

ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION
4th Floor, Singareni Bhavan, Red Hills, Hyderabad 500 004

O.P.No.3 of 2015
Dated: 19-08-2015

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

Between:

1. Southern Power Distribution Company of
Andhra Pradesh Limited
Besides Srinivasa Kalyanamandapam
Tiruchanur Road, Tirupati - 517 501
2. Eastern Power Distribution Company of
Andhra Pradesh Limited
P&T Colony, Seethammadhara, Visakhapatnam - 530 020 ... Petitioner

A N D

M/s. KSK Mahanadi Power Company Limited
8-2-293/82/A/431/A, Road No.22, Jubilee Hills
Hyderabad - 500 033 ... Respondent

The petition has come up for hearing finally on 14-08-2015 in the presence of Sri P. Shiva Rao, learned Standing Counsel for the petitioners and Sri Anand K Ganesan, learned counsel for the respondent. After carefully considering the material available on record and after hearing the arguments of both the counsel, the Commission passed the following:

ORDER

A petition under Section 86 (1) (b) of the Electricity Act, 2003 for approval for the plan under agreement dated 19-12-2014 signed and executed between the parties.

2. The petitioners contended that the respondent submitted a letter dated 26-11-2014 proposing for extension of the current agreement for supply of 400 MW power to distribution companies of Andhra Pradesh for a further period of five

years on the period of earlier medium term contract expiring and requested for an early decision in view of the need for immediate steps for corridor allocation. The respondent has already secured a medium term open access until June, 2016. The current power purchase agreement itself provided for such extension adequately and after the APPCC examined the proposal of the respondent after noting the relevant surrounding circumstances, the proposal was approved on agreed base prices of variable cost with annual escalation besides firm price of fixed cost. The approval in the meeting held on 29-11-2014 with agreed tariff was subject to approval of the State Electricity Regulatory Commission. The respondent was stated to have accepted unconditionally the proposal by its letter dated 18-12-2014 on certain terms and conditions. It also furnished an undertaking and in view of the power for all programme implemented in Andhra Pradesh, apart from free power supply for agriculture for nine hours and connection to all unconnected households, the plan in the agreement may be approved.

3. The respondent in its reply claimed that certain unique aspects of the power purchase agreement have not been brought out succinctly in the petition and narrated them in detail. It claimed that the supply of power under the extended power purchase agreement is in substance long term procurement of power by the distribution licensees as per provision 2.1 (a) of the Ministry of Power Guidelines No.23/11/2004-R&R (Vol II) dated 19-01-2005 and amendment thereto. The respondent also desired that it should be made clear that the determination of tariff as well as the period is matched between the bids under L1 case-1 bidding and the power purchase agreement. The respondent claimed to be in the process of applying for open access and stated that the agreement is that the presidential directive dated 17-07-2013 will not be deemed to be a change in

law for the purposes of this extension. The respondent hence desired that while adopting the tariff, necessary mechanism should be provided for tariff adjustment to be finalized and frozen only upon the completion of the competitive bidding process and commencement of power delivery under such bid as per the agreed matching principle. It also wanted the petitioners to be directed to jointly work with the procurers for dispensation and enablement of the necessary open access for continued supply. It desired the power purchase agreement to be effectively a long term power purchase agreement. It also wanted liberty to be provided to both parties to approach the Commission on any extraordinary future development including about the coal linkages and on the whole, it wanted the Commission to approve the procurement of electricity by the petitioners from the respondent under the extended power purchase agreement.

4. As the respondent desired the PPA to also fulfill conditions (a) to (d) of Para 19 of the reply, the response of the petitioners to the said requests was directed to be placed before the Commission and in the response, the petitioners stated that the existing power purchase agreement itself provided for extension of its term as per which the present agreement was entered into. While refusing to accept any issue raised by the respondent other than the agreed terms, the petitioners submitted that by letter dated 18-12-2014, the respondent has stated that it agreed that the tariff agreed by the seller in this proposal is lower subject to reduction if the discovered price in the ongoing long term bidding process on DBFOO basis of Discoms is found lesser than the agreed tariff and it shall be matched to L1, subject to actual power delivered at such L1 tariff. The petitioners stated that at this stage when 2400 MW bidding evaluation is under process, it is not possible to state as to whether the tariff agreed in the power

purchase agreement with the respondent is lesser or not than the tariff that may be arrived at in the ongoing tender. The petitioners also promised to extend all possible support to the respondent within the scope of regulations of CERC/APERC and the terms and conditions of the agreement dated 19-12-2014 towards the processing of open access application. In fact, open access application was already processed and no more terms than stated in the power purchase agreement are acceptable. While requesting the Commission to take a view on the agreement being considered as a long term power purchase agreement without any obligations, liabilities and penalties to the distribution companies, the petitioners requested that the terms and conditions of the present agreement and the earlier agreement dated 31-07-2012 can be followed in approaching the Commission. Hence, the petitioners sought for approval of the plan under the agreement dated 19-12-2014.

5. A close perusal of the contents of the pleadings and documents of the parties and careful consideration of the arguments advanced by Sri P. Shiva Rao, learned Standing Counsel for the petitioners and Sri Anand K. Ganesan, learned counsel for the respondent reveals that the parties are in broad agreement about the need for acceptance of the contents of the agreement dated 19-12-2014 with each side attempting to have clarifications on certain specified aspects. While the language and the contents of the agreement dated 19-12-2014 between the parties do not appear to present any ambiguity, there appears no legal or factual hindrance for giving effect to the consensus ad idem of the parties as expressed in the agreement. The respondent is also not resiling from the contents of its letter dated 18-12-2014 or the confirmation and undertaking dated 19-12-2014. Copies of correspondence filed by the respondent also show that there was no ultimate

disagreement. While both parties are not in dispute about the agreed terms specifically incorporated in the agreement dated 19-12-2014, the petitioners are not in any manner reversing their stand on the agreed terms concerning the tariff for extended period. While there appears no basis for any reasonable apprehension that either party will not abide by the said term relating to tariff on approval of the power purchase agreement by the Commission, any unilateral deviation by either party from the terms can definitely be placed before the Commission for necessary remedial action within the limits of the regulatory jurisdiction under the Electricity Act, 2003 read with the Andhra Pradesh Electricity Reform Act, 1998 and the rules and regulations made under the statutes. While the petitioners extending all possible support for processing of the open access applications is not factually in dispute, the request of the respondent to have the agreement considered as a long term power purchase agreement is claimed to be in accordance with the Ministry of Power Guidelines referred to in the reply, which claim is not in dispute and therefore, acceptance of such request without any obligations, liabilities and penalties to the petitioners in consequence thereof will facilitate the due execution and implementation of the agreement. Approaching this Commission on account of any extraordinary future developments will be dependent upon the scope and content of such approach vis-à-vis the jurisdiction of the Commission as conferred by the relevant statutes, rules and regulations. The same can neither be dependent on the consent of the parties nor the subject of any advance consideration by the Commission. If any such matter, question or issue within the jurisdiction of the Commission arises for consideration, either party will necessarily have the liberty to approach the Commission in respect thereof which need not be the subject of a specific

direction. This petition therefore has to be disposed of on the basis of the above reasoning.

6. Therefore, the petition is allowed and the plan under the agreement dated 19-12-2014 signed and executed between the petitioners and the respondent is approved. Both parties will hopefully abide by the agreed terms in respect of the tariff for the extended period and the petitioners, admittedly extending all possible support to the respondent for processing of open access application, may continue to extend all such support permissible under law for giving due effect to the agreement dated 19-12-2014. The agreement dated 19-12-2014 be considered as a long term power purchase agreement in terms of the Ministry of Power Guidelines No.23/11/2004-R&R (Vol II) dated 19-01-2005 as amended from time to time without any obligations, liabilities and penalties for the petitioners only due to such consideration. Both parties have the liberty to approach this Commission for any permissible relief necessitated by any extraordinary future development provided the same is within the jurisdiction of this Commission. The parties shall bear their own costs.

This order is corrected and signed on this the 19th day of August, 2015.

Sd/-
P. Rama Mohan
Member

Sd/-
Dr. P. Raghu
Member

Sd/-
Justice G. Bhavani Prasad
Chairman