



ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION

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

13TH DAY, THE THURSDAY 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.52 of 2019

Southern Power Distribution Company of A.P. Ltd.
Eastern Power Distribution Company of A.P. Ltd.

... **Petitioners**

A N D

M/s Andhra Pradesh Power Development Company Ltd.

... **Respondent**

The Original Petition has come up for hearing through video conference finally on 23-06-2020 in the presence of Sri P. Shiva Rao, learned standing counsel for the petitioners, Sri K. Gopal Choudary, learned counsel for the respondent and Sri M.Venugopala Rao, learned objector. After carefully considering the material available on record and after hearing the arguments of the learned counsel for both parties and the learned objector and also taking into consideration the written submissions filed by the parties and the learned objector, the Commission passed the following:

ORDER

This petition has been filed jointly by the Southern Power Distribution Company of Andhra Pradesh Ltd. (APSPDCL) and the Eastern Power Distribution Company of Andhra Pradesh Ltd. (APEPDCL) (collectively referred as "the petitioners") seeking to resolve the disputes / differences with the Andhra Pradesh Power Development Company Ltd. (APPDCL) as specified in para 12 of the order dated 13-07-2018 of the Commission in O.P.No.21 of 2016 in respect of the amended and restated Power Purchase Agreement dated 24-08-2016 entered with APPDCL by the petitioners for procurement of power from 2 x 800 MW Sri Damodaram Sanjeevaiah Thermal Power Station (SDSTPS), Krishnapatnam, Nellore District., and praying the Commission to pass orders in respect of two issues viz.(i) Enhancement of Normative Availability from 80% to 85% and (ii) Non-payment of fixed charges for backing down & third party sales, in the PPA entered by them with the respondent in respect of the said project.

2. The averments of the petitioners are briefly referred hereunder:

- (i) The erstwhile four (4) APDISCOMs entered into a Power Purchase Agreement (PPA) dated 22.11.2010 with APPDCL for procurement of power from 2 x 800 MW Sri Damodaram Sanjeevaiah Thermal Power Station (SDSTPS), Krishnapatnam. Subsequently, after bifurcation of the A.P. State into two States viz. Telangana and Andhra Pradesh w.e.f. 2nd June, 2014, as per the AP Reorganization Act, 2014, the petitioners have separately entered into an Amended and Restated Power Purchase Agreement on 24.08.2016 with APPDCL for total capacity. Commission, vide its order dated 13.07.2018, issued in-principle approval to the amended and restated

PPA dated 24.08.2016 entered by APDISCOMs with APPDCL and directed both the parties, to finalise the following issues through discussions and make suitable amendments to the amended PPA and submit to the Commission for consent within 60 days from the date of order:

- a. Payment of fixed charges on normative availability of power of 85% of the capacity and the incentive also to commence from above 85%.
- b. Non-payment of fixed charges for backing down and third party sales by APPDCL in such an eventuality, and
- c. Deletion of stipulation to claim fixed charges during force majeure.

(ii) In pursuance of the aforesaid directions, the Petitioners (APDISCOMs) have conducted meetings with APPDCL to arrive at consensus on the above issues. No consensus was reached between the parties on two issues i.e., about enhancement of normative availability from 80% to 85% and non-payment of fixed charges to the extent of third party sales in case of backing down. However consensus was arrived on the aspect of non-payment of fixed charges during Force Majeure period to the effect that if the force Majeure event is not approved by the Petitioner, there is no liability of fixed charges to DISCOMs. Accordingly, a letter was addressed to the Commission on 22.02.2019 with a request to decide the said two issues which eluded consensus.

(iii) Subsequently, the Commission while disposing O.P.No.47 of 2017 vide its order dated 02.03.2019, with regard to the tariff determination of Sri Damodaram Sanjeevaiah Thermal Power Station (SDSTPS), (2 x 800 MW) Stage-I, directed either of the parties or both (APDISCOMs, APPDCL) to

approach the Commission through an appropriate petition for adjudication of the aforesaid unsettled issues. Further, the Commission directed the petitioners vide letter dated 22.03.2019 to take appropriate action as per the directions of the Commission at Para 11(f) of its order dated 02.03.2019 in O.P. No.47 of 2017.

(iv) In view of the above, the petitioners prayed for adjudication of the following unsettled issues:

- a) Payment of fixed charges on normative availability of power of 85% of the capacity and the incentive also to commence from above 85% PLF.
- b) Non-payment of fixed charges to the extent of third party sales by APPDCL in case of backing down.
- c) Deletion of stipulation to claim fixed charges during force majeure.

(v) Since no consensus was reached between the parties on the issues (a) and (b) above i.e. enhancement of normative availability from 80% to 85%, non-payment of fixed charges on third party sales due to backing down, the petitioners stated that this Commission is empowered to decide the same by adjudication.

(vi) On the issue (c) both parties agreed to incorporate the following: "Non-payment of fixed charges during the Force Majeure period, if, Force Majeure event is not approved by the Petitioner. However, petitioner agreed for payment of fixed charges duly disallowing the RoE, in case the Force Majeure event is agreed, since the Respondent generator has to honour his commitments.

3. The case of the petitioners on the above issues is as follows:

- (i) With regard to the issue of normative availability of power at 85%, the petitioners averred that the APERC Terms and Conditions for determination of tariff for supply of electricity by a generating company to a distribution licensee and purchases of electricity by distribution licensees Regulation, 2008 (Regulation No. 1 of 2008) does not provide the norms for 800 MW capacity thermal power plant, whereas CERC in its Regulation, 2014 has notified the Normative Annual Plant Availability Factor (NAPAF) for 800 MW capacity as 85%. The petitioners agree for annual PLF of 85% as against 80% for payment of fixed charges and incentive for PLF above 85% without allowing the APPDCL for additional procurement of imported coal. Further, since SDSTPS is a supercritical technology thermal power plant, the stand of the petitioners for adoption of 85% is stated to be justified. They further averred that the stand of the respondent that any further enhancement of availability norm from 80% to 85% leads to procurement of additional imported coal, is not tenable.
- (ii) As regards payment of fixed charges on third party sales upon backing down, during the hearing, a consensus was reached which will be discussed at appropriate place.
- (iii) The petitioner proposed the following clauses (submitted by way of an Annexure to the petition) to be incorporated in the PPA.

2.1 (c) Notwithstanding anything to the above, in case APDISCOMs do not avail power up to the Declared Capacity in any time block provided by APPDCL means APPDCL is asked to back down, APPDCL shall have the option to sell such Declared Capacity, in such time block, not

availed by APDISCOMs to any third party or require the payment of Fixed charge from APDISCOMs towards such un-availed Declared Capacity not sold to third parties. DISCOMs shall not be required to pay Fixed Charge corresponding to such time blocks sold to third parties.

2.1 (d) In the event the annual Plant load Factor (PLF) exceeds Target PLF for Incentive as a result of the aggregate energy exported to APDISCOMs and to third parties under separate commercial arrangements on the conditions as stated in clause 2.1 (c) above, APDISCOMs shall pay to the APPDCL an Incentive Payment, as stated in "this Agreement". However the Procurers, notwithstanding the sale to third party as aforesaid, shall continue to pay the Incentive Payment for the energy exported by APPDCL over and above Target availability excluding the energy exported to the third parties of "this Agreement". It is further clarified that the incentive Payment to be paid inter-se in the events stated above by the parties for export of energy beyond Target PLF shall be calculated for each financial year during the tenure of "this Agreement".

- 2.3.6 In the event that the capacity at any time is determined to be lower than the declared capacity i.e. the day ahead capacity declared by APPDCL is known as mis-declaration.

- 3.2.4 The quantum of penalty for the first mis-declaration for any duration / block in a day shall be the charges corresponding to two days' fixed charges. For the second mis-declaration the penalty shall be equivalent to fixed charges for four days and for subsequent mis-declarations, the penalty shall be multiplied in the geometrical progression over a period of a month.

(iv) On the aspect of powers of this Commission, the petitioners have relied on an order of the Hon'ble Supreme Court in a case between Tata Power

Company Ltd., versus Maharashtra Electricity Regulatory Commission (MERC), passed in the year 2009, wherein the Hon'ble APEX court held that the Commission has powers to grant approval and also to adjudicate the differences.

4. The petition was taken on the file as O.P.No.52 of 2019 and a Public Notice was issued on 27-08-2019 inviting views / suggestions / objections of interested persons / stakeholders and informing about the public hearing to be held..
5. The respondent filed a counter on 15.11.2019 in which they submitted the following with respect to the issues referred to in the Petition:

- (i) Payment of fixed charges on normative availability of power of 85% of the capacity and the incentive also to commence from above 85%: The project is designed for operation with higher grade coal with about 4800 kcal/kg. The Raw Coal Linkage with Mahanadi Coalfields is 5 MMTPA. This raw coal is washed to yield 3.67 MMTPA of washed coal with a GCV of about 4200 kcal/kg, and this is blended with Imported coal of GCV of about 6300 kcal/kg for a blended total coal input with a GCV of about 4800 kcal/kg. With the availability of raw coal linkage and the blending with imported coal, the coal availability is only for 80% of the capacity. If the operational capacity is to be further enhanced, it will be necessary to procure more imported coal with consequential considerable impact on the variable cost and therefore the normative availability be retained at 80%. If APPDCL is allowed to procure further quantities of low moisture and higher grade imported coal as and when required basis, and the additional fuel costs so incurred is passed through in the variable cost, the APPDCL is willing to agree to a normative

availability of 85% from the date of approval of the Commission for such arrangement. The issue of applying differential variable cost according to the dispatch from time to time is also to be considered and decided upon by the Commission.

- (ii) Non-payment of fixed cost during backing down and third-party sale in such an eventuality: The amendments proposed in the Annexure to the petition were not put to the Respondent before, and these are made known for the first time in the petition. The amendment for Clause 2.1(c), as stated in the Annexure to the Petition, provides that, in the event the APDISCOMs do not avail any part of the power upto the declared capacity in any time block provided by APPDCL, or if the APPDCL is required to back down, then APPDCL shall have the option to sell such declared capacity not availed by APDISCOMs in such time block to any third party or require payment of fixed charges from the APDISCOMs towards such unavailed declared capacity not sold to third parties; provided that the APDISCOMs shall not be required to pay fixed charges corresponding to such time blocks sold to third parties. The Respondent (APPDCL) agrees to the proposed Clause 2.1(c). The proposed Clause 2.1(d) is also acceptable. However, the two clauses need to be re-drafted.

- (iii) Deletion of stipulation to claim fixed charges during force majeure: Considering that the APPDCL will have to honour its fixed cost commitments during any force majeure event, it is agreed that the APPDCL will issue notice for force majeure to the APDISCOMs for their concurrence / acceptance. If the APDISCOMs, based on the circumstances, accept the

claim of Force Majeure, they must pay the fixed cost. If they do not accept the claim for valid reasons, the APDISCOMs will not pay the fixed cost; provided that the Return on Equity (RoE) element of fixed cost will not be paid for any force majeure period.

On the contents of Annexure to the petition, the respondents submitted that the Annexure, purportedly setting out the proposed amendments to the PPA is confusing and contradictory. That on the one hand, it is stated that the amendments are those proposed in addition to the issues dealt with in the Petition. On the other hand, the proposed clauses 2.1(c) and 2.1(d) relate to the issues already dealt with as issues in the petition, and the additional proposed clauses 2.3.6 and 3.2.4 are not at all within the scope of the issues required to be discussed in terms of the order dated 13.07.2018 and were never the subject matter of discussions.

Accordingly, the respondent APPDCL submitted that the proposed clauses 2.3.6 and 3.2.4 are misconceived, unwarranted and not acceptable to them and that the Commission may consider the issues arising out of the order dated 13.07.2018 alone after hearing the parties.

6. Pursuant to a direction by the Commission, the petitioners, by way of a Memo dated 21.12.2019, submitted the pending issues to be resolved between the parties in O.P.No.52 of 2019 as specified in para 12 of the order of the Commission in O.P.No.21 of 2016 dated 13-07-2018, and the stand of the parties is as under:

- a) Payment of fixed charges on normative availability of power of 85% of the capacity and the incentive also to commence from above 85%.

Petitioners' stand: As per the norms of CERC (Terms and Conditions of Tariff) Regulation, 2014, the Normative Annual Plant Availability Factor (NAPAF) for 800 MW capacity is 85%. Hence, APDISCOMs agree for annual PLF of 85% as against 80% for payment of fixed charges and incentive for PLF above 85% without allowing the APPDCL for additional procurement of imported coal. Further, SDSTPS is a supercritical technology thermal power plant.

APPDCL's stand: The availability of raw coal linkage and blended with imported coal is only for 80% of the capacity. APPDCL agreed for the normative availability of 85%, if it is allowed to procure further quantities of imported coal and the additional fuel cost so incurred passed through in the Variable cost.

Remarks of the Petitioners: The proposal of APPDCL is not acceptable in view of the interest of end consumers of the State, since allowing additional imported coal quantities, above 30% results in higher variable cost. Further, as per CERC Regulations 2014, the PLF for a Supercritical technology thermal power plant like SDSTPS has to be adopted as 85%. As per MoEF Environment clearance dated 17.07.2007, the project was proposed to blend the Indian washed coal (70%) and imported coal (30%) only. Hence, additional imported coal is not acceptable by APDISCOMs and APPDCL has to avail Indian washed coal of 5 MMPTA (70%) and not the Raw coal linkage of 5 MMPTA (70%).

- b) Non-payment of fixed charges for backing down & third party sales by APPDCL in such an eventuality.

Petitioners' stand: APDISCOMs have proposed Amendments as per Annexure for non-payment of fixed charges for backing down & third party sales by APPDCL.

APPDCL's stand: APPDCL agreed for the proposed clauses 2.1(c) & 2.1(d). They have never agreed for incorporation of clauses 2.3.6 & 3.2.4 with regard to mis-declaration by APPDCL and stated that they are misconceived and unwarranted.

Remarks of the petitioners: APPDCL agreed to the proposal of clauses 2.1(c) & 2.1(d). However, APPDCL desires to redraft the clauses and the same may be approved by the Commission. Further, with regard to mis-declaration, even though the said issue was not covered in the order dated 13.07.2018, by way of discussions between the parties, APPDCL vide letter dated 31.10.2018 has accepted the proposal of APDISCOMs. Hence, the clauses are incorporated accordingly.

- c) Deletion of stipulation to claim fixed charges during force majeure.

Petitioners' stand: They will not pay fixed charges during the Force Majeure period, if Force Majeure event is not approved by them. However, Petitioners agreed for payment of fixed charges duly disallowing the RoE, in case the Force Majeure event is agreed, since the Respondent generator has to honour its commitments.

APPDCL's stand: APPDCL will issue notice for force majeure to the APDISCOMs for their concurrence / acceptance. If the APDISCOMs, based on the circumstances, approve, they will pay the fixed cost. If it is not

approved for valid reasons, the APDISCOM will not pay the fixed cost; provided that the RoE element of fixed cost will not be paid for any force majeure period.

Remarks of the petitioners: Agreed by both parties. However the issue of difference in terminology needs to be resolved by the Commission. The following text will be added in similar lines to the amended and restated RTPP Stage-IV PPA entered by APDISCOMs & APGENCo and the same was agreed vide letter dated 03.01.2019 by APPDCL also, which is as hereunder:

"In case any payments are received from the contractor or coal supplier by way of compensation by APPDCL and compensation received from Insurance towards Fixed cost component if any, in the event of any Force majeure, then APPDCL shall be liable to pass on such benefit to APDISCOMs."

7. Having regard to the respective stands of the parties as referred above, the points that arise for adjudication of the Commission are:
 - a) Whether the petitioners are liable to pay fixed charges on normative availability of power of 85% of the capacity instead of at 80% and the incentive also to commence from above 85%?;
 - b) Whether the petitioners are not liable to pay fixed charges for backing down to the extent of third party sales by APPDCL in such an eventuality?;
 - c) What is the true purport of force majeure?.
8. Although there is a broad agreement between the parties on points (b) and (c) supra leaving only point (a) to be adjudicated, points (b) and (c) are also

included under the points to be decided inasmuch as any changes to the PPA should be finally approved by the Commission before it becomes effective and furthermore there was no complete unanimity even on the two issues with regard to the phraseology .

9. As regards point (a) payment of fixed charges on normative availability of power of 85% of the capacity and the incentive also to commence from above 85%, the final position of the parties as submitted in their respective written submissions and the views of the learned objector Sri M.Venugopala Rao, to the extent relevant, are extracted hereunder:

- a) The petitioners, while stating that the operating norms of CERC (Terms and Conditions of Tariff) regulations, 2014 need to be considered for the 800 MW capacity projects as the APERC Regulation 1 of 2008 is confined for the plants of capacity upto 500 MW, asserted that the plants of 800 MW capacity are designed to deliver the power with normative plant availability of 85% whereas APPDCL is claiming normative plant availability of 80%, and also the secondary oil consumption at 2 ml/kWh and auxiliary consumption at 6.5% are claimed as against the CERC norms of 0.5 ml/kWh and 5.25% respectively. They have further stated that the operating parameters being better in supercritical plants when compared to subcritical plants, the specific coal consumption (Kg/KWH) will be less thereby reducing the per unit variable cost and with lower auxiliary consumption, the availability of the plant gets improved. They further stated that, as stated by APPDCL in their counter there is a considerable reduction in the variable cost by utilizing blending of Indian

washed coal with imported coal. On the assertion of the respondent that it will be necessary to procure more imported coal for further enhancement of the plant availability, the petitioners stated that if the respondent has the coal linkage for washed coal of 5 MMPTA instead of raw coal, it may achieve 85% availability with blended coal in the ratio of 70% and 30%. The petitioners expressed that they are not authorised to allow additional imported coal beyond 30% in view of the conditions of MoEF environmental clearance dated 17.07.2007 which stipulate that the Indian washed coal and imported coal shall be blended in the ratio of 70% and 30%.

- b) The respondent stated that the project is designed for operation with higher grade coal with GCV of about 4800 kcal/kg and the raw Coal linkage with Mahanadi Coalfields is 5 MMTPA. After washing it yields 3.67 MMTPA with a GCV of about 4200 kcal/kg, which is blended with imported coal of GCV about 6300 kcal/kg to obtain blended total coal input with low moisture and a GCV of about 4800 kcal/kg. With such availability of raw coal linkage and blending with imported coal, the coal availability is only for 80% of the capacity and recognising this, the parties had agreed for fixed charges for availability at 80% of the capacity as evident from clause 3.6(c) of the PPA. Also, if the availability and operational capacity is to be further enhanced to 85%, there is no technical problem or impediment except the availability of coal. The respondent further stated that there being no availability of linkage or availability of indigenous low moisture coal which could give a GCV of at

least 4800 kcal/kg, it will be necessary to procure more imported coal with low moisture content and a GCV of at least 4800 kcal/kg. If allowed to procure and use further quantities of low moisture and higher grade imported coal, on an "as and when required" basis, and the additional fuel cost so incurred is permitted to be passed through in the variable cost, the respondent conceded for a normative availability of 85% from the date of the Commission's approval for such arrangement and that the MoEF conditions will continue to be complied with by an appropriate quality and quantity of the additionally imported coal. And also stated that since maintaining an additional stock of low moisture higher GCV coal is essential to be able to declare availability of 85%, the carrying cost of such coal (interest on working capital) must be considered as an addition to the fixed cost and the fixed cost needs to be revised accordingly. The respondent accordingly prayed either to confirm the availability of 80% for payment of fixed cost as originally agreed in the PPA, or to specify an availability of 85% with pass through in variable cost of additional fuel cost for imported coal and also provide for additional carrying cost of such imported coal stock necessary to be held to declare 85% availability and to revise the fixed cost accordingly.

- c) Sri M.Venugopala Rao, learned objector has stated that SDSTPS being a supercritical technology thermal power plant, the stand of the petitioners to the effect that additional imported coal is not acceptable, the normative PLF should be 85% and incentive for generation above 85% PLF only should be permitted, is justified. He has also stated that

the respondent should have presented its requirement for generating at 85% PLF and got the coal linkage accordingly. Importing additional coal, in view of fluctuations in its price, taxes, transportation charges, etc., and allowing such variable cost as pass through, would impose additional burdens on the consumers. Moreover, the respondent could not guarantee that by using additional imported coal, it will generate more power at a lesser variable cost on the basis of the quality of the additional imported coal, as expressed during the hearings pursuant to a query by the Member / Finance.

10. Commission's Decision: We have carefully examined the respective stands. SDSTPS is established as a supercritical technology power plant. As per CERC (Terms and Conditions of Tariff) Regulations, 2014, the target availability for fixed cost recovery of such plants is 85%. Hence, there cannot be any deviation on any ground as regards to target availability. The respondent APPDCL submitted that there is no technical problem or impediment if the availability and operational capacity is now to be further enhanced to 85%, except the availability of coal. They further stated that there is no linkage or availability of indigenous low moisture coal which could give a GCV of at least 4800 kCal/kg and it will necessarily have to be imported.
11. The problem is primarily arising since the APPDCL has a raw coal linkage with Mahanadi Coalfields to the extent of 5 MMTPA instead of washed coal linkage as also proposed and as stipulated as one of the conditions while granting environmental clearance which is extracted hereunder:

“3 (iii): The Indian washed coal and imported coal shall be blended in the ratio of 70% and 30%.The blended coal to be used as fuel shall have sulphur content not exceeding 0.62% and ash content not exceeding 28.3%.”

12. There is no issue as regards usage of 30% of imported coal. The DISCOMs' view is that they are not authorized to allow additional imported coal i.e. beyond 30%, in view of the existing conditions of MoEF environmental clearance dated 17.07.2007 at para 3(iii) stating that the Indian washed coal and imported coal shall be blended in the ratio of 70% and 30%. In this scenario, the only way out appears to be APPDCL obtaining washed coal linkage to the extent of 5 MMTPA. No information is filed with the Commission on the efforts made to obtain the linkage as indicated supra. Further, the responsibility of obtaining coal linkage squarely lies with that of the project proponent being APPDCL herein. By no stretch of logic, neither this responsibility nor the consequences of not shouldering such responsibility by APPDCL be allowed to be passed on to the DISCOMs and consequently to the end consumers by this Commission, which has a mandate of safeguarding the interest of consumers. For the above mentioned reasons the target availability for recovery of full fixed cost shall stand fixed at 85% without any additional cost to the account of the petitioners. As a natural corollary, the other consequential things would follow as per the provisions of APERC Regulation No.1 of 2008 and the binding PPA, for which the Commission has already granted in-principle approval. Further, the target plant load factor for incentive shall be 85% instead of 80% indicated in clause 3.16 of the PPA dated 24.08.2016. This point is accordingly answered.

13. As regards point (b), the final position of the parties and the views of the learned objector Sri M.Venugopala Rao, to the extent relevant, are as hereunder:

a) The petitioners stated that as per the averments and based on the submissions during the public hearings on 23.6.2020 before the Commission, the Respondent accepted to amend the suitable clauses as below:

2.1(c) Notwithstanding anything to the above, in the event that the APDISCOMs do not avail any part of the power upto the Declared Capacity in any time block provided by APPDCL, or if the APPDCL is required to back down, then APPDCL shall have the option to sell such declared Capacity not availed by APDISCOMs in such time block to any third party or require payment of Fixed charge from APDISCOMs, towards such un-availed Declared Capacity not sold to third parties, provided that the APDISCOMs shall not be required to pay Fixed Charges corresponding to such time blocks, during which the un-availed declared capacity is sold to third parties.

2.1(d) In the event the annual Plant Load Factor (PLF) exceeds Target PLF for Incentive as a result of the aggregate energy exported to APDISCOMs and to third parties under separate commercial arrangements on the conditions as stated in clause 2.1(c) above, APDISCOMs shall pay to the APPDCL an Incentive Payment, as stated in "this Agreement".

However, the procurers notwithstanding the sale to third parties as aforesaid shall continue to pay the incentive payment for the energy exported by APPDCL over and above target availability excluding the energy exported to the third parties of "this agreement". It is further clarified that the incentive Payment to

be paid inter-se in the events stated above by the parties for export of energy beyond target PLF shall be calculated for each financial year during the tenure of "this Agreement".

- b) The respondent stated that in accordance with its averments and as agreed by the petitioners at the time of hearing and in their written submissions dated 10.07.2020, the following additions as clauses 2.1(c) and (d) of the PPA may be approved.

2.1(c) Notwithstanding anything above, in the event that the APDISCOMs do not avail any part of the power up to the declared capacity provided by APPDCL in any time block, or if the APPDCL is required to back down, then APPDCL shall have the option to either (i) sell such declared capacity not availed by APDISCOMs in such time block to any third party, or (ii) require payment of fixed charges from the APDISCOMs towards such un-availed declared capacity not sold to third parties; Provided that the APDISCOMs shall not be required to pay fixed charges corresponding to such time blocks sold to third parties.

2.1(d) In the event the annual Plant Load Factor (PLF) exceeds Target PLF for Incentive as a result of the aggregate energy exported to APDISCOMs and to third parties under separate commercial arrangements on the conditions as stated in clause 2.1(c) above, APDISCOMs shall pay to the APPDCL an Incentive Payment, as stated in "this Agreement".

However, the Procurers, notwithstanding the sale to third parties as aforesaid, shall continue to pay the Incentive Payment for the energy exported by APPDCL over and above Target availability excluding the energy exported to the third parties of "this Agreement".

It is further clarified that the incentive to be paid inter-se in the events stated above for export of energy beyond the target PLF shall be calculated for each financial year during the tenure of this agreement.

- c) Sri M. Venugopala Rao, the learned objector asserted that the understanding between the parties on this issue cannot protect the interests of the consumers as, (i) the power from the much-delayed project, with avoidable higher capital cost and higher tariff, is not required by the DISCOMs to meet demand, (ii) there is surplus power for the year 2020-21, as determined by the Commission vide its Retail Supply Tariff Order and which situation will continue for some more years to come and the respondent's project will invariably be asked to be backed down and it will be the first thermal power station to be directed to be backed down under merit order dispatch, in view of very high variable cost, (iii) the petitioners have miserably failed to sell the surplus power, despite the direction given to them in the past to sell the surplus power and will continue to fail to sell surplus power for the current financial year and some more years to come, in view of the prevailing

surplus power situation and the continuing trend of falling of demand for power due to slump in the economy in the pre-Covid period and later during the lockdown, (iv) RTPP units are already being backed down under merit order dispatch and it is reported that GoAP is toying with the idea of AP Genco forming a joint venture with NTPC to run the RTPP units, with a proposal to sell the power elsewhere, and (v) the chances for SDSTPS to generate power at normative level of PLF and selling power backed down under merit order dispatch to third parties are, and will continue to be, absolutely remote. Accordingly, he has suggested that appropriate clauses to the effect that, when the respondent's project is asked to back down, the petitioners shall not pay fixed charges therefor, whether the power station is able to sell power backed down to a third party or not, should be incorporated in the PPA to protect larger consumer interest. He has stated that it is a business risk SDSTPS has to face and it is all the more imperative that the consumers of the petitioners are and will be saddled with unwarranted and high-cost power and the resultant burdens arising out of purchasing and backing down of power from SDSTPS.

14. Commission's Decision: As can be seen from the above and as between the parties, broadly there is agreement on this issue except for certain editorial corrections being incorporated by the respondent APPDCL in respect of clause 2.1(c) and in respect of 2.1(d). We will revert to this issue at a later stage.

As can be seen from the above, the essential suggestion of Sri M.Venugopala Rao, the learned objector, is that appropriate clauses to the effect that, when

SDSTPS is asked to back down, the DISCOMs shall not pay fixed charges therefor, whether the power station is able to sell the power backed down to a third party or not, should be incorporated in the PPA.

In answering the objections of the learned objector Sri M.Venugopala Rao as extracted supra, the following are to be noted as it relates to the subject project:

- a. Commission granted in-principle approval to the amended and restated Power Purchase Agreement dated 24.08.2016 vide order dated 13.07.2018 in O.P.No. 21 of 2016. The Order of the Commission on the issue of whether there is requirement of Power by APDISCOMs from this project is, *"APPCC in unequivocal terms stated that there is no burden on DISCOMs by availing of power from SDSTPS (1440 MW) and further stated that this PPA capacity has been considered in AP TRANSCO supply, demand, load forecast studies. Additionally and most importantly it is brought to our notice as part of the responses to the objections extracted supra that the Government of Andhra Pradesh and the four (4) Distribution Companies are having 49% share in this project, which is substantial. Further, even Electricity Act, 2003 provides that the Distribution Licensee would be free to undertake generation. That being the case, the power from this project should be given pre-eminence over others in terms of its off-take since the project, inter-alia, is established by DISCOMs which are conferred with the universal service obligation. In passing it is also to be noted that power is being received by AP Discoms, since May, 2015. In view of the above and for all the reasons given by the parties to the agreement extracted supra, the issue of requirement of power by APDISCOMs from this project is not a matter of concern and answered accordingly."*

The above Order has attained finality having not been challenged.

- b. The Commission passed order dated 02-03-2019 in O.P.No.47 of 2017 & I.A.No.28 of 2017 determining the tariff for Sri Damodaram

Sanjeevaiah Thermal Power Station (SDSTPS) Stage-I of APPDCL for the period from 05.02.2015 to 31.03.2019. The above order deals with delay in implementation and capital cost also. The following extract from the order may please be noted.

"11. In the result:

- a. The Commission approves Rs.10761.40Cr. (Rupees Ten Thousand Seven Hundred and Sixty-one Crores and Forty Lakhs) against the petitioner's claim of Rs.12630Cr. in the original petition and the revised claim of Rs.12551Cr.*
- b. The Commission approves Rs.6936.01Cr. against the petitioner's claim of Rs.8122.84 Cr. towards fixed cost for the period from 05.02.2015 for the rest of the control period of 2014-2019."*

The above Order has attained finality on all aspects having not been challenged except for a review petition filed by APDISCOMs seeking downward revision of the Capital Cost to the extent of Rs.70 Cr.and the same is pending before the Commission.

- c. Commission, vide order dated 15.04.2019 on Load Forecasts and Resource Plans for the fourth (4th) Control Period from FY2019-2020 to FY2023-24 and fifth (5th) Control Period from FY2024-25 to FY2028-29, under the head - Commission's decisions on sources and as regards to APGenco thermal and hydel sources (Paras 112 to 119), for the reasons stated therein observed that:*

"119. Accordingly, Commission considered thermal and hydel Power Plants of AP Genco and APPDCL [includes the subject project-emphasis ours] being the State owned utilities indicated above for Power supply projection for the 4th Control Period."

- d. The APERC Terms and Conditions for determination of tariff for supply of electricity by a generating company to a distribution licensee and purchases of electricity by distribution licensees Regulation, 2008 (Regulation 1 of 2008) provide for the following:

"2 i.(e) "Availability" in relation to a thermal generating station for any period means the average of the daily average declared capacities for all the days during that period expressed as a percentage of the installed capacity of the generating station minus the normative auxiliary consumption in MW, as specified in this Regulation and shall be computed in accordance with the following formula:

$$\text{Availability} = 10000 \times \sum DC / N \times IC \times (100 - \text{AUXn}) \%$$

where —

- N = number of days during the period
DC = Average Declared Capacity for the ith day of the period in MW,
IC = Installed Capacity of the generating station in MW,
AUXn = Normative Auxiliary Consumption, expressed as a percentage of gross generation*

11.1.1 Availability

- a. Target availability for full recovery of annual fixed charges in case of coal / gas — based plants shall be 80 percent."*
- e. From the above, the present standing of the project is that (i) its PPA having been granted in-principle approval, (ii) its tariff including the issues of Capital cost and the delay in establishing the project having been settled by this Commission vide its orders quoted supra, (iii) the subject power plant finding its place in the Load forecast and resource plans approved by the Commission as quoted supra, (iv) fixed cost payment being based on availability and not on actual generation and accordingly, if the generator is able to maintain threshold target availability prescribed, it is entitled to full fixed cost recovery, whether the

DISCOMs actually offtake the power or not as can be seen from the APERC Regulation 1 of 2008, which squarely applies to the State owned projects and duly noting that all the above orders having attained finality except for a review being filed by APDISCOMs on order dated 02.03.2019 in O.P.No.47 of 2017 and pending with the Commission (whose disposal cannot in any case make the issue worse), it is not legally permissible to interfere with the right of the generator for receiving payment of fixed cost subject to the fulfilment of required conditions. Accordingly, the objection of the learned objector on fixed charges shall stand rejected.

15. Reverting back to the clauses to be incorporated into the PPA by way of amendment at 2.1(c) and 2.1(d), clause 2.1(c) is further edited to enhance clarity as below for incorporation into the PPA by the parties and there is no need for altering clause 2.1(d) inasmuch as the same is agreed by both the parties and is in order.

2.1(c) Notwithstanding anything contained herein above, in the event that the APDISCOMs do not avail any part of the power up to the declared capacity provided by APPDCL in any time block, or if the APPDCL is required to back down, then APPDCL shall have the option to either (i) sell such declared capacity not availed by APDISCOMs in such time block to any third party, or (ii) require payment of fixed charges from the APDISCOMs towards such un-availed declared capacity not sold to third parties;

Provided that the APDISCOMs shall not be required to pay Fixed Charges corresponding to such time blocks, during which the un-availed declared capacity is sold to third parties.

16. As regards point (c) Deletion of stipulation to claim fixed charges during Force Majeure, the final position of the parties and the views of the learned objector Sri M.Venugopala Rao, to the extent relevant, are as hereunder:

a) On this issue the petitioners submitted that as per the averments of the respondent and based on the submissions of both the parties during the public hearings on 23.6.2020 before the Commission, the petitioner APDISCOMs accepted to add / incorporate the following text:

"The APPDCL will issue a notice for force majeure to the APDISCOMs for concurrence / acceptance. If the APDISCOMs, based on the circumstances, approve, APDISCOMs will pay the fixed cost. If it is not approved for valid reasons, the APDISCOMs will not pay the fixed cost; provided that the RoE element of fixed cost will not be paid for any force majeure period.

In case any payments are received from the contractor or coal supplier, by way of compensation, by APPDCL and compensation received from Insurance towards Fixed cost component, if any, in the event of any Force majeure, then APPDCL shall be liable to pass on such benefit to APDISCOMs".

b) Whereas the respondent submitted that in accordance with their averments and as agreed by the petitioners at the time of hearing and in their written submissions dated 10.07.2020, the following substitution for the second paragraph of Article 8 of the PPA may be approved.

"The generator is entitled to claim only fixed charges and cannot claim any consequential losses during force majeure. For this purpose, the APPDCL will issue a notice for force majeure to the APDISCOMs for their concurrence / acceptance. If the APDISCOMs, based on the circumstances, approve, they will pay the fixed cost. If it is not approved

for valid reasons, the APDISCOMs will not pay the fixed cost; provided that the Return on Equity element of fixed cost will not be paid for any force majeure period.”

- c) Sri M.Venugopala Rao, learned objector stated that the agreement between parties to the effect that under conditions of force majeure the petitioners have to pay fixed charges to the respondent when the latter fails to generate and supply power, is inequitable, irrational and detrimental to larger consumer interest, as (i) the conditions of force majeure are generally intended for extending time for completing execution of a project when the same is delayed due to the contingencies defined under force majeure for specified period, (ii) allowing and continuing conditions of force majeure after COD with a condition that the DISCOMs should pay fixed charges to the power plant when the latter fails to generate and supply power due to conditions of force majeure is one-sided and totally loaded against the interests of the consumers of power, (iii) the responsibility for conditions of force majeure coming into play at any point of time after declaration of COD does not lie only with the DISCOMs and their consumers but equally lies with the generator as well, (iv) the DISCOMs will be constrained to purchase power from other sources in a situation of deficit to meet demand during force majeure and allowing payment of fixed charges to SDSTPS by the DISCOMs for non-supply of power imposes avoidable, unjustified and additional burden on the consumers, (v) there is no legal sanctity, either in the law, rules and regulations made thereunder and regulations of the Commission, to impose the condition of payment of fixed charges by the DISCOMs to any power plant

for the latter's failure to generate and supply power under conditions of force majeure, and (vi) the provision for payment of fixed charges by the DISCOMs to SDSTPS when the latter fails to generate and supply power, under conditions of force majeure, is contrary to the letter and spirit of the fair condition that the generator has to pay penalty to DISCOMs or forego fixed charges proportionately to the extent the generator fails to generate and supply power to the DISCOMs. He has further stated that normally generators are protecting their interest by insuring their plants and the premium is being allowed as passthrough to be borne by the consumers as a part and parcel of tariff and the generators can avail themselves of compensation they are entitled to get under conditions of force majeure, from the insurance company. He has requested to reject the proposed change in the PPA providing for payment of fixed charges by the DISCOMs to SDSTPS when the latter fails to generate and supply power under conditions of force majeure.

17. Commission's Decision: The contentions of Sri M.Venugopala Rao, learned objector, that conditions of force majeure are generally intended for extending time for completing execution of a project when the same is delayed due to the contingencies defined under force majeure for specified period; that allowing and continuing conditions of force majeure with a condition that the DISCOMs should pay fixed charges to the power plant when the latter fails to generate and supply power due to conditions of force majeure is one-sided and totally loaded against the interests of the consumers of power; and that there is no legal sanctity, either in the law, rules and regulations made thereunder and regulations of the Commission to impose the condition of payment of fixed charges by the

DISCOMs to any power plant for the latter's failure to generate and supply power under conditions of force majeure, do not reflect the true position. Some of the provisions relevant to Force Majeure and its financial consequences more particularly after the COD generally form part of some of the gas projects' PPAs, and as an example, the relevant clauses in the PPA of M/s GVK Ltd. (Extension) that has already been approved by the Commission are as hereunder:

10.5 Financial Consequences of Force Majeure

- (a)
- (b) Except as provided in this Article 10.5, an act, event or circumstance of Force Majeure shall not excuse the payment obligations of either Party which shall be determined in accordance with the terms of this Agreement.
- (c) Payments to the Company by the APTRANSCO in respect of periods of Political Force Majeure shall be limited as follows:
 - (i) In case of any event of Political Force Majeure affecting either Party as per Article 10.1(i) (2) occurring after the COD of th Project claimed by the affected party, the APTRANSCO shall pay, for each settlement period for which such Force Majeure is in effect, Capacity Charges, until the earlier of the (x) the date the effects of such Political Force Majeure event cease to exist and (y) 180 days from the date of commencement of such event. The Capacity Charges shall be computed in the manner described in Article 5.2 (b) except such charges shall be calculated for the period only described above and shall be based (rather than on the Installed Capacity) on the average Availability Declaration of the past 180 days (excluding from such 180 day period any period of Force Majeure or scheduled outages) or such lesser period in case the relevant data is not available for a period of 180 days.

- (ii) On the occurrence of any other Political Force Majeure event affecting either Party as per Article 10.1(i), occurring after the COD of the first Unit, claimed by the affected party, the APTRANSCO shall pay, for each Settlement Period for which such Force Majeure is in effect, 75% of Capacity Charges, until the earlier of the (x) the date the effects of such Political Force Majeure event cease to exist and (y) one hundred and eighty (180) days from the date of commencement of such event. The Capacity Charges shall be computed in the manner described in Article 5.2(b) except such charges shall be calculated for the period only described above and shall be based (rather than on the Installed Capacity) on the average Availability Declaration of the past 180 days (excluding from such 180 day period any period of Force Majeure or Scheduled Outages) or such lesser period in case the relevant data is not available for a period of 180 days.
- (d) Non-Political Force Majeure affecting the APTRANSCO after Project COD
In case of any Non-Political Force Majeure event affecting the APTRANSCO as per Article 10.1(ii) occurring after the COD of the Project, the APTRANSCO shall pay, for each Settlement Period for which such Force Majeure is in effect, 65% of the Capacity Charges, until the earlier of the (x) date the effects of such Non-Political Force Majeure event cease to exist and (y) one hundred and eighty (180) days from the date of commencement of such event. The Capacity Charges shall be computed in the manner described in Article 5.2 (b) except such charges shall be calculated for the period only described above and shall be based (rather than on the Installed Capacity) on the average Availability Declaration of the past 180 days (excluding from such 180 day period any period of Force Majeure of Scheduled Outages) or such lesser period in case the relevant data is not available for a period of 180 days.
- (e) In case of Political Force Majeure events described under Article 10.1(i) (2) affecting the Fuel supplier or transporter, which prevents delivery of Fuel to the Project and for which the Fuel supplier or transporter is excused under

Fuel Supply Agreement(s), the APTRANSCO shall pay for each settlement period for which such Force Majeure is in effect 65% of the Capacity Charges, commencing, however, on the date 30 days after the date on which a notice of commencement of such event is delivered by the Fuel supplier or transporter to the Company under the Fuel Supply Agreement(s), as communicated to the APTRANSCO and the APTRANSCO having satisfied itself that the Company made best efforts to provide alternate fuel supplies during this 30 day period until the earlier of the (x) date the effects of such Force Majeure Event cease to exist and (Y) one hundred and eighty (180) days from 31st day of commencement of such event. The Capacity Charges shall be computed in the manner described in Article 5.2 (b) except such charges shall be calculated for the period only described above and shall be based (rather than on the installed Capacity) on the average Availability Declaration of the past 180 days (excluding from such 180 days period any period of Force Majeure or Scheduled Outages) or such lesser period in case relevant data is not available for a period of 180 days.

18. From the above, while it is clear that provision for payment of different fixed charges in different situations even after COD is already in place in some of the PPAs approved by the Commission as stated supra, what needs to be kept in mind is the broad scheme of things that are generally followed while approving a Power Purchase Agreement. The need for power is first assessed and the power plants are identified or developed to meet the assessed need. In the instant case, the power is off taken by the DISCOMs and in turn distributed to consumers. The only source of recovering the project cost is from DISCOMs and in turn the end consumers unlike a merchant power plant. There is no other source for recovering costs. In other words, the project is developed by a non-recourse kind of financing. The developer has an obligation to clear his

loans and meet other expenses towards O & M etc. only from the revenues earned from the DISCOMs / consumers. That being the situation, paying fixed charges in situations of force majeure is not improper. APPDCL agreed to forego Return on Equity during periods of force majeure. This is an improvement over earlier positions in the PPA. The objections of the learned objectors are accordingly disposed of.

19. As regards the issue that penalty needs to be paid by the generator for the power not supplied or for not declaring the availability, it is to be noted that such provisions of not recovering part of the fixed charges to the extent the availability falls short of threshold PLF are already built into the PPA in Article 3.6 (c).
20. With regard to the suggestion that generators are protecting their interest by insuring their plants and the premium is being allowed as passthrough to be borne by the consumers as a part and parcel of tariff and that the generators can avail themselves of compensation they are entitled to get under conditions of force majeure from the insurance company, Commission directs the respondent that such insurance proceeds, if any, have to be given back to DISCOMs since they are covering the risks of Force Majeure.
21. Accordingly, the following proposal of APDISCOMs duly modified to the above effect needs to be incorporated into the amendment to the PPA even though the same does not appear to have been agreed by APPDCL:

“In case any payments are received from the contractor or coal supplier by way of compensation by APPDCL and compensation received from Insurance

towards Fixed cost component, if any, in the event of any Force majeure, then APPDCL shall be liable to pass on such benefit to APDISCOMs".

22. There is also another issue raised by the respondent APPDCL in their counter, on applying differential variable cost according to the dispatch from time to time on the petition filed by APDISCOMs, which is not mentioned as an issue to be decided. Hence, it cannot be addressed in this order. If the respondent APPDCL desires this issue to be decided, they may file a separate petition as also stipulated at para (10) of the Commission's order dated 02-03-2019 in O.P.No. 47 of 2017 & I.A.No.28 of 2017.

23. In the result, the following are the decisions of the Commission:

- (a) The target availability for full recovery of annual fixed charges shall be 85% without there being any additional cost on the petitioners on fuel cost and the target Plant Load Factor for incentive shall be 85%.
- (b) The following clauses shall be incorporated in the PPA at the appropriate place, by way of amendment to the PPA.

"2.1(c) Notwithstanding anything contained herein above, in the event that the APDISCOMs do not avail any part of the power up to the declared capacity provided by APPDCL in any time block, or if the APPDCL is required to back down, then APPDCL shall have the option to either (i) sell such declared capacity not availed by APDISCOMs in such time block to any third party, or (ii) require payment of fixed charges from the APDISCOMs towards such un-availed declared capacity not sold to third parties;

Provided that the APDISCOMs shall not be required to pay Fixed Charges corresponding to such time blocks, during which the un-availed declared capacity is sold to third parties.

2.1(d) *In the event the annual Plant Load Factor (PLF) exceeds Target PLF for Incentive as a result of the aggregate energy exported to APDISCOMs and to third parties under separate commercial arrangements on the conditions as stated in clause 2.1(c) above, APDISCOMs shall pay to the APPDCL an Incentive Payment, as stated in "this Agreement".*

However, the Procurers, notwithstanding the sale to third parties as aforesaid, shall continue to pay the Incentive Payment for the energy exported by APPDCL over and above Target availability excluding the energy exported to the third parties of "this Agreement".

It is further clarified that the incentive to be paid inter-se in the events stated above for export of energy beyond the target PLF shall be calculated for each financial year during the tenure of this agreement."

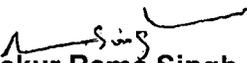
(c) The following shall be substituted in place of the existing content in the PPA at the second paragraph of Article 8, by way of an amendment to the PPA.

"The generator is entitled to claim only fixed charges and cannot claim any consequential losses during force majeure. For this purpose, the APPDCL will issue a notice for force majeure to the APDISCOMs for concurrence / acceptance. If the APDISCOMs, based on the circumstances, accept / approve APPDCL's claim of force majeure, APDISCOMs will pay the fixed cost. If it is not approved for valid reasons, the APDISCOMs will not pay the fixed cost; provided that the RoE element of fixed cost will not be paid for any force majeure period.

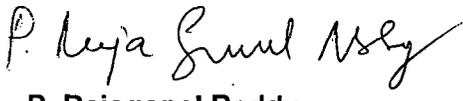
In case any payments are received from the contractor or coal supplier by way of compensation by APPDCL and compensation received from Insurance towards Fixed cost component, if any, in the event of any Force majeure, then APPDCL shall be liable to pass on such benefit to APDISCOMs".

24. Necessary amendments to the PPA as above shall be submitted to the Commission for consent as per the decision indicated supra.

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


Thakur Rama Singh
Member


Justice C.V. Nagarjuna Reddy
Chairman


P. Rajagopal Reddy
Member