



**ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION**

4thFloor, Singareni Bhavan, Red Hills, Hyderabad - 500004

26TH DAY, THE WEDNESDAY OF AUGUST  
TWO THOUSAND AND TWENTY

:: Present ::

**Justice C.V.Nagarjuna Reddy, Chairman**

**Sri P.Rajagopal Reddy, Member**

**Sri Thakur Rama Singh, Member**

**O.P.No.23 of 2020**

**Between:**

LANCO KONDAPALLI POWER LTD

... **Petitioner**

**A N D**

1. SOUTHERN POWER DISTRIBUTION COMPANY OF ANDHRA PRADESH LTD;
2. EASTERN POWER DISTRIBUTION COMPANY OF ANDHRA PRADESH LTD;
3. ANDHRA PRADESH POWER COORDINATION COMMITTEE. ... **Respondents**

The Original Petition has come up for hearing through web hearing finally on 19-08-2020 in the presence of Sri B. Adinarayana Rao, learned senior counsel representing Sri Challa Gunaranjan, learned counsel for the Petitioner and Sri P. Shiva Rao, learned Standing Counsel for the Respondents. After carefully considering the material available on record, hearing the arguments of the learned counsel for both parties and the written submissions filed by the parties, the Commission passed the following:

## **ORDER**

1. The Petitioner filed this original petition, seeking directions to the Respondents to continue power procurement by them from its combined cycle gas power plant till 30.09.2020 or till further such date, at the tariff approved in APERC order dated 06.04.2020.

The averments of the Petitioner are briefly as under:

That on 26.03.2020, the Respondent DISCOMs wrote a letter to the Commission to permit them to procure power from the Petitioner's gas power plant during FY 2020-21 on short term basis till such time the expected gas diversion to the state run GGPP plant materializes or the Gas Supply Agreement expires, whichever is earlier, or until the review petition filed by the Respondent on the Tariff Order for FY2020-21 is disposed of.

That on 27.03.2020, the Commission passed an order approving the proposal of the Respondents and allowing the Respondent DISCOMs to procure power from the Petitioner's power plant temporarily at single part tariff of Rs.3.29 ps /Unit (kWh) for the months of April and May 2020 with a condition that an undertaking shall be obtained from the Petitioner stating that the Petitioner will not seek any upward variation / revision of the tariff specified at a later time.

That the Petitioner submitted the required undertaking dated 31.03.2020, in the format provided by the Respondents through email dated 31.03.2020.

That the Respondent DISCOMs wrote another letter to the Commission on 06.04.2020, requesting the Commission for downward revision of procurement tariff at Rs.2.69/Unit (kWh) from the Petitioner's power plant in view of the reduction of domestic gas prices from USD 3.23/MMBTU to USD 2.39/MMBTU

by Ministry of Power and Natural Gas, Government of India for the period 01.04.2020 to 30.09.2020.

That on 06.04.2020, the Commission passed an order modifying its earlier order dated 27.03.2020 by substituting the Tariff of Rs.3.29 ps per unit with the rate of Rs.2.69 ps/unit payable to the Petitioner.

That the Respondent No. 1 wrote a letter dated 07.04.2020 to the Petitioner informing about the APERC Order dated 06.04.2020 and requesting the Petitioner to supply the power to Respondent DISCOMs on short term basis at the rate of Rs.2.69 ps per unit for the period from 01.04.2020 to 31.05.2020. Further, Respondent No.1 requested the Petitioner to furnish an undertaking, duly accepting the substituted tariff and accepting all the other terms and conditions unaltered as per the APERC Order dated 06.04.2020. Similarly, an email dated 07.04.2020 was issued by Respondent No.2 requesting the Petitioner to furnish a similar undertaking.

That the Petitioner, in accordance with the above mentioned letter dated 07.04.2020 by Respondent No.1 and email dated 07.04.2020 by Respondent No.2; issued an undertaking dated 15.04.2020 in favour of the Respondents DISCOMs. As per the Undertaking dated 15.04.2020, the Petitioner has undertaken that the cost of procurement by Respondent No.1 and Respondent No.2 from the Petitioner during the period from 01.04.2020 to 31.05.2020 shall be at the rate of Rs.2.69 ps per unit. Further, the Petitioner had undertaken that it will supply power at Rs.2.69 ps per unit for the period 01.04.2020 to 31.05.2020, without prejudice to the rights of fuel cost pass through that have accrued or available under law and the contract.

That the Petitioner continued supplying power to the Respondents DISCOMs in accordance with the APERC Orders dated 27.03.2020

and 06.04.2020. On 31.05.2020, Respondent No.3 wrote an email to the Petitioner requesting it to supply power on short term basis beyond 31.05.2020 to the Respondent DISCOMs until further intimation in accordance with the APERC Order dated 27.03.2020 and APERC Order dated 06.04.2020.

That Respondent Nos.1 and 2 wrote letters dated 28-05-2020 and 29-05-2020e respectively to the Commission, requesting to issue suitable orders for temporary power procurement of power from the Petitioner until the review petition filed by the Respondent DISCOMs on the Retail supply Tariff order dated 10.02.2020 is disposed of by the Commission as the temporary procurement granted by its Orders dated 27.03.2020 and dated 06.04.2020 has expired on 31.05.2020. The Respondent DISCOMs were scheduling electricity from the Petitioner's power plant subsequent to 31.05.2020 and it was generating and supplying electricity to them.

That the Respondents through emails informed the Petitioner that they have received the proceedings of the Commission dated 19.06.2020, wherein it observed that the Undertaking dated 31.03.2020 and the Undertaking dated 15.04.2020 issued by the Petitioner show the intention of the Petitioner to claim higher tariff than what is permitted to be collected by him as per the APERC Order dated 06.04.2020 and therefore, it was of the view that unless the Petitioner unequivocally undertakes to supply power at Rs.2.69 ps per unit without any condition whatsoever, it is not in public interest to permit the Respondent DISCOMs to procure power from the Petitioner's power plant in view of definite possibility of their suffering litigation from payment of higher tariff. That the APERC Proceedings dated 19.06.2020 further states that if the Respondent DISCOMs fail to procure the written undertaking from the Petitioner without any condition in the

undertaking and if such undertaking is not produced before the Commission within one week from the date of the said proceedings, the Respondent DISCOMs shall stop taking the power from the Petitioner's power plant with effect from 01.07.2020.

That the Respondents sent an e-mail to the Petitioner requesting him to issue the revised undertaking in accordance with the APERC Proceedings dated 19.06.2020. The Petitioner was further informed that if the undertaking is not furnished before 25.06.2020, the scheduling of power from its power plant will be stopped immediately without any further intimation. SLDC was informed accordingly by the Respondents.

That the Petitioner has submitted the undertaking to the Respondent DISCOMs on 25.06.2020 in accordance with the APERC Proceedings dated 19.06.2020 for the power supplied during the months of April and May 2020.

That The Respondent no.3 vide its email dated 01.07.2020 has requested the Petitioner to submit unequivocal undertaking for supply of power at Rs.2.69 ps per unit for the period from 01.06.2020 to 30.09.2020 or until the review petition filed by the Respondent DISCOMs on Retail Supply Tariff Order for FY 2020-21 is disposed of by the Commission, whichever is earlier and that if such an undertaking is not furnished within two days from the date of email, the power scheduling from the Petitioner's power plant will be reviewed.

That in response to the Respondent's email dated 01.07.2020, the Petitioner wrote a letter to Respondent DISCOMs on 08.07.2020 requesting them to revise the tariff back to Rs.3.29 ps per kWh and place relevant facts before the Commission on priority basis, to enable the Petitioner's power plant to continue its operations on a sustainable basis without any interruption. Further, the Petitioner requested the Respondent DISCOMs to exempt it from

furnishing undertaking till the time the relevant facts are placed before the Commission and a decision has been made by the Commission in this regard.

That Respondent no.3 vide its email dated 11.07.2020 informed the Transmission Corporation of Andhra Pradesh that the Petitioner has not furnished the undertaking for the period beyond May, 2020 and has filed a writ petition before the Hon'ble High Court of Andhra Pradesh on 02.07.2020. It further states that due to the reluctant attitude of the Petitioner to comply with the directions of the Commission to submit undertaking and in absence of approval by the Commission for future procurement from the Petitioner's power plant, Respondent no.3 has requested AP Transco to stop scheduling power from the Petitioner's power plant from 12.07.2020 onwards.

That the Respondent no.3 has, thereafter, stopped procurement of power from the Petitioner's power plant from 12.07.2020 onwards only because the Petitioner did not want to give up its right to seek revision of tariff as fixed in APERC Order dated 06.04.2020. This decision of APPCC to stop procuring power from the Petitioner's power plant was taken without receiving any directions from the Commission and without placing the relevant facts before it.

That On 17.07.2020, the Commission has issued proceedings which held that if the Petitioner is not willing to supply power at the tariffs approved by its Order dated 06.04.2020, for the power supplied by the Petitioner's power plant from 01.06.2020 and for future, the Respondent DISCOMs should stop taking power from the Petitioner's power plant, if they have not already done, with immediate effect on receipt of said proceedings.

That the Petitioner approached the Hon'ble High Court of Andhra Pradesh to seek relief as the Respondent DISCOMs stopped procuring power from the Petitioner's power plant.

That during the hearings before the Hon'ble High Court on 05.08.2020 and 06.08.2020, the Petitioner submitted that it is undergoing a corporate insolvency resolution process and that if the power plant of the Petitioner is shut, it will be fatal for the Petitioner. The Petitioner submitted that it is willing to supply power to the Respondent DISCOMs in accordance with the tariff decided by the Commission in its Order dated 06.04.2020 and is also willing to provide the undertaking as directed by the Commission in the said order in accordance with further directions in its proceedings dated 17.07.2020. The Petitioner accordingly also filed such undertaking dated 06.08.2020 to be provided to Respondent DISCOMs during the hearing before Hon'ble High Court.

That, in spite of the above mentioned submissions of the Petitioner before the Hon'ble High Court and having an undertaking prepared as required by the Commission, the Respondents DISCOMs have refused to procure power from the Petitioner's power plant. The High Court of Andhra Pradesh remanded the matter back to APERC to decide the issues raised by the Petitioner.

2. The main grounds stated by the Petitioner for the relief sought for are:
  - i. That it is evident from the APERC Order dated 27.03.2020 and 06.04.2020 read along with APERC Proceedings dated 17.07.2020 that the Respondent DISCOMs wished to procure power from the Petitioner's power plant. Therefore, the Respondent DISCOMs should start procuring power from the Petitioner and the act of the Respondent DISCOMs of denying procurement of power from the Petitioner's power plant is against the directions in proceedings dated 17.07.2020 of APERC .
  - ii. That the decision to stop procuring power from the Petitioner's power plant from 12.07.2020 is not only gravely prejudicing the

Petitioner, but is also against consumer interest as the power generated from the Petitioner's power plant was being offered at very competitive rates.

- iii. That the Project was awarded to the Petitioner subsequent to a competitive bidding process by the Government of Andhra Pradesh/APSEB. Moreover, the Petition for approval of the renewal of power purchase agreement dated 28.04.2017 and the application for the withdrawal of the same are currently pending before the APERC. However, in terms of the renewed PPA, the Respondent DISCOMs are under a contractual obligation to procure power from the Petitioners as per Clause 2.3 thereof till the time the APERC grants approval for the same. It is pertinent to highlight that there has been no instance where the Petitioner has failed to meet its obligation to supply power as scheduled, and as such there has been no default on the part of the Petitioner.
- iv. That APERC may consider that the Petitioner is currently undergoing CIRP under the relevant provisions of the IBC. The Hon'ble Supreme Court of India in the case of Swiss Ribbons vs. Union of India (2019 SCC Online SC 73) has held that the primary focus of the IBC is to ensure revival of the corporate debtor, maximization of the value of the assets of the corporate debtor and to keep running the business of the corporate debtor as going concern. The relevant extract of the order reads as:

" ( . . . )

*Therefore, maximization of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code.*

( . . . ) ,

*It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a*

*beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters / those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, infact, protective of its interests."*

Therefore, taking cue from the aforementioned judicial approach, in the present case of Petitioner, it may be noted that the continuation of the offtake of power being produced by the Petitioner's power plant is critical for running the business of the Petitioner as a going concern.

3. In response to the Petitioner's contentions, the Respondents' main counter submission are:
- i. That the Respondents have submitted renewed PPA for approval and subsequently sought to withdraw, and since the said proceedings are pending, the DISCOMs have no contractual obligation to procure power. As a matter of fact, considering the subsequent events concerning load demand in the State, it is found that power from the Petitioner's power plant is not required.
  - ii. That since the Petitioner did not comply with the orders dated 19.06.2020 of the Commission granting permission with condition, the Respondents have stopped power procurement. Subsequent developments are that in this financial year, Hydel power availability due to good monsoon, the forecast of DISCOMs underwent a change. As such power from the Petitioner's power plant is not required.
  - iii. That already ten (10) Units of APGenco with a capacity of 2490 MW are under back down. Even in the orders of the Commission on Load forecast & Resource plan, it has not included Petitioner's power plant in it. In view of the above facts, procurement of power from the Petitioner's power plant is detrimental to the

interests of DISCOMs/ end consumers. Already the DISCOMs are burdened with fixed cost liability of backed down units of APGenco. The financial position of DISCOMs is precarious. They are unable to pay monthly bills of power supplies. Their borrowing capacity is already exhausted. Thus they are unable to bear the burden of procurement of power from the Petitioner's power plant.

- iv. That the Commission in its proceedings dated 19.06.2020 clearly directed the DISCOMs to stop procuring power from the Petitioner's power plant with effect from 01-07-2020 if the undertaking in the required form is not furnished by the Petitioner within one week. The Petitioner has furnished the undertaking in the required form only for the period from 01.04.2020 to 31.05.2020. Later the Respondents have requested the Petitioner to furnish the undertaking on the similar lines for the period from 01.06.2020 to 30.09.2020. As the Petitioner failed to furnish such an undertaking, the Respondents could not continue to take power from the Petitioner.
- v. That the unconditional undertaking dated 06.08.2020 of the Petitioner was for the first time furnished during hearing of the case before the Hon'ble High Court, and later in this proceedings before this Commission. Therefore, the said undertaking has no material bearing to adjudicate the correctness or otherwise of the decision of the Respondents not to procure power from Petitioner's power plant, as the said decision to stop procurement, was not only due to not submitting required undertaking, but also due to surplus power position.
- vi. That because of good rainfall, more Hydel power is available which is unexpected this year. Consequently, purchases through short-term are not required as per earlier forecast. Thus, although the DISCOMs earlier requested this Commission by letter dated 28.05.2020, at present in view of said availability of Hydel power,

it is not required to procure power from the Petitioner's power plant. That apart, in the power exchange market, the power is available at a cheaper rate. Therefore, in public interest the procurement of power from the Petitioner's power plant is not prudent.

- vii. That the Hon'ble supreme court judgement relied upon by the Petitioner is not applicable to the present fact situation. The said law does not govern the electricity purchases where under paramount consideration is interest of end consumers.
4. The Petitioner in his rejoinder to the counter submissions of the Respondent DISCOMs, inter alia stated:
- i. That the generating station of the Petitioner has received gas allocation from the Ministry of Petroleum and Natural Gas, Government of India along with the Godavari Gas Plant ("GGP"), Spectrum Power Generation Corporation Ltd ("SPGL") and Andhra Pradesh Gas Power Corporation Limited ("APGPCL"). It is a known fact that the gas operating agency M/S. GAIL Limited ("GAIL") is not able to supply the allocated quantities of gas to the said allottees including the Petitioner's power plant and in view of the insufficient gas supplies, all these plants, including the generating station of the Petitioner, are operating at about 40% PLF. As per the Gas Supply Agreements entered into by these generating stations with GAIL, in the event that any consumer of gas, within the pipeline network of these generators and other consumers, is unable to consume the gas being supplied, the said unused gas by the consumer will be supplied to the remaining consumers on pro rata basis. Therefore, the unused gas of the Petitioner's power plant is now being supplied to Godavari Gas Plant, Spectrum Power Generation Corporation Ltd and Andhra Pradesh Gas Power Corporation Limited on a pro rata basis. That, the Respondents are procuring power from the said three generators to the extent of

their available generation. The fact that the unused gas of the Petitioner's power plant is being reallocated to GGP, SPGL and APGPCL is evident from allocation statements of GAIL.

- ii. That In view of the above, the quantum of power that could have been generated by the Petitioner is now being generated by the said three generators i.e. GGP, SPGL and APGPCL whose tariffs are higher than the tariff approved for Petitioner's power plant. In other words, in case the Respondents are directed to procure power from the Petitioner's power plant by the Commission, the said three generators will get reduced generation proportionately and therefore the generation and dispatch of power from the Petitioner's power plant will not lead to additional supply of power and in fact beneficial to the Respondent DISCOMs.
  - iii. That the Commission in its proceedings dated 17.07.2020 directed the Respondents to stop procuring power from the Petitioner if unconditional undertaking is not submitted by the Petitioner. The Petitioner has now voluntarily furnished the undertaking in terms of the orders and proceedings of this Commission and due to the fact that no opportunity was given to the Petitioner to submit undertaking in accordance with APERC Proceedings dated 17.07.2020, the Respondents shall not refuse procurement of power from the Petitioner's power plant and accept the undertaking dated 06.08.2020 being furnished by the Petitioner.
5. With regard to the points raised in the rejoinder for the first time as above by the Petitioner, the Respondents have submitted the power generation details day wise from all the other three gas generators from 01.07.2020 to 31.07.2020 and the generation from the Petitioner's plant day wise from 01.07.2020 to 12.07.2020 to show that there is no additional generation from M/s Spectrum and M/s APGPCL after stopping procurement of power from the Petitioner's power plant.

However, the generation from state owned GGP has increased and almost nearly 98 percent increase over the earlier generation.

6. On 25.08.2020, the Petitioner in response to the further submission of the Respondents stated that it is reasonable to compare the gas supply status and power generation during the month of June, 2020 when all the consumers of GAIL Ltd were operating and gas supply status and power generation during the month of August, 2020 when the Petitioner's plant could not operate. The gas supply details vis-a-vis power generation details from all the other three gas generators including from its plant are furnished based on GAIL & SRLDC data to show that there is additional generation from Spectrum, APGPCL & GGP due to stoppage of generation from its plant whose tariff is higher than the tariff of the Petitioner's plant. Hence, the interest of the consumers is not compromised in any manner and furthermore, the Respondents will save more money by procuring power from the Petitioner's power plant, which would be in consumer interest. However, the Respondents are denying procurement of power from the Petitioner's plant in spite of the fact that the Petitioner has furnished the unconditional undertaking in terms of the proceedings of this Commission.
7. In the light of the rival contentions, the point arising for consideration is whether the Petitioner is entitled to the reliefs claimed?
8. From the respective contentions as discussed above it emerges that on the request of the Respondents DISCOMs, this Commission permitted them to procure power from the Petitioner and M/s. Spectrum by its order dated 27-03-2020 for the months of April and May 2020 for the reasons mentioned in the said order, subject to the condition that the suppliers shall give unconditional undertaking that they shall not claim upward revision of tariff during supply period on the ground of increase in fuel cost. However, it has so happened that on 31-03-2020 i.e.,

before commencement of the supply period itself, the Government of India reduced gas price substantially which resulted in reduction in cost of power. In that situation this Commission found it imperative to accept the request of the Respondent DISCOMs to adjust the procurement price commensurate with reduction in the cost of gas. The Respondents were directed to obtain unconditional undertakings from both the suppliers to supply power at the reduced tariff. While M/s. Spectrum gave such undertaking, the Petitioner gave an undertaking with mutually contradictory clauses, giving scope for future litigation. It also approached this Commission, claiming a difference of tariff from the Respondents.

When the Petitioner realised that it had no option, except to give an unconditional undertaking, it gave and immediately filed a writ petition in the Hon'ble High Court of Andhra Pradesh for nullification of its own undertaking. This vacillating conduct of the Petitioner certainly lacks bonafides and consistency and betrays its intention to make unjust enrichment.

Be that as it may, the Petitioner having changed its stand, has given unconditional undertaking to supply power at Rs.2.69 ps from 01-06-2020, in WP 13111 of 2020 before the Hon'ble High Court of Andhra Pradesh besides filing a similar undertaking before this Commission. Ironically the Respondents have changed their stand and been now resisting the Petitioner's request to receive power.

While both parties came out with their respective stands on economic viability or otherwise on the power being offered by the Petitioner, in the present situation, the Commission finds it unnecessary to delve into

this aspect, for the present situation arose due to the own making of the Petitioner, in that, it refused to agree to supply power at the reduced tariff. Had the Petitioner agreed for the reduced tariff, as done by M/s. Spectrum, the Respondents would have had no option, other than procuring power till September end from the Petitioner's power plant, irrespective of the later events such as availability of Hydel Power etc., as pleaded by them.

If the factors pleaded by the Respondents were to weigh against the Petitioner, they equally weigh against M/s. Spectrum as well. The only distinguishing factor between the two suppliers is submission of unconditional undertaking by one supplier and failure to do so by the other supplier (Petitioner). Now that the Petitioner has given its unconditional undertakings, i.e., undertaking Dt.25-06-2020 for the period of supply from 1st April to 31st May 2020 and undertaking Dt. 06-08-2020 to supply power from June, 2020 till September, 2020 at Rs.2.69 ps/unit, this distinction is fully obliterated and both suppliers are placed on an even keel vis a vis Respondents. Therefore, irrespective of merits and demerits in the pleas of both parties on the economics involved in the procurement of power by the Respondents from the Petitioner's power plant, the Commission finds it just and equitable to permit the Petitioner to supply power to the Respondents till 30-09-2020 @ Rs.2.69 ps per unit, as per the order dt 06-04-2020 and as reiterated in the Commission's later orders and also as unconditionally undertaken by the Petitioner. The petitioner is entitled to receive payment at the said rate of Rs.2-69 ps per unit only for the power actually supplied by it from 1st April 2020 up to the end of September 2020. It is however made clear that except the above

discussed reasons, no other factor pleaded by the Petitioner such as existence of the the draft PPA between the parties, huge public debts recoverable from the Petitioner etc, weighed with this Commission in allowing this petition. It is also made clear that this order would not in any way create any right in the Petitioner to supply power to the Respondents and an obligation in the Respondents to procure power from the Petitioner for the period beyond 30-09-2020. The Respondents shall act as per the tariff order dated 10-02-2020 and the directions that may be issued from time to time by this Commission in the matter of procurement of power from 01-10-2020.

9. The petition is disposed of accordingly. No costs.

**Sd/-**  
**Thakur Rama Singh**  
**Member**

**Sd/-**  
**Justice C.V. Nagarjuna Reddy**  
**Chairman**

**Sd/-**  
**P. Rajagopal Reddy**  
**Member**