



ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION
4th Floor, Singareni Bhavan, Red Hills, Hyderabad 500004

THURSDAY, THE SIXTEENTH DAY OF NOVEMBER

TWO THOUSAND AND TWENTY THREE

(16-11-2023)

Present

Justice C.V. Nagarjuna Reddy, Chairman
Sri Thakur Rama Singh, Member
Sri P.V.R. Reddy, Member

OP.Nos. 29 & 30 of 2023

OP.No. 29 of 2023

Between

M/s. Hetero Wind Power (Pennar) Pvt Ltd.,
7-2-A2, Hetero Corporate, 3rd Floor,
Industrial Estate, Sanath Nagar,
Hyderabad - 500 018

.....Petitioner

AND:

1. Southern Power Distribution Company of AP Limited,
Represented by its Chairman & Managing Director,
19-13-65/A, Srinivasapuram, Tiruchanoor Road,
Tirupati - 517503, Chittoor District, Andhra Pradesh.
2. Andhra Pradesh Power Coordination Committee,
A.P. Transco, Vidyut Soudha, Gunadala, Vijayawada-500 082.

.... Respondents

OP.No. 30 of 2023:

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M/s. Hetero Wind Power (Pennar) Pvt Ltd.,
7-2-A2, Hetero Corporate, 3rd Floor, Industrial Estate,
Sanath Nagar, Hyderabad - 500 018

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A.P. Transco, Vidyut Soudha, Gunadala, Vijayawada-500 082.

...Respondents

The two Petitions have come up for final hearing before this Commission on 31-10-2023 in the presence of Smt. Rashmi G Kamath, counsel representing Sri. S. Vivek Chandra Sekhar, learned Counsel for the petitioner and Sri. P. Shiva Rao, learned Standing counsel for the respondents, that after hearing both the learned counsel and after carefully considering the material available on record, this Commission made the following:

COMMON ORDER

M/s. Hetero Wind Power (Pennar) Pvt Ltd., (hereinafter referred to as “the petitioner”) has filed these two petitions under Section 86(1)(f) & (e) of the Electricity Act, 2003, read with Clause-8 of the Andhra Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 (as amended) and also read with Clause-5.2 Article 5 of the Power Purchase Agreement (PPA) entered into between the petitioner and APSPDCL, seeking directions to the APSPDCL for expeditiously releasing the payments of the amounts due and payable to the petitioner under the PPA towards Late Payment Surcharge.

The case of the petitioner, in brief, is:

1. that the petitioner invested and developed the Wind Power Project in the State of AP. for a total capacity of 40.5 MW (10.5

MW, 6 MW and 24 MW) and 13.5 MW respectively;

2. that since the date of commissioning and synchronization of the said projects, the petitioner has been generating and selling power to the first respondent;
3. that though the petitioner has been diligent in strictly abiding by the obligations under PPAs, the first respondent only made part payments of invoices; and that as on the date the petitioner has raised invoices as noted below:

OP.Nos	Period	Invoices Raised (Rs.)	Amount paid (Rs.)	Balance to be paid (Rs.)	LPS to be paid (Rs.)
29/2023	Feb, 2017 to Feb, 2023	254,48,57,445	197,04,79,364	56,33,20,925	25,74,48,290 Feb,2017 to April, 2023
30/2023	March, 2017 to July, 2022	87,70,69,055	61,48,21,031	25,97,07,465	14,25,48,985 April, 2017 to July, 2022

4. that as per the terms of the PPAs, more particularly, Articles 1.6 and 5.2, in the event of the first respondent not making the payments as per the due date of payment, the petitioner is entitled for LPS;
5. that it is significant to note that as is the industrial practice in the infrastructure, power projects are also financed through equity as well as debt raised from finance institutions;
6. that since raising debts until the current instances of default, the petitioner had been committedly servicing his debt/obligations in

respect of the aforementioned loans/debts and timely paying the interest amounts and/or principal amounts in respect thereof in terms of the agreement with the lenders;

7. that, instead of making payment of the legitimate dues of the petitioner, the first respondent filed a petition before this Commission being OP.No. 17 of 2019 seeking amendments of the normative parameters in Regulation No. 1 of 2015 and consequent revision of the tariff fixed for Wind Power Projects pursuant to Regulation No.1 of 2015 (Petitioner company has not been arrayed as a respondent in OP.No. 17 of 2019);
8. that being aggrieved by the above, some wind power producers filed writ petitions before the Hon'ble High Court being W.P.No.2401 of 2019 and batch, challenging the action of this Commission in numbering the said petition as being wholly without jurisdiction; that the Hon'ble High Court, vide: its Common Order dated 24-09-2019 in W.P.No. 2401 of 2019 and batch, disposed of the said Writ Petitions with a direction to this Commission to determine the issues raised in the OP.No. 17 of 2019 within a period of 6 months from the date of receipt of the copy of that order;
9. that, in the meantime, the Government of Andhra Pradesh issued Go.RT.No.63 dated 01-07-2019 constituting a High Level Negotiating Committee (HLNC) to review, negotiate, and bring

down Wind and Solar power prices;

10. that in pursuance of the order passed by the HLNC respondent No.1 sent letter to the petitioner to reduce the tariff under the PPAs to Rs.2.43 ps per unit and submit revised bills;
11. that being aggrieved by the arbitrary and unlawful acts of the GoAP and the first Respondent, various generating companies, including the petitioner, challenged the HNLC order and the letter dated 12.07.2019 addressed by respondent No.1, by filing a batch of writ petitions before the Hon'ble High Court, including W.P. No. 9873 of 2019 filed by the petitioner;
12. that the Hon'ble High Court, vide: its Common Order dated 24.09.2019, quashed the HLNC Order and the letters dated 12.07.2019, whilst taking cognizance of threat of turning a profitable asset into a non-performing asset, directed respondent No.1 to make payments of all pending and future invoices at the 'interim' rate of Rs.2.43 ps., per unit, till the adjudication of OP No. 17 of 2019 by the Hon'ble Commission;
13. that the aforesaid decision of the learned Single Judge of the Hon'ble High Court was challenged by way of W.A.No.383/2019 & Batch;
14. that, despite the aforesaid Order of the learned Single Judge of the Hon'ble High Court being in favour of the Petitioner, Respondent No.1 has not made the said payment to the

Petitioner till date;

15. that the Petitioner has been facing acute financial hardships in maintaining and operating their projects due to the payment default by first Respondent which is in complete violation of the PPAs, the Act, the Wind Power Policy, 2015 and the Regulations of the Andhra Pradesh Electricity Regulatory Commission;
16. that, though the Petitioner consistently supplied the power as per the terms of the PPAs, the Respondents have always delayed the payments and further, wrongly deducted amounts from the invoices of the Petitioner and the Petitioner has not received any payment against Late Payment Surcharges (LPS) that was guaranteed to it under the PPAs;
17. that the Petitioner has made several requests for payment of the amounts as against the monthly invoices pending from February, 2017, but the Respondents have neither disputed the same nor replied in any manner and, on the other hand, respondent No.1 has unlawfully withheld principal amounts due to the Petitioner herein;
18. that respondent No.1 is bound by the terms and conditions of PPAs and same are binding and enforceable on the parties;
19. that, admittedly, the first Respondent has not made the payments as per the monthly invoices, despite the Petitioner continuously supplying power to the Respondents, and have exceeded the due

date of payment for which, the respondents are liable to pay interest, as per Article 5.2 of the PPAs;

20. that this Hon'ble Commission, vide: orders passed in several other cases has directed the respondents therein, ie., the DISCOMs, to pay the LPS amounts to the generators; and that, therefore, the Petitioner is compelled to approach this Hon'ble Commission by filing the present petition seeking appropriate directions.

The case of respondent No.1, as stated in its counters, in brief, is:

1. that, because of procurement of Wind Power at High tariff of Rs. 4.83 ps, Rs.4.84 ps per unit, and involvement of hidden cost such as Adequacy cost, balancing cost and integration cost in the Procurement of power (variable/renewable power) which was assessed as Rs. 2.50 ps per unit by the Central Electricity Authority (CEA) in its January 2018 report, the financial position of respondent became precarious;
2. that, considering the same as well as the hidden cost, the DISCOMs have filed O.P.No.17 of 2019 against Petitioner and others for reduction of tariff, but the same was quashed by the Hon'ble High Court vide: its order dated 15-03-2022, and basing on the said order, the Respondents are making payments in full as per the agreed Tariff;
3. that the averments made by the petitioner are not true to the

actual facts and the allegation on Respondents for not making payments to the tune of Rs. 56,33,20,925 from February, 2017 to February, 2023, in respect of OP.No. 29 of 2023 and Rs.25,97,07,465/- from May, 2017 to February, 2023 in respect of OP.No.30 of 2023 are inclusive of GBI, CUF and principal amounts. As on 05.07.2023 the Respondents have cleared an amount of Rs. 34,29,19,067/- towards the principle amounts due to the petitioner in respect of 29 of 2023 and Rs. 25,97,07,425/- in respect of OP.No. 30 of 2023.

4. that the respondents have cleared all the principal amounts due to the Petitioner for the period claimed by the petitioner in the petitions;
5. that the limitation period prescribed for money claims under the Limitation Act, 1963 i.e. 3 years, which will also be applicable for filing the application before the Commission;
6. that the present OPs have been filed seeking payments for the period commencing from February 2017 to February, 2023, in respect of OP.No. 29 of 2023 and from May, 2017 of Feb 2023 in respect of OP.No.30 of 2023 and, as per the Limitation Act 1963, the claims pertaining to the period before March 2020 in respect of OP.No.29 of 2023 and February 2020 in respect of OP.No. 30 of 2023 are barred by Limitation;
7. that, as per Clause-20 of Regulation 1 of 2015, the Respondents

- have started deducting the GBI amounts from the monthly bills of the Generators from January 2017 and filed OP No.1 of 2017 before this commission for modification of Tariff Orders dated 26.03.2016 duly amending Clause-20 of Regulation 1 of 2015;
8. that this Commission vide: order dated 28.07.2018 allowed th OP and permitted respondent No.1 to deduct the amounts paid towards GBI from the monthly bills of the Generators;
 9. that the Wind Power Generators obtained stay orders against the commission orders from the Hon'ble High Court of A.P;
 10. that the Respondents have started deducting the GBI amounts from the monthly bills before filing the OP No.1 of 2017, as the Hon'ble High Court has not given any specific directions for not deducting the amounts from the bills;
 11. that the Respondents are deducting the GBI amounts based on the Provisions of Clause-20 of Regulation 1 of 2015 only;
 12. that the respondents never agreed to procure the power beyond 23.5%; but with an intention to encourage RE power, the Respondents are willing to pay Rs.0.50 Paisa per unit to the excess power supplied beyond CUF of 23.5%; and
 13. that the Respondents are ready to pay for the excess units over and above the CUF @ Rs.0.50 per unit to the petitioner.

The petitioner filed its reply-affidavits denying the averments in the counter-affidavits and reiterated its stand in the Original petitions. It is, *inter*

alia, stated therein that respondent No.1 has not cleared the entire principal amount; that the claims of the petitioner before March, 2020 are not barred by limitation as the petitioner has been requesting the respondents periodically to clear the outstanding dues prior to the aforesaid date; that the act of the 1st respondent in deducting the GBI amounts, under the guise of suspension of the order of this Commission by the High Court stating that there is no specific direction from the High Court not to deduct the GBI amounts is not valid; that respondent No.1 cannot limit the generation of green power especially when they are covered under “must-run status”; and that respondent No.1 cannot deny payment of the amounts for the power already injected into the grid and utilized by it and the petitioner is rightfully entitled to receive the same.

The Commission has carefully considered the submissions of the learned counsel for the parties with reference to the material on record. On such consideration, the following points arise for consideration:

1. Whether GBI is deductible from the monthly bills?
2. Whether the petitioner is entitled to be paid for the power generated beyond 23.5 CUF and injected into the Grid. If so, at what rate?
3. Whether the respondents are liable to pay LPS as per PPAs? and
4. Whether the Claims are barred by limitation?

Re Point No.1: Whether GBI is deductible from the monthly bills?

The Ministry of New Renewable Energy (MNRE), Government of India, formulated a scheme for implementation of Generation Based Incentive (GBI) for Grid interactive Wind Power Projects on 17-12-2009. Under the Scheme,

an incentive of Rs.0.50 ps per unit is envisaged in parallel with Accelerated Depreciation (AD) on a mutually exclusive manner, with a cap of Rs.62.00 lakhs per MW. The generating Companies are allowed to avail either AD or GBI, but not both. The Scheme also provides that this incentive is over and above the tariff that may be approved by the State Electricity Regulatory Commissions in various States.

This Commission, vide: its tariff orders dated 01-8-2015 and 26-3-2016 fixed Levelized Preferential Generic Tariffs separately i.e., one without considering the AD and the other with AD. The benefit of AD was deducted from the tariff when availed, while GBI is not deducted whether availed or un-availed, thereby allowing the additional benefit of Rs.0.50 ps per unit over and above the tariff without AD benefit.

The respondents filed OP No.1 of 2017 before this Commission claiming the relief of amending the Wind Generation Tariff orders dated 1-8-2015⁶ and 26-3-2016 in order to pass on GBI amounts to the A.P. Distribution Companies in compliance with Clause-20 of Regulation 1 of 2015 and other appropriate orders. After holding public hearings, this Commission has passed a detailed order dated 28-7-2018 in O.P.No.1 of 2017, holding that the tariff was fixed without giving effect to Clause-20 of Regulation 1 of 2015 under which, while fixing the tariffs, the Commission shall take into consideration any incentive or subsidy offered by the Central or State Governments. This Order was challenged by the Wind Power Association of Andhra Pradesh in the Honourable High Court of Andhra Pradesh by filing a

Writ Petition and the Honourable High Court has stayed the order of this Commission. The Writ Petition is still pending.

In the counter-affidavit filed on behalf of the respondents it has been averred that the respondents have started deducting the GBI amounts from the monthly bills of the generators from January, 2017 and thereafter filed OP No.1 of 2017 before this Commission seeking modification of Tariff Orders dated 1-8-2015 and 26-3-2016 duly giving effect to Clause-20 of Regulation 1 of 2015. While admitting that the Honourable High Court of Andhra Pradesh has stayed this Commission's order dated 28-7-2018, it is, however, pleaded that there is no direction by the Honourable High Court not to deduct the GBI amounts from the bills.

This Commission is not inclined to discuss the effect of the interim order of the Honourable High Court, because if the deduction of GBI amounts is in contravention of the interim order of the Honourable High Court, the petitioner is entitled to approach the Honourable High Court for effectuating the interim order. That has not been done by the petitioner. The fact remains that GBI is being deducted continuously from January, 2017 and no further legal action is initiated by the petitioner or the Wind Power Association before the High Court to restrain the respondents from deducting the GBI amounts. Moreover, Clause-20 of Regulation 1 of 2015, as referred to above, mandates that the subsidies or incentives received either from the State Government or the Central Government shall be taken into consideration while fixing the tariffs. This Commission in its order dated 28-7-2018 clearly stated that while fixing

the tariffs it has not considered Clause-20 and, accordingly, it has taken corrective steps by directing that the GBI availed by the Wind Power Generators shall be given credit to in the tariff determination under its orders dated 01-8-2015 and 28-3-2016. Whether this order of the Commission is legal and proper is subjudice before the Honourable High Court. Therefore, the Commission is not inclined to intervene at this stage in respect of the GBI incentive, more so, when the deduction is being continued from as far back as January, 2017.

This point is, accordingly, answered.

Re-Point-2: Whether the petitioner is entitled to be paid for the power generated beyond 23.5 CUF and injected into the Grid. If so, at what rate?

As regards this aspect, this is no longer *res integra*. This Commission in its order dated 26-9-2022 in OP.Nos. 66 & 85 of 2021 (**ZR Renewable Energy Pvt.Ltd VS APSPDCL & APTRANSCO**), *inter alia*, held as under:

“In the facts and circumstances of the case, we feel that payment of a sum of Rs.0.50 ps per unit (twice the incentive of Rs.0.25 ps per unit applicable for thermal plants prescribed in APERC regulation 1 of 2008, because wind plants generate clean energy) for the energy generated and supplied in excess of the prescribed CUF subject to adjustment as held in point no 2 and illustrated in the annexure to this order will meet the ends of justice. Accordingly, the respondents are directed to calculate the energy and pay/adjust the amounts depending on excess or shortfall as the case may be within two months from the date of receipt of this order.”

Following the above order, it has to be held that the petitioner is entitled to payment of @ Rs.0.50 ps., per unit for the energy injected in excess of 23.5% CUF. Accordingly, the respondents are directed to calculate the energy

and pay/adjust the amounts depending on excess or shortfall as the case may be within two months from the date of receipt of this order.

This point is, accordingly, decided.

Re Point-3: Whether the respondents are liable to pay LPS as per PPAs?

The parties are governed by the PPAs, which have been approved by this Commission. Article-5 of both the PPAs deal with the “Billing and Payment”. Under Article-5.2, in respect of any payment made beyond the due date, the DISCOM shall pay interest at the existing SBI base rate plus one percent; and, in case this rate is reduced, such reduced rate is applicable from the date of reduction.

The amount payable under Point No.2 fell due month after month. In view of the admitted fact that payment of this amount is beyond the due date, LPS as per Article-5.2 (as discussed supra) is payable. Accordingly, respondent No.1 is directed to pay the LPS on the amounts payable under Point No.2 supra along with the payment due under the said Point.

This Point is, accordingly, answered.

Re Point-4: Whether the Claims are barred by limitation?

In para 18, the petitioner has pleaded as under:

“18. It is most respectfully submitted that from the month of Feb’17 to Feb’23, despite the fact that the Petitioner was supplying power and raising monthly invoices as per the PPAs, the 1st Respondent, for reasons best known to them, have released only part payments i.e. Rs. 1,97,04,79,364 and are due for an amount of Rs. 56,33,20,295 /- against the invoices”.

In Para-33 also the petitioner has stated that it has made several requests for payment of the amounts as against the payment of monthly invoices pending from February, 2017 and that the respondents have neither disputed the same nor replied in any manner.

Clause-5.1 of Article 5 (Billing and Payment) of the PPA reads as under:

“5.1. For Delivered Energy purchased, Wind Power Producer shall furnish a bill to the DISCOM calculated at the rate provided for in Article 2.2, in such form as may be mutually agreed between the DISCOM and the Wind Power Producer, for the billing month on or before the 5th working day following the Meter Reading Date”.

Under Clause 5.3, the DISCOMs shall pay the bill on a monthly basis as per Article 5.1. Under Clause 5.5 Wind Developers shall submit bills for the energy delivered during the billing period as per the provisions of the PPA and thereupon DISCOMs shall make payment for the eligible bill amount by the due date of payment.

In **A.P. Power Coordination Committee Vs. M/s. Lanco Kondapalli Power Limited**¹, the Hon'ble Apex Court dealt with the issue of limitation in proceedings before the Commission. It is, *inter alia*, held therein that there is nothing in the Electricity Act 2003 to create a right in a suitor before the Commission to seek claims which are barred by law of limitation. It was further held that the Commission has been elevated to the status of a substitute for the Civil Court in respect of all disputes between the licensees and generating companies; that such disputes need not arise from the exercise of powers under the Electricity Act; that even claims or disputes arising purely out of

¹) (2016) 3 SCC 468=2015 SCC Online-SC 1029..

contract like in the present case have to be either adjudicated by the Commission or the Commission itself has the discretion to refer the dispute for arbitration after exercising its power to nominate the arbitrator; and that it would be fair to infer that the special adjudicatory role envisaged under Section 86(1)(f) appears to be for speedy resolution so that a vital developmental factor - electricity and its supply is not adversely affected by delay in adjudication. It was also held that, evidently, in absence of any reason or justification the legislature did not contemplate to enable a creditor who has allowed the period of limitation to set in, to recover such delayed claims through the Commission. It was accordingly held that the claim coming before the Commission cannot be entertained or allowed if it is barred by limitation prescribed.

This Commission, in its order dated 09-8-2023 in OP No.43 of 2019 **(M/s.ITC Limited Vs. Southern Power Distribution Company of Andhra Pradesh and others)** has taken the view that the period of limitation for recovery of amounts shall be three years as per Article 137 of the Schedule to the Limitation Act; and that as per the said provision, the limitation commences “when the right to apply accrues”. This Commission, accordingly, has considered the dates of bills sent by the developer in that case and the date on which it has approached this Commission for the purpose of determining whether the monthly bills were barred by limitation. We do not find any reason why the same yardstick shall not be applied in this case.

As noted hereinbefore, on the petitioner's own showing it was raising monthly bills, which were payable on the 5th working day following the meter reading date, as per Clause 5.1 of Article 5 (supra). The petitioner has claimed bills from February, 2017 till February, 2023. Since the petitioner has approached this Commission on 25th April, 2023, bills, which are payable for three years preceding the said date, are within the period of limitation and the petitioner is entitled to payment for the said period, as determined under Points 2 and 3 supra.

We hold this point accordingly.

In the result, both the OPs are allowed in part as indicated above.

This common order is made and signed on the 16th day of November, 2023.

**Sd/-
P V R REDDY
MEMBER**

**Sd/-
Justice C.V. NAGARJUNA REDDY
CHAIRMAN**

**Sd/-
THAKUR RAMA SINGH
MEMBER**