



ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION
4th & 5th Floors, Singareni Bhavan, Red Hills, Hyderabad - 500004

O.P. No.29 of 2009

Dated 26.11.2012

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

Between:

Transmission Corporation of Andhra Pradesh Limited

... Petitioner

AND

M/s Spectrum Power Generation Limited

....Respondent

This petition is coming up for hearing on 03.11.2012 in the presence of Sri P. Shiva Rao Advocate for the petitioner and Sri S.Ravi, Advocate for the respondent, the Commission passed the following:

ORDER

The petitioner filed the above said petition u/s 62 (1), 94(f), 52 of the Electricity Act, 2003 r/w Section 11 (e) of A.P. Electricity Reforms Act, 1998 and Regulatory Commission Business Regulations.

2. The material averments mentioned of the petition are briefly as follows:

(i) The APTRANSCO had requested M/s. SPGL to consider revision of the following issues:

(a) **Station Heat Rate:** SPGL was requested to reduce the station heat rate to 1850 k.cal/kWh on par with new IPPs (Gowthami, Konaseema, Vemagiri & GVK extension projects), from the existing station heat rate of 2000 k.cal/kWh.

(b) **Auxiliary Consumption:** SPGL was requested to reduce the auxiliary consumption to 2.5% on par with BSES, from existing 3%.

(c) **Insurance:** SPGL was requested to reduce the insurance amount to a maximum of 0.5% of the capital cost from existing 20% of O&M cost.

(d) **Interest on Loans:** SPGL was requested to take up swapping of loans, as loans are available at low interest rates in the present market.

(e) **ROE:** Due to fall in interest rates, SPGL was requested to accept for ROE of 10%, against existing 16%.

(f) **Incentive:** SGPL was requested to accept a threshold PLF of 85% for payment of incentive, instead of existing PLF of 68.5% on par with BSES Andhra Power Ltd.

(g) **Notional Generation:** SPGL was requested to dispense with notional generation clause. As per existing terms of PPA, Notional Generation is payable to 85% PLF.

(ii) M/s. SPGL has conveyed that their management is not agreeable for any changes in the Amended and restated Power Purchase Agreement and confirmed the same in their letter dated 26.12.2003.

(iii) As M/s. SPGL has not accepted for revision of any parameter and in view of the regulations (terms and conditions of tariff) published by CERC, APTRANSCO requests the APERC to consider revision of the following parameters on par with CERC regulations dt.26.03.2004.

(a) **Return on Equity:** As per CERC regulations, the return on equity shall be computed on the equity at 14% per annum, subject to a maximum equity of 30% of the capital cost.

Provided that equity invested in foreign currency shall be allowed a return upto the prescribed limit in the same currency and the payment of this account shall be made in Indian Rupees based on the exchange rate prevailing on the due date of billing.

APTRANSCO is paying return on equity at 16% per annum, and return on foreign equity is paid in the same currency converted into Indian Rupees on

payment date. Hence, it is requested to reduce the same to 14% from the existing 16%.

(b) (i) **O&M expenses:** CERC has specified the amounts (Rs. in lakhs/MW) towards O&M expenses (including insurance) for gas turbine/combined cycle generating stations. The O&M expenses are escalated at 4% per annum.

(b) (ii) **Insurance:** In addition to the O&M expenses, APTRANSCO is paying actual insurance premium subject to a maximum of 20% of O&M expenses. Hence it is requested to consider the revision of O&M expenses (including insurance) on par with CERC regulations dt.26.03.2004.

(c) **Recovery of full fixed charges:** As per CERC regulations dated 26.03.2004, full fixed charges are recoverable at 80% PLF for all thermal stations and at 75% PLF for Thermal stations of Neyveli Lignite Corporation and Talcher Thermal power stations.

APTRANSCO is paying full fixed charges to SPGL at 68.5% PLF as per provisions of PPA.

Hence, it is requested to consider the revision of target PLF for recovery of full fixed charges to 80% on par with CERC regulations.

(d) **Target PLF for incentive:** As per CERC regulations dated 26.03.2004, the target PLF for payment of incentives to all thermal power generating stations is 80% and for thermal generating stations of Neyveli Lignite Corporation and Talcher Thermal power stations is 75%.

APTRANSCO is presently paying incentive to the company for generation beyond 68.5% PLF.

Hence, it is requested to consider the revision of target PLF for payment of incentive to 80% in respect of SPGL from the existing 68.5% PLF on par with CERC regulation dt.26.03.2004.

(iv) The usage of Naphtha may not be required in future. In view of the high cost of Naphtha, APTRANSCO is not permitting M/s. SPGL to utilise Naphtha, even when there is a shortage of gas.

(v) M/s. SPGL is claiming minimum fuel off take charges for non drawal of Naphtha and also claiming notional generation, for not using Naphtha during the period of short supply of gas. As per Art. 3.10.2 Notional generation upto 85% PLF shall be considered for payment of incentives.

(vi) The specific provisions for use of Naphtha and provisions to claim for notional generation and minimum fuel off take are causing additional expenditure on power purchase costs which is a pass through to end consumer through higher tariffs.

(vii) In this connection, a copy of the order of High Court of Judicature at Bombay on Writ petition No. 1205 of 2001 filed by M/s. Dabhol Power Company, Mumbai against Maharashtra State Electricity Board, Maharashtra Electricity Regulatory Commission and other is put up for perusal.

“35.....Having regard to the provisions of Section 22(1)(a) read with Section 29 it cannot be disputed that no other party would have jurisdiction to determine the tariff except the State Commission.

59.....The State Commission has power as are vested in civil court under the code of Civil Procedure in respect of matters specified in section 12 of the ERC Act r/w Section 23.”

(viii) The objects and reasons of the Act show that the main functions of the State Electricity Regulatory Commission shall be: (i) to determine the tariff for Electricity___wholesale, bulk, grid and retail; (ii) to determine the tariff payable for use of the transmission facilities; and (iii) to regulate power purchase and procurement process of the transmission utilities etc.

(ix) The provisions of A.P. Electricity Reforms Act, 1998 and the Electricity Act, 2003 supercedes the terms of the agreement. Even the arbitration has to be done by the Commission only. As such there is no alternative for the petitioner, than to approach the Commission for redressal. Even otherwise the reviewing of the procurement of power process is the part and parcel of functions of the Commission, as incorporated in the new Act, the same need to be reviewed even without a formal case by the petitioner.

x) As far as the powers of the Commission about the earlier contract is concerned, the matter is set at right by the judgments of Supreme Court reported at AIR 1998 S.C.1761 and the aforesaid case (B.S.E.S Vs. Tata Power Co) wherein the Supreme Court held that the Regulatory Commission is competent to decide the disputes concerned to earlier agreements also.

xi) Further u/s 11 (e) of A.P. Electricity Reforms Act, 1998 the Commission has power to regulate the purchase, distribution, supply of electricity. The meaning of the word regulation is denoted by the apex court in a judgment reported at AIR 1964 S.C. 1781 and AIR 1985 S.C. 660, as “to regulate either by increasing the rate or decreasing the rate the test being what is it that is necessarily or expedient to be done to maintain, increase or decrease of supply of essential articles in question and to arrange for its equitable distribution at fair prices”.

xii) In the circumstances explained above, the Commission is requested to examine, the PPA of M/s. SPGL under the aforesaid sections of the Electricity Act & A.P. Reform Act. Keeping in view the revised interest rates, terms and conditions of new PPAs etc, and CERC Regulations dated 26.03.2004 and to reduce the operating parameters and to consider to issue directions to amend the PPA, deleting the provision for operation of mixed fuel.

xiii) Hence, the applicant prays to review the terms of the PPA entered on 23.01.1997 with the respondent.

a) To reduce station heat rate on par with new IPPs (Gautami, Konaseema, Vemagiri and SPGL extension project)

- b) To reduce the auxiliary consumption on par with M/s. BSES Andhra Power Ltd
- c) To revise ROE to 14% from existing 16% on par with CERC regulations dated 26.03.2004.
- d) To revise the O & M expenses (including insurance) as per CERC regulations dated 26.03.2004
- e) To revise the target PLF to 80% from existing 68.5% for recovery of full fixed charges on par with CERC regulations dated 26.03.2004.
- f) To revise the target PLF to 80% from existing 68.5 on par with CERC regulations dated 26.03.2004, for payment of incentive.
- g) To delete notional generation.
- h) To direct M/s. SPGL to refinance the existing loans, with new loans at low interest rates.
- i) To issue directions to amend the specific provisions of the amended and restated Power Purchase Agreement dated 19.04.1996 with M/s. SPGL, deleting the provision for operating the 3rd turbine with mixed fuel i.e., gas and naptha.

3. The petitioner has also submitted supplementary grounds on 16.06.2004 narrating the following aspects apart from other grounds:

In fact specific period ought not have been fixed, as the tariff has to be paid by determining the same in accordance with notifications issued by the Competent Authority, time to time, by altering it suitably, to be in consonance with the such guidelines and notifications. As regards the tariff, and about the power of authorities to alter the existing mode, the apex court of India interpreted the same and held that the authorities concerned (as specified in the law time being in force and now the State Electricity Regulatory Commission) have the exclusive power to alter it by adopting the procedure prescribed.

4. The respondent filed its counter and the material averments of the counter are briefly as follows:

a) The petition filed by the petitioners is not maintainable and the same is liable to be dismissed in view of the judgment and order dated 28.09.2008 passed by the Hon'ble Appellate Tribunal for Electricity in Appeal No. 90,91,92,93,108,109,110 & 111 of 2006 titled as Rithwik Energy Systems Limited vs. Transmission Corporation of Andhra Pradesh Limited and Ors., wherein, the Hon'ble Appellate Tribunal while dealing with the issue as to whether the Power Purchase Agreements "PPAs" can be reopened, had been pleased to observe and hold that the concluded PPAs cannot be reopened by the Commission unless it is to be reopened for the purposes of encouraging and promoting renewable sources of energy projects pursuant to the mandate of S.86(1)(e) of the Act, which requires the State Commission to promote co-generation and generation of electricity from renewable sources. It is stated that the generating project of the answering respondent is a 208 MW based combined cycle project "Project" and therefore, is not a renewable source of energy. As such, the PPA in respect of the same is not liable to be re-opened in view of the above noted judgment passed by the Hon'ble Tribunal.

b) In the matter of Transmission Corporation of AP & Anr. Vs. Andhra Pradesh State Electricity Regulatory Commission & Ors., wherein the Hon'ble Tribunal has been pleased to hold that the "Power Purchase Agreement" is in the nature of a contract between the parties and in the normal course Regulatory Commission will have no jurisdiction to modify it unless mutually agreed to by the involved parties."

c) Any change in the concluded terms and conditions between the parties now, i.e, after about 15 years from the commissioning of the project would be severely detrimental to the interest of the project and would lead to financial bankruptcy of the project.

d) The perusal of the various provisions of the ERC Act makes it clear that the said Act or its provisions or the sections do not apply retrospectively so as to determine the tariff in respect of a generating station. The PPA has been executed in the year 1997 i.e., prior to the enactment of the ERC Act.

e) The petitioner has sought the relief to delete the provision of operating the 3rd turbine with mixed fuel i.e, gas and naphtha, which is contrary to the provisions of the PPA and the technical specifications entered by and between parties during the year 1997. The petitioner is taking a contradictory and whimsical stand in relation to the above issue as the petitioner itself had directed the respondent company to fire naphtha as a mixed fuel from the year 2007 onwards. The project was designed as per preamble of the PPA is to operate two gas turbines with natural gas and the 3rd turbine with balance of any gas and supplementary fuel or with alternate fuel or with both. As per the PPA, the supplementary fuel means naphtha which is expected to constitute approximately 26% of the project's fuel in normal operations. As such, the contention of the petitioner is quite against the prudent technical practises and contrary to the technical operating parameters.

f) The review and modification of Amended and Restated PPA dated 23.01.1997 is impermissible in law and totally devoid of any merit. Concluded and legally binding contract between the parties cannot be amended unilaterally. U/s 62 of the Electricity Act, Commission cannot determine tariff in deviation of the terms and conditions of the concluded and binding PPA. The said position of law is settled by a number of decisions of the Hon'ble Supreme Court. Further, Appellate Tribunal for Electricity in its various appeal emanating from this Commission also considered the said proposition and held that the Commission has no authority to alter or change the PPAs came into existence prior to the constitution of the Commission. The Commission itself in its order dated 24.03.2003 held that "it had no authority to open the PPAs before the Reforms Act came into force". Therefore, the petition is liable to be dismissed with exemplary costs.

g) In the order dated 18.06.2003 WP No. 1906/1998, in case of GVK Industries Ltd., (a similar IPP with identical parameters) the Hon'ble High Court of AP rejected challenge of the PPA and upheld the legal validity and binding nature of the PPA. Therefore, the question of review of the PPA to the detriment of the respondent by this Commission will not arise. Tariff under the PPA shall have to be in accordance with the provisions there under and

not otherwise. The tariff is not subject to review as the same is consistent with the provisions of then applicable laws and notifications issued there under. On this ground also, the petition is liable to be dismissed.

h) Under PPA dated 24.01.1997 certain rights were accrued to the parties there to and the said rights have not been extinguished by Electricity Act, either expressly or impliedly. The provisions of Reforms Act, 1998 and the Electricity Act, 2003 have not superseded the terms of the PPA. As a matter of fact, the provisions of the PPA were saved under the Electricity Act.

i) CERC regulations cannot be applied to the determination of tariff in the present case as they are notified subsequently. The petitioners are not entitled to raise pleas contrary to the PPA and they are liable to pay the respondent for purchase of power as per the PPA, as the PPA is a concluded and binding contract.

j) The Commission has no power to revise or review the original terms and conditions incorporated in the PPA entered much earlier to the enactment of Electricity Reform Act and Electricity Act and the Regulations notified by CERC. The Commission in its Tariff order dt.24.03.2003 categorically stated that it has no authority to reopen concluded agreements. It is now well settled that contractual terms cannot be changed unilaterally. It is submitted that all notifications will operate prospectively, but not retrospectively. An existing notification as on the date of signing a PPA, will override provisions in such PPA which are contrary to regulations of such notification. It is therefore, urged that the CERC regulation dated 24.03.2004 is prospective and that the petitioners cannot seek revision of the provisions of the PPA unilaterally and the petition filed by the petitioners is liable to be dismissed.

k) The respondent would adopt the counter filed in OP No. 30/2009 as the petitioner has raised the identical issues in that petition.

l) The Commission has dismissed the petition filed by the petitioners seeking the same relief's against GVK Industries Ltd., a co-IPP having similar

operating parameters and provisions of PPA. A copy of the order passed by the Commission in OP No. 26/2009 between APDISCOMs and GVK Industries Ltd.

m) Hence, it is prayed that the Commission may be pleased to dismiss the petition and pass such further or other order(s) as the Commission deems fit and proper in the circumstances of the case.

5. On the date of hearing, the learned counsel for the petitioners while reiterating the averments mentioned in the petition, submitted the following aspects while addressing arguments in support of the petitioner.

6. The petitioners are engaged in purchasing electric power from various generating companies producing electricity and supplying the same to the consumers within the State. Previously, the Law relating to Electricity is governed by the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948. Subsequently, the Parliament enacted the Electricity Regulatory Commissions Act, 1998 which came into force from 02.07.1999. The main function of the Electricity Regulatory Commissions constituted under the said Act was to determine tariff wholesale, bulk, grid and retail supply of electricity and to regulate power purchase and procurement process of transmission utilities. The legislature of Andhra Pradesh enacted A.P. Electricity Reform Act, 1998 setting up State Electricity Regulatory Commission with similar objects. Subsequently, the parliament enacted a comprehensive law relating to electricity, viz., the Electricity Act, 2003 and it repealed the Indian Electricity Act, 1910; the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998. The Hon'ble Supreme Court in its judgment reported in 2004(1) SCC 195, while dealing with jurisdiction of Electricity Regulatory Commission held that the Commission has exclusive power to determine tariff.

7. In the light of the above decision, the Commission has to revise or review the norms for tariff payable to the respondent and such power is vested with this Commission. When the Commission fixes tariff by revision of

the norms, such tariff operates in future and past applicability of the contract is not affected. Earlier, the interests of consumers have been neglected and the electricity laws governing the subject matter which are remedial in nature mandate the Commission to revise the parameters as mentioned in the petition.

8. Prior to 1998, Gol used to issue statutory notifications and subsequently that power relating to electricity came to be vested in CERC. Certain parameters for payment of tariff to the respondent are contrary to the Regulation dated 26.03.2009 issued by the CERC and therefore, the Commission may be pleased to allow the petition filed by the petitioners accepting the proposed revision of parameters which are on par with CERC Regulation.

9. On the other hand, the learned counsel for the respondent while reiterating the averments mentioned in the counter, submitted the following points in support of the respondent's case.

10. The Commission has no power to revise / review the original terms and conditions incorporated in the PPA entered much earlier to the enactment of Electricity Reform Act and Electricity Act and the Regulation notified by CERC. It is also further stated that the counsel for the petitioner is asking the Commission for a relief which is already declined by the Commission. The Commission in its Tariff Order dt. 24.03.2003 categorically stated that it has no authority to reopen concluded agreements. It is now well settled that contractual terms cannot be changed unilaterally. It is submitted that all notifications will operate prospectively, but not retrospectively. An existing notification as on the date of signing a PPA, will override provisions in such PPA which are contrary to regulations of such notification. It is therefore, urged that the CERC Regulation dated 26.03.2009 is prospective and that the petitioners cannot seek revision of the provisions of the PPA unilaterally and the petition filed by the petitioners is liable to be dismissed.

11. Basing on the respective pleadings, the following are the points that arise for consideration of the Commission:

- (i) Whether, the petitioners are entitled for the revision of parameters on par with the CERC Regulation dated 26.03.2009?
- (ii) Whether, revision can be entertained in the tariff in deviation of the terms and conditions of the concluded and binding PPA?
- (iii) To what relief?

Point No.1

12. The petitioner has filed the above said petition before the Commission for revision of parameters in view of the Regulation (Terms and conditions of tariff) published by CERC dated 26.03.2004. The parameters are mainly: (a) Return on Equity (ROE), (b) O&M expenses, (c) insurance, (d) Amount of working capital (e) Interest on working capital, (f) Target availability for recovery of full capacity (fixed) charges, (g) Target PLF for incentive, (h) incentive, (i) station heat rate on par with new IPPs to 1850 k.cal/kWh from the existing station heat rate of 2000 k.cal/kWh, (j) to reduce auxiliary consumption from existing 3% to 2.5% on par with BSES, since the respondent has not accepted for the revision of any parameters. Whereas the respondent's contention is that reviewing or revision of the conditions basing on the CERC regulation dated 26.03.2004 is against to law and it has no application to the PPAs entered prior to the advent of Electricity Act, Electricity Regulatory Commissions Act; and that the Commission has no power to compel the respondent to the proposed revision or it has no right to ask for revision unilaterally and the petition itself is not maintainable under law.

13. It is clear from the record that the CERC has made the regulation in exercise of its powers conferred under S.178 of the EA 2003. It says that

- (1) These regulations may be called the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004.

- (2) These regulations shall come into force on 01.04.2004, and unless reviewed earlier or extended by the Commission, shall remain in force for a period of 5 years.

Provided that where a project, including a part thereof, has been commissioned before the date of commencement of these regulations and whose tariff has not been finally determined by the Commission till that date, tariff in respect of such a project or part thereof, as the case may be, for the period ending 31.03.2004 shall be determined in accordance with the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2001.

- (3) Words and expressions used in these regulations and not defined herein but defined in the Act shall have the meaning assigned to them under the Act.

The learned counsel for the petitioner relied upon a decision of APTEL reported in *2002 ELR APTEL 0429. Konark Power Projects Ltd., Karnataka vs. Bangalore Electric Supply Co., Ltd. And KERC, Karnataka.* In this it was held that

“(a) The State Commission as indicated in the impugned order has power to modify the Tariff for concluded PPA in larger public interest.

“(b) The guiding principles laid down in Section 61 of the 2003 Act would indicate that the Commission has to maintain a balance so that the generators also may not suffer unnecessarily. In the context of prevailing power situation in the country, it would not be desirable to keep any generating unit out of service for want of “just” Tariff.”

In batch appeals CA No. 296/2006 and others by the Apex Court on 08.07.2010 and remitted the matter to the Commission while holding that

“the ERC has the jurisdiction to determine the tariff which takes within the ambit the purchase price for procurement of electricity generated by the NCE Developers generators in the facts and circumstances of this case.”

Hence, it is clear that the Commission has power to determine the tariff while looking into larger public interest.

14. The above said regulation is issued under section 178 of the EA 2003. If the Commission wants to implement, it may implement the same by taking it as a guideline in the absence of any specific provision, but it is not mandatory for the Commission to accept the same, since the Commission itself is vested with similar powers u/s 181 of the EA 2003 akin to the powers vested in the CERC u/s 178 of the EA 2003, under which it can make such a regulation. It is pertinent to note that the relief sought by the petitioner to revise/review the original terms and conditions incorporated in the PPA basing on the CERC regulations u/s 178 of EA 2003 is against to law. S.178 of EA 2003 empowers CERC to frame its own regulation. The regulation framed under CERC is not binding on this Commission. There is no provision under the Act empowering CERC to make the SERC's adopt its regulation. When the regulation itself is not applicable, the question of revision/review of terms of the PPA does not arise. It is the prerogative of the Commission to frame its own regulations. In case of framing a regulation the said regulation of the CERC may be taken as a guideline. It is not mandatory for this Commission to adopt the same regulation, ignoring its own powers to make such regulation. Even otherwise, the claim made by the petitioner for revision/review on the basis of the CERC regulation which has come into force with effect from 01.04.2004 is only with prospective effect but not with retrospective effect. The very approach made by the petitioner by asking the Commission to follow the regulation of CERC by filing a petition for revision/review is not only against to the provisions of law but also against to the principles of natural justice. In the absence of a regulation of the State Commission u/s 181 akin to the regulation issued by the CERC u/s178 of EA2003, the petitioner has no right to approach the Commission to revise the parameters on par with those of the CERC regulation dated 26.03.2004. The very approach made by the petitioner invoking the powers of the Commission to adopt the CERC regulation is unknown to law and the same cannot be entertained.

15. The supplementary grounds submitted by the petitioner are almost similar to the grounds already mentioned in the petition narrating the powers of the Commission to follow the same. This has already been considered that the Commission has got the power to modify the tariff depending upon the changed circumstance. In addition, the Commission has already discussed

and considered that the same cannot be entertained by the Commission in view of the provisions incorporated u/s 181 akin to the regulation issued by CERC u/s 178 of EA 2003. Hence, the supplementary grounds raised by the petitioner are not sustainable and they cannot be considered. Hence, this point is answered in favour of the respondent and against to the petitioner.

Point No.2

16. It is clear from the judgment of the Apex court in the above said batch of appeals that the Commission is vested with the power to determine the tariff and it is within the ambit of the Commission depending on the demand and the electricity generated by the NCE Developers. But the very regulation itself, though not applicable, is prospective and the same is incorporated in the preamble of the regulation and hence the said regulation cannot be adopted to the PPAs entered long prior to the said notification. The petitioner ought to have approached the Commission in a different form but not by filing this petition to adopt CERC regulation parameters ignoring the powers of the Commission in fixation of the tariff, etc independently without looking into the parameters defined in the above said regulation. This Commission has already passed an order in O.P.26/2009 filed by the petitioner against M/s. GVK Industries Ltd., on the same grounds and the same was dismissed on 10.03.2011. No appeal is filed against the said order and the finding of the Commission has become final. Hence, this point is also answered in favour of the respondent and against the petitioner.

Point No. 3

17. In the result, the O.P filed by the petitioner is hereby dismissed but in the circumstances without costs.

This order is signed on this 26th day of November, 2012

Sd/-
(R.ASHOKA CHARI)
MEMBER

Sd/-
(C.R.SEKHAR REDDY)
MEMBER

Sd/-
(A.RAGHOTHAM RAO)
CHAIRMAN