



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

SATURDAY, THE SECOND DAY OF MARCH
TWO THOUSAND NINETEEN

:Present:

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

O.P.No. 29 of 2017

Between:

1. Southern Power Distribution Company of Andhra Pradesh Limited
2. Eastern Power Distribution Company of Andhra Pradesh Limited

... **Petitioners**

A N D

1. M/s. GVK Gautami Power Private Limited
2. Southern Power Distribution Company of Telangana Limited
3. Northern Power Distribution Company of Telangana Limited

... **Respondent**

... **Proforma
Respondents and
no notice is
required for them**

This Original Petition has come up for hearing finally on 16-02-2019, in the presence of Sri P. Shiva Rao, learned Standing Counsel for the petitioners and Sri M. Naga Deepak, learned counsel for the 1st 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 to direct the 1st respondent to pay the bill at HT-1 category tariff for the imported energy drawn by it from March, 2013 up-to-date with interest at 18% per annum from the date of the petition till realization and to further direct the 1st respondent to pay similarly during the period of non-operation of the project.

2. The petitioners, the two distribution licensees of the State of Andhra Pradesh claimed that as per clause 2.7 of the amended Power Purchase Agreement dated 18-06-2003 amending the original Power Purchase Agreement dated 31-03-1997, the imported energy drawn by the 1st respondent from the AP grid towards startup and maintenance of their project has to be billed at the rate of energy charge computed under article 3.3 and set off from the next monthly bill. As the project was non-operational due to non-availability of natural gas, the set off of imported energy could not be given effect to. After narrating the chronology of events that led to the dwindling of gas supplies to the 1st respondent from November, 2012, which became NIL by 01-03-2013, it was stated that the 1st respondent continued consuming imported energy from the petitioners for startup and maintenance of the project though there was no generation of power. The imported energy accumulated to 15.64 MU from March, 2013 to March, 2017. That power has to be billed as per clause 2.7 of the Power Purchase Agreement. The petitioners are incurring losses due to accumulation of the imported energy and as per the Power Purchase Agreements between Solar Power Generators and the petitioners, when there was no delivered energy by the Solar Power Developers (SPD) at the interconnection point, then the energy drawl from the petitioners shall be billed as per the prevailing HT-1 category tariff. The petitioners requested the 1st respondent to communicate their concurrence to amend clause 2.7 of the Power Purchase Agreement on similar lines that in case the petitioners could not set off such power for a continuous period of two consecutive billing months then they shall bill the energy at the applicable tariff for HT-1 category tariff. There was no response from the 1st respondent and hence the petition.

3. The 1st respondent in its counter stated that the petition is liable to be dismissed *in limini* being without any cause of action or maintainability. This Commission passed orders in O.P.No.4 of 2017 between the petitioners herein and M/s. Srivathsa Power Projects Limited on 01-07-2017 holding that

“If the parties did not contemplate such a proposal or its acceptance and if the respondent is unwilling to agree to any change in its rights and obligations under the original Power Purchase Agreement, due to any intervening circumstances causing any inconvenience or loss to the petitioner being not due to its conduct, forcing it to agree to an amendment imposing any legal obligation on it will be violative of the specific provisions of the Indian Contract Act, 1872 and either the principles of justice, equity and good conscience or the principles of natural justice. If the petitioner did not foresee such a situation originally and did not negotiate for it with the respondent, it has to thank itself and cannot make the consequent burdensome or onerous nature of the contract, a ground to make it burdensome or onerous for the respondent unilaterally”.

The present claim does not fall within the amended and restated Power Purchase Agreement dated 18-06-2003 and the 1st respondent cannot be coerced to amend the relevant terms of the Power Purchase Agreement to take additional financial burden. This Commission also held in O.P.No.4 of 2017 that

“Thus, a dispute essentially requires the preexistence of an agreement before it is adjudicated and an adjudication of a dispute as to whether any terms and conditions can be imposed on an unwilling party to force it to enter into an agreement is not contemplated by Section 86 (1) (b) and (f) of the Electricity Act, 2003”.

The Hon'ble Supreme Court held by an order dated 11-04-2017 in Civil Appeal Nos.5399-5400 of 2016 that if a generating company generates and sells electricity in more than one State, the jurisdiction to adjudicate the disputes between such generator and the licensee, as per Electricity Act, 2003, is vested with the Central Electricity Regulatory Commission but not any State Electricity Regulatory Commissions. The Power Purchase Agreement in this case is about a generating station in the State of Andhra Pradesh supplying electricity to the two distribution companies each located in the States of Telangana and Andhra Pradesh. Hence, this Commission has no jurisdiction. The petitioners never raised any bill under articles 2.7 and 3.3 and the 1st respondent never disputed any such bill. Hence, there was no cause of action for the petition and the petitioners cannot seek any directions in the absence of any such procedure under the Power Purchase Agreement. The non-supply of gas by the Ministry of Petroleum and Natural Gas, Government of India was not due to any responsibility of the 1st respondent and though the 1st respondent gave availability declaration of alternate fuel available for generation of power, the four distribution companies never gave dispatch instructions due to which the 1st respondent is entitled for capacity charges from all the four respondents. Hence, the petition be dismissed.

4. The point for consideration is whether the petitioners are entitled to seek payment for the imported energy at HT-1 category tariff with interest from the 1st respondent ?

5. A similar set of facts was under consideration of this Commission in O.P.No.4 of 2017 between Eastern Power Distribution Company of Andhra Pradesh Limited and M/s. Srivatsa Power Projects Limited decided on 01-07-2017 and also in O.P.No.31 of 2017 between the two distribution licensees of the Andhra Pradesh

State and M/s. GVK Industries Limited and the two distribution licensees of the State of Telangana decided on 24-11-2018.

6. This Commission has observed in its order in O.P.No.4 of 2017 that,--

“If the parties did not contemplate such a proposal or its acceptance and if the respondent is unwilling to agree to any change in its rights and obligations under the original Power Purchase Agreement, due to any intervening circumstances causing any inconvenience or loss to the petitioner being not due to its conduct, forcing it to agree to an amendment imposing any legal obligation on it will be violative of the specific provisions of the Indian Contract Act, 1872 and either the principles of justice, equity and good conscience or the principles of natural justice. If the petitioner did not foresee such a situation originally and did not negotiate for it with the respondent, it has to thank itself and cannot make the consequent burdensome or onerous nature of the contract, a ground to make it burdensome or onerous for the respondent unilaterally”.

It is further observed that “a dispute essentially requires the preexistence of an agreement before it is adjudicated and an adjudication of a dispute as to whether any terms and conditions can be imposed on an unwilling party to force it to enter into an agreement is not contemplated by Section 86 (1) (b) and (f) of the Electricity Act, 2003”.

7. Similarly in the order O.P.No.31 of 2017, this Commission noted in para 10 of its order that,---

“10. Sri S. Ravi, learned Senior Counsel for the 1st respondent has also relied on the decision of the Hon’ble Appellate Tribunal for Electricity in I.A.Nos.71 and 72 of 2007 in AFR No.424 of 2007 dated 05-10-2007 between

Vemagiri Power Generation Limited Vs. Transmission Corporation of A.P. Ltd., represented by Chairman and Managing Director and others. In that case the erstwhile Andhra Pradesh Electricity Regulatory Commission approved an amendment to an article of the Power Purchase Agreement without notice to and without any opportunity to the generating company and the Hon'ble Appellate Tribunal for Electricity held that the principles of natural justice are fundamental in the Constitutional set up and no person should be condemned un-heard. Nava Bharat Ferro Alloys Limited Vs A.P. Electricity Regulatory Commission **2007 APTEL 622** was followed wherein it was clearly held that in case, no hearing is given to a person by a judicial, quasi-judicial or an Administrative Authority before making an adverse decision against his rights / interests, it would be violative of the principles of natural justice. Hon'ble Appellate Tribunal for Electricity further considered, with reference to the binding principles from the Hon'ble Supreme Court, the question whether where the parties have entered into a Power Purchase Agreement, the Commission could permit amendment without consent of the parties owning the generating station. Hon'ble Appellate Tribunal for Electricity ultimately held that the Andhra Pradesh Electricity Regulatory Commission was not empowered to amend the clause of the Power Purchase Agreement without the unqualified consent of all the parties to the agreement. Though earlier these precedents were not cited before this Commission in O.P.No.4 of 2017, it has come to the same conclusion. However, ingeniously the petition and the relief were drafted herein, when in effect and substance the relief sought for is an amendment to article 2.7 of the Power Purchase Agreement dated 18-06-2003 read with article 3.3 thereof, the petition has to fail but without

prejudice to the rights of the parties to enter into an appropriate agreement relating to the subject matter of the petition”.

8. This petition is on all the fours identical with the questions in issue in O.P.No.4 of 2017 and O.P.No.31 of 2017. The orders of this Commission in both those matters are admitted to be continuing in force. For the same reasons and under identical circumstances, this petition is also should be disposed of in identical terms.

9. Accordingly the petition is dismissed without costs. However, the result of this petition will not affect the liberty of the parties to enter into such or any other agreement relating to the subject matter of this petition on their own volition and free will. This order is not an adjudication on the truth or otherwise of the 1st respondent drawing the imported energy in question or on the quantification of such imported energy consumed or its value. If the petitioners are so entitled under law otherwise, they are at liberty to seek appropriate remedies as per law for recovery of the value of any imported energy consumed by the 1st respondent beyond and independent of the terms and conditions of the Power Purchase Agreement between the parties.

This order is corrected and signed on this the **2nd day of March, 2019.**

Sd/-
P. Rama Mohan
Member

Sd/-
Justice G. Bhavani Prasad
Chairman