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

WEDNESDAY, THE EIGHTH DAY OF NOVEMBER
TWO THOUSAND AND TWENTY THREE
***

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

O.P.No.9 of 2023

Between:
BETWEEN;
M/s Alufluoride Limited, Mulagada, Mindi,
Visakhapatnam 530 012. Rep by its Managing Director-
Venkat Akkineni

...Petitioner

And:
1. AP State Load Despatch Centre,
   Vidyuth Soudha, Gunadala, Vijayawada.
2. APTRANSCO, VidyuthSoudha, Gunadala, Vijayawada.
3. AP Eastern Power Distribution Company of A.P. Ltd,
   P & T Colony, Seethamdhara, Visakhapatnam.

… Respondents

This Original Petition has come up for hearing before us today in the presence of Sri L.Arvinda Reddy, learned counsel for the petitioner and Sri P. Shiva Rao, learned Standing Counsel for the respondents; that after carefully considering the material available on record and after hearing the arguments of the learned counsel for both the parties, the Commission passed the following:

ORDER

This Original Petition is filed by an Open Access applicant challenging rejection order, vide: Proceedings No.CE/SLDC/SE//ERS/EE/EBC/F.No.Alufluoride/ /D.No.180/2021 dated 16-7-2021 of respondent No.1. The petitioner also prayed for extending the deemed banking facility for 23.21 lakh units

generated by the petitioner during the period from 01-4-2020 to 10-01-2021 in view of the specific undertaking by the Special Chief Secretary, Energy Department, on behalf of the Government of Andhra Pradesh before the Honourable High Court of Andhra Pradesh and settle the unsettled 6.18 lakhs units generated from 25-3-2-019 to 31-3-2020.

The case of the petitioner, in brief, is as under:

A. The Government of Andhra Pradesh had framed the Andhra Pradesh Solar Power Policy-2015, for encouraging and promoting the Solar Power Projects, which was effective for 5 years from the date of its issuance or till another policy is framed by the Government; that as per the said Policy the Energy injected into the grid from the date of synchronization to Commercial Operation Date (COD) will be considered as deemed energy banking; that Intra-state Open Access clearance will be be granted for the whole tenure of the project or 25 years, whichever is earlier, as per the APERC Regulations amended from time to time; that in the absence of any response or intimation from the Nodal Agency to the to the application of the Generator for Open Access within 21 days from the date of such application, then it shall be considered to be the deemed Open Access; and that the said policy gave various benefits including transmission, distribution charges, distribution loss with specific conditions. The salient features of the said policy are as under:

i. Energy banking was permitted for open access or schedule consumers throughout the year with an adjustment @ 2% of energy at the point of drawl with an intermittent period of not permitting drawl for certain period and hours;

ii. The energy banking was deemed to commence from the date of synchronization to the date of commercial operation with a condition that the unutilized banked energy shall be deemed to have been purchased by DISCOMs at the pooled power purchased cost, to be decided by APERC and the settlement was to be paid on monthly basis; and

iii. The intra-state open access was given for the whole tenure or specified therein with an exemption of electricity duty for captive consumption or sale to DISCOMs or third parties.

B. It is further stated that as per the Solar policy of 2018, the Energy injected into the grid from the date of synchronization to Commercial Operation Date (COD) will be considered as deemed energy banking; that the unutilized banked energy shall be considered as deemed purchase by DISCOMS at 50% of the Average Pooled Power Purchase Cost as determined by the APERC for the applicable year; that the energy settlement shall be done on monthly basis; that the said Amendment, though was discouraging compared to the existing policy, but it has at least considered the deemed banking of the energy generated from the date of synchronization to COD; that the Policy of 2018 did not exempt the transmission and distribution charges (Wheeling Charges), distribution loss and removed majority of exemptions given to the Generators of Solar Power and permitted the energy banking only with prior approval, while increasing the banking charges to 5% from 2% and restricting

the unutilized banked energy to 50%, which has to be purchased at pooled power purchase cost by the DISCOMS with a capping of 10% of the total banked energy.

C. It is further stated that Phase-I of the Petitioner's Project with 1.6 MW capacity was approved under the 2015 Policy, which was commissioned and synchronized with the Grid on 25.03.2019 i.e., after the issuance of the 2018 Policy; that as per both the Policies of 2015 and 2018, the banking facility during the period from date of synchronization till the Commercial Operation Date (COD) was made applicable to the Petitioner; and that the Petitioner is entitled to 100% energy banking under the 2015 Policy.

D. It is further stated that Phase-II of the petitioner's Project for 1.4 MW was synchronized to the Grid on 19.08.2020; that though the Project was ready for synchronization by March 2020, necessary applications for Short Term Open Access (STOA) could not be made by the petitioner due to COVID-19 restrictions imposed by the State and Central Governments; and that immediately after relaxation of the said restrictions, the petitioner made all the necessary applications for STOA on 21.08.2020, which was approved by the Respondent Authorities with effect from 11.01.2021, but the benefits of the Solar Policy, 2015 were not being extended to the Petitioner w.e.f. 01.04.2020 to 10-1-2021, though the Petitioner has banked the energy generated during that period.

E. It is further stated that, thereafter, the government of AP issued G.O. Ms.No.35, Energy (Power-II) Department, dated 18.11.2019, making amendments to the A.P. Solar Power Policy, 2018, A.P. Wind Power Policy, 2018 and A.P.Wind-Solar Hybrid Policy, 2018, which was challenged by various Generators by filing Writ Petitions before the Hon'ble High Court for the State of Andhra Pradesh, vide: W.P. No. 13374 of 2020, W.P. No. 13716 of 2020, W.P. No. 9680 of 2021 and W.P. No. 11872 of 2022; that the Hon'ble High Court of AP., by an interim order suspended the operation of the said G.O; that, subsequently, the Government of A.P., keeping in view the larger objective of creating congenial atmosphere in the State to attract investments, especially, in the Power Sector and to give a quietus to the long pending litigation, has decided to honour various agreements and to provide incentives to the Developers, who signed the agreements as per Wind, Solar and Wind-Solar hybrid policies of 2015 and 2018, which preceded issuance of G.O.MS No. 35, and filed an additional affidavit in respect thereof before the Honourable High Court; and that, recording the said concession given by the Government of A.P., in the Additional affidavit, the High Court of Andhra Pradesh has disposed of the said Writ Petitions, vide: common order dated 16.08.2022.

F. It is further submitted that the project of the Petitioner was approved under the 2015 policy and the Phase-I of the project for 1.6 MW was

commissioned and synchronized with the grid on 25.03.2019 i.e., after the issuance of the 2018 policy; and that as per the guidelines contained in both the 2015 and 2018 policies, the banking facility during the period from date of synchronization till the Commercial Operation Date (COD) was made applicable to the Petitioner and the Petitioner is entitled to 100% energy banking under the 2015 Policy, but only 13.15 lakhs units were adjusted as against the total production of 19.33 lakhs units and the balance 6.18 lakhs units for period 25.03.2019 to 31.03.2020 remained unsettled. As regards Phase-II for 1.4 MW, it is stated that it was synchronized to the grid on 19.08.2020; that though the project was ready for synchronization by March 2020, necessary applications for STOA could not be made due to the COVID-19 restrictions; that, immediately, after relaxation of the said restrictions the Petitioners made necessary application on 21-08-2020 for STOA, which was returned on 22.12.2020 directing the Petitioner to submit separate applications for the said two units, viz., 1.6 MW and 1.4 MW; that, accordingly, the Petitioner submitted applications on 23.12.2020, which were approved by the Respondent-Authorities with effect from 11.01.2021, but the benefits of the Solar Policies were not extended to the Petitioner w.e.f. 01.04.2020 to 10-1-2021 though the Petitioner has banked 23.21 lakhs units of energy during that period and it was deprived of the

benefits of the Policies issued by the Government of Andhra Pradesh.

In this petition, the petitioner is seeking consideration of unsettled Banking Units of 6.18 lakhs during the period 25.03.2019 to 31.03.2020 and 23.21 lakhs units during the period from 01.04.2020 to till 10.01.2021 (total 29.39 lakhs units) towards increasing the capacity from 1.6 MW to 3.00 MW Generation in their project at Polepalli Village, Butchayyapeta Mandal, Visakhapatnam District AP.

Respondents 1 and 2 filed a counter-affidavit on 02-05-2023 admitting the dates of synchronization of the two Units, viz., 1.6 MW and 1.4 MW, to the Grid on 25-03-2019 and 19-08-2020 respectively. It is, *inter alia,* stated therein that the petitioner is claiming the benefit of Regulation 2 of 2016 to the effect that from the date of synchronization to the date of COD of the Project, the power injected into the grid shall be considered as deemed banking; that on 21-8-2020 the petitioner has applied for STOA with effect from 19-8-2020, but it was granted from only on 11-1-2021 to the effect that the energy injected from 01-4-2020 to 10-1-2021 need to be considered as the banked units, which shall be adjusted/paid towards deemed purchase of unutilized units; that the date of COD of the Project was considered as 03-10-2019; that in respect of Phase-I (1.6 MW) there was an STOA upto 31-3-2020; therefore, the number of units injected from the date of synchronization on 25-3-2019 to the date of COD on 02-10-2019 were assessed as 9,19,947 (after deduction

of the Banking changes) and a part of those units were adjusted in the Open Access settlement during the months of January, 2019 and January, 2020; that the petitioner, in fact, requested respondent No.3 for adjustment of 8,60,000 deemed banked units, which were already adjusted/settled during the said period and the balance of 59,467 units are to be paid towards deemed purchase of unutilized banked energy; and that the claim of the petitioner for 6.18 lakh units is imaginary and baseless.

As regards the second part of the claim, i.e., 23.21 lakh units injected into the grid from 01-04-2020 to 10-01-2021, it is averred by the the respondents that as on 01-04-2020 Phase-I for 1.6 MW was in operation; that Phase-II for 1.4 MW was synchronized to the Grid on 19-8-2020; that the application dated 21-8-2020 made by the petitioner to the SLDC for STOA for seven months period, i.e., from 21.08.2020 to 28.02.2021, was not accompanied by acceptance of payment of required fees and the feasibility report in respect of the proposed OA consumer (ELR747), which is different from earlier OA consumer, who availed the power up to 31-03-2020, and, hence, it is invalid; that the feasibility report in respect of the proposed OA consumer was received by respondent No.3 on 11-09-2020 and the consolidated technical feasibility reports for Phase-2 and the two OA Consumers were received by respondent No.1 on 03.10.2020; and that the petitioner submitted revised applications separately on 23.12.2020 and the 1st respondent has issued STOA approvals on 11.01.2021 for the period from 11.01.2021 to 28.02.2021. It is further averred that from the STOA application

dated 21-08-2020, the revised STOA application dated 26-11-2020 and another revised applications for Phases-I and II separately on 23.12.2020 submitted by the petitioner, it is evident that from 01-04-2020 to 11-01-2021 there was no OA agreement after expiry of the earlier OA agreement on 31-03-2020, and, hence, the said period does not fall either between synchronization and COD period or agreement period; and that in the absence of an Open Access Agreement, the claim of the petitioner in respect of 23.21 lakh units cannot be considered as banked units. In support of the aforesaid stand, the respondents relied upon the order of this Commission in O.P No. 65 of 2019 dated 20-12-2021 (M/S TGV SRAAC Ltd vs. APTRANSCO), wherein this Commission held that pumping of energy into the grid without the knowledge and approval of SLDC is unlawful.

It is further averred that the claim of the petitioner for adjustment of the alleged banked units for payment towards deemed purchase banked units in respect of the energy injected from 01-04-2020 to 10-01-2021 is baseless, incorrect and contrary to the provisions of law in force as the said period is beyond the expiry of earlier Open Access Agreement; and that since the petitioner had injected energy into the grid during the said period, without knowledge of the SLDC, the petitioner is not entitled to any claim and the same should be considered as inadvertent power.

The respondents have denied that they have not considered the total units of energy as per the Regulation 2 of 2006 as amended vide: Regulation No.4 of 2019 and averred that the assessment made in respect thereof by the

petitioner is baseless and incorrect. It is averred that the respondents have considered the correct figures of the Banked units upto the date of COD and adjusted those units in December 2019 and January 2020; and, hence, the claim made by the petitioner is not tenable. The respondents have denied that the 2015 Policy has lapsed and stated that in midcourse of 2015 policy the Government of A.P. has issued 2018 policy. However, for the projects established during the said Policy periods, the benefits, as contemplated initially and as affected by the regulation 4 of 2019, were considered and extended to the petitioner. It is further averred that since the petitioner has injected the power unauthorizedly during the period from 01-04-2020 to 10-01-2021, the said power was considered as inadvertent power; and that, therefore the petitioner is not entitled for the prayer made in the petition.

Heard both the parties at length.

Sri L.Aravinda Reddy, learned counsel for the petitioner, submitted that the petitioner could not submit the STOA application, in time, for the approval, due to Covid-19. There was also delay in granting approval for the application filed and the same should be treated as deemed approval from the date of filing the application. Even though the Regulation is silent on the deemed approval of STOA applications, the Government Policy provides for the same and, hence, the petitioner is entitled for payment of the banked energy which was injected into the grid. He has also contended that the petitioner has filed the STOA application with scheduled capacity along with the details of the

consumers and, hence, the petitioner has complied with the requirement of the procedure.

Sri P.Shiva Rao, learned Standing Counsel appeared for the respondents, vehemently argued that as per Clause-10.4 of Regulation 2 of 2006 there has to be permission for the scheduled capacity and in the absence of the same the petitioner is not entitled to any payment for the electricity injected into the grid. But, he fairly agreed that there was delay in granting approval to the STOA application filed on 21-08-2020.

Having regard to the respective pleadings and the submissions of the learned counsel for the parties, the following points arise for consideration:

1. Whether the petitioner is entitled to claim payment of Rs.6.18 lakhs units injected from 25-3-2019 to 31-3-2020?
2. Whether the petitioner is entitled to claim payment for the units relating to 1.6 MW (Phase-I) for the period from 1-4-2020 to 19-8-2020? and
3. Whether the petitioner is entitled to claim payment for Rs.14,51,420/- from 20-8-2020 to 10-1-2021? And, if so, at what rate the petitioner is entitled to be paid?

Re Point No.1:

During the hearing, Sri P.Shiva Rao, learned Standing Counsel for the respondents, fairly admitted that the claim of the petitioner for payment in respect of 6,18,428 Units deserves to be allowed and that even the respondents are also inclined to make payment in respect thereof at 50% of the average Pooled Cost for the relevant year. The learned counsel for the petitioner did not dispute the rate at which payment is offered to be made.

In the light of this concession, no further adjudication in respect of the same is necessary.

Re Point No.2:

The Claim under this point relates to the period from 01-4-2020 to 19-8-2020 relating to 1.6 MW (Phase-1) Unit. Admittedly, no application for Open Access was made for the said period. The only stand taken by the petitioner in this regard is that during that period, due to Covid-2019, they could not make such an application. In our opinion, this stand of the petitioner is not sustainable. It is not as if during the Covid period no applications for Open Access were made and granted. Therefore, we are of the opinion that the petitioner is not entitled to claim any amount for the period from 01-4-2020 to 19-8-2020.

Point No.2 is, accordingly, answered.

Re Point No.3:

The period of dispute under this Point is from 20-8-2020 to 10-1-2021. There is no dispute about the fact that the petitioner has injected 14,51,420 units during this period. Admittedly, a common application dated 21-8-2020 was made in respect of both the Units for grant of Open Access for supplying power to the petitioner's scheduled consumer, and it was not disposed of for four months.

Regulation 2 of 2005 governs grant of Open Access for Long Term (LTOA) and Short Term Open Access(STOA). This Regulation was amended by Regulation 1 of 2016. Since the present case relates to STOA, Clause-11

of the said Regulation is relevant, which envisages that the SLDC shall process the application for STOA within the prescribed limits. In respect of the applications beyond one week and upto one month the time for processing is Seven days. If an application is made for the period beyond one month and upto one year, the process should be completed within Thirty days. The Regulation envisages deemed approval in respect of LTOA. However, it is silent on the same in respect of STOA.

Learned counsel for the petitioner placed before us G.O.Ms.No.1, Energy, Infrastructure & Investment (PR-II) Department, dated 03-01-2019. Para 4(c) of the same reads as under:

> "**Para 4(c): Open Access:** Intra-state Open Access clearance for the whole tenure of the project or 25 years whichever is earlier will be granted as per the APERC Regulations amended from time to time. In the absence of any response or intimation from the Nodal Agency to the generator within 21 days, then such application shall be considered to be deemed open access".

The learned counsel for the petitioner relied upon the said provision and submitted that even in the absence of Regulation framed by this Commission providing for deemed approval in respect of STOA, the respondents are bound by the Policy framed by the State Government.

Ordinarily the Commission follows the Regulations framed by it. However, where there is no conflict between the Regulation and the Policy, we do not find any reason to not follow the Policy. As noted above, the Regulation envisaged deemed approval only in respect of LTOA. However, there is no Clause in the Regulation, which expressly says that such deemed approval is not applicable to STOA. However, proviso to Clause-12.3 of the Regulation

mandated that in the case of short-term users Open Access shall be allowed, as early as possible, notwithstanding the time frame stipulated in the Regulation. From this, the intent of the Regulation is very clear that the SLDC shall endeavour and process the applications for STOA even earlier than the periods stipulated in the Regulation. While we find some vacuum in the Commission's Regulation due to non-provision of deemed approval in the case of STOA, we do not find any reason why the deemed approval, as envisaged for LTOA, shall also not be applicable to STOA. Otherwise, there is a possibility of SLDC keeping STOAs pending for a long time and the DISCOM concerned enjoys the power treating the same as inadvertent power, as happened in this case.

In this case, admittedly, the respondents, instead of disposing of the petitioner's application for STOA within Thirty days or earlier than that as per Clause-12.3 of the Regulation, has kept the application pending for four months, and, eventually, returned the same on the ground that a common application for both the Units is not in order and individual applications have to be filed.

There is another interesting aspect which needs to be referred to in this context. While denying banking to the petitioner in respect of the 2nd Unit, the respondents have taken a specific stand that under the extant Regulation synchronisation of the 1st Unit shall be treated as synchronisation of the entire project, and that, therefore, there cannot be a separate synchronisation of the

2nd Unit and, thereby, the petitioner is not entitled to the benefit of banking provision.

As rightly submitted by Sri Aravinda Reddy, learned counsel for the petitioner, this is a self-contradictory stand. While for the purpose of considering STOA, the respondents have taken the stand that common application for both the Units is not maintainable; for the purpose of denying Banking facility for the 2nd Unit, the respondents have taken the stand that synchronisation of the 1st Unit shall be treated as the synchronisation of the entire Project. On their own showing when the entire plant is deemed to have been synchronised with the synchronisation of the 1st Unit, there was no need for filing individual applications for the Two Units. Therefore, in our opinion, the very non-consideration of the application dated 21-8-2020 and its return, on the ground that common application is not maintainable, is erroneous. Once a common application is held to be maintainable, going by the respondents' own logic, the petitioner's application dated 21-8-2020 shall be deemed to be a valid application and injection of power during that period qualifies for attracting the deemed banking provision. Viewed from this angle also, the respondent cannot deny the benefit of deemed banking for the period from 19-8-2020 to 10-1-2021 in respect of 14,51,420 units.

Sri P.Shiva Rao, learned Standing Counsel for the respondents, submitted that the petitioner has not given a separate schedule of capacity and, therefore, in the absence of the same, the petitioner is not entitled to the benefit of deemed banking.

However, on a perusal of the petitioner's application form for grant of STOA would show that the petitioner has shown M/s. Alufluoride Ltd (VSP-246) and M/s.SVR Spinning Mills Pvt. Ltd (ELR-747) as the buyers. In the counter-affidavit it is stated that on 26-11-2020 the petitioner has stated that the proposed consumer i.e., M/s.SVR Spinning Mills Pvt. Ltd (ELR-747) was not interested to take power and, therefore, it cancelled the said consumer and submitted a revised application on the said date with new proposed consumer M/s.Granules India Limited (VSP-1389) for the period from 1-12-2020 to 28-2-2021. It is further stated that again the petitioner has submitted revised application for Phase-1 and 2 Units separately on 23-12-2020 requesting STOA approval.

From the above material, it is clear that the petitioner has not only mentioned the scheduled buyers in the original STOA application, but also kept the respondents informed about the change of the scheduled buyers from time to time. Further , 10.4 of Regulation 2 of 2006 has no relevance to the facts of this case .

In the light of the above, we have no hesitation to hold that the petitioner is entitled to the benefit of deemed banking. Admittedly, the respondents have the benefit of utilising the units injected by the petitioner during the period from 20-8-2020 to 10-1-2021. However, since the petitioner has filed this application on 21-8-2020 and one month time is provided for approval of STOA application made for 6 months, the deemed banking provision will be attracted on the expiry of one month from the date of the said

application i.e., from 21-9-2020 to 10-1-2021. The energy injected during this period qualifies for payment.

As regards the price at which payment shall be made, it is not in dispute between the learned counsel for the respective parties that the petitioner is entitled to payment at 50% of the Pooled Cost for the relevant year.

In the light of the above, the OP is allowed in part to the extent indicated above. Respondent No.3 shall make payment to the petitioner as determined in this order within 30 days from the date of receipt of this order.

Sd/-	Sd/-	Sd/-
P.V.R. Reddy	**Justice C.V. Nagarjuna Reddy**	**Thakur Rama Singh**
Member	**Chairman**	**Member**