC of Rs.0.4776 per unit has been fixed in Article 3.2 (ii) for the period of agreement as per the PPA.

12. The petitioner's comparison with the incentive payments being made to M/s. GVK (Stage I) and M/s. Spectrum Industries, has no relevance, since the respective PPAs are governed by the terms of respective PPAs.

13. The attempt of the petitioners to establish a link between the rebates received by the DISCOMs for the early payments and the incentive payments is not tenable as there is no direct relationship between them.

14. For all the reasons stated above, the petitioner has no case and accordingly, the petition stands dismissed.

This order is corrected and signed on this 7th day of February, 2013.

Sd/-
(R.Ashoka Chari)
Member

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

Sd/-
(A.Raghotham Rao)
Chairman