



ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION

4thFloor, Singareni Bhavan, Red Hills, Hyderabad 500004

WEDNESDAY, THE NINETEENTH DAY OF OCTOBER,
TWO THOUSAND AND TWENTY TWO

:Present:

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

O.P.No.51 of 2022

Between:

M/s. MDA Mineral Dhatu (AP) Pvt. Ltd., A company incorporated under the Companies Act, 1956, having its registered Office at:12, Ho Chi Minh, Sarani, Kolkata-700071, Ferro Alloys Plant, Plot No. 165, APIIC, Growth Centre, Bobbili, Vizianagaram District, Andhra Pradesh.
Rep. by its Managing Director, Mr. Vidhan Mittal (HT)

... PETITIONER

And

1. Eastern Power Distribution Company of Andhra Pradesh Limited (APEPDCL), Rep by its Managing Director, P&T Colony, Seethammadhara, Visakhapatnam, Andhra Pradesh-530013.

2.AP State Load Dispatch Centre, Constituted under Section 31 of the Electricity Act, Represented by Transmission Corporation of Andhra Pradesh Limited, Office at Vidyut Soudha, Gunadala, Eluru Rd, Vijayawada, Andhra Pradesh - 520004.

3. Transmission Corporation of Andhra Pradesh Limited.
Vidyut Soudha, Gunadala, Eluru Road, Vijayawada, Andhra Pradesh- 520004. Rep. by its Chairman and Managing Director

...RESPONDENTS

This Original Petition has come up for hearing today in the presence of Smt.Deepti Anand, counsel representing Sri P.Vikram, 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 parties, the Commission passed the following:

ORDER

This O.P. is filed for a declaration that the action of the respondent No.1 in rejecting the petitioner's application vide: letter ref No.01/MDA dated 16-5-2022 for interstate short term open access as arbitrary, illegal, contrary to the provisions of the of the Electricity Act, 2003, Regulation No.2 of 2005 and the order dated 12.08.2021 passed in Appeal No.92 of 2021- (***Srikalahasthi Pipes Limited vs APSPDCL & Anr***) by the Hon'ble Appellate Tribunal for Electricity and to direct the respondents 1 and 2 to grant open access to the petitioner on its application, subject to payment of necessary charges.

The mainstay of the petitioner's case is that in view of the order dated 12-8-2021 in the aforesaid Appeal No.92 of 2021 of the APTEL, the petitioner is entitled to Open Access as of right.

After taking time, a counter-affidavit is filed by the Chief General Manager, RAC, PPA & Solar Energy, APEPDCL, Visakhapatnam, on behalf of respondent No.1, wherein he has opposed the petition on various grounds. However, significantly it is noticed that the counter-affidavit is conspicuously silent on the aforementioned order of the APTEL. The relevant part of the APTEL's Order reads as under:

“...21. According to Appellant, the Respondent Commission disallowed open access to the Appellant on the ground that the calculation of cross subsidy surcharge came to nil for Energy Intensive industries, hence, the commission opined that there has to be a restriction to exterid open access to Ferro Alloy Industries.

22. It is surprised to know that the Respondent Commission though opined that several other industries fell in the category of Energy Intensive industry as a whole, the so called compulsion/restriction/ban

concerned was imposed only on Ferro Alloy industries. By such imposition only to Ferro Alloy industry, it is carving out a separate category from Energy Intensive industry as a whole. Unless there is rationale behind doing so, which is acceptable not only on facts but also in accordance with law, the said action of the Respondent Commission cannot be appreciated.

25. It is argued that the tariff rates fixed for Ferro Alloys industries was much lower than the actual cost of service extended by the DISCOM. Several incentives were given by the Government to Ferro Alloys industries over several financial years. Ferro Alloys industry was not paying any minimum energy take-off and deemed consumption charges. The Respondent Commission seems to have imposed the so-called ban/restriction on the ground of incentive or concessional tariff said to have been extended to the Ferro Alloy Industries.

26.That apart, out of Energy Intensive industry group only, Ferro Alloy industry is carved out separately. But there is no rationale why other energy intensive industries were allowed to have open access and why only Ferro Alloys industries are left out. All Energy Intensive industries are to be treated at par with no additional benefit of any nature. Definitely it amount to discrimination, if the restriction is only to the Ferro Alloys industries and not to other Energy Intensive industries.

27.It is difficult to accept the contention that respondent Commission was justified in making a decision which carves out Ferro Alloys industry alone from the category of Energy Intensive industries. The selection of the source from where the power has to be procured definitely is a commercial decision which has to be exercised with commercial prudence. The consumer is entitled to consider all factors, which tend to fall in his favour and then decide to procure power at time from the market when it is favourable tariff to the consumer. This means, it is the option of the consumer rather it is the right of the consumer to select the supplier of power. If this right is interfered with by the State Commission, it would mean that the consumer is forced to procure power only from distribution licensee, which would definitely defeat the very purpose and objective why open access was introduced.

28. The State Commission, for that matter any Commission, constituted under the Electricity Act is a Regulator to regulate the tariff determination. It is a neutral body. It has to take decisions in the larger public interest. By granting open access, the consumer who chooses open

access definitely has to pay the cross-subsidy surcharge and wheeling charges, which is not in dispute.It is noticed that the eligibility criteria contemplated for obtaining open access, only refers to adequacy of transmission system and none of the provisions pertaining to open access either in the Act or the Regulations indicate that there could be prescription of any condition like restricting the Ferro Alloy industries from purchasing power through open access. As long as the consumer, who obtains open access is ready to take cross subsidy burden, there should not be any obstruction or restriction or limitation to enjoy the benefit of open access. The relevant factor seems to be that if the Ferro Alloys industries are allowed to have open access, then DISCOM in question will not be able to recover fixed charges. This definitely cannot be the relevant factor and cannot be at the cost of consumer under the guise of taking into consideration relevant factor, which is not applied evenly to all Energy Intensive industries. Over and above this, it is surprising to note that even if some concessions or incentives were extended to Ferro Alloys industries in the past, it cannot become a ground or relevant factor to stop the Ferro Alloys industries to exercise the option of procuring power through open access subsequently. It is nothing but discrimination.Therefore, the open access in terms of Section 42 read with the definition of 'open access' under Section 2(47) explicitly goes to show that there cannot be any compulsion or restriction which comes in the way of right to have open access”.

When Sri P. Shiva Rao, learned Standing Counsel for the respondents, was confronted on the APTEL's Order, he has fairly submitted that he cannot join issue on the APTEL's order; and that, therefore, he has no option, but to concede the relief claimed by the petitioner.

We cannot appreciate the manner in which the counter affidavit is filed, in not dealing with the main stand taken by the petitioner regarding the order passed by the APTEL, which unequivocally declared that the DISCOMS cannot deny open access to any category of consumers, muchless, Ferro Alloys consumers, merely because some concessional tariff has been extended to them. When the respondents chose

to file a counter, it is their duty to advert to all relevant aspects, whether they are in favour or against them. Failure of the respondents to deal with the critical aspect of the case, which formed the sole basis for the petitioner to file the present OP, amounts to impropriety.

As the learned Standing Counsel for the respondents submitted that he cannot sustain the objections of the respondents, in view of the categorical declaration by the APTEL that Ferro Alloys industry cannot be denied open access, we have no option other than allowing this O.P. Accordingly, the O.P. is allowed, as prayed for.

Indeed, this is a fit case for imposing costs on the respondents for the two reasons, viz., (1) in spite of the binding order passed by the APTEL, the respondents have unfairly driven the petitioner to file this OP incurring needless expenditure; and (2) for not advert to the order passed by the APTEL in the counter, which unequivocally declared that the DISCOMS cannot deny open access to any category of consumers, muchless, Ferro Alloys consumers, merely because some concessional tariff has been extended to them. However, taking a lenient view, the Commission chose not to impose costs with a caution to the respondents not to repeat such conduct in future.

Sd/-
Thakur Rama Singh
Member

Sd/-
Justice C.V. Nagarjuna Reddy
Chairman

Sd/-
P. Rajagopal Reddy
Member