



ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION

4th Floor, Singareni Bhavan, Red Hills, Hyderabad 500 004

TUESDAY, THE NINETH DAY OF JULY
TWO THOUSAND NINETEEN

:Present:

Justice G. Bhavani Prasad, Chairman
Dr. P. Raghu, Member
Sri P. Rama Mohan, Member

In the matter remanded by the Hon'ble High Court of Andhra Pradesh vide its order dated 29-04-2019 in W.P.No.32465 of 2017

Between:

M/s. Balaji Energy Private Limited

... **Petitioner**

A N D

Southern Power Distribution Company of Andhra Pradesh Limited ... **Respondent**

This matter remanded by the Hon'ble High Court of Andhra Pradesh vide its order dated 29-04-2019 in W.P.No.32465 of 2017 has come up for hearing finally on 15-06-2019 in the presence of Sri S. Ravi, learned Senior Counsel for the petitioner and Sri P. Shiva Rao, learned Standing Counsel for the respondent. After carefully considering the material available on record and after hearing the arguments of the learned counsel for both parties, the Commission passed the following:

ORDER

Writ Petition bearing W.P.No.32465 of 2017 was filed by the petitioner herein against the respondent herein for a writ, direction or order directing the respondent to determine the tariff payable by reckoning the capacity of the petitioner mini hydel plant @ 12 MW instead of 10 MW from 27-06-2008 and re-compute the tariff payable to the petitioner in accordance with the orders of the Andhra Pradesh Electricity Regulatory Commission applicable from time to time for non-conventional energy power producers and pay the overdue amount with 18% interest thereof and

further direct the respondent to permit the petitioner to sell the power generated by it to third parties.

2. The case of the petitioner in the Writ Petition is that the Government of Andhra Pradesh adopted the policy of the Government of India and its purchase price under G.O.Ms.No.93 dated 18-11-1997 and the Andhra Pradesh State Electricity Board allotted a 2 x 5 MW small hydel power project to the petitioner. Subsequently Non-Conventional Energy Development Corporation of Andhra Pradesh was delegated the power to deal with mini hydel projects of 25 MW capacity as the nodal agency. The petitioner synchronized 2 x 5 MW first unit on 31-12-2005 and second unit on 02-01-2006. The energy generated and supplied by the petitioner was paid tariff as per the orders of the erstwhile Andhra Pradesh Electricity Regulatory Commission dated 22-06-2013, which was challenged by the petitioner in W.P.No.3267 of 2010 and on its dismissal, in W.A.No.681 of 2013, which is pending. When after 2016, the respondent reduced the tariff contrary to the orders of the Commission, the petitioner filed W.P.No.20728 of 2016, which is pending. Though the periods overlapped, the present Writ Petition is on additional issues than the earlier petitions. Due to impounding of water in Somasila reservoir being raised to higher level gradually, more power could be generated and hence the petitioner approached the Non-Conventional Energy Development Corporation of Andhra Pradesh for capacity enhancement by 2 MW, which was permitted as 2 x 6 MW capacity by a letter dated 28-09-2006. The petitioner enhanced the capacity with considerable expenditure and modified the equipment at a cost of Rs.2,61,42,980/-. As per the orders of Non-Conventional Energy Development Corporation of Andhra Pradesh and the erstwhile Andhra Pradesh Electricity Regulatory Commission, the respondent directed the Superintending Engineer,

Southern Power Distribution Company of Andhra Pradesh Limited on 25-06-2008 to conduct full load test for enhanced capacity and the Divisional Engineer, Operation Division, Atmakur, Nellore conducted the load test and submitted load test report on 27-06-2008 about the test witnessed by a team of engineers of Transmission Corporation of Andhra Pradesh Limited and the respondent. The Power Trading Corporation agreed to take the additional power at Rs.6/- per unit, but the petitioner was not permitted to supply the power to third parties and the respondent insisted to supply power to them only. By a letter dated 25-07-2008, the respondent accepted to take the additional 2 MW energy and it was drawing the said additional power. The price was negotiated between the parties and a draft Power Purchase Agreement was sent. The applicable tariff is restricted to the units computed at 45% Plant Load Factor and the units in excess, earn only a nominal incentive. The enhanced capacity of 2 MW was not considered for calculation of tariff by the respondent and the payment for the additional energy drawn was never released in spite of discussions. Still the petitioner was asked to give an undertaking not to claim any payment for the past period and the petitioner demanded payment for the entire capacity and power drawn from 27-06-2008 with interest at 18% per annum. In spite of repeated demands, payments were not released and the petitioner was not even permitted to deliver additional energy to third parties under Open Access Policy. Hence the Writ.

3. The Hon'ble High Court issued an interim direction dated 22-09-2017 to consider the request of the petitioner for payment of amount, for the power to be supplied henceforth, if otherwise entitled to.

4. In the Counter Affidavit for the Writ Petition, the respondent referred to the Power Purchase Agreement with the petitioner dated 31-01-2005 consented to by the erstwhile Andhra Pradesh Electricity Regulatory Commission, the consideration of the request for enhancement of capacity, the conduct of the load test on 27-06-2008 etc., but contended that the petitioner was not furnishing the requisite information to the respondent to respond. Hence, it decided not to enhance the capacity in the Power Purchase Agreement, which was intimated to the State Government and the erstwhile Andhra Pradesh Electricity Regulatory Commission. Unless the capacity in the Power Purchase Agreement is amended and approved by the Andhra Pradesh Electricity Regulatory Commission, the petitioner is not entitled to compute the tariff for 12 MW capacity and hence the respondent sought for vacation of the interim order and appropriate orders in the Writ Petition.

5. The petitioner in its Rejoinder contradicted all the averments of the respondent and gave a detailed narration of the events and contended that the requisite information sought for by the respondent was submitted from time to time. Hence, it prayed that on its own admissions by the respondent from time to time, the Writ Petition be allowed. The petitioner placed all the relevant documents before the Hon'ble High Court in support of its contentions including providing all the requisite information to the respondent from time to time.

6. Thereafter the respondent filed a further Counter Affidavit on 19-12-2018 contending that the Hon'ble High Court may close the Writ Petition by granting liberty to the parties to approach the APERC for determining the tariff and to grant approval for capacity enhancement of the petitioner duly considering the issue as per Section 86 (1) (b) of the Electricity Act, 2003.

7. The petitioner filed a Reply on 28-12-2018 contending that the prayer of the respondent in this regard may be considered without prejudice to the petitioner and the respondent be directed to pay the tariff to the petitioner from 27-06-2008 at the tariff being paid for 10 MW with interest at 18% with quarterly rests.

8. The Hon'ble High Court passed orders on 29-04-2019 noting that the learned counsel appearing on both sides agreed for remanding the matter to APERC for determining the tariff and to grant approval for capacity enhancement of the petitioner duly considering the issue as per Section 86 (1) (b) of the Electricity Act, 2003 and to pass such orders as directed by the Hon'ble High Court. In the light of the submissions made by both the counsel, the Hon'ble High Court remanded the matter to APERC for the above relief and on determination of the tariff by the APERC, the petitioner is given liberty to avail appropriate remedy for implementing the orders. The Writ Petition was disposed of accordingly, while directing the APERC to dispose of the matter as early as possible preferably within eight (08) weeks from the date of receipt of a copy of the order. The copy of the order of the Hon'ble High Court was placed before the Commission by the petitioner along with its letter dated 07-05-2019 on 13-05-2019. In obedience to the said orders of the Hon'ble High Court, this Commission issued notices to both the parties on 15-05-2019 that the matter will be taken up for hearing on 18-05-2019 to enable the Commission to take further necessary action for faithful compliance of the orders of the Hon'ble High Court within the preferable period of time fixed by the Hon'ble High Court.

9. The respondent filed a Memo on 10-06-2019 during the hearing referring to the Power Purchase Agreements for 2 x 5 MW, consideration of the request of the

petitioner for enhancement of the capacity with 2 x 6 MW, the conduct of load test on 27-06-2008, acceptance by the respondent to take additional energy of 2 MW, the Chief General Manager of the respondent intimating by a letter dated 01-08-2008 about the additional load being arrived at on 27-06-2008 in the third year of operation and draft amendment for enhancement of the capacity to 12 MW. The test report was stated to have been opined by Andhra Pradesh Power Coordination Committee to be not containing adequate information for want of clarifications sought for from the petitioner. The petitioner was stated to have furnished the required certificates etc. but the Andhra Pradesh Power Coordination Committee was stated to have decided on 23-12-2008 not to consider the sale of additional 2 MW capacity. The subsequent events were described as earlier and the respondent itself claimed to have filed a petition before the Commission for approval of change of capacity, decision of implementation of additional capacity etc. The petition was stated to have been returned ultimately on which the present orders of the Hon'ble High Court were passed at the behest of the parties. So, the respondent stated that the enhancement of the capacity and other issues arising in in consequence are to be examined.

10. The petitioner filed a reply Memo stating that the remand order of the Hon'ble High Court contained two components. The first, enhancement of capacity of the petitioner's plant and the second, fixation of tariff. Paras 5, 7 and 9 of the Memo of the respondent dated 07-06-2019 show the acceptance pursuant to the load test communicated on 27-06-2008 to be an accepted fact and the subsequent prayer of the petitioner for enhancement of the capacity to that effect from 27-06-2008 has to be considered along with payment of tariff on that basis. Regarding the applicable tariff, the petitioner contended that the payment for energy supplied is only as per

the approval of the Commission from time to time for NCE projects and the Commission's order dated 22-06-2013 governs the same. The petitioner is seeking payment at the same rates and the reduction of tariff from the 11th year of operation is the subject of W.P.No.20728 of 2016 in which the respondent was directed to pay for the energy consumed at Rs.3.10 ps even after the expiry of initial period of 10 years, which would be subject to the outcome of the said Writ Petition.

11. In W.P.No.20728 of 2016, the Hon'ble High Court passed an interim order on 29-06-2016 that "the petitioner is entitled to pay the procurement tariff as being paid by it at present". The copy of the order of the erstwhile Andhra Pradesh Electricity Regulatory Commission dated 22-06-2013 fixing the tariff for Mini Hydel projects from the 1st year to the 10th year of operation since the commencement of the units was also filed.

12. The respondent filed a Reply Memo along with a copy of the Writ Petition in W.P.No.20728 of 2016 stating that the interim order of the Hon'ble High Court dated 29-06-2016 is limited to a capacity of 10 MW and therefore, the tariff as decided by the Commission vide its order dated 23-08-2014 needs to be continued to the amended / enhanced capacity from the 11th year onwards.

13. The petitioner filed a reply Memo to the said Memo stating that for Mini Hydel power generators, the tariff is paid on actual units generated and supplied at the inter-connecting points. Applicable tariff is restricted to the units consumed at 45% of the Plant Load Factor. The units in excess of 45% of the Plant Load Factor only earned a nominal incentive. Therefore, even though the capacity of the petitioner's Mini Hydel plant increases from 10 MW to 12 MW, the basis for calculation of the tariff ought to be the same. Therefore, the same tariff applicable for 10 MW plant will be applicable when the capacity is enhanced to 12 MW.

14. The order of remand passed by the Hon'ble High Court in W.P.No.32465 of 2017 specifically noted the request of the learned counsel for both sides to be to remand the matter to APERC for determining the tariff and to grant approval for capacity enhancement of the petitioner. The Hon'ble High Court in the light of the submissions made by both the counsel, remanded the matter for the said relief only and it was further specified that on determination of the tariff by the APERC, the petitioner is given liberty to avail appropriate remedy for implementing the orders. Therefore, the specific and unambiguous remand order of the Hon'ble High Court makes the consideration herein to be only on two aspects, one is determination of tariff and the second is approval for capacity enhancement. Any other ancillary and incidental issues that may arise between the parties were delegated to the appropriate remedy for implementing the orders to avail to which the petitioner was given liberty.

15. Therefore, the points for consideration on issues herein are the two specific aspects for determination of which the matter was remanded to this Commission by the Hon'ble High Court.

16. The claim of the petitioner about the manner of enhancement of capacity of its Mini Hydel power plant from 10 MW to 12 MW (2 x 5 MW to 2 x 6 MW) was admitted in the Counter Affidavit of the respondent in the Writ Petition to be on the basis for consideration of the request for enhancement by NREDCAP and to have been subjected to a load test on 27-06-2008. The various documents filed by the petitioner before the Hon'ble High Court and herein ex-facie establish that there was no factual controversy about the conduct of the load test and the same establish enhancement of the capacity as claimed by the petitioner. The additional information

sought for, claimed to be the information that makes it adequate, does not appear to be casting any shadow of doubt on the acceptability of the claim for enhancement of the capacity as evidenced by the successful load test. Even in the Counter Affidavit of the respondent to remand the matter to the Commission, the respondent itself referred to the petition filed by it before the Commission to grant approval for change of capacity and to decide the date of implementation of the additional capacity and up-to-date of settlement of energy immediately. In the Memo filed by the respondent herein also, the respondent specifically referred to the prayers in the said petition which was returned by the Commission compelling it to approach the Hon'ble High Court to grant liberty to approach the Commission for determining the tariff and for grant of approval for capacity enhancement as rightly claimed by the petitioner. There was no controversy on the accepted fact of enhancement of capacity with effect from 27-06-2008 and this was not disputed by the respondent in its reply to the Memo filed by the petitioner and hence it has to be firstly concluded that the prayer of the petitioner for enhancement of the capacity with effect from 27-06-2008 has to be accepted on which installed capacity the energy supplied and the tariff to be paid have to be consequently calculated.

17. In so far as determination of tariff is concerned, the erstwhile Andhra Pradesh Electricity Regulatory Commission in its order dated 22-06-2013 passed in pursuance of the orders of the Hon'ble Appellate Tribunal for Electricity determined the tariff for the Mini Hydel power projects at the specified rates for the 1st year to 10th year of operation since the commencement of the units at the specified rates with incentive on generation beyond the Plant Load Factor of 45% at the rate of Rs.0.35 ps per kilo watt hour. It is on the basis of the said order that tariff is being paid by the respondent to the petitioner at 10 MW capacity and the contention of the

petitioner is also that even though the capacity of the petitioner unit increased from 10 MW to 12 MW, the basis for calculation of the tariff will not change as the applicable tariff is restricted only to the units computed at 45% of the Plant Load Factor and the units in excess of the same earn a nominal incentive only. Therefore, the claim that the same tariff applicable to 10 MW even when the capacity increased from 12 MW appears to be logical and irresistible. That apart in W.P.No.20728 of 2016, the Hon'ble High Court specifically ordered on 29-06-2016 that the petitioner is entitled to be paid the procurement tariff as was being paid to it then and it is not in dispute that the said interim direction between the parties continues to be in force though any payment made in the meanwhile is ultimately subject to the result of the said W.P.No.20728 of 2016. Any deviation from the said orders by the Commission is impermissible. The said binding orders of the Hon'ble High Court have to be given due effect. Therefore, the absence of any material difference in the matter due to enhancement of capacity makes any reference to the tariff said to have been decided by the erstwhile Andhra Pradesh Electricity Regulatory Commission on 23-08-2014 in respect of generation from 11th year of commencement onwards irrelevant. Any reference to such tariff under the order dated 23-08-2014 will also amount to transgressing the interim direction of the Hon'ble High Court in W.P.No.20728 of 2016 dated 29-06-2016 and the request in the reply to the Memo filed by the petitioner from the respondent dated 11-06-2019 cannot be accepted.

18. Therefore in compliance with the order of remand by the Hon'ble High Court of Andhra Pradesh in W.P.No.32465 of 2017 dated 29-04-2019, it is hereby ordered that the capacity enhancement of the petitioner from 10 MW to 12 MW (2 x 5 MW to 2 x 6 MW) is approved with effect from 27-06-2008 and the tariff payable by the respondent to the petitioner for the power generated by the petitioner and supplied to the respondent

from the mini hydel plant of the petitioner of 12 MW (2 x 6 MW) capacity with effect from 27-06-2008 shall be in accordance with the order of the erstwhile Andhra Pradesh Electricity Regulatory Commission dated 22-06-2013 and any further orders of the Andhra Pradesh Electricity Regulatory Commission applicable from time to time to such power generating units and the petitioner is entitled to be paid the procurement tariff as was being paid to it by 29-06-2016 in compliance with the interim orders of the Hon'ble High Court of the said date in W.P.M.P.No.25412 of 2016 in W.P.No.20728 of 2016 subject to any further or final orders that may be passed by the Hon'ble High Court in the said Writ Petition or otherwise. All other issues or questions between the parties are not the subject of any consideration or expression of opinion by the Commission in this order and in this regard the Hon'ble High Court has given liberty to the petitioner to avail appropriate remedy for implementing the orders in the subject order of remand

This order is corrected and signed on this the **9th day of July, 2019.**

Sd/-
P. Rama Mohan
Member

Sd/-
Dr. P. Raghu
Member

Sd/-
Justice G. Bhavani Prasad
Chairman