



ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION

4th Floor, Singareni Bhavan, Red Hills, Hyderabad 500 004

WEDNESDAY , THE FIRST DAY OF MARCH,
TWO THOUSAND AND TWENTY THREE

Present

Justice C.V.Nagarjuna Reddy, Chairman

P.Rajagopal Reddy, Member

T.Rama Singh, Member

O.P.No.40 of 2020

In the matter of the dispute relating to the purchase of power by APSPDCL from a Mini Hydel Power Plant of Victory Power Systems Pvt. Ltd. in terms of the Power Purchase Agreement dated 16.02.2019.

Between:

Victory Power Systems Pvt Ltd

...Petitioner

And

Southern Power Distribution Company of Andhra Pradesh Ltd.

... Respondent

R.P.No.3 of 2020

In the matter of seeking a review of the directions of APERC about in-principle approval accorded for the procurement of power from Mini Hydel Projects.

Between:

Southern Power Distribution Company of
Andhra Pradesh Limited & another.

... Review Petitioners

And

Kandaluru Power Company Limited & others

...Respondents

These two Petitions have come up for hearing finally on 28-09-2022 in the presence of Sri K. Gopal Chowdary, Counsel representing Sri Challa Gunaranjan, learned Counsel for the petitioner-Mini Hydel Power Plant, and Sri P. Shiva Rao, learned Standing Counsel for the APDISCOMS, and the learned objector Sri M. Venu Gopala Rao; that after hearing the learned counsels for both the parties and on consideration of the entire material available on record, the Commission passes the following:

COMMON ORDER

The Original Petition (O.P.No 40 of 2020) filed by Victory Power Systems Pvt Ltd (for short “VPSPL”) and the Review petition (R.P.No.3 of 2020) filed by the Southern Power Distribution Company of Andhra Pradesh Limited (for short “APSPDCL”) and the Eastern Power Distribution Company of Andhra Pradesh Limited (for short “APEPDCL”) are interrelated and, hence, they are being disposed of together.

Main averments in O.P.No.40 of 2020

VPSPL is currently in the process of setting up a 9 MW Mini Hydel Power Project at Velugodu Village in Andhra Pradesh. After participating in bids conducted by APSPDCL for the procurement of 20 MW of power from Mini Hydel Projects in the state, VPSPL emerged as one of the lowest bidders at Rs. 5.70 per unit. However, after negotiations with APSPDCL, VPSPL agreed to reduce the tariff to Rs.3.73 ps., per unit.

The Commission gave in-principle approval for APSPDCL and APEPDCL to procure 19 MW of power from successful bidders, including VPSPL at a tariff of Rs.3.73 ps., per unit for a duration of 12 years. APSPDCL subsequently issued a Letter of Intent (for short “LOI”) for the purchase of power from VPSPL at a tariff of Rs.3.73 ps., per unit for 12 years from the Commercial Operation Date (for short “COD”), subject to the approval of the

Commission. VPSPL accepted the LOI, furnished the required Performance Bank Guarantees and entered into a Power Purchase Agreement (for short “PPA” with APSPDCL.

However, in a meeting held on 16.09.2019, APSPDCL asked VPSPL to reduce the tariff from its project to Rs.2.43 ps., per unit. VPSPL strongly opposed the proposal, stating that it had already reduced the tariff from Rs.5.70 ps., per unit to Rs.3.73 ps., per unit, which is well below the lowest price discovered in the bidding process and the CERC determined tariff of Rs.5.74 ps., per unit for projects of less than 5 MW capacity.

That since APSPDCL had not submitted the PPA to the Commission for approval, it was unable to obtain term loans, achieve financial closure, and proceed further with the execution of the project. The proposal of tariff reduction worsened the situation further. Therefore, VPSPL requested APSPDCL to submit the PPA to the Commission without delay and to allow it to complete the project at least 24 months from the date of PPA approval by the Commission through a suitable amendment to the PPA.

That, VPSPL rejected the reasons cited by APSPDCL for the reduction in tariff such as the discovery of lower tariffs in the bids across the country in respect of all categories of Renewable Energy Projects and also that VPSPL can go in for open access if it does not agree to the tariff of Rs.2.43 ps., per unit. VPSPL further maintained that it already spent Rs.8.00 crores towards tender expenses, Bank Guarantee Charges and land, etc., and that it will suffer irreparable loss and injury if APSPDCL goes back on its commitment.

VPSPL further submitted that after it filed the present petition, APSPDCL sent a letter dated 22.09.2020 purporting to cancel the bidding process

dated 03.04.2017 and rescind with immediate effect the LOI and also the PPA, dated 16.02.2019, wrongly claiming it as a draft. Vide: letter dated 28.09.2020, VPSPL responded to APSPDCL's letter stating that it is arbitrary and illegal to rescind PPA after its completion and issuance of the LOI. VPSPL claimed that the PPA is a fully executed binding contract and not a draft, and that, therefore, rescinding the PPA is *abinitio* null and void. VPSPL further accused APSPDCL of willfully not seeking approval of the PPA from the Commission. That the PPA is a legally binding contract between the parties, and APSPDCL was obligated to seek approval from the Commission. APSPDCL's demand for a lower tariff after the conclusion of the contract is arbitrary, unreasonable and malice in law. APSPDCL's reliance on clause 3.16 of the RfS is misconceived, malicious and not tenable.

VPSPL contended that APSPDCL cannot unilaterally cancel the PPA or bidding process, even if the contract is subject to the approval by the Commission. The fact that the contract is pending approval does not give APSPDCL the right to cancel it. APSPDCL's contention that the PPA is a draft is contradictory and as the contract itself provides for enforcement of the happening of a condition precedent by way of the formality of regulatory approval by the Commission. The reasons for financial difficulties arising out of gross mismanagement by APSPDCL cannot be pleaded as the reason for reneging the concluded contracts. Reference to Section 21 of the AP Electricity Reform Act, 1998 is misconceived as it is no longer in effect. APSPDCL is not a licensee under that Act, and it is settled that there is now no Commission under that Act. That in any case, the contract is subject to the approval of the Commission, and the contention is untenable even if

section 21 is considered. VPSPL is not aware of any interpretation of the Supreme Court that a PPA remains a plan till it is approved, and hence it is denied.

Following the above averments, VPSPL prayed for the following reliefs:

“(a) To set aside and declare APSPDCL’s Lr.No.CGM/(IPC&PMM)/APSPDCL/F.Mini Hydel Bidding/D.No.91/20 dated 28.01.2020 and Lr.No.CGM/(IPC)/APSPDCL/F.Mini Hydel Bidding/D.No.1090/20 dated 22.09.2020 as unjustified, unreasonable, unwarranted, and/or illegal;

(b) to approve the Power Purchase Agreement dated 16.02.2019 between the respondent and the petitioner;

(c) to direct amendment of the definition of “Scheduled COD” in Article-1 of the Power Purchase Agreement dated 16.02.2019 to provide for 24 months from the date of approval of the said agreement by the Commission instead of the existing provision; and

(d) to pass such further order/orders as the Hon’ble Commission may consider fit and proper in the circumstances of the case and/or in the interest of justice.

Relevant averments in the Counter in O.P.No.40 of 2020:

The petition is not maintainable due to the absence of an enforceable contract between the parties and the fact that APDISCOMs do not intend to procure power from the VPSPL’s project due to its high tariff in comparison to the prevailing market prices. Further, since there were no bidding guidelines under section 63 of the Electricity Act 2003 at that time, the bidding process undertaken by APDISCOMS should be considered as a general bidding process under section 62. Therefore, they have the right to cancel the bidding process unless a valid and enforceable agreement is formed between the parties, subject to the approval of the PPA by the Commission. As per Clause 11 of the PPA, VPSPL is required to establish the project within 24 months from the signing of the PPA but has not done so.

Therefore, VPSPL's claim that the Commission has ratified the PPA at a tariff of Rs.3.73 ps., per unit is not tenable, as APDISCOMs are still negotiating in the light of tariff reductions nationwide.

That, considering the reduction in tariffs across the country and their financial position, APDISCOMs negotiated to reduce the tariff to Rs.2.43 ps., per unit with the option given to VPSPL to go in for open access if the reduced tariff is not acceptable to it. However, since VPSPL did not respond to the said letter, APDISCOMS did not submit the draft PPA to the Commission and they cancelled the bidding process, revoked LOI dated 18.07.2018, and rescinded the draft PPA dated 16.02.2019.

That the prayer of VPSPL for amending the PPA seeking 24 months from the date of the approval of the PPA is contrary to the bidding conditions. The APTEL in Appeal No 22 of 2016 dated 18.07.2018 held that a bid can be cancelled even after the issuance of an LOI and filing of a petition for the adoption of tariff under Section 63 of the Electricity Act. APERC in the order dated 05.07.2021 in O.P.Nos. 09 and 20 of 2020 held that unapproved PPAs are not binding on APDISCOMs.

That as per clause 16 of the PPA, the agreement shall come into force subject to APERC approval. The in-principle approval for procurement of power given by the Commission is only for procurement approval required under Regulation 4 of 2005 and it is not a blanket order or unconditional, and the approval is subject to further orders or directions, or reviews. In support of its arguments, APSPDCL relied on the judgment in Narain Vs. Ankholi I.L.R.12 Cal.152, Section 31 of the Contract Act, 1872, the

judgements of Hon'ble Supreme Court in the Energy watchdog and National Agricultural Cooperative Marketing Federation of India Vs Alimenta S.A.

Relevant averments in the Rejoinder in O.P.No.40 of 2020:

There is a concluded contract between the parties that has been entered into in pursuance of the Commission's approval vide letter dated 30.05.2018. All that was left was for the Commission to formally examine the PPA and give its consent, along with any modifications to other terms of the agreement that it deems necessary or appropriate.

That the PPA entered into on 16.02.2019 was a final agreement and the same constitutes a binding contract. Clause-11, when read together with the entire PPA, means that the agreement will become effective on the specified effective date, but its enforcement is subject to approval from the Commission, which will be granted once the PPA has been properly submitted for its review and approval. It is like a condition precedent that is required for asserting any claim for performance under the contract. It is also an implied obligation undertaken by APSPDCL to duly submit the PPA for the approval of the Commission. A party is not entitled to rescind the contract itself for the reason that it has not taken the steps required of it to satisfy a condition precedent, whether intentionally, mischievously, unconscionably, or otherwise. As APSPDCL has willfully, and with a mala fide intention, omitted and failed to submit the PPA for the approval of the Commission, VPSPL has filed this petition seeking, *inter alia*, approval of the PPA. The conduct of APSPDCL is also tantamount to fraud.

The VPSPL further stated that it has not been able to proceed further with the completion of the project, only because APSPDCL has not carried

out its obligation in law and submitted the PPA for the approval of the Commission hampering VPSPL from achieving financial closure. Moreover, the conduct of APSPDCL in seeking to repeatedly re-negotiate the tariff despite the tariff given by the Commission and without prior approval of the Commission for any such re-negotiation had further hampered VPSPL to attain financial closure and complete the project.

That no material was placed on record by APSPDCL to substantiate the claim that there have been reductions in tariffs across the country. It is a settled law that the financial position of the party does not entitle it to rescind the contract. The decision to negotiate further without the Commission's permission and consent is unauthorized and constitutes misconduct that undermines the Commission's approval. Having entered into a contract in pursuance of the approval sought and taken from the Commission, APSPDCL was obliged in law and good conscience to submit the executed PPA for the approval of the Commission. Not doing so is improper conduct and vitiated by malice in fact and in law.

That APSPDCL is aware of the inherent nature of renewable energy such as mini hydel when it approached the Commission for consent to the bidding process and tariff. The plea for amending the PPA has arisen as a result of the conduct of APSPDCL, and it is within the jurisdiction of the Commission to issue directions to amend the PPA.

As regards the APSPDCL's reliance on the Hon'ble Appellate Tribunal's decision in Appeal No. 22 of 2016, VPSPL stated that the decision is distinguishable on facts and the same is *per incuriam* in view of the decision dated 02.02.2018 in Appeal Nos 235 & 191 of 2015 which has been affirmed

by the Hon'ble Supreme Court in the judgement dated 25.04.2018 in C.A. Nos. 2502-2503 of 2018 and batch.

As for APSPDCL's reliance on the decision of this Commission in O.P. Nos.9 and 20 of 2020, dated 05.07.2021, on the enforceability of the PPA in the absence of the approval of the Commission, the VPSPL stated that this decision is also *per incuriam* on the interpretation and application of section 21 of the A.P. Electricity Reform Act, 1998 in the light of the judgement of a Division Bench of the Andhra Pradesh High Court which has been affirmed by the Hon'ble Supreme Court, and also for the reason of incorrect appreciation and application of other decisions and judgements in that order without considering the distinguishing facts and the real ratio in those cases. VPSPL also relied on certain judgments which will be referred to and discussed at appropriate stages.

Objector's (Sri M. Venugopal Rao) views in O.P.No.40 of 2020:

The fact that even after five years of bidding, the contract is yet to be concluded indicates that APDISCOMs had no requirement of power from mini during the above period. The bidding process and negotiations carried out by APDISCOMs and draft PPAs signed by them were not carried out on commercial principles. APDISCOMs were aware of the vagaries of generation from mini hydel projects at the time of bidding and signing of PPAs. The stand of APDISCOMs indicates the need for shelving the proposals and bidding processes initiated in the past and also draft PPAs entered into for purchasing power at relatively higher costs. In its order dated 13.7.2018 in O.P.No.5 of 2017, the Commission rightly and emphatically held that "even if there is an agreement for the development of wind power projects and

understanding of the agreement with APDISCOMS for purchase of power they are not binding on the Commission. The Commission while exercising its powers u/s 86(1)(b) is bound to verify whether there is a need to procure power and if so, determine the quantum and the price and terms of the PPA, before according approval if necessary if it is in consumer interest. The wind power developers can have no vested right in claiming that once they agree to develop wind power projects on the basis of agreement with Govt. of Andhra Pradesh, APDISCOMS were obliged to procure power. Unless and until the Commission verifies and approves each PPA in the interest of the consumers, such agreements can have no relevance and are not enforceable and cannot be taken cognizance of under law (Electricity Act, 2003)". He requested the Commission to take a holistic view of the issue considering the above-mentioned submissions to protect the larger interests of consumers.

Averments in R.P.No.3 of 2020:

This Review petition is filed by APSPDCL seeking the review of the order dated 30.05.2018 whereunder in-principle approval was accorded for the procurement of 19 MW power from the three Mini Hydel Projects, i.e., Kandaleru Power Company Limited (6 MW) and Victory Power Systems Private Limited (9 MW) and Raji Power Pvt Ltd(4 MW) at the tariff of Rs.3.73 per unit for a duration of 12 years, subject to any further orders or directions or reviews by the Commission, as may be found necessary or reasonable or appropriate, from time to time.

APDISCOMS entered into PPAs with the above projects on 16.02.2019. Clause 11 of the said PPAs reads that "this Agreement shall come into force

subject to APERC approval". They have averred that the draft PPA cannot be enforced until the Commission grants its consent. As per section 21 of the AP Electricity Reform Act, 1998, the PPA which has no consent of APERC is void, and as per the interpretation of Section 86(1)(b) of Electricity Act, 2003 by the Hon'ble Supreme Court, the PPA remains as plan only until it is approved. In this regard, APDISCOMs relied on certain judgments, which will be referred to and discussed at appropriate stages.

It is averred that though the limitation specified in clause 49 of APERC Conduct of Business Regulation applies to this Review Petition, APDISCOMs requested the Commission to relax the limitation in exercise of powers conferred under clause 59 of the said Regulation keeping in view the financial condition of APDISCOMs and the lesser demand growth in the state.

Counter averments in R.P.No.3 of 2020:

APDISCOMs are obligated to place the PPA before the Commission for approval after having completed the process of finalizing the bids, issuing LOI, negotiation of price and entering into a PPA, etc. The inaction of APSPDCL in placing the PPA for the approval of the Commission is wilful and not bona fide. APDISCOMs cannot be permitted to take advantage of its wilful omission and wrong. Section 21 of the AP Electricity Reforms Act, 1998 is not applicable in this case as it is no longer in effect. That section is about a PPA entered into by a supply licensee under the AP Electricity Reforms Act, 1998. That licensing regime is no longer in force. APDISCOMs are not the supplying licensees under that Act. The Commission is also not a Commission under the AP Electricity Reforms Act, 1998. The case law

mentioned by APDISCOMs without citations neither applies to the facts of this case nor those cases support the propositions put forth by the APDISCOMs.

That APDISCOMs have failed to show any valid or permissible ground recognized by law for review in terms of section 94 (1)(f) of the Electricity Act, 2003 read with Order 47 CPC. No error apparent from the face of the record is made out or even pleaded as such. Clause 49 of Regulation 2 of 1999 is subject to the express provisions of section 94(l)(f) of the Electricity Act read with Order 47 CPC and is to be construed accordingly. Clause 59 of Regulation 2 of 1999 cannot be relied on and it is not the case of the APDISCOMs in this RP that they seek any enlargement of time for doing anything directed to be done. The order sought to be reviewed was issued granting approval to the proposal submitted by APDISCOMs themselves. Therefore, they cannot be aggrieved parties as they acted on the order without demur and proceeded to issue Letters of Intent, take Performance Bank Guarantees and entered into PPAs with hydel power projects. They cannot, therefore, be permitted to renege on their obligations by resorting to devious means such as this review petition. The petition is an abuse of the process of the court and cannot be countenanced. The review petition is barred by time. Subsequent events are no justification or explanation or grounds for a review petition to be entertained after the lapse of the statutory period. Purported subsequent events also are no grounds for review. Clause 59 of Regulation 2 of 1999 does not apply to the facts of the present case. By making false statements as to the nature of the PPA, the issue involves adjudication of the question as to whether or not the PPA is a

draft or a concluded contract, and thereby the review petition has raised an adjudicatory issue which cannot be adjudicated in a review petition, more particularly when no ground for review permissible in law is made out or even pleaded. The prayer in the review petition is inchoate. If review is allowed, the prayer of APDISCOMs in the original request leading to the order remains the prayer of APDISCOMs, and they could not argue for a different result. APDISCOMs cannot be permitted to contend contrary to their request. No error in the order, let alone an error apparent from the record, is made out or even pleaded. The prayer does not spell out explicitly what APDISCOMs are praying for on review being allowed.

The other averments in the counter are more or less the same as those advanced in O.P.No.40 of 2020.

CONTENTIONS:

Sri K.Gopal Chowdary, learned counsel for VPSPL submitted that following the transparent bidding process undertaken by APSPDCL, this Commission has granted in principle approval for procurement of the power of the total capacity of 19 MW, including 9 MW of VPSPL power plant, at the rate of 3.73 ps., per unit for a period of 12 years; that, in pursuance thereof, the respondent has issued LOI dated 18-7-2018 in terms of Clause 4.1.3 (B) (9) of RFS; that by the said LOI the respondent has called upon the VPSPL to attend the office with Performance Bank Guarantee of 180 lakhs valid for a period of 30 months from the date of signing of the PPA with certain other conditions necessary for execution of the project. The learned counsel further submits that following compliance of the LOI conditions, VPSPL and

APSPDCL have duly entered into a PPA on 16-2-2019. While stoutly refuting the plea of the APSPDCL that the PPA was in the nature of a draft agreement, the learned counsel submitted that as per the terms of the PPA, it shall come into force subject to this Commission's approval, which does not mean that it is in the nature of a draft PPA. The learned counsel further submitted that having entered into an agreement for receiving power, subject, of course, to the approval of the Commission, the APSPDCL cannot renege on its commitment for wholly unsustainable reasons, such as the subsequent reduction in RE tariffs etc. He further submitted that having specifically agreed to pay a particular tariff, it is not open to the APSPDCL to unilaterally insist on the VPSPL to reduce the tariff price further. In support of this contention, the learned counsel relied upon the Judgment of the Supreme Court in **Suresh Kumar Wadhwa Vs. State of Madhya Pradesh**¹. The learned counsel further submitted that since the PPA is subject to the condition of the approval of the Commission, a duty and obligation is cast upon the APSPDCL to seek its approval and the APSPDCL in abdication of such obligation and responsibility failed to seek such approval, and, instead, sought for review of the order of this Commission granting in principle approval. The learned counsel further submitted that the order rescinding the PPA is against the provisions of Section 62 of the Indian Contract Act as a party to a contract, the APSPDCL cannot rescind it unilaterally. In support of this submission, the learned counsel referred to and relied upon the Judgment of the Supreme Court in **City Bank N.A. Vs. Standard Chartered Bank**². The learned counsel further submitted that merely because the PPA

¹) (2017) 16 SCC 757.

²) (2004) 1 SCC 12.

is hedged in by the condition that its enforceability is subject to the approval by this Commission, the APSPDCL cannot ignore the PPA and that the PPA ought to be brought before this Commission for its final approval; and that that if the APSPDCL has failed to place the PPA before this Commission, the VPSPL is not precluded from approaching this Commission for approval of the PPA. To buttress these contentions, the learned counsel placed heavy reliance on the judgment of the APTEL in **Hinduja National Power Corporation Ltd., Vs. AP Electricity Regulatory Commission**³; the judgment of the Supreme Court in **Southern Power Distribution Power Company Limited of Andhra Pradesh (APSPDCL) & another Vs. M/S Hinduja National Power Corporation Limited & Another**⁴.

As regards the Review Petition filed by the APSPDCL and APEPDCL (for short “the DISCOMs), the learned counsel submitted that it is liable to be rejected *in limine* as it is woefully time barred. The learned counsel further submitted that even on merits also the Review is liable to be rejected, for, after in-principle approval, in respect of which the Review Petition has been filed, the APSPDCL has acted upon the same without any demur and proceeded to issue a LOI, take Performance Bank Guarantee and even entered into the PPA; and that, therefore, the APSPDCL cannot renege on their obligations by resorting to devious means, such as filing the Review Petition.

Opposing the above submissions, Sri P.Shiva Rao, learned Standing Counsel for the respondent in the OP and the petitioners in the Review

³) (2020) SCC Online APTEL 3.

⁴) (2022) 5 SCC 484.

Petition, submitted that in-principle approval granted by this Commission for procurement of power was subject to any further orders or directions or review by this Commission as may be found necessary, reasonable or appropriate, from time to time; that the PPA is subject to approval by this Commission; and that, therefore, the PPA, though concluded, is a contingent contract. The learned Standing Counsel further submitted that as long as the condition pertaining to approval of PPA by the Commission remains unfulfilled, there can be no right of action on the contract, either for specific performance or for some other relief. In support of this proposition, the learned Standing Counsel relied on the Judgment in **Narain Vs. Ankholy**⁵. The learned Standing Counsel also relied on the Judgment of the Supreme Court in **Energy Watchdog and others Vs. Central Electricity Regulatory Commission and others**⁶ in support of his contention that the PPAs are contingent contracts. He also relied upon the Judgment of the Supreme Court in **National Agricultural Cooperative Marketing Federation of India Vs. Alienta SA**⁷ for explaining the effect of the contingent contracts. The learned Standing Counsel also relied on the Judgment of the APTEL in **SunE Solar B.V., Vs. Delhi Electricity Regulatory Commission and others**⁸ to support his submission that even after LOI is given, the DISCOMs could cancel the same in the interest of the consumers. The learned Standing counsel also relied upon the Judgment of the APTEL in **Tarini Infrastructure Vs. Gujarat Urja Vikas Nigam Limited and others**⁹.

⁵) ILR 12 Calcutta 152.

⁶) (2017) 14 SCC 80

⁷) AIR 2020 SC 2681

⁸) Appeal No.22 of 2016 dt.18-7-2018.

⁹) Appeal No.29 of 2011, dt.31-5-2012.

With respect to the Review Petition, the learned Standing Counsel submitted that after entering into the PPA the APSPDCL has realised that the tariffs in respect of the RE Power have considerably come down in the country and that since the VPSPL has not agreed for reducing the tariff to match the reduced power tariffs, the APSPDCL had no option other than rescinding the PPA. The learned Standing Counsel also submitted that in view of application of scheduled RE Power, which enjoy must run status, the respondents are obliged to back down the thermal power plants paying fixed charges; that the hydel power, which is only seasonal, is not of much use for the DISCOMs; and that, therefore, having regard to the various compelling reasons, the Review Petitioners-DISCOMs had no option except to rescind the PPA.

Having regard to the respective contentions of the learned counsel for the parties, as noted above, the following points emerge for consideration:

- 1) Whether the PPA dated 16-2-2019 entered into between the VPSPL and APSPDCL is a conclusive contract binding both the parties; and, if so, whether VPSPL is entitled to seek enforcement of the same?
- 2) Whether the proceedings, vide letter No.CGM/(IPC)/APSPDCL/F.Minor Hydel Bidding/D.No.91/20, dated 28-1-2020 and letter No.CGM/(IPC), dated 22-9-2020 of the APSPDCL are legal and valid?
- 3) Whether the petitioner in the OP (VPSPL) is entitled to any relief; and, if so, to what extent? and
- 4) Whether the Review Petition filed by the DISCOMs deserves to be allowed?

Re Points 1, 2 and 4:-

“1. Whether the PPA dated 16-2-2019 entered into between the VPSPL and the APSPDCL is a conclusive contract binding both the parties; and, if so, whether the VPSPL is entitled to seek enforcement of the same? and

2. Whether the proceedings, vide letter No.CGM/(IPC)/APSPDCL/F.Minihydel Bidding/D.No.91/20, dated 28-1-2020 and letter No.CGM/(IPC), dated 22-9-2020 of the APSPDCL are legal and valid?”

4. Whether the Review Petition filed by the DISCOMs deserves to be allowed?

In order to consider these points, the brief background of the case, as pleaded by the APSPDCL itself in the Review Petition filed by it, needs to be recounted.

In pursuance of the National Electricity Policy issued by the Ministry of Power (MOP), vide: Resolution dated 28-12-2016, the APSPDCL has approached this Commission, vide: its letter dated 11-3-2016 to accord approval for procurement of power from the new Mini Hydel Projects, through competitive bidding process. This Commission has accorded in-principle approval of the said request, vide: its communication dated 20-4-2016. Following the same, the then Government of Andhra Pradesh, vide: its letter dated 22-12-2016 permitted to conduct competitive bidding process for procurement of power from Mini Hydel Projects, duly following the rules and regulations. Accordingly, the APSPDCL initiated the competitive bidding process for procurement of 20 MW power from the proposed Mini Hydel Projects in a phased manner out of total capacity of 92.90 MW consisting of 21 numbers of Projects. The APSPDCL issued Request for Selection (RfS) document together with Power Purchase

Agreement(PPA) on e-procurement platform on 03-4-2017 for procurement of 20 MW power. On the request of the bidders, the respondents-DISCOMs approached this Commission to accord approval for Model Power Purchase Agreement and also to give suitable instructions with regard to the duration of the PPAs to be adopted in the bidding process. This Commission, vide: its letter dated 26-4-2017, directed the DISCOMs to re-examine whether there is any need and necessity to go ahead with the bidding process in view of the surplus power situation prevailing in the State. After such re-examination, the DISCOMs have requested this Commission, vide: their letter dated 28-7-2017, to accord approval to open the bids for evaluation of the tariff, duly stating that if the bid quoted tariff is equal to the Pooled Power Purchase Cost, AP DISCOMs would purchase the power from the Mini Hydel Projects; else they will cancel the bids. The DISCOMs also requested this Commission to fix the tenure of the PPA to indicate whether the period of PPA shall be 35 years or 12 years. On considering the said request of the DISCOMs, this Commission, vide: its letter dated 26-8-2017, permitted the DISCOMs to open the bids and evaluate the same. The Commission further directed that if the quoted tariff is either equal to or less than the Pooled Power Purchase Cost, the APPCC/APDISCOMs shall approach the Commission again with information regarding the outcome of the bids, justification and need for procuring such power and all other such circumstances to enable the Commission to examine the issue on merits. The Commission also indicated that the term of the PPA shall be between 5 to 12 years; and that if a period of 12 years is proposed, all the relevant factors, including the life of the project, the way the tariff is structured (front

loading or levelized etc.), need to be placed before the Commission to enable consideration of such requests on merits. In pursuance of the said approval of the Commission, the DISCOMs have opened the three numbers of technical and financial bids. Respondent No.1 in the Review Petition - M/s.Khandaleru Power Company Limited - quoted Rs.5.69 ps., respondent No.2 in the Review Petition (petitioner in OP No.40 of 2020) - M/s. Victory Power Systems Private Limited (VPSPL) - quoted Rs.5.70 ps., while respondent No.3 in the Review Petition - M/s.Raji Power Private Limited - quoted Rs.5.76 ps. As the DISCOMs found the tariffs high, they negotiated with the bidders. During negotiations, the bidders have agreed to reduce the tariff to match the computed Pooled Power Purchase Cost of Rs.3.73 ps., per unit for Financial Year 2016-17, applicable to FY 2017-18. All the three bidders have agreed to sell the power at Rs.3.73 ps., per unit subject to approval of this Commission for a period of 12 years. Thereafter, as directed by this Commission, vide: letter dated 26-8-2017, the APPCC has once again approached the Commission for approval of the proposals for purchase of power by the DISCOMS. Vide its letter dated 06-1-2018 the Commission has returned the proposal of the APPCC on the ground that it was premature while directing the proposals to be resubmitted after determination of the Pooled Cost of Power Purchase by the Commission. By order dated 03-3-2018 the Commission has determined the Pooled Power Purchase Cost for FY 2016-17 to be considered for FY 2017-18 as Rs.3.741 per unit. Consequently, the DISCOMs have resubmitted the proposals to this Commission on 12-3-2018. Having considered the said proposals, this Commission, vide: its letter dated 30-5-2018 communicated in-principle

approval for procurement of 19 MW power from the three technically qualified bidders at the tariff of Rs.3.73 ps., per unit for a period of 12 years, subject to any further orders or directions or reviews by this Commission as may be found necessary or reasonable or appropriate, from time to time, and directed the AP DISCOMs to take further necessary action, as deemed fit for approval of PPA and adoption of tariff as contemplated under the A.P. Electricity Reform Act, 1998 and the Electricity Act, 2003 keeping in view all the relevant Orders/directions of the Commission issued from time to time. In pursuance of the said proceedings of the Commission, the DISCOMs have issued Letters of Intent (LOI) to M/s.Khandaleru Power Company Limited (KPCL) (6 MW) and M/s. Victory Power Systems Private Limited (VPSPL) (9 MW) on 18-7-2018 to sell power from their Projects at Rs.3.73 ps., per unit at interconnection point for a period of 12 years from the Commercial Operation Date (COD) or Scheduled Commercial Operation Date (SCOD), whichever is later. The DISCOMs, however, made the LOIs subject to the approval of PPAs by the Commission. Following the issue of LOIs, PPAs were entered into with KPCL and VPSPL on 16-2-2019. Later, the DISCOMS appeared to have changed their mind and insisted on the developers to reduce the tariff to Rs.2.43 ps., per unit, which was declined by the developers. Since KPCL, which has already established and synchronized its project, has opted out of the PPA and been supplying power through open access, the PPA has fallen through. VPSPL, however, filed OP No.40 of 2020 seeking approval of the PPA. Post filing of the said OP, the APSPDCL has rescinded the PPA, which has been challenged in the OP by way of

amendment. APSPDCL, in turn, filed the Review Petition for reviewing the in principle approval granted by this Commission.

From a conspectus of various events narrated above, it is evident that APPCC and DISCOMs have floated the tenders and conducted bids for purchase of power from Mini Hydel Projects to be established after a deep contemplation. At every stage, both pre and post conduct of bids, DISCOMs have approached this Commission and obtained its approvals. In this process, the DISCOMs have assessed the need and necessity of procurement of power after being pin-pointed by the Commission. Not being satisfied with the offers made in the bids, the APPCC and the DISCOMs have held negotiations with the developers and persuaded them to steeply reduce the tariff by almost Rs.2/- per unit so as to match with the Pooled Power Purchase Cost. It is only after undertaking this elaborate exercise that the DISCOMs have issued the LOIs. After issuing the LOIs, the DISCOMs have taken the next logical step of entering into the PPAs agreeing to pay Rs.3.73 ps., per unit, which was in-principle approved by this Commission.

While in the counter filed by the DISCOMs they have termed the PPA as a draft PPA, the DISCOMs appear to have relented in its stand on this aspect as could be seen from the Short Notes submitted on their behalf by their Standing Counsel on 22-3-2022. In para 4 of the Short Notes, it is stated as under:

“Therefore the P.P.A though concluded, is a contingent contract. As long as the condition stated in PPA remains unfulfilled there can be no right of action on the contract, either for specific performance or for some other relief”.

In the light of the above altered stand of the DISCOMs, we shall proceed further by treating the PPA as a conclusive contract, but a contingent one. The burden of the song of the DISCOMs is that since the PPA is a contingent contract, it is not enforceable until and unless it is approved by this Commission. There could be no quarrel on this contention. A similar plea was considered by the APTEL in **Hinduja National Power Corporation Ltd., (3 supra)**. The APTEL while holding that the previous PPA and the continuation agreement, subject to approval by the Commission, in that case constituted a concluded contract, albeit a contingent one, and they were not inchoate or incomplete contracts, as contended by the APDISCOMs. In coming to the said conclusion, the APTEL has placed heavy reliance on the Judgment of the Supreme Court in **Mrs. Chandne Widyavati Madden Vs. Dr.C.L.Katilal**¹⁰. The facts of the said case bear resemblance to that in the present case. Hence, it may be appropriate to briefly refer to them. The plaintiff entered into a contract for sale of a disputed property. The agreement provided that the vendor shall obtain the permission of the Chief Commissioner to the transaction for sale within two months of entering into the agreement, and if the said permission was not forthcoming within the said time, it was open to the purchaser to extend the date or to treat the agreement as cancelled. The defendant has made an application to the proper authorities for the necessary permission, but withdrawn that application without any justification. The Plaintiff, therefore, filed a suit for specific performance of the contract of sale or in the alternative for damages. One of the issues

¹⁰) AIR 1964 SC 978

framed was whether the contract was contingent or impossible of performance and is uncertain and vague and is therefore void. The trial Court while dismissing the suit for specific performance of contract and for permanent injunction decreed the suit by awarding certain damages with proportionate costs. The reason for rejecting the prayer for specific performance of contract was that the agreement was inchoate in view of the fact that the previous sanction of the Chief Commissioner to the proposed transfer has not been obtained. On appeal filed by the plaintiff, the High Court held that the trial Court committed an error in holding that the agreement was inchoate and not decreeing the suit for specific performance on that ground. Relying upon the judgment of the Judicial Committee of the Privy Council in *Motilal Vs. Nanhelal*, the High Court held that the condition in the agreement to obtain sanction of the Chief Commissioner did not render the contract incomplete; that in pursuance of that term in the agreement the vendor had to obtain the sanction of the Chief Commissioner and as she has withdrawn the application for necessary sanction, she was to blame for not having carried out her part of the contract. The High Court further held that if the Chief Commissioner ultimately refused to grant the sanction for the sale, the plaintiff may not be able to enforce the decree for specific performance of the contract, but that was no bar to the Court passing a decree for that relief. The Supreme Court, before which the defendant filed an appeal, while affirming the judgment of the High Court, rejected the contention that as the contract is contingent in nature, the same is not enforceable. The Supreme Court has made the following pithy observations:

“4. The main ground of attack on his appeal is that the contract is not enforceable being of a contingent nature and the contingency not having been fulfilled. In our opinion, there is no substance in this contention. So far as the parties to the contract are concerned, they had agreed to bind themselves by the terms of the document executed between them. Under that document it was for the defendant-vendor to make the necessary application for the permission to the Chief Commissioner. She had as a matter of fact made such an application but for reasons of her own decided to withdraw the same. On the findings that the plaintiffs have always been ready and willing to perform their part of the contract, and that it was the defendant who wilfully refused to perform her part of the contract, and that the time was not of the essence of the contract, the Court has got to enforce the terms of the contract and to enjoin upon the defendant appellant to make the necessary application to the Chief Commissioner. It will be for the Chief Commissioner to decide whether or not to grant the necessary sanction.

5. In this view of the matter, the High Court was entirely correct in decreeing the suit for specific performance of the contract. The High Court should have further directed the defendant to make the necessary application for permission to the Chief Commissioner, which was implied in the contract between the parties. As the defendant vendor, without any sufficient reasons, withdrew the application already made to the Chief Commissioner the decree to be prepared by this Court will add the clause that the defendant, within one month from today, shall make the necessary application to the Chief Commissioner or to such other competent authority as may have been empowered to grant the necessary sanction to transfers like the one in question, and further that within one month of the receipt of that sanction she shall convey to the plaintiffs the property in suit. In the event of the sanction being refused, the plaintiffs shall be entitled to the damages as decreed by the High Court” .

The observations in **Mrs. Chandne Widyavati Madden (10 supra)** aptly apply to the facts of the present case. Undoubtedly, as per its terms, the PPA will be enforceable subject to the approval by this Commission. It is a matter of practice, nay convention, that the DISCOMs apply for approval of the PPAs by approaching this Commission. Indeed, the Commission, while giving its in principle approval for the DISCOMs’ proposal, directed the latter to submit detailed proposals for approval of the PPA. So much so, a legitimate duty was cast on the DISCOMs, to have filed a petition for approval of the PPA. Instead of carrying out this implied obligation, the

DISCOMs have gone to the extent of rescinding the PPA on jejune grounds, which will be discussed, in detail, while dealing with Point No.4. Thus, the DISCOMs are solely responsible for non-fulfilment of the condition in the PPA, thereby rendering the PPA unenforceable. Having thus failed to discharge their obligation, the DISCOMs cannot be permitted to raise the plea that being the contingent contract, it is not enforceable. While in law a contingent contract is not enforceable unless the specified event has happened, the DISCOMs are certainly not entitled to take the plea that since the event has not happened, the terms are not binding on it. In our opinion, when a solemn agreement is entered into between the parties having reciprocal obligations, they bind both the parties. It is only when any of the parties failed to fulfil their promises, that the other party is entitled to resist performance of its obligations under the contract. It is not the case of the DISCOMs that the VPSPL has committed any breach of its obligations. It is only after the VPSPL has complied with the conditions of LOI, viz., furnishing of performance guarantee etc., the DISCOMs have entered into a PPA. Being parties to the PPA, the DISCOMs started insisting on reducing the tariff, which amounts to variation/modification of the term of the PPA. As noted earlier, as the VPSPL refused to agree for such modification/reduction, the APSPDCL has rescinded the contract.

In **Suresh Kumar Wadhwa (1 supra)** the Supreme Court held:

“26. Equally well-settled principle of law relating to contract is that a party to the contract can insist for performance of only those terms/conditions, which are part of the contract. Likewise, a party to the contract has no right to unilaterally “alter” the terms and conditions of the contract and nor they have a right to “add” any additional terms/conditions in the contract unless both the parties agree to add/alter any such terms/conditions in the contract.

27. Similarly, it is also a settled law that if any party adds any additional terms/conditions in the contract without the consent of the other contracting party then such addition is not binding on the other party. Similarly, a party, which adds any such term/condition, has no right to insist on the other party to comply with such additional terms/conditions and nor such party has a right to cancel the contract on the ground that the other party has failed to comply with such additional terms/conditions”.

The action of the APSPDCL in insisting on the VPSPL to alter the terms and conditions of the contract by reducing the agreed tariff is thus in the teeth of the above settled legal proposition.

In **City Bank N.A. (2 supra)**, the Supreme Court, having considered the effect of Sections 41, 61, and 62 of the Indian Contract Act, 1872, held as under:

“ 47. Novation, rescission or alteration of a contract under Section 62 of the Indian Contract Act can only be done with the agreement of both the parties of a contract. Both the parties have to agree to substitute the original contract with a new contract or rescind or alter. It cannot be done unilaterally. ...”

In the light of the above discussed ratio in **City Bank N.A. (2 supra)**, the impugned proceedings of the APSPDCL in unilaterally rescinding the PPA is not sustainable.

We shall now discuss the judgments on which the respondent-DISCOM placed reliance.

As regards the judgment of the Calcutta High Court in **Narain Vs. Ankholy (5 supra)**, from the Short Notes submitted by the learned Standing Counsel for the DISCOMs, it could be seen that the said Judgment is relied upon for the proposition that as long as the condition in the PPA remains unfulfilled, there can be no right of action on the contract, either for specific performance or for some other relief. In our opinion, this judgment is of no

avail to the APSPDCL because the condition in the PPA on hand for its enforceability pertains to its approval by this Commission. Since the APSPDCL failed to take steps for the approval of the PPA, it cannot take advantage of its own default and plead that the PPA cannot be enforced in the absence of the Commission's approval.

In **Raghu Rama Renewable Energy Limited Vs. Tamilnadu Electricity Board**¹¹ the APTEL held that it is incumbent on the parties to a PPAs to get the PPA approved from the State Commission. In **Hinduja National Power Corporation Ltd., (3 supra)** the APTEL addressed the question whether a generating company is prohibited from seeking approval of the PPA and answered the said question in the negative. It has held that the Commissions constituted under the Electricity Act, 2003 have a duty and responsibility under Section 86(1)(b) of the Act to examine whether to grant approval or not of a PPA brought before it and that, in that process, the Commissions have the obligation to look into various aspects, including public interest, and decide whether the PPA should be approved or not, at the instance of the generating company.

We are, therefore, of the opinion that if the Procurer, being a party to the PPA, fails to institute the required proceedings for approval of the PPA, the Generator, being the other party to the PPA, is not barred under the existing legal environment from moving this Commission for approval of the PPA.

The learned Standing Counsel for the DISCOMs has relied upon the Judgment of the Supreme Court in **Energy Watchdog and others (6 supra)**

¹¹) Appeal No.126 of 2010

in support of his contention that the PPAs are Contingent Contracts. As discussed earlier, the enforceability of a PPA depends upon its approval by the appropriate Commission.

Under Section 32 of the Indian Contract Act, a Contingent Contract cannot be enforced by law unless and until the specified event has happened. The said provision further provides that if the event becomes impossible, such contract becomes void. It is not the case of the respondent that the contingency of approval of the PPA by the Commission is an impossible event. It is only when this Commission does not give its approval to the subject PPA, then only the respondent will be relieved of its obligations under the PPA and not until then. The Judgment in **National Agricultural Cooperative Marketing Federation of India (7 supra)** dealt with the question of enforceability of a Foreign Award under the Foreign Awards Act. The Judgment has discussed the provisions of Section 32 of the Contract Act and held that, on the facts of that case, Section 32, and not Section 56, of the Contract Act was attracted. As the Judgment in that case turned on its own facts, which has no similarity to the facts of the present case, the same has no relevance. The Judgment of the APTEL in **SunE Solar B.V (8 supra)** was the next one on which the learned Standing Counsel has placed reliance in support of his plea that even after the LOI was issued, the DISCOMs have the freedom to cancel the same if the public interest so warrants. In the said case, the question was whether LOI constituted a Binding Contract. The APTEL, based on various clauses of RFP, held that the LOI by itself cannot be termed as a Concluded Contract and that the Procurer, viz., BSES

Rajdhani Power Limited (BRPL), New Delhi, was entitled to cancel the LOI for germane reasons.

The learned counsel for the VPSPL, however, relied upon another Judgment dated 02-2-2018 of the APTEL in **M/s. DB Power Ltd., Vs. Rajasthan Electricity Regulatory Commission**¹². A coordinate Bench of the Tribunal, speaking through Justice N.K.Patil, Judicial Member, who was incidentally a Member of the Bench which decided **SunE Solar B.V. case (8 supra)** has taken judicial notice of its earlier Judgments in **Lanco Kondapalli Power Private Limited Vs. Haryana Electricity Regulatory Commission and another (Appeal No.156 of 2009) and Essar Power Limited Vs. UPERC and others (Appeal No.82 of 2011)**. In the first mentioned case it was held that the contract came into existence when LOI was issued even before the PPA was drawn up and executed; in the latter case the Tribunal held that the Procurer shall issue LOI in favour of the bidder and PPA should be signed with him and with nobody else. Relying upon the said Judgment, the APTEL in **M/s. DB Power Ltd., (12 supra)** held that where the competitive bid is governed by the guidelines, the advance approval of the Commission has to be obtained in respect of the quantum of power to be procured and the lowest bidder is entitled to have the LOI issued to him and PPA executed with him. The Tribunal further held that in a case governed by Section 63 of the Act, enforceable contractual rights and obligations arise on the completion of the bidding process and issuance of the LOI even before the execution of the PPA.

¹²) Common Judgment dt.02-2-2018 in Appeal Nos.235 and 191 of 2015 of the APTEL.

The learned Standing Counsel for the DISCOMs, however, contended that the Judgment in **M/s.DB Power Ltd., (12 supra)** will apply where bidding was held in a transparent manner following the guidelines issued by the Government of India and that in the instant case when the bids were held, the guidelines of the Government of India were not in place and, therefore, the Judgment in **M/s.DB Power Ltd., (12 supra)** may not apply to the present case.

This aspect need not detain the Commission for long, because, in the instant case, issuance of LOI was followed by a duly concluded contract in the form of a PPA after the VPSPL has complied with the conditions contained in the LOI, such as, furnishing of Performance Guarantee etc. As rightly pleaded by the VPSPL, with the execution of the PPA, the bidding process comes to a close and neither party can wriggle out of their respective contractual obligations unilaterally. Unless such a concluded contract suffers from any of the legal infirmities envisaged under the Indian Contract Act, 1872, the parties cannot back out of the contract. However, enforceability of the PPA depends upon its approval by this Commission. As already noted, as held by the Supreme Court in **City Bank N.A. (2 supra)**, once the contract is concluded, it cannot be unilaterally rescinded unless the parties to the contract mutually agree for such rescindment as adumbrated under Section 62 of the Indian Contract Act, 1872. Similarly, APSPDCL had no right to insist upon VPSPL to reduce the tariff as held in **Suresh Kumar Wadhwa (1 supra)**. Therefore, the impugned proceedings unilaterally rescinding the contract is illegal and nonest in law.

As regards the Order of this Commission in **M/s.Vibrant Greentech India Pvt. Ltd., Vs. Southern Power Distribution Company of A.P. Ltd¹³**, a perusal of the same shows that it mainly turned on its own facts. It was held therein that since the PPA was entered by the DISCOM contrary to the specific direction given by the Government of Andhra Pradesh that no fresh PPA could be entered into without its approval, the same is not enforceable. Hence, the said Order is not of any help to the DISCOM.

The next aspect is whether VPSPL is entitled to seek enforcement of the PPA.

Once there is a binding contract between the parties, either party is entitled to seek its enforcement. However, in addition to the Indian Contract Act, PPAs are governed by the Electricity Act, 2003. Though the terms of the PPA bind the parties, their enforcement is subject to approval by the appropriate Commission. Section 61 of the Electricity Act, 2003 enjoins upon the appropriate Commission to prescribe the terms and conditions for determination of the tariff. While laying down such terms and conditions, the Commission shall be guided by various aspects as contained in Clauses (a) to (i) of Section 61 of Electricity Act, 2003. For better appreciation Clauses (a) to (i) are reproduced hereunder:

“(a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;

(b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;

(c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;

¹³) Common Order dated 05-7-2021 in OP Nos.9 and 20 of 2020.

- (d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;
- (e) the principles rewarding efficiency in performance;
- (f) multi year tariff principles;
- (g) that the tariff progressively reflects the cost of supply of electricity and also, reduces and eliminates cross-subsidies within the period to be specified by the Appropriate Commission;
- (h) the promotion of co-generation and generation of electricity from renewable sources of energy;
- (i) the National Electricity Policy and tariff policy”

The Act provides for determination of tariff by the Commission in two different methods - one under Section 62 and the other under Section 63 of the Act. While under Section 62, the determination of tariff is made in accordance with the provisions of the Act and the Tariff Regulations framed under Section 61 of the Act; under Section 63 the Commission shall adopt the tariff if such tariff has been determined through transparent bidding process in accordance with the guidelines issued by the Central Government. As noted earlier, the case of the APSPDCL is that though the bidding process was undertaken in a transparent manner, when the bids were held, the guidelines issued by the Central Government were not in existence.

One should not, however, lose sight of the fact that the DISCOMs have conceived the method of procurement of power from the New Mini Hydel Projects through a competitive bidding process as per the National Electricity Policy issued by the Ministry of Power, vide: its Resolution dated 28-1-2016, for conducting competitive bidding process. To briefly recapitulate the facts already noted, having secured the approvals of this

Commission as well as that of the Government of Andhra Pradesh, the DISCOMs have prepared RfS documents together with PPA and floated on e-procurement platform. When the DISCOMs sought for approval of model Power Purchase Agreement, the Commission has directed the DISCOMs to re-examine whether there is need and necessity to go ahead with the bidding process in view of the surplus power situation prevailing in the State. After further examination, the DISCOMs have reported back to this Commission that there is every need for procuring power and requested approval to open the bids for evaluation of the tariff. The DISCOMs also informed the Commission that if the bid quoted tariff is equal to the Pooled Power Purchase Cost, then they will purchase the power from the Mini Hydel Projects, else they will cancel the bids.

These events would, without any cavil of doubt, indicate that the DISCOMs have evolved their own methodology of processing the bids with the approval of the Commission, after being thoroughly satisfied about the need to procure power with a clear idea of how much should be the tariff, since the DISCOMs have laid down the benchmark for acceptance of the tariff as not more than the Pooled Power Purchase Cost. Though in their bids the three Companies, including the petitioner herein (VPSPL), have offered the tariff varying between Rs.5.69 ps., and Rs.5.76 ps., the DISCOMs, in line with their targeted tariff, have brought the Developers to the negotiating table and made them bring down the tariff to the level of Pooled Power Purchase Cost. After initially returning the DISCOMs' proposal for approval of the said tariff, this Commission has entertained the fresh

proposals from the APSPDCL after determination of the Pooled Power Purchase Cost for the FY 2016-17 to be considered for FY 2017-18. After thorough examination of the said proposals, this Commission has communicated its in-principle approval for procurement of power at the reduced tariff of Rs.3.73 ps., per unit, which is, in fact, less than Rs.3.741 per unit determined as Pooled Power Purchase Cost. for FY 2016-17 to be considered for FY 2017-18. When so much exercise was preceded by the in-principle approval granted by this Commission, both the parties have moved too far further to the point of no return viz., the DISCOMs issuing LOI subject to various conditions to be complied with by the VPSPL, the latter complying with all those conditions, and, eventually, both the parties entering into a Concluded Contract by way of PPA. All this exercise was sought to be set at naught by the DISCOMs. The DISCOMs have come out with a new condition through its letter No.CGM/(IPC)/APSPDCL/F.Minor Hydel Bidding/D.No.--/20 dated 28-1-2020 to reduce the tariff to Rs.2.43 ps. per unit for supplying power by the Developers. As this was not agreed to by the VPSPL and the other two Developers, the DISCOMs have purportedly rescinded the PPA. In doing so, the DISCOM-APSPDCL has indicated the following reasons for their decision to rescind the PPA:

- 1) Due to precarious financial position of the DISCOMs, the draft PPA was not submitted by them to the Commission for approval;
- 2) In the competitive bidding across the country, low tariffs to the extent of Rs.2.43 ps., per unit were offered and that the petitioner was requested to reduce the tariff accordingly;

- 3) As per Clause 3.16 of RfS, the Authorised Representative reserves the right to reject any or all of Bids or cancel the Bid process without assigning any reasons whatsoever and without any liability;
- 4) As per the terms of the PPA, the sam would come into force after approval of the Commission, which has not taken place;
- 5) Under Section 21 of the A.P. Electricity Reform Act, the PPA without the consent of the APERC is void;
- 6) The DISCOMs are having large quantity of surplus power from approved sources having binding PPAs, particularly, Renewable Energy Projects, due to which many thermal stations are now facing backing down condition, and, hence, the DISCOMs are liable to pay fixed charges unnecessarily without availing power;
- 7) The DISCOMs have been suffering heavy losses and came to a situation where they are unable to pay monthly power bills from June, 2018 onwards;
- 8) In the case of Wind Power Developers, the High Court has granted interim direction directing the DISCOMs to pay an interim tariff of Rs.2.43 ps., per unit and the DISCOMs are not able to pay the monthly bills regularly even at the rate rate fixed in the said interim direction; and
- 9) The DISCOMs' borrowing capacity has already exhausted and no financial institutions are coming forward to lend money to the DISCOMs; and that any further procurement of power under long

term PPA from Renewable Energy Projects at tariff more than Rs.2.43 ps., per unit would be detrimental to the interest of the end consumers in the State;

As a result of *consensus ad idem*, once a contract is concluded, the same cannot be unilaterally rescinded, as observed hereinbefore. Such a contract has to be either mutually rescinded or a party can approach the Court for relieving him from the contractual obligations on the ground of frustration of contract under Section 56 of the Indian Contract Act. **In M/s. Alopi Parshad & Sons Ltd., Vs. Union of India**¹⁴, the Supreme Court held that the Contract Act does not enable a party to a contract to ignore the express covenants thereof and to claim payment of consideration, for performance of the contract at rates different from the stipulated rates, on a vague plea of equity. It was further held that parties to an executory contract are faced, in the course of carrying it out, with a turn of events which they did not at all anticipate, for example, a wholly abnormal rise or fall in prices which is an unexpected obstacle to execution. This does not in itself get rid of the bargain they have made. It is only when a consideration of the terms of the contract, in the light of the circumstances existing when it was made, showed that they never agreed to be bound in a fundamentally different situation which had unexpectedly emerged, that the contract ceases to bind. It was further held that the performance of a contract is never discharged merely because it may become onerous to one of the parties. In **Naihati Jute Mills Ltd., Vs. Hyaliram Jagannath**¹⁵, after

¹⁴) 1960 (2) SCR 793

¹⁵) 1968 (1) SCR 821

relying on the celebrated Judgment in **Satyabrata Ghose Vs. Mugneeram Bangur & Co., (1954 SCR 310)**, the Supreme Court held that a Contract is not frustrated merely because the circumstances in which it was made are altered; and that the Courts have no general power to absolve a party from the performance of its part of the contract merely because its performance has become onerous on account of an unforeseen turn of events. The entire case law on the subject was thoroughly discussed in the decision in **Energy Watchdog and others (6 supra)** by the Supreme Court, which held that merely on account of additional liability to pay for the incremental coal cost the fundamental basis of the PPA does not get altered and that, therefore, the procurer cannot avoid performance of the PPA.

The above discussed case law is an answer to the stand of the DISCOMs that due to various subsequent events, they are unable to perform their part of obligations under the PPA by procuring power at the tariff as agreed between the parties. While there is a serious doubt on the correctness of the statement that the tariffs have come down to the level of Rs.2.43 ps., per unit, which has not been substantiated by the DISCOMs, we refrain from delving into this aspect because of two reasons, viz., (1) as held by the Supreme Court mere increase or reduction in prices after entering into the Contract would not alter the position of the parties and relieve them from discharging their obligations under the Contract; and (2) the DISCOMs have taken a conscious decision to accept the tariff if the same is not less than the Pooled Power Purchase Cost. As noted above, the agreed tariff is slightly below the Pooled Power Purchase Cost, as

determined by this Commission. Therefore, the DISCOMs cannot resile from its contractual obligations on the purported ground of subsequent reduction in tariffs. Indeed, the DISCOMs have not produced any PPA entered by them in the State of Andhra Pradesh for such reduced tariffs.

As regards the reasonableness of the tariff agreed under the PPA, in our opinion, after a thorough examination this Commission itself has accorded in-principle approval as far back as 30-5-2018 for Rs.3.73 ps., per unit, which was in fact a negotiated price being much lower than Rs.5.70 ps., offered by VPSPL. Evidently as this tariff was almost equal to the Pooled Power Purchase Cost, this Commission has lent its seal of approval. Therefore, the DISCOMs having acted upon this approval by issuing LOI and entering into the PPA, we do not find any reason to embark upon further exercise to redetermine the tariff at this stage.

As regards the alleged availability of surplus power, which is one of the grounds taken in the order rescinding the PPA, it is undeniable that the DISCOMs have day in and day out been purchasing power from the market spending huge money. During the last year (FY 2021-22) all the three DISCOMs have purchased 11,773 million units of power from the market by spending Rs.6,256/- crores, at an average cost of Rs.5.31 ps., per unit. Therefore, it is idle to contend that either the DISCOMs do not need the power contracted with the VPSPL or the tariff of Rs.3.73 ps is higher than that available in the market. Hydel Power being more consistent when water is available than the Wind and Solar Power, the same could be used as base load during the season when water is available. Therefore, it is in public

interest that the DISCOMs buy such power from the VPSPL. Moreover, the Commission is charged with the duty of promoting generation of electricity from renewable sources of energy under Section 61(h) of the Electricity Act, 2003. In the light of the above reasons, we are of the considered opinion that the VPSPL is entitled to seek enforcement of the PPA dated 16-2-2019. We also hold that the impugned letters referred to in Point No.2 supra, are illegal and invalid. Further, Review Petition No.3 of 2020 is liable to be dismissed, both, on merits, as discussed above, and also as time barred, as admittedly there is a delay of two years in filing the Review Petition, for which no explanation is offered. .

Points 1, 2 and 4 are accordingly answered.

Point No.3: Whether the VPSPL is entitled to any relief; and, if so, to what extent?

In the Original Petition filed by VPSPL, it has, inter alia, sought for approval of the Power Purchase Agreement, dated 16-2-2019 and a direction to the APSPDCL to amend the definition of “Scheduled COD” in Article-1 of the PPA dated 16-2-2019 to provide for 24 months from the date of approval of the PPA.

The Scheduled COD has been defined in the PPA as under:

"Scheduled COD" shall mean the date when all the generating Unit(s) are commissioned and where upon the Developer is required to start injecting power from the Project to the delivery point i.e. Twenty Four (24) months from the Effective Date of signing of the PPA”.

After the PPA was entered on 16-2-2019, the APSPDCL has not taken any obligatory steps to submit the same to the Commission for approval and that it has, instead, sent a letter on 06-9-2019 to the VPSPL stating that it

had been resolved at the APPCC meeting held on 22-8-2019 to renegotiate with VPSPL and requested VPSPL to attend the meeting on 16-9-2019. In the said meeting, VPSPL was asked to indicate its willingness to reduce the tariff. As it was not possible for such reduction, VPSPL has sent a reply on 24-9-2019, whereunder it was stated as under:

“ (a) It was not possible to consider any further reduction in price pointing out that the price was also reduced to Rs 3.73 per unit, being the average pooled power purchase cost for 2017-18, despite the L.1 price of Rs 5.69 having been discovered in the competitive bidding process and despite the CERC determined tariff at that time being Rs 5.74 per unit for projects of less than 5 MW capacity.

(b) The PPA had not yet been submitted by the Respondent to the APERC for approval, and that the project is not bankable in the absence of APERC approval, and that the Petitioner is not able to proceed further with the project by obtaining term loans and attaining financial closure, and that the reopening of the price at this stage had further aggravated the issue with financial institutions already wary about financing power projects in Andhra Pradesh.

(c) It was requested that PPA be expeditiously sent for approval of APERC and to allow at least 24 months from the date of APERC approval for the CoD of the project by a suitable amendment to the PPA”.

Thereafter, the APSPDCL addressed one of the impugned letters dated 28-1-2020 asking the VPSPL to reduce the tariff to Rs.2.43 ps., per unit and the same was followed by the proceedings dated 22-9-2020 rescinding the PPA. Nowhere the APSPDCL has alleged that due to the default on the part of the VPSPL the Project could not be completed within the time stipulated in the PPA. On the contrary, the above facts pleaded by the VPSPL have not been disputed. These undisputed facts clearly show that it is only due to the conduct of the APSPDCL that the VPSPL could not ground the Project and complete the same within the stipulated time.

In this fact situation and, more so, as it is held that the action of the APSPDCL in rescinding the PPA is illegal, it is, but, just and proper to direct

the parties to amend the definition of “Scheduled COD” in Article-1 of the PPA dated 16-2-2019 so as to commence the period of 24 months from the date of this order approving the PPA. Accordingly, the APSPDCL is directed to take appropriate steps for such an amendment and complete the same within one month from today. The remaining terms of the PPA shall stand unaltered and bind both parties.

In the result, the OP is allowed to the extent indicated above.

Sd/-
Thakur Rama Singh
Member

Sd/-
Justice C.V.Nagarjuna Reddy
Chairman

Sd/-
P. Rajagopal Reddy
Member

