



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

O.P.No 63 of 2012

Dated 16.11.2012

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

Between:

M/s. K.M.Power Pvt. Ltd., & 5 others

... Petitioners

AND

1. Transmission Corporation of Andhra Pradesh Limited
2. Central Power Distribution Company of Andhra Pradesh Limited
3. Southern Power Distribution Company of Andhra Pradesh Limited
4. Northern Power Distribution Company of Andhra Pradesh Limited
5. Eastern Power Distribution Company of Andhra Pradesh Limited

....Respondents

This petition is coming up for hearing on 01.09.2012 in the presence of Ms.Swapna Seshadri, Advocate for the petitioner and Sri. P. Shiva Rao, Advocate for the respondents, the Commission passed the following:

ORDER

The petition filed by the petitioners for determination of adhoc interim tariff u/s 61,62,64 & 86 of the Electricity Act, 2003 (for short, the Act) and in terms of the order dated 20.07.2012 passed by the Hon'ble Appellate Tribunal for Electricity.

2. The averments mentioned in the said petition, in brief, are as follows:
 - a) The petitioners herein have signed Power Purchase Agreements (PPAs) / Power Wheeling and Purchase Agreements (PW&PAs) with the Respondent No.1 (APTRANSCO) for sale of electricity which were later assigned to the respondents 2 to 5. The PPAs/PW&PAs were entered into, in the standard agreement format as proposed by APTRANSCO.

b) The Commission initiated suo-moto proceedings for determination of purchase price of power for APTRANSCO from non-conventional energy projects effective from 01.04.2004 onwards. The above proceedings of the Commission culminated in the passing of the order dated 20.03.2004 whereby a reduced tariff was determined for the petitioners. The power purchase price for the petitioners – Mini Hydel projects as a single part tariff of Rs.2.60 per unit for the first year of operation and gradually reducing the same to Rs.1.88 per unit for the 10th year of operation.

c) Aggrieved by the above order dated 20.03.2004, the association of Small Hydro Power Developers in the State filed a writ petition before the Hon'ble High Court of Andhra Pradesh. By order dated 27.04.2004, the Hon'ble High Court disposed of the above writ petition and directed the project developers to approach the Commission for a review of the order dated 20.03.2004.

d) Pursuant to the above, a review petition being Review Petition No. 5 of 2004 was filed before the Commission. The Commission, by order dated 07.07.2004 disposed of the said review petition after considering minor modifications of the Capital cost and certain other aspects. The following tariff as the power purchase price for APTRANSCO were determined:

Year of operation (nth year)	Tariff (Rs/unit)
1 st	2.69
2 nd	2.60
3 rd	2.52
4 th	2.43
5 th	2.34
6 th	2.26
7 th	2.17
8 th	2.09
9 th	2.00
10 th	1.92

Further, the above tariff was determined by the State Commission only for the PLF up to 35%. For generation of electricity above 35%, the price for power was determined as 25 paise per unit.

e) Aggrieved by the above order dated 07.07.2004 passed by the Commission, the Small Hydro Power Developers Association filed a Writ Petitions No. 16621 of 2004 in the Hon'ble High Court of Andhra Pradesh. The Hon'ble High Court by an interim order dated 16.09.2004 directed the APTRANSCO to pay 50% of difference amount between the existing tariff and revised tariff in addition to the rates payable under revised tariff with effect from 16.09.2004. Subsequently, upon the constitution of the Hon'ble Tribunal in the year 2005, the Hon'ble High Court by an order dated 15.06.2005 disposed off the writ petition with a direction to the petitioners to approach the Hon'ble Tribunal by way of appeal.

f) The Hon'ble Tribunal also passed interim order dated 28.07.2005 similar to orders of Hon'ble High Court, namely, that the petitioners shall be paid 50% differential amounts between the existing and revised tariff.

g) The Hon'ble Tribunal allowed the above appeals of the project developers by a judgment dated 02.06.2006 and set aside the orders of the Commission revising the tariff applicable to the non-conventional project developers.

h) Aggrieved by the above order of the Hon'ble Tribunal, the APTRANSCO filed an appeal being Civil Appeal 2926 of 2006 before the Hon'ble Supreme Court of India. During pendency of the appeal before the Hon'ble Supreme Court and even in the absence of any interim order passed by the Hon'ble Supreme Court, APTRANSCO/APDISCOMs did not pay the tariff as was applicable, namely Rs.3.48 per unit and continued to pay only the tariff as per the interim order dated 28.07.2005 of the Hon'ble Tribunal. The above was arbitrarily paid by the APTRANSCO/APDISCOMs, which resulted in severe cash flow problems to the petitioners.

i) The Commission initiated proceedings for determination of tariff for sale of electricity by the non-conventional energy developers in the State to the distribution licensees for the period from 01.04.2009 to 31.03.2014. By order dated 31.03.2009, the Commission determined the applicable tariff for various types of non-conventional energy projects in the State of Andhra Pradesh. However, the Commission did not determine any tariff for the period from 01.04.2009 onwards for mini hydel projects, on the ground that tariff for mini hydel projects had been determined in the year 2004 for 10 years of operation of the project and no tariff was presently necessary to be determined.

j) The Hon'ble Supreme Court by judgement and order dated 08.07.2010 disposed of the appeal filed against the order dated 02.06.2006 passed by the Hon'ble Tribunal.

k) Pursuant to the above, the Commission heard the matter afresh and by order dated 12.09.2011, determined the tariff for the non-conventional energy in pursuance of the Remand order dated 08.07.2010 passed by the Hon'ble Supreme Court of India in Civil Appeal Nos. 2926 and batch. The matter has been decided by three separate orders given by each Member of the Commission. These orders were also dated differently, namely, the decision of the Technical Member Mr.Radha Kishen was on 13.06.2011, the decision of the Chairman Mr.A.Raghotham Rao is dated 19.08.2011 and the decision of the Finance Member Mr.C.R.Sekhar Reddy is dated 02.09.2011. Thereafter, by order dated 12.09.2011 the Commission has pronounced the judgment comprising of all the three independent orders.

l) Against the above orders, the petitioners and other developers filed appeal before the Hon'ble Tribunal. The appeal filed by the petitioners being No. 173 of 2011 filed under section 111 of EA, 2003.

m) The petitioners had moved an interim application in the appeal.

n) In the above appeal, the Hon'ble Tribunal vide interim order dated 01.02.2012 directed as under:

“18.We also feel that the balance of convenience lies in favour of the appellants whose tariffs have not been determined due to stalemate caused by the three different orders by the three Members, despite a clear direction by the Hon’ble Supreme Court. Thus, we are of the opinion that there is a need to pass an order to allow interim tariff to be applicable till the final disposal of the appeal.

19.Keeping in view the interests of both the parties, we decide that the tariffs including the incentive and terms and conditions as determined by the Chairman in his order dated 19.08.2011 shall be made effective in the interim period till the final disposal of the appeals. The respondent distribution licensees are also directed to make payment of arrears to the appellants on the basis of difference in tariff as determined by Shri A.Raghotham Rao, Chairman, and the tariff already paid within 30 days of the date of this order. We are not giving any interim order regarding payment of interest which will be considered in the final judgment. However, any delay in making payment of arrears by the respondent distribution licensees beyond 30 days will attract a simple interest @1% per month. This is subject to adjustment as a result of findings of this Tribunal on the final disposal of the appeal.”

o) The respondents challenged the interim order before the Hon’ble Supreme Court which directed compliance with the order in a particular manner. Thereafter, APTRANSCO by letter dated 07.06.2012 furnished the detailed statement for reconciliation where the tariff for the 11th year onwards has been shown as Rs.2.66 per unit as per the Hon’ble Tribunal’s order dated 01.02.2012. After the reconciliation, the respondents furnished another statement dated 20.06.2012 wherein also the tariff of Rs.2.66 per unit has been shown for 11th year in terms of the interim order dated 01.02.2012 of this Hon’ble Tribunal.

p) In terms of the interim order dated 01.02.2012, the respondents 1-5 were required to pay to the petitioners the tariff as specified in the interim order pending disposal of the appeals before the Hon’ble Tribunal. Such tariff was to be paid to all project developers including those where the period of 10 years has expired and the respondents are being supplied electricity, without allowing the project developers to sell electricity to third parties.

q) The Hon'ble Tribunal by interim order dated 01.02.2012 had directed the respondents to pay the tariff as per the order of the Chairman 19.08.2011 without any reservation and subject to the final disposal of the appeals. The order of the Chairman deals with the fixed cost applicable to the mini hydel plants but does not specify as to what tariff would be applicable to the projects which have completed 10 years.

r) However, the respondent distribution licensees refused to pay the tariff to the petitioners as per the interim order and were arbitrarily paying tariff of Rs.1.92 per unit as per the order dated 20.03.2004 of the Commission (which has been modified by subsequent judgment dt.07.07.2004) applicable for the 10th year, for 11th year onwards. The respondents are forcing the petitioners to supply power to them without giving the proper tariff payable.

s) The respondents are paying a highly reduced and arbitrary rate of Rs.1.92 per unit for the period after the 10th year of operation as per 2004 order of the Commission and continuing the same rate of Rs.1.92 per unit in the 11th year and 12th year despite the interim order dated 01.02.2012 of the Hon'ble Tribunal and the statements given by the respondents.

t) In the appeal, the petitioners had specifically raised the issue of the interim tariff to be fixed for the period after 31.03.2009 onwards and the requirement to fix an interim tariff for the period subsequent to 31.03.2009. At the relevant time it was not the case of the respondents that no tariff should be fixed for the period after the 10th year of operation.

u) In the circumstances mentioned above, the petitioner moved another interim application, being IA 234 of 2012 before the Hon'ble Tribunal for clarification.

The Hon'ble ATE passed the order as

“We feel that the interim tariff of the mini hydro generators from 11th year onward should be decided by the State Commission as it would not be appropriate for the Tribunal to usurp the powers of the State Commission to determine tariff. However, we feel there is difficulty for the State Commission to give an interim order without specific directions from this Tribunal in view of the

pendency of the appeal before the Tribunal as the tariff for the 11th year onwards will depend on the final outcome of this appeal.

Keeping in view the financial difficulties being experienced by the mini hydro generators and the distribution licensees continuing to off-take power from these generators even after completion of 10th year of operation, we feel there is urgent need for the State Commission to determine an interim tariff for period from 11th year onward. Accordingly, we direct the State Commission to determine the interim tariff for the mini hydro projects who have already completed 10 years of operation for sale to the distribution licensees from 11th year onwards, keeping in view the interim order dated 01.02.2012 passed by this Tribunal. We direct the State Commission to determine the interim tariff within one month of the date of commencement of this order.”

v) The majority of the mini hydel plants of the petitioners have already completed 10 years of operation and most of them are in the 11th and 12th year of operation. Since no proper tariff is being paid by the respondents, the petitioners are in default and have not been able to discharge their loans and cases under section 138 of Negotiable Instruments Act, are pending against the petitioners.

w) Hence, the Commission may be pleased to

- i) Take up the matter expeditiously and determine the adhoc interim tariff to be paid to the petitioners by the respondents in terms of the interim orders dated 01.02.2012 and 20.07.2012 passed by the Hon'ble Tribunal;
- ii) Direct the respondents to pay the tariff of Rs.2.66 per unit, namely the tariff of the 10th year as per the interim order dated 01.02.2012 continuing the Chairman's order dated 19.08.2011 for the 11th year onwards, till the Hon'ble Tribunal finalised the tariff for the earlier period;
- iii) direct that if the respondents would not pay Rs.2.66 per unit, the petitioners, in the interim period will be entitled to third party sales through open access;

3. On 01.09.2012, the counsel for the respondents 1 to 5 submitted reply and the material averments of the reply are briefly as follows:

a) In the order dated 20.03.2004, the Commission examined the issue of tariff in a scientific manner by considering several parameters, operational norms and cost of fuel etc., for various categories of NCE projects viz., (i) Biomass, (ii) Bagasse, (iii) Mini Hydel (iv) Industrial Waste to energy (v) Wind & (vi) Municipal Solid Waste (MSW). The said tariff order is passed by the Commission in discharge of its statutory obligation of price fixation/tariff determination, which is a legislative task. Subsequently, the Commission passed order dated 07.07.2004 in the review petition No.5 of 2004 filed by the mini hydel developers with an increased capital cost of Rs.3.75 Crores/MW and an incentive of 25 paise per unit for the generation of electricity above 35% PLF.

b) The developers were paid 50% difference amount as per the directions of the Hon'ble Tribunal.

c) During pendency of the appeal before the Hon'ble Supreme Court, APDISCOMs continued to pay as per the interim order passed by the Hon'ble Tribunal.

d) The Member Technical /APERC issued an order wherein it was stated that *“(1) continue to supply by mutual agreement for further period of 10 years at mutually agreed prices / or (2) by approaching the commission for fixation of the price or by selling the same to third parties if points 1 & 2 are not satisfied”*. But the said order of Member / Technical since has no force of law could not be considered as valid order and this cannot be considered for any purpose. The order passed by Chairman and Members of APERC have been challenged in ATE and the same is before Appellate Tribunal. APDISCOMs have decided to pay the tariff to the developer as per 10th year of operation tariff i.e., Rs.1.92 as adhoc basis from 11th year onwards, subject to adjustment as per the orders that may be passed by APERC in the revision proceedings for determination of tariff from 11th year of operation to 20th year of operation. Accordingly, the APDISCOMs have been paying the adhoc tariff of Rs.1.92 for the projects completed 10th year of operation. The fixation of tariff from 11th year of operation to 20th year of operation is still not initiated by APERC.

On the aspect of third party sales, in view of the concluded PPA which is valid for 20 years the developers are not entitled to claim third party sales. As such, the petitioner's contention cannot be considered.

e) The tariff paid to the developers, upto 10th year was paid in accordance with the interim order dated 01.02.2012 passed by the Hon'ble Tribunal. The tariff for the 11th year of operation is not determined or fixed by the competent authority. The interim order dated 01.02.2012 is not applicable to tariff payable beyond 10th year. As on date, there is no final order fixing tariff for 10th year except the order dated 20.03.2004 passed by the Commission.

f) Infact there cannot be an independent proceedings for interim tariff. There ought to be an independent proceedings for determination of tariff payable from 11th year onwards, and in that proceedings, one can seek interim orders. Surprisingly, and unknown to law independent proceedings are taken up to decide interim tariff.

g) However, the DISCOMs as stated, decided and submitted that the 10th year tariff as was determined in the order dated 20.03.2004, which is in force, as on date, may be confirmed until final decision for determination of tariff payable for 11th year to 20th year.

h) Hence, it is prayed that the Commission may be pleased to dismiss the O.P No. 63 of 2012 and pass orders to pay tariff of Rs.1.92 as interim measure, until the Commission finally determines the tariff.

4. The learned advocate for the petitioner argued that the petitioner and some others filed IA 258/2011 in Appeal No. 173/2011 on the file of Hon'ble ATE, against the orders passed by the Commission when different divergent orders were passed by the Commission on the tariff applicable to the renewable sources; and that the Hon'ble ATE passed interim direction to pay in the interim period the tariff and incentives and terms & conditions determined by the Chairman's order dated 19.08.2011 pending disposal of the appeal. It is further urged that in pursuance of the said direction, the petitioner filed this petition requesting consequential order to implement the orders of

the Hon'ble ATE and hence the petitioner is entitled @ Rs 2.66 per unit, as the tariff of the 10th year as per the interim order dated 01.02.2012 and in the event of respondents not paying Rs.2.66 per unit, in the interim period, the petitioner is also entitled to third party sales through open access.

5. The learned advocate for the respondents argued that the third party sales cannot be entertained in view of the concluded PPA which is valid for 20 years. It is also further argued that the DISCOMs are paying adhoc tariff of Rs.1.92 for the projects completed 10th year of operation; since the fixation of tariff from 11th year of operation to 20th year of operation still not initiated by APERC; and that the interim order dated 01.02.2012 is not applicable to tariff beyond 10th year of operation. It is further pointed out that the 10th year of operation of tariff was determined in the order dated 20.03.2004 which is in force as on date may be confirmed until final decision for determination of tariff payable for 11th year to 20th year. Hence, it is prayed that the petition may be dismissed by ordering payment of tariff of Rs.1.92 as interim measure till the Commission finally determines the tariff.

6. From the above arguments, the following are the issues coming up for consideration by the Commission:

- (i) whether the petitioner is entitled for tariff at Rs.2.66 per unit as prayed for?
- (ii) whether the petitioner is entitled for third party sales under open access as prayed for?

7. The above issues are as examined hereunder:

(i) Whether the petitioner is entitled for tariff at Rs.2.66 per unit as prayed for?

As is evident from the averments supra, the basis for the above prayer of the petitioner is the interim order dated 01-02-2012 of Hon'ble ATE to pay in the interim period the tariff and incentive and terms & conditions determined by the Chairman's Order dated 19-08-2011, pending disposal of the appeal and the interim order of Hon'ble ATE dated 20-07-2012.

Whereas, the respondents herein, has strongly contended that, the interim order of the Hon'ble ATE dated 01-02-2012 is not applicable to the tariff beyond 10th year of operation and hence, Rs.2.66 per unit being the 10th year tariff as per Chairman's order dated 19-08-2011 cannot be given and Rs.1.92 per unit being the 10th year tariff determined by Commission in order dated 20-03-2004 may be continued.

In view of the rivals contentions as above and in addressing the issue under consideration, it is apt to note the orders of the Hon'ble ATE vide order dated 20-07-2012, in as much as this order is issued pursuant to the above said order. Towards the above end, the relevant portions of the Hon'ble ATE order dated 20-07-2012 are extracted as hereunder:

***“We feel that the interim tariff of the mini hydro generators from 11th year onward should be decided by the State Commission as it would not be appropriate for the Tribunal to usurp the powers of the State Commission to determine tariff. However, we feel there is difficulty for the State Commission to give an interim order without specific directions from this Tribunal in view of the pendency of the appeal before the Tribunal as the tariff for the 11th year onwards will depend on the final outcome of this appeal.*”**

Keeping in view, the financial difficulties being experienced by the mini hydro generators and the distribution licensees continuing to off-take power from these generators even after completion of 10th year of operation, we feel there is urgent need for the State Commission to determine an interim tariff for period from 11th year onwards. Accordingly, we direct the State Commission to determine the interim tariff for the mini hydro projects who have already completed 10 years of operation for sale to the distribution licensees from 11th year onwards, keeping in view the interim order dated 01.02.2012 passed by this Tribunal.....”

As can be seen from the above and in terms of the Hon'ble ATE Orders dated 20-07-2012, the direction to the Commission to determine the interim tariff for the mini hydel power projects who have already completed 10 years of operation for sale to the distribution licensee from 11th year onwards, is keeping in view, the interim order dated 01-02-2012. That being the case, the contention of the respondents to continue Rs.1.92 per unit beyond the 10th year based on the Commission order 20-03-2004 is not sustainable.

Further, any determination of interim tariff from 11th year onwards has to be in terms of interim order dated 01-02-2012 only. However, the said order does not contain the tariff for the 11th year. In view of this fact, determination of interim tariff for the 11th year onwards has to be derived from the tariff stream determined in Chairman's order dated 19-08-2011. For this purpose and before going any further on the matter, it is necessary to extract the tariff stream determined by Chairman's order dated 19-08-2011 as hereunder:

Year of operation (nth year)	Tariff (Rs/unit)
1 st	3.49
2 nd	3.39
3 rd	3.29
4 th	3.20
5 th	3.10
6 th	3.01
7 th	2.92
8 th	2.83
9 th	2.74
10 th	2.66

As can be seen from the above table, the tariff reduction year-on-year is in the range of 10 paise to 8 paise and the average works out to 9 paise per unit. That being the case and in as much as the fixed tariffs get reduced with aging of project, the tariff for 11th year can be safely fixed at Rs.2.57 per unit i.e., (Rs.2.66 – paise 0.09) and the tariffs for subsequent years can be safely arrived at by reducing the previous year tariff by an amount of 9 paise per unit. In view of the above, the respondents are directed to make payments in accordance with the above fixation.

(ii) Whether the petitioner is entitled for third party sales under open access as prayed for?

On this issue, the prayer of the petitioner is to permit them third party sales through open access, in the interim period, if the respondents fail to pay Rs.2.66 per unit.

In response to the above, the respondents have said that, in view of the concluded PPA which is valid for 20 years the developers are not entitled to claim third party sales. As such, the petitioner's contention cannot be considered.

The Commission has examined the issue. The concluded PPA is valid for 20 years. As such, no third party sales can be permitted during the validity of the PPA.

8. In the result, the petition is partly allowed as detailed in para 7 above. This is subject to disposal of the main petition pending before the Commission.

This order is corrected and signed on this 16th day of November, 2012.

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

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

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