



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

SATURDAY, THE TWENTY FOURTH DAY OF NOVEMBER
TWO THOUSAND EIGHTEEN

:Present:

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

O.P.No.31 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 Industries 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 17-11-2018, in the presence of Sri P. Shiva Rao, learned Standing Counsel for the petitioners and Sri S. Ravi, learned Senior 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 under Section 86 (1) (f) of the Electricity Act, 2003 for a direction to the 1st respondent for payment of the bill at HT-1 category tariff for the imported energy drawn by the 1st respondent from October, 2016 up-to-date with interest at 18% per annum from the date of the petition till the date of realization and for a

further direction to the 1st respondent to pay HT-1 tariff for the imported energy every month during the period of non-operation of the project and other appropriate orders.

2. The case of the petitioners, the two distribution licensees of the State of Andhra Pradesh is that under clause 2.7 of the Power Purchase Agreement dated 18-06-2003, the imported energy drawn by the 1st respondent from the Andhra Pradesh Grid towards start-up and maintenance of the project is liable to be billed against the company by the petitioners at the rate of the energy charge computed under article 3.3 and to be set off from the next monthly bill. However, the petitioners could not have such set off, due to non-operation of the project and due to non-availability of natural gas. The Power Purchase Agreement dated 18-06-2003 entered into in consequence of the decision of the State Government of the erstwhile State of Andhra Pradesh and erstwhile Andhra Pradesh State Electricity Board, which resulted in establishment of 220 MW Stage-I of the extension project, was transferred to the four distribution companies of the erstwhile State of Andhra Pradesh under the third transfer scheme. However, GAIL failed to supply natural gas to the 1st respondent's project from ONGC fields as per the Gas Supply Agreements in pursuance of the allotment of natural gas by the Ministry of Petroleum and Natural Gas, Government of India. In the meanwhile, due to advent of RIL D-6 natural gas in KG basin in 2009, the Empowered Group of Ministers, Government of India allocated 0.88 MWSCMD natural gas on firm basis to the 1st respondent's project from April, 2009 and the Commercial Operation Date of the project was declared by the 1st respondent on 14-04-2009, making the Power Purchase Agreement effective upto 13-04-2004 for a term of 15 years. The gas supplies were dwindling from November, 2012 and became a zero from 01-03-2013, from which date there was no generation of energy. However, the 1st respondent

continued to import energy from the distribution companies for start-up and maintenance, which could not be set off from the subsequent energy bills due to absence of any generation. Later, the AP distribution companies proposed and the 1st respondent agreed to set off the imported energy during the operation of their project under e-bid RLNG scheme of the Government of India for the years 2015-16 and 2016-17. The imported energy charges of the 1st respondent were recovered by the AP distribution companies during phases I, II & III e-bid RLNG operations upto 30-09-2016. From October, 2016 to March, 2017, the imported energy drawn by the 1st respondent as per the Power Purchase Agreement accumulated to a tune of 1.32 MU. There was no further communication from the Ministry of Power and Natural Gas on any augmentation / allocation of the natural gas to the 1st respondent and AP distribution companies are incurring losses due to accumulation of imported energy to a tune of 1.38 MU and in tune with clause 2.7 of the Power Purchase Agreement, the AP distribution companies proposed to raise the bills for the imported energy as per HT-1 category tariff whenever such power could not be set off. The 1st respondent did not accept the proposal to communicate its concurrence for the proposed amendment to clause 2.7 of the Power Purchase Agreement accordingly and hence, the petition.

3. The 1st respondent in its counter contended that no cause of action was pleaded or established against the 1st respondent and hence the petition has to be dismissed *in limine* as not maintainable on facts or law. The petition is filed with the intention of shirking their payment obligation under the Power Purchase Agreement dated 18-06-2003. The decision of the Commission in O.P.No.4 of 2017 dated 01-07-2017 between the petitioners herein and M/s. Srivathsa Power Projects Limited squarely applies, making the petition not maintainable under Section 86 (1)

(f) of the Electricity Act, 2003. In view of the decision of the Hon'ble Supreme Court dated 11-04-2017 in Civil Appeal Nos.5399-5400 of 2016, the generating station of the 1st respondent situated in Andhra Pradesh and supplying electricity to the two distribution licensees of the State of Telangana is liable for adjudication of any dispute only before the Central Electricity Regulatory Commission. There was never any dispute between the parties in the absence of demand and denial. No bill was ever raised by the petitioners against the 1st respondent under clause 2.7 and the 1st respondent never disputed any such bill. As there was hence no cause of action, the petitioners are not entitled to seek any directions on the ground of not being able to set off any billed amounts. From March, 2013, there was no generation of power due to non-availability of gas, which is beyond the control of the 1st respondent. The 1st respondent gave an availability declaration to the petitioners and respondents 2 and 3 to use alternate fuel as per the Power Purchase Agreement. None of them gave any dispatch instructions entitling the 1st respondent to capacity charges only and to evade the same, the present petition is filed. The petitioners cannot insist on the 1st respondent agreeing for any amended terms of the Power Purchase Agreement to make the imported power chargeable under HT-1 category instead of HT category. Article 2.7 does not contemplate any such procedure and a new tariff category cannot be applied retrospectively. In the absence of any agreement regarding payment of imported energy charges during the period during which power was not generated, the petitioners are not entitled to seek payment for the same or to seek any direction from the Commission. As the request for amendment was admittedly denied, there was no agreement or consensus between the parties to the Power Purchase Agreement and the petitioners are not entitled to make any claim. The 1st respondent therefore sought for dismissal of the petition.

4. The respondents 2 and 3 did not enter appearance before the Commission and on the pleadings and documents available on record, it is very clear that they are only proforma parties as stated by the petitioners themselves in the petition that no notice is required to them.

5. As recorded by this Commission on 23-06-2018, the petitioners stated that the claim involved herein relates to the demand for payment of tariff for imported energy with interest and costs for the period from October, 2016, which is a post-bifurcation claim by the distribution companies of Andhra Pradesh which has nothing to do with the A.P. Reorganization Act, 2014. The generating unit of the 1st respondent is located within the territorial jurisdiction of the State of Andhra Pradesh and both the petitioners are the distribution licensees of the State of Andhra Pradesh, seeking recovery of HT-1 category tariff for the imported energy drawn by the 1st respondent, post-bifurcation of the State. Though in para 6 of the counter of the 1st respondent, a claim is made about the Central Electricity Regulatory Commission being the appropriate Forum for adjudication of the dispute, the principle laid down by the Hon'ble Supreme Court is about generation and sale of electricity in more than one State. The counter itself admits that the generating station of the 1st respondent is situated in the State of Andhra Pradesh and the dispute is about the imported energy availed by the 1st respondent for that generating unit, which was drawn from the two distribution licensees of the present State of Andhra Pradesh. As such, any issue of territorial jurisdiction does not arise and any impact of the A.P. Re-organization Act, 2014 on the maintainability of the petition does not arise. As such, it has to be decided on merits.

6. The point for consideration is whether the petitioners are entitled to seek payment from the 1st respondent at HT-1 category tariff for the imported energy supplied by them from October, 2016 up-to-date and in future and during the period of non-operation of the project with interest at 18% per annum and with any consequential reliefs ?

7. Under the Power Purchase Agreement between the erstwhile Transmission Corporation of Andhra Pradesh Limited and the 1st respondent dated 18-06-2003 and the sequence of events that led to the agreement, it is clause 2.7 that obligates the AP Transco to provide the 1st respondent on its request, power as and when required for construction of the project upto and including synchronization of the first generating unit for start-up, testing and commissioning of the project and even thereafter AP Transco shall provide power as and when required for start-up and maintenance of the project. While upto synchronization and commissioning, the billing for the power shall be at a price equal to AP Transco's applicable published tariff, thereafter, the billing shall be at the rate as the energy charge computed under Article 3.3 and such billed amount shall be set off from the next monthly bill. Clause 3.3 (a) enumerates the formula for computation of the energy charge and obviously the petitioners are not now seeking to enforce article 2.7 read with 3.3, as they stand. Even the averments in the petition are very clear that it is only on the AP distribution companies incurring losses due to accumulation of imported energy to a tune of 1.38 MU from October, 2016 to March, 2017 that the petitioners 1 and 2 proposed to raise the bills as per HT-1 category for the imported energy whenever they could not set off for such power against the generated power itself. This idea was borrowed from a similar clause incorporated in the Power Purchase Agreements between Solar Power Developers and the AP distribution companies as

per para 13 of the petition. Even the petitioners were of the clear understanding that this proposal is an amendment to clause 2.7 of the Power Purchase Agreement for which they sought for concurrence of the 1st respondent which the 1st respondent did not accept to give or convey. As such the sole ground on which the relief is sought for for recovery of HT-1 category tariff during the relevant period with interest and other reliefs from the date of the petition till the realization and for the future is the claim of the AP distribution companies of incurring losses due to accumulation of the imported energy.

8. The letter from the Chief Engineer/IPC, Andhra Pradesh Power Coordination Committee dated 16-08-2016 to the 1st respondent and others also clearly shows that after detailed deliberations on the aspect and considering the serious objections of Audit, the Andhra Pradesh Power Coordination Committee proposed to get an amendment to clause 2.7 as indicated in the letter and the concurrence of the 1st respondent and others was requested for the same. While concurrence was obviously not forthcoming, the petitioners did not trace their request to any other clause in the Power Purchase Agreement or any other provisions of the Electricity Act, 2003 or the Andhra Pradesh Electricity Reform Act, 1998 or the Rules or Regulations or Orders or Practice Directions there-under, except Section 86 (1) (f) which only refers to adjudication of disputes between the licensees and the generating companies.

9. A similar situation has come up before this Commission in O.P.No.4 of 2017 between Eastern Power Distribution Company of Andhra Pradesh Limited and M/s. Srivathsa Power Projects Limited, decided on 01-07-2017. This Commission has referred to the Indian Contract Act, 1872 and observed,--

“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”.

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.

11. 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 **24th day of November, 2018.**

Sd/-
P. Rama Mohan
Member

Sd/-
Dr. P. Raghu
Member

Sd/-
Justice G. Bhavani Prasad
Chairman