



ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION

4thFloor, Singareni Bhavan, Red Hills, Hyderabad 500004

WEDNESDAY, THE TWENTY FOURTH DAY OF AUGUST
TWO THOUSAND AND TWENTY TWO

:Present:

Justice C.V. Nagarjuna Reddy, Chairman
Sri P. Rajagopal Reddy, Member
Sri Thakur Rama Singh, Member

O.P.No.76 of 2021

Between

Spectrum Power Generation Limited, MCH No. 6-3-1093,
Space No. 602, 6th Floor, VV Vintage Boulevard,
Raj Bhavan Road, Somajiguda, Hyderabad - 500 082.

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... Petitioner

A N D

1) Southern Power Distribution Company of AP Ltd,
D.No.19-13-65/A, Tiruchanoor Road,
Tirupathi, Chittoor District, Andhra Pradesh.

2) Eastern Power Distribution Company of A.P. Ltd
Corporate Office, P&T Colony, Seethammadhara, Visakhapatnam.

... Respondents

This Original Petition has come up for hearing finally before us on 24-8-2022 in the presence of Sri S.Ravi, Senior Counsel and Sri T.Uma Sankar and M.Naga Deepak, learned counsel for the petitioner; and Sri P. Shiva Rao, learned Standing Counsel for the respondents, upon carefully considering the material available on record and after hearing the arguments of the learned counsel for both parties, the Commission passed the following:

ORDER

This O.P., is filed for the following reliefs:

“In the facts and circumstances mentioned herein above, it is respectfully submitted that this Hon'ble Commission may be pleased to:

a) admit the petition and adjudicate on the disputes which have arisen between the Petitioner and Respondents in regard to the balance Fixed Cost payment of Rs. 16.04 Crores to be released to M/s. SPGL for the FY 2018-19;

b) direct the Respondents to release the withheld amounts of Rs.2,42,94,888/- for power supplied during December, 2020 and Rs.1,78,07,671/- for power supplied during April, 2020;

c) declare the action of the Respondents in adjusting an amount of Rs.24,28,81,776/- under the pretext of excess amounts as being void, illegal, without authority of law and barred by limitation;

d) direct the Respondents to make payment of the balance withheld Fixed Cost amount of Rs.16.04 Crores to M/s. SPGL in terms of the proceedings dtd. 20th December 2019 in OP No. 27 of 2019 before this Hon'ble Commission along with interest at the rate of 24% from the date of due to till the date of realisation on the total Fixed Cost amount of Rs.37.92 Crores; and

e) pass any such further Order or Orders as this Hon'ble Commission may deem just and proper in the circumstances of the case”.

The facts of the case, in brief, are that after expiry of the PPA, which was initially entered into in the year 1997, the respondents requested the petitioner to continue to supply power at the tariff as prescribed in the expired PPA. A series of such letters could be found on record, commencing from 18-4-2016. Such letters were addressed every month thereafter. It will suffice if the contents of the letter dated 18-4-2016 addressed by the Chief Engineer, Commercial, APPCC, Vidyuth Soudha, Hyderabad, to the petitioner, are extracted:

“Lr.No.CE(Comml.)/Trading/IPP/F.No.SPGL-144/D.No.27/16, dt.18-4-2016.

Sir,

Sub: Expiry of term of PPA by 18.04.2016 Extension of PPA up to 18.05.2016
to Exercise appropriate option by APDISCOMs to during extension
extension Schedule entire power only to DISCOMs of Andhra Pradesh
State - Reg.

Ref: Power Purchase Agreement dated 23.01.1997.

With reference to the above subject, it is to inform that, as per the Article-7 of PPA, upon expiry of PPA, APDISCOMs can opt for either Renewal of PPA or buyout the project as per the procedure specified in Schedule-A of the PPA.

AP DISCOMs being Government companies need the nod of GoAP for exercising any of the options that are provided in the PPA, which may take about a month's time. Hence, it is proposed to extend the PPA for a period of one month i.e. up to 18.0.2016 without prejudice to the rights of APDISCOMs, and **during the said extended period tariff will be paid as per the terms and conditions of extant PPA.**

In this regard, you are requested the following:

- i. Upon expiry of PPA i.e. form 19.04.2016 at 00.00hrs schedule the entire power only to APDISCOMs (APSPDCL & APEPDCL)
- ii. To give concurrence to the extension of PPA for one month with a liberty to APDISCOMs to exercise option either for Renewal of PPA or Buyout of the project, during the said extended period of PPA.

As such, you are requested to give concurrence for the said request of APDISCOMs in writing along with acknowledgement of the receipt of this letter”.
(Emphasis added)

Though there was no PPA between the parties, the respondents proposed purchasing of power from the petitioner at the rate as prescribed in the expired PPA before this Commission for the year 2016-17. This Commission vide its Tariff order dated 31-3-2016 has accepted the respondents’ plea and vide Annexure-7 has approved the Energy Despatch from the petitioner’s station at a Power Purchase Cost of Rs.3.72 ps. Having received the power, the respondents have paid at Rs.3.72 ps.

Later disputes between the parties arose on two aspects, viz., (1) payment of fixed charges based on the actual PLF achieved during the period FY 2018-19 instead of at 40% PLF fixed by this Commission; and (2) payment of variable charge towards increase of fuel cost as a pass-through.

The Commission while granting the first mentioned relief on concession by the respondents, however, rejected the second relief. As the respondents owed certain monies to the petitioner, following grant of the first mentioned relief, at that stage, they have sought to withhold certain amounts from the dues payable to the petitioner on the purported ground that they have paid excess tariff to the petitioner for the FY 2016-17.

During the hearing, Sri S.Ravi, learned Senior Counsel for the petitioner, took the Commission through the correspondence, which includes letters dated 18-4-2016, 17-5-2016, 18-6-2016, 18-7-2016, 18-8-2016, 17-9-2017 and 18-10-2016, and submitted that the respondents have unequivocally committed themselves to pay the Tariff for the period from 18-4-2016 to 18-5-2017 at the Tariff fixed under the expired PPA, which is Rs.3.72 ps., and that having so agreed, the respondents cannot unilaterally withhold a part of the amounts payable to the petitioner for the subsequent period on the purported ground of payment of excess amount for the FY 2016-17.

Sri P.Shiva Rao, learned Standing Counsel for the respondents sought to justify the action of the respondents on the ground that there was no approved Tariff for the FY 2016-17 and that during the year 2017-18 the petitioner itself has offered to supply power at the reduced tariff of Rs.3.31 ps. The learned Standing Counsel further

submitted that in the absence of approved Tariff for the FY 2016-17, the series of letters addressed by the Chief Engineer, Commercial, APPCC, Vidyuth Soudha, Hyderabad from 18-4-2016 onwards, as referred to above, is not enforceable in law. The learned Standing Counsel further submitted that the action of the respondents in receiving power and paying Tariff as per the expired PPA without the Commission's approval is illegal and no sanctity could be attached to the commitment of the respondents. He further submitted that he will advise the respondents to come up with a petition for fixation of the Tariff for the year 2016-17.

Having carefully considered the respective submissions of the learned counsel for the parties, we are of the opinion that the respondents have been taking inconsistent stands at different points of time. Having unequivocally committed themselves to receive power supply at the Tariff fixed under the expired PPA, they have altered their stand on the ground that such commitment has no sanctity in law as the authority vests with this Commission to fix the Tariff under Section 62 of the Electricity Act, 2003 (for short "the Act").

As far as the legal proposition, which the respondents' Standing Counsel advanced, viz., that the Commission alone is vested with the authority to fix the Tariff is concerned, there can be no quarrel thereon. However, we are very much disturbed with the conduct of the respondents in making their commitment overlooking the provisions of the Act, compelling the petitioner to supply power on the assurance that they will pay as per the Tariff fixed under the expired PPA and then seeking to go back on it on the purported realisation that such commitment is contrary to the

provisions of the Act. One needs to take note of the fact that they made a proposal before this Commission for the despatch of power from the petitioner at Rs.3.72 ps., which was accepted by this Commission. However, we hasten to add that such approval cannot be termed as a final approval in terms of Section 62 of the Act. However, the question is - till Tariff is finally fixed in the proposed petition to be filed by the respondents, whether the respondents are justified in seeking to recover the amounts already paid to the petitioner, unilaterally assuming that they have paid excess Tariff for the year 2016-17, contrary to their own specific commitment? Our answer to this question is in the negative. While the respondents are entitled to file a petition seeking fixation of the Tariff for the year 2016-017 post-facto, however, they are not entitled to recover any part of the Tariff paid in pursuance of their firm commitment on the mere hypothesis of excess Tariff having been paid. Such an action constitutes arbitrariness and unfairness.

In these facts and circumstances, without adjudicating on the actual Tariff payable to the petitioner by the respondents for the FY 2016-17 and reserving right of the respondents to file an application for this purpose, we hold that the respondents are not entitled to recover any amount from the petitioner or withhold any amount payable to the petitioner on the purported ground that they have paid excess amount to the petitioner for the FY 2016-17.

The OP is accordingly allowed to the extent indicated above.

Sd/-
Thakur Rama Singh
Member

Sd/-
Justice C.V. Nagarjuna Reddy
Chairman

Sd/-
P. Rajagopal Reddy
Member