



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

SATURDAY, THE THIRTY FIRST DAY OF AUGUST
TWO THOUSAND AND NINETEEN

:Present:

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

O.P.No. 35 of 2019

Between:

M/s. Vayu Urja Bharat Private Limited

... **Petitioner**

A N D

Southern Power Distribution Company of AP Limited

... **Respondent**

This Original Petition has come up for hearing finally on 24-08-2019, in the presence of Sri P. Sri Raghuram, 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

A petition under Section 86 (1) (f) and (e) of the Electricity Act, 2003 to direct the respondent to pay Rs.9,57,75,159/- towards the partly paid monthly invoices from March, 2017 to May, 2018 and Rs.113,49,11,720/- towards the unpaid monthly invoices from June, 2018 till 06-03-2019 and Rs.6,47,00,015/- towards LPS/DPC within 7 days from the date of the order herein and further direct the respondent to pay carrying cost at 15% per annum, comply with the terms of the Power Purchase Agreement including the obligation of the respondent to make timely payments and comply with the terms of the Power Purchase Agreement and for costs and other appropriate orders.

2. The substance of the petitioner's case is that it is a generating company owning and operating a 120 MW wind power project at Guruvepally of Marrimakula of Anantapuram District and the petitioner entered into a Power Purchase Agreement with the respondent on 28-07-2016 for the sale of the entire electricity generated from the project for a term of 25 years. The tariff shall be firm at Rs.4.84 per kWh without accelerated depreciation from the date of commercial operation as per the orders of the Commission dated 26-03-2018 in O.P.No.13 of 2016. The project was commissioned in phases on 31-03-2017, 29-11-2017 and 29-12-2017. For the consistent supply of power in terms of the Power Purchase Agreement, the petitioner was raising monthly invoices / bills, but the respondent always delayed the payments. Only part payments were made without any reason and deducting Generation Based Incentives and HT services. The petitioner addressed a number of letters demanding payment as per the Power Purchase Agreement for the energy supplied and the petitioner even offered to waive 100% of Late Payment Surcharge. There was no response from the respondent. The various State Electricity Regulatory Commissions and the Hon'ble Appellate Tribunal for Electricity are directing payment of unlawfully withheld principal amounts apart from interest / DPC / NPS amounts. The petitioner is subjected to severe cash flow problem due to default by the respondent and it could become a Non Performing Asset. The respondent attempted to compel the petitioner to waive the LPS and also give an additional discount of 1% and the petitioner agreed to give up the LPS only for the period from 14-03-2018 to 31-03-2018. Hence, the petitioner is entitled to the reliefs as prayed for

3. The respondent filed a counter stating that the only issue is whether or not the respondent is required to pay interest having paid the bill amount after 30 days. The respondent will pay the monthly bills to the petitioner during the course of time as and when funds are available, but at an earliest. The Discoms are unable to pay the bill

the

amount on time as their financial condition is very bad and even in the near future, they ^{will be} are unable to pay the bill amount within time, even though they are trying to make payment at the earliest without any default. As per clause 10.1 of the Power Purchase Agreement, the generator / petitioner is at liberty to terminate the agreement in the event of default. Hence, the petitioner may choose either to terminate the work or wait for payment without claiming interest. The petitioner did not take recourse to the process of resolution as per article 10.2 and 10.3 of the agreement for resolution of any dispute or default and hence the petition is premature. The respondent is deducting the power consumption charges from the monthly bills in terms of the Power Purchase Agreement and the Commission may not pass any orders compelling the Discoms to pay interest for the delayed payment in view of the poor financial condition of the Discoms. The petition be dismissed with costs.

4. The petitioner's case in the rejoinder in brief is that the Power Purchase Agreement is not based on the contingency of availability of funds. The matter of deduction against HT services was resolved to the extent that the respondent will not be making further deductions under that head from the monthly bills and the past amounts so deducted were refunded by the respondent on 12-06-2019. The Hon'ble High Court ordered in W.P.No.29847 of 2018 on 23-08-2018 that there shall be interim suspension of the order dated 28-07-2018 of the Commission relating to the Generation Based Incentive. The respondent cannot withhold any amount towards the Generation Based Incentive. Timely payments and Late Payment Surcharge are clearly stipulated under the agreement and the petitioner, who made a substantial investment, suffered serious cash flow problem in its business operations. The petitioner is finding it very difficult to service its debts and the financial difficulties of the respondent are not legitimate ground for not making payment. The respondent cannot demand the petitioner to terminate the agreement. The respondent is precluded from taking any such pleas on the grounds of

promissory estoppel and legitimate expectation. The petitioner acted upon the Wind Policy of 2015 and tender documents and the petitioner is entitled to have the Power Purchase Agreement specifically enforced. Hence a fixed schedule for making payment of past arrears be provided and future invoices be timely paid.

5. The petitioner filed a further affidavit before the Commission on 17-08-2019 to bring to the notice of the Commission the extremely grave financial conditions faced by the petitioner due to non-payment. Briefly stated the petitioner contended that Rs.135.70 crores was due by 17-08-2019 from March, 2017 to June, 2019 and time was essence of the contract in relation to payment obligations of the respondent. The supply of energy by the petitioner was without any default and the adjudication process before the Commission took six months. Article 10.4 of the Power Purchase Agreement gives liberty to the petitioner to directly approach the Commission without following the process under article 10.1 to 10.3. The monthly debt repayment obligation of the petitioner in relation to this project is approximately Rs.16 crores and the total outstanding debt of the petitioner is Rs.784.07 crores. The monthly operational and maintenance expenses are approximately Rs.40 lakhs. The petitioner required at least two months amount as a buffer and it requires at least Rs.49.20 crores to avoid default in debt repayment schedule. Hence, such amounts be released within seven days by 24-08-2019 and the balance past arrears be paid without further delay and future payment be made timely.

6. The point for consideration is whether the petitioner is entitled to the reliefs sought for and if so, to what extent and in what manner ?

7. At the outset, the respondent filed a copy of W.P.No.9876 of 2019 on the file of the Hon'ble High Court of Andhra Pradesh at Amaravathi, by the present petitioner against the State of Andhra Pradesh in its Energy Department, New & Renewable

Energy Development Corporation of Andhra Pradesh Limited and the Union of India challenging G.O.RT.No.63 (HLNC order) dated 01-07-2019 and a letter dated 12-07-2019 from the respondent herein and to restrain any steps for reduction of tariff or termination of the Power Purchase Agreement. The respondent attempted to canvass that the subject matter of the present petition is thus under consideration of the Hon'ble High Court. However, the affidavit containing the chronology of events ultimately challenged the Government Order and the letter referred to above on the ground of violation of the fundamental rights of the petitioner, coercion, want of jurisdiction and violation of the electricity laws and the regulations. On the elaborate grounds stated in the affidavit, the petitioner herein desired to hold the Government Order and the letter to be illegal and unconstitutional. Thus, though the writ petition concerns the rights claimed by the petitioner under the same Power Purchase Agreement, it is primarily directed against any interference with the contractual rights of the petitioner under the said agreement through the Government Order and the letter, whereas the subject matter of the present petition is specifically confined to non-payment of the price of the electricity supplied from March, 2017 up-to-date with consequential liability to pay the Late Payment Surcharge / carrying cost / interest and costs. The subject matter of the *lis* before the Hon'ble High Court and the subject matter of this petition are thus totally different and distinct and this petition cannot be considered to be barred on the principle of the subject matter being *subjudice*.

8. Similarly, the respondent also filed a copy of W.P.No.11688 of 2019 filed by PTC Energy Limited, for recovery of the amount due and payable for generation and supply of electricity by it along with surcharge for delayed payment and further to direct the present respondent to make payment in terms of the existing Power Purchase Agreement. It is true that the claim of PTC Energy Limited in the said writ petition and the claim by the present petitioner in this petition are both for recovery of the amounts

due and payable for the energy generated and supplied by the generating units to the distribution company along with the consequential surcharge etc. But merely because the petition by PTC Energy Limited for a similar relief is pending before the Hon'ble High Court, the same cannot bar the petitioner in law to seek the relief prayed for in this petition, if it is otherwise entitled to the same. Section 86 (1) (e) of the Electricity Act, 2003 makes it one of the functions of the State Electricity Regulatory Commission, promotion of cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person and Section 86 (1) (f) confers the jurisdiction on the State Electricity Regulatory Commission to adjudicate upon the disputes between the licensees and the generating companies. It cannot be seriously in dispute that the Commission has jurisdiction to entertain a petition of the present nature and the mere fact that another generator had chosen to approach the Hon'ble High Court for a similar relief on similar grounds by way of a writ cannot be considered to bar the petitioner from pursuing this petition. The respondent further objected the petitioner approaching this Commission without exhausting the procedure prescribed by article 10.1 to 10.3 of the Power Purchase Agreement dated 28-07-2016. But article 10.4 of the said agreement clearly states that failing resolution of the dispute in terms of article 10.1 to 10.3 or even otherwise, any party may approach the AP Electricity Regulatory Commission to adjudicate upon the dispute in terms of Section 86 (1) (f) of the Electricity Act, 2003 and the learned counsel for the petitioner relied on P. Ramanatha Aiyar's Advanced Law Lexicon, 5th edition to contend that the words 'even otherwise' are of a wide import and mean 'in different manner, in another way, differently in other respects etc.,' and therefore the petitioner interpreted the provision as enabling either party to approach the Commission directly without following the process set out in article 10.1 to 10.3. The plain grammatical meaning of article 10.4 clearly appears to convey the same meaning as interpreted by the petitioner. Even otherwise, article 10.1 to 3 contemplating

● resolution of any dispute between the parties by the designated representatives or the senior officers of the parties only signify the recognition of the need to attempt to resolve the dispute through the best efforts of the parties in good faith and the very opening words of article 10.4 contemplate failure of such efforts giving a right to either party to approach the Commission. When it is stated further that 'even otherwise' either party can approach the Commission, the same obviously appears to mean what meaning the petitioner is attempting to attribute to the same. While thus the direct approach by the petitioner to the Commission with this petition does not appear to be barred by article 10 of the Power Purchase Agreement, learned counsel for the petitioner also referred to the decisions reported in *Energy Watchdog Vs Central Electricity Regulatory Commission and others* (2017) 14 SCC 80, *Mary Vs State of Kerala and others* (2014) 14 SCC 272, *Hinduja National Power Corporation Limited Vs Andhra Pradesh Electricity Regulatory Commission & others* of the Hon'ble Appellate Tribunal for Electricity dated 29-05-2019, *Vivek Pharmachem (India) Limited Vs Rajasthan Electricity Regulatory Commission of the Hon'ble High Court of Rajasthan* dated 09-02-2018, *Maharashtra State Electricity Distribution Company Limited Vs Maharashtra Electricity Regulatory Commission & another* before the Hon'ble Appellate Tribunal for Electricity dated 24-04-2018, *Kusheshwar Prasad Singh Vs State of Bihar and others* (2007) 11 SCC 447, *Essar Power Limited Vs Uttar Pradesh Electricity Regulatory Commission* dated 16-12-2011 before the Hon'ble Appellate Tribunal for Electricity and a copy of the 126th Report of the Law Commission of India on Government and Public Sector Undertaking Litigation Policy and Strategies. The Law Commission after elaborate discussion observed that it is nothing but wastage of precious exchequer's funds collected through the hard earned money of the public, utilized merely for the whims and fancies of certain over enthusiastic departments of the Government and certain Public Sector Undertakings to keep on litigating for frivolous reasons such as a matter of prestige etc. Without duplicating the in-depth discussion by the Law Commission on the subject, it

cannot be disputed that a Public Sector Undertaking like the respondent should not indulge in unnecessary litigation without substantial grounds and justification. In Essar Power Limited, the Hon'ble Appellate Tribunal for Electricity laid down the principles for exercise of power under Section 63 of the Electricity Act, 2003 by the State Commission which also shall not violate the principles of natural justice. In Kusheshwar Prasad Singh's case, it was pointed out that a man cannot be permitted to take undue and unfair advantage of his own wrong to gain favourable interpretation of law and he, who prevents a thing from being done shall not avail himself of the non-performance he has occasioned i.e., a wrong doer ought not be permitted to make profit out of his own wrong. In Appeal No.75 of 2017 between Maharashtra State Electricity Distribution Company Limited Vs Maharashtra Electricity Regulatory Commission & another, the Hon'ble Appellate Tribunal for Electricity observed that the liability for payment of the Late Payment Surcharge not being disputed, the difficulty in cash flow situation makes it the responsibility of the distribution company to arrange the funds and to make timely payment to the generator based on contracts / regulations. In Vivek Pharmachem (India) Limited, the Hon'ble Rajasthan High Court observed that liabilities under contracts cannot be circumvented for reasons of financial difficulty and the liability for Late Payment Surcharge was upheld. In the interim order in Hinduja National Power Corporation Limited, the Hon'ble Appellate Tribunal for Electricity directed payment by the A.P. Discoms in instalments. In Mary, the Hon'ble Supreme Court reiterated the duty to act fairly and reasonably and the necessity to give effect to the statutory contracts / rules when they clearly provided for the consequences of non-performance. In Energy Watchdog, while dealing exhaustively with the issues arising under Section 63 of the Electricity Act, 2003 held that mere incidence of expense or delay or onerousness is not insufficient to invoke the *doctrine of frustration*. The principles are not in dispute and in the Power Purchase Agreement, due date for payment of the amount payable by the Discom to the generator was clearly defined and the manner of presentation of bill by a

generator to the distributor was also clearly specified. The Power Purchase Agreement further provided for Late Payment Surcharge / DPC / interest and the petitioner has referred to the specific orders of the Hon'ble Appellate Tribunal for Electricity and some other State Commissions giving positive directions under such circumstances.

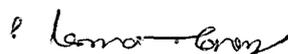
9. The respondent in its counter only relied on its bad financial condition as disabling it from making payment but such bad / poor financial condition absolving the respondent of its contractual obligations under the Power Purchase Agreement is not shown to be supported by any provision or principle of law or term or condition of the Power Purchase Agreement. The respondent cannot compel the petitioner to terminate the agreement under circumstances specified in the Power Purchase Agreement as it is an option or right given to the petitioner and not the respondent. Similarly, if the petitioner has a right to demand the LPS / DPC / interest / carrying cost from the respondent under the contractual terms and conditions, the respondent cannot unilaterally disown any liability for making such payment. The claim of the petitioner that its monthly debt repayment obligation is approximately Rs.16 crores and its monthly operation and maintenance expenses are approximately Rs.40 lakhs is not seriously disputed and the petitioner requests for atleast part payment sufficient to meet such expenses for two months followed by similar payments thereafter and it filed a copy of the 18th Annual Report of the respondent to suggest that the respondent is not in any financial difficulties. The claims made by the petitioner as outstanding towards the partly paid or totally unpaid monthly invoices from March, 2017 upto the petition are not factually disputed and in the further affidavits, the petitioner claimed Rs.135.70 crores to be due as on 17-08-2019. The respondent had undoubtedly to pay the petitioner the value of the electricity received by it during the period in question at the tariff agreed under the Power Purchase Agreement. For payments not made by the due dates, the consequences of liability to pay LPS / DPC / interest / carrying cost are also claimed to

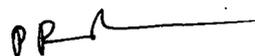
have arisen and so long as the Power Purchase Agreement is in force, the respondent is bound to comply with the terms thereof.

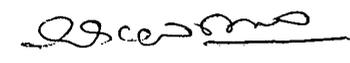
10. In so far as principal amount of the value of the energy supplied is concerned, the liability is not disputed and cannot be disputed but the financial condition of the respondent does not appear such as would allow it to pay the entire dues in *lump sum*, leave alone pay the LPS / DPC / interest / carrying cost that may be due under the terms and conditions of the agreement or the costs of the petition, though the clear default by the respondent forced the petitioner to approach the Commission. Any direction for a *lump sum* payment within a short time does not appear to be capable of being complied with by the respondent and any economic collapse or irretrievable financial distress of the respondent will no way help the petitioner in realizing its dues. At the same time, the petitioner also should not be driven to become a Non Performing Asset and face insolvent circumstances. Therefore, keeping in view the minimum monthly funds required to meet the debt servicing obligation of the petitioner and the operational and maintenance expenses, making the respondent pay a sum of Rs.16.40 cores per month towards the amounts due to the petitioner up-to-date, will meet the ends of justice, while the liability for LPS / DPC / interest / carrying cost may be relegated to be determined on a future application as such liability in respect of arrears due up-to-date may continue proportionately till the last payment of the principal amount due by now in terms of stipulations under the Power Purchase Agreement. The postponement of quantification of such sums will be in the interests of justice as it is open to the parties to come to an understanding / agreement regarding such amount in the meanwhile also. While the responsibility of the respondent to continue to comply with the terms and conditions of the Power Purchase Agreement in future stands as it is, the petition can be ordered on the above lines, while directing the parties in equity to bear their own costs in this petition.

Therefore, the respondent shall pay all the amounts due to the petitioner towards the tariff / price payable under the Power Purchase Agreement dated 28-07-2016 towards the electricity generated and supplied by the petitioner to the respondent from March, 2017 to 31-08-2019 today, in installments of not less than Rs.16.40 crores per month by 15th of every month commencing from 15-09-2019 till the entire liability for the principal sum is discharged. The issues / claims relating to Generation Based Incentive and / or any other amounts, which are under adjudication before the Hon'ble High Court or the Hon'ble Appellate Tribunal for Electricity or the Hon'ble Supreme Court shall abide by the orders of the Hon'ble High Court or the Hon'ble Appellate Tribunal for Electricity or the Hon'ble Supreme Court, as the case may be, which orders are either in force or may be passed further or finally. The respondent is further directed to comply with all the terms and conditions of the Power Purchase Agreement dated 28-07-2016 with the respondent in respect of the electricity generated and supplied to it by the petitioner from today so long as the Power Purchase Agreement is in force including its obligation to make due payment for the delivered energy regularly hereafter. The respondent and the petitioner are at liberty to come to an understanding / agreement regarding the LPS / DPC / interest / carrying cost payable on the amounts due under this Original Petition towards the electricity generated and supplied by the petitioner from March, 2017 till today i.e., 31-08-2019 by the date of last payment of the amount due as per the orders herein and in the absence of any such understanding / agreement, the parties are at liberty to approach this Commission with an appropriate application for determination of such sum. The Original Petition is ordered accordingly without costs.

This order is corrected and signed on this the 31st day of August, 2019.


P. Rama Mohan
Member


Dr. P. Raghu
Member


Justice G. Bhavani Prasad
Chairman