ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION

Vidyut Niyantrana Bhavan, Dinnedevarapadu Road, Kurnool - 518 002, Andhra Pradesh

TUESDAY, THE EIGHTEENTH DAY OF JUNE

TWO THOUSAND AND TWENTY-FOUR

(18.06.2024)

Present

Justice C.V. Nagarjuna Reddy, Chairman

Sri Thakur Rama Singh, Member

Sri P.V.R. Reddy, Member

RP No. 3 of 2021 in O.P. NO. 33 OF 2019 AND 35 OF 2018 (PART)

Andhra Pradesh Power Generation Corporation Limited (APGENCO),

....Petitioner

This Review Petition has come up for final hearing before the Commission on 20.12.2023 in the presence of Sri S.V. Ramana, Counsel representing Sri O.Manohar Reddy, learned Counsel for the Petitioner; and Sri P. Shiva Rao, learned Standing Counsel for the Respondents. After hearing the argument of the learned Standing Counsel and carefully considering the material available on record, the Commission passes the following:

ORDER

1. The petitioner APGENCO filed this petition on 25.03.2021 under section 94 (1) (f) of the Electricity Act, 2003, read with Regulation 49 (1) of the APERC Conduct of Business Regulation 1999, seeking review of the Commission Order dated 31.12.2020 in O.P.No. 33 of 2019 in the matter of granting consent to the amended and restated PPA of RTPP-IV & O.P.No. 35 of 2018 (Part) in the matter of determination of the Tariff of RTPP-IV for the FY 2018-19 to FY 2023-24.

2. The averments of the petitioner in brief are as follows:

   i. **IDC on account Delay due to rains:** For the months from August 2017 to November 2017, the rainfall was 224.7 mm, 181.99 mm, 221.77 mm and 36.44 mm. In view of the heavy rains, the labour colony was submerged, and the labour could not be employed. However, though the hampering of work for four months due to heavy rain was acknowledged in the Order, the Commission considered only a two-month delay for the computation of IDC. Hence, the review is sought to consider a 4-month delay instead of 2 months for the computation of the IDC due to rains. Accordingly, the capital cost and fixed costs need to be revised.

   ii. **IDC due to delay in land acquisition:** The RTPP Stage-IV commercial operation declaration (COD) was on 29-03-2018. The Commission considered CERC Tariff Regulations 2014 and disallowed the delay in land acquisition while determining the capital cost and tariff. The CERC has allowed the IDC owing to a delay in

land acquisition, considering it an "uncontrollable factor" in the orders issued for certain projects during FY 2014-19. Though the Commission acknowledged the delay in land acquisition in its Order, it has disallowed the same by applying CERC Tariff Regulations 2014. The CERC Tariff Regulation 2019 applicability is from 01.04.2019. As per CERC Tariff Regulations 2019, Land acquisition is an uncontrollable factor except where the delay is attributable to the generating company or the transmission licensee. Though the CoD of the project was declared on 29.03.2018, and the delay in the land acquisition was due to factors beyond the control of APGENCO, as the orders for tariff determination were issued on 31.12.2020 after CERC tariff Regulations came into force from 01.04.2019, the Commission ought to consider the CERC tariff Regulations 2019 instead of the Tariff Regulations 2014 and allow the delay of 16 months in land acquisition treating it as an uncontrollable factor for computation of the IDC. However, for tariff determination from 01.04.2019, the CERC Tariff Regulations 2019 may be applied.

iii. **Return On Capital Employed (ROCE):** The Commission has deducted accumulated depreciation from the 1st year instead of deducting it from the 2nd year. As per clause 12.1 of APERC Regulation 1 of 2008, ROCE shall be calculated based on the original capital cost minus accumulated depreciation and the addition of working capital. For the financial year 2018-19, there is no accumulated depreciation being the first year of operations. However, the Commission has deducted the depreciation from the capital cost

for the financial year 2018-19. Consequently, the accumulated depreciation would vary from FY2018-19 to FY2023-24. Thus, there is an apparent error in the order, and hence, the review sought to revise the ROCE from FY2018-19.

iv. **Prospective effect of the normative availability:** APGENCO and APDISCOMS have entered into the PPA with 80% availability in line with APERC Regulation 1 of 2008. The Commission issued orders with a normative availability of 85 percent as per the CERC Tariff Regulations. All the orders have to be followed prospectively. Hence, the review is sought to consider the date of applicability of the availability of 85 percent from the date of issue of orders, i.e., 31-12-2020, and not from the date of COD. Accordingly, the tariff revision is sought.

3. In response to the notice issued by the Commission, APDISCOMS have filed a counter on 16.08.2021. The main submissions of the DISCOMS in their counter are that all the points raised by APGENCO were already canvassed in their original petition. After due analysis and the reasons recorded therein, the Commission has given distinct findings on each of the items/components. Under the guise of the Review petition, the petitioner is trying to canvass the grounds that can be urged in Appeal. As such, the review petition deserves to be dismissed at the threshold without examining the merits or otherwise of the claims.

4. On merits, it was averred that the claim to apply the CERC Regulations 2019 instead of the CERC Regulations 2014 is incorrect. As per the record, the plant achieved CoD on 29.03.2018, which is well within the

limit of the control period envisaged in the CERC Tariff Regulations 2014.

Commissions Analysis and Decision

5. With regard to the respective pleadings of the Petitioner and APDISCOMS, the point that arises is whether the grounds urged by the Petitioner, APGENCO, fall within the parameters of review and, if so, whether the petitioner is entitled to any relief. Before discussing the grounds, it is necessary to discuss the scope of Review under Section 94(1)(f) of the Act. This Commission thoroughly discussed this aspect in its common order dated 4-8-2020 in R.P.No.1/2019 in O.P.No.30/2018 and R.P.No.3/2019 in O.P.Nos.28 and 29 of 2018 in **M/s. Tirumala Cotton & Agro Products Pvt. Ltd. and another Vs. M/s. Transmission Corporation of A.P. Ltd. and others.** It is useful to reproduce the relevant portion of the order hereunder:

" ..... Section 94(1)(f) of the Electricity Act (for short "the Act")" confers the power of review of its decisions, directions and orders on the Commission. However, neither the Act nor the Rules framed thereunder indicated any parameters for exercise of this power. In the absence of any indicia, it is not only apt but also permissible to follow the law laid down by the constitutional courts in this regard. In Sow Chandra Kanta & Another Vs. Sheik Habib (1975 SCC (4) 457) the Hon'ble Supreme Court held that a review of a judgement is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. In P.N. Eswara Iyer vs. The Registrar, Supreme Court of India (1980 AIR 808), a constitution bench of the

Supreme Court reaffirmed the ratio in Chandra Kanta (1 supra). In Shri Ravinder Kumar Vs. Kamal Sen Gupta (2008) 8, the Hon'ble Apex Court held that unlike in appeal, scope of review is grossly circumscribed to such cases where review seeker has made a discovery of a new and important matter of evidence, which, after exercise of due diligence, was not within his knowledge and could not be produced by him when the decree or order where some mistakes or errors apparent on the face of the record have been made or when the court has overlooked some obvious facts based on which decision could be made. The court further held that one of the above three considerations should be established for review. In Devender Pal Singh vs. State of NCT of Delhi (2003) 2 SCC 501, the Apex Court held that review is not a rehearing of appeal all over again and that the scope of interference is very limited to aspects such as miscarriage of justice."

Considering the limited scope of review jurisdiction, as explained in the above-quoted orders, we shall consider the points raised by the petitioner supra.

Re: Point (i)

IDC on account Delay due to rains: To examine the plea of the petitioner to consider a delay of four months due to heavy rainfall, the conclusions drawn by us in the Order dated 31.12.2020 on this point is extracted below:

"Perusal of the copy of the meteorological report containing district-wise monthly rainfall for the year 2017 filed by the DISCOMs shows that the

rainfall in Kadapa District was 224.7 mm in August, 181.9 mm in September, 221.7 mm in October and 36.4 mm in November. These statistics clearly establish that the rainfall during the three months of August to October was unusually heavy. We are therefore convinced with the stand of the petitioner that due to heavy rainfall, the worksite got badly affected, stalling the progress of the work for a period of two months. As this constitutes force majeure which is an uncontrollable factor as per the CERC guidelines, we are inclined to allow IDC for a period of two months only. To summarize, the Commission allows IDC for two months only against the claim of IDC for 41 months by APGENCO."

As can be seen from the above, having concluded that the rainfall during the three months of August to October was unusually heavy based on the *meteorological report, we inadvertently considered only two-months delay for the computation of IDC due to heavy rainfall. This is an apparent error and passes the criteria set by the Hon'ble Supreme Court for review. Hence, we are inclined to review the same and allow a three-month delay instead of the two months considered in the Order dated 31.12.2020. Consequently. The petitioner is entitled to the relief to that extent. Accordingly, the IDC component is re-computed. The total capital cost approved in the Order dated 31.12.2020, the claim in Review petition by the Petitioner and approved by the Commission with revised IDC in the present Order are shown in the table below.*

(Rs. Crore)	Approved in Order dated 31.12.2020 in OP No. 33 of 2019	APGENCO Relevant Claim in RP No. 03 of 2021	Commission's Approval in the present Order	Difference
	A	B	C	D=C-A
Hard Cost Plus Taxes	3321.59	3321.59	3321.59	0.00
IDC	609.77	662.74	636.255	26.49
Total Capital Cost	**3931.36**	**3984.33**	**3957.85**	26.48

Due to the revision of the total capital cost shown above, the ROCE and Depreciation computed in the Order date 31.12.2020 are to be revised. The depreciation approved in the Order dated 31.12.2020, claimed in the Review and approved in the present order are shown in the table below.

Depreciation (Rs. Crore)	**Approved in Order dated 31.12.2020 in OP No. 46 of 2017**	**Relevant Claim of APGENCO in RP**	**Approved by the Commission in Present Order**	**Difference**
FY	A	B	C	D=(C-A)
2018-19	206.13	220.06	207.53	1.40
2019-20	206.13	220.06	207.53	1.40
2020-21	206.13	220.06	207.53	1.40
2021-22	206.13	220.06	207.53	1.40
2022-23	206.13	220.06	207.53	1.40
2023-24	206.13	220.06	207.53	1.40
Total	**1,236.76**	**1,320.36**	**1,245.15**	**8.40**

The detailed computations are shown in the Annexure. The ROCE is discussed in the following paragraph.

Re: Point (ii)

IDC due to a delay in land acquisition: The petitioner's plea is that the delay of 16 months is to be considered for computation of IDC as the land acquisition was beyond its control, treating the same as an uncontrollable factor by adopting the CERC Tariff Regulations 2019

instead of CERC Tariff Regulations 2014. The relevant part of the decision of the Commission in the Order dated 31.12.2020 is extracted below on this point.

"Problems in the acquisition of part of the land, unrest by land losers and default of the BOP (Balance of Plant) contractor and consequent change of the BOP contractor.

The Commission is of the view that it is not necessary to discuss in detail the merits of each of these reasons, since it proposes to follow Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, in the absence of its own Regulations, in terms of Clause 10 of Regulation 1 of 2008. The question however to be considered is which regulation of CERC has to be followed in the present case. Under the proviso to Clause 2 of 2014 Regulations, the said Regulations were made applicable to the project or a part thereof declared under commercial operation before the commencement of the 2014 regulations and whose tariff has not been finally determined by the Commission till that date. Admittedly, the commercial operation of the project under consideration has been declared in the year 2018 and its tariff has not been finally determined. Even the 2019 regulations also made 2014 regulations applicable to a project such as the present one, as it satisfies the twin criteria of the declaration of the unit under commercial operation and non-fixation of tariff therefor before the date of commencement of 2019 Regulations. Accordingly, the Commission has decided to follow 2014 Regulations of the CERC wherever necessary, for determination of tariff.

Regulation 12 deals with the controllable and uncontrollable factors in the matter of cost escalation impacting contract prices, IDC and IEDC of the project. Under clause 1 of the said Regulation, land acquisition issues and delay in the execution of the project on account of the contractor, supplier or agency of the generating company or transmission licensee are included as controllable factors. Force majeure events are treated as uncontrollable factors under clause 2 of Regulation 12. Regulation 11 of the said regulation deals with IDC and IEDC. It provides that in case of delay in achieving SCOD, the generating company shall be required to furnish detailed justification with supporting documents for such delay including prudent phasing of funds. It further provides that on such examination, if the delay is found not attributable to the generating company and if the same is due to uncontrollable factors as specified in Regulation 12, IDC may be allowed after due prudence check. It is therefore clear from these regulations, that prudence check of reasons for the delay is envisaged by the regulations only in respect of uncontrollable factors, implying thereby that no such prudence check could be undertaken with regard to the controllable factors.

The Learned Counsel for APGENCO however placed reliance on the order dated 27.04.2011 in appeal No. 72 of 2011 of the Appellate Tribunal for Electricity (APTEL) in the matter of Maharashtra State Power Generation Co. Ltd Vs Maharashtra Electricity Regulatory Commission. The APTEL has undertaken the exercise of prudence check while considering various delay factors. A perusal of the said order shows that the APTEL has considered Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations 2009, which were in force at that time and observed that the

CERC has not laid down any benchmark norms for prudence check and that its regulations only indicate the area of prudence check including cost overrun and time overrun. The APTEL found fault with the Maharashtra State Commission for not examining the reasons for the delay in commissioning the project and attributed the entire time overrun related cost with respect to the contractual schedule agreed with BHEL to the Generating Company and that this was not prudence check. In the absence of specific regulations, the APTEL has undertaken a prudence check of time overrun related costs.

On a comparison of 2009 Regulations with that of 2014 Regulations, which replaced the former regulations shows that the CERC has dispensed with the concept of prudence check as envisaged in its 2009 Regulations in respect of the controllable factors and confined the same to the uncontrollable factors for considering the inclusion of IDC and IEDC for delays in the tariff. Therefore, in the Commission's view, the APTEL's order in appeal no. 72 of 2010 has no application as the present exercise is undertaken in terms of 2014 regulations, which, as aforesaid, has done away with the concept of prudence check in respect of the controllable factors. As all the above-noted reasons pleaded by the petitioner fall within the category of the controllable factors, IDC for the delay period cannot be allowed."

As can be seen from the above, the Commission gave detailed reasoning for not allowing the petitioner's delay in land acquisition, as contended by the DISCOMS. It is to reiterate that the proviso to Clause 2 of CERC 2014 Tariff Regulations made the said Regulations applicable to the project or a

part thereof declared under commercial operation before the commencement of the 2014 regulations and whose tariff has not been finally determined by the Commission till that date. The project's commercial operation was in 2018, and its tariff was not yet determined when CERC 2019 Tariff Regulations were issued. Even the 2019 regulations also made 2014 regulations applicable to the project under discussion as it satisfies the twin criteria of the declaration of the unit under commercial operation and non-fixation of tariff therefor, before the date of commencement of 2019 Regulations. Accordingly, the Commission had decided to follow the 2014 Regulations of the CERC, wherever necessary, to determine tariff in its Order dated 31.12.2020. The Petitioner ignored the above, again raising the issue that as the orders for tariff determination were issued on 31.12.2020 after the CERC tariff Regulations came into force from 01.04.2019, the Commission ought to consider the CERC tariff Regulations 2019 instead of the Tariff Regulations 2014. There is no merit in the argument. Hence, we disallow the petitioner's plea on this point.

Re: Point (iii)

6. **Return On Capital Employed (ROCE):** The petitioner's plea is that the Commission has deducted accumulated depreciation from the 1st year instead of deducting from the 2nd year while computing ROCE. Regulation 12.1 (a) of the APERC (Terms and Conditions for Determination of Tariff for Supply of Electricity by a Generating Company to a Distribution Licensee and Purchase of Electricity by Distribution Licensees) Regulation-2008 provides that the Return on Capital Employed (RoCE)

equals the sum of the Original Capital Cost less accumulated depreciation and Working Capital approved by the Commission as per this Regulation, multiplied by the Weighted Average Cost of Capital (WACC). Accumulated depreciation, as the name indicates, is the accumulation or aggregation of the annual depreciation allowed into the tariff. The Depreciation allowable in a particular year and accumulated depreciation are two distinct items. Further, Regulation 12.2 (iv) of Regulation 1 of 2008 provides that Depreciation shall be chargeable from the first year of operation. Depreciation shall be charged pro-rata if the asset is operated for part of the year. As pointed out in the review petition, while calculating the RoCE for the first year, the accumulated depreciation has been deducted. As claimed by the petitioner in the review, it results in the under-recovery of fixed costs. This, we concede, is an error. Hence, we decide this point in favour of the petitioner. The ROCE approved in the Order dated 31.12.2020, the Petitioner's claim and the present Order's review are shown in the table below.

FY	**Approved in Order dated 31.12.2020 in OP No. 46 of 2017**	**Relevant Claim of APGENCO in RP**	**Reviewed by the Commission in Present Order**	**Diff = Approve in Present Order- Approved in Order dated 31.12.2020**
	A	B	C	D=(C-A)
2018-19	501	558	529	28
2019-20	477	533	505	28
2020-21	452	507	480	28
2021-22	428	482	456	28
2022-23	404	457	431	27
2023-24	379	431	407	27
Total	2,642	2,969	2,808	166

The detailed computations are shown in the Annexure.

Re: Point (iv)

<u>Prospective effect of the normative availability</u>: The COD of the project was achieved on 29.03.2018. The Commission passed its order under review approving the PPA and determining tariff from FY2018-19 to FY2023-24 on 31.12.2020. Regulation 1 of 2008, notified by APERC, does not specify the percentage of target availability for recovery of full fixed charges for 600 MW coal-based thermal units. Therefore, in terms of Clause 10 of Regulation 1 of 2008, the Commission has fixed the Target Availability of 85 percent as per CERC Tariff Regulations 2014 as against the target availability of 80 percent in the PPA. The petitioner's plea is that the effective date for target availability shall be prospective from the date of the passing of the Order of the Commission instead of COD for recovery of fixed charges since the PPA was entered as per Regulation 1 of 2008. Nonetheless, the Petitioner is aware that Regulation 1 of 2008 does not specify the availability norms for units of 500 MW above. In all such cases, clause 10 of the Regulation applies. Accordingly, CERC tariff Regulations must be applied wherever necessary when entering into PPAs. They ought to consider 85 percent target availability as per CERC Regulations. Hence, we do not find any error in the decision. Therefore, we are not inclined to accept this plea.

7. In terms of the Commission's above decisions, the Annual Fixed Charges (AFC) determined in the Order dated 31.12.2020 need to be revised. The AFC approved in the Order dated 31.12.2020, claimed in the Review Petition and approved in the present Order are shown below.

Financial year	AFC approved by APERC in Order Dated 31.12.2020 (Rs Crs)	Relevant AFC claimed by APGENCO in Review Petition (Rs Crs)	AFC approved in the present Order (Rs Crs)	Difference (Rs Crs)
(A)	(B)	(C)	(D)	(E)=(D)-(B)
2018-19	817.66	851.77	847.12	29.46
2019-20	800.58	833.58	829.87	29.29
2020-21	784.01	815.9	813.13	29.12
2021-22	767.99	798.77	796.94	28.95
2022-23	752.53	782.21	781.32	28.79
2023-24	737.7	766.26	766.32	28.62
Total	4660.47	4848.49	4834.71	174.24

The detailed computations are shown in the Annexure.

8. The Petitioner is entitled to claim the difference of the amount shown in the above table from APDISCOMS for the power supplied from FY 2018-19 to FY 2023-24, corresponding to the actual availability achieved.

9. Accordingly, the Review petition is disposed of.

Sd/-	Sd/-	Sd/-
P.V.R. Reddy	**Justice C.V. Nagarjuna Reddy**	**Thakur Rama Singh**
Member	**Chairman**	**Member**

ANNEXURE

(IDC Computations)

Sr.No.	Particulars	%	Rs. Crs
1	Equity	30%	996.48
2	Debt	70%	2325.11
3	Rate of Interest	12.43%	

Description		1	2	3	4	Total
Loan Drawl		2325.11				
1st Year	664.32	41.29	87.71	98.61	83.15	-
2nd Year	664.32		41.29	87.71	73.96	-
3rd Year	664.32			41.29	65.78	-
4th Year (9 months)	332.16				15.48	-
Total	**2325.11**	**41.29**	**128.99**	**227.60**	**238.37**	**636.25**

(Depreciation Computations in Rs. Crs)

Item	FY 19	FY 20	FY 21	FY 22	FY 23	FY 24
Capital Cost	3957.85	3957.85	3957.85	3957.85	3957.85	3957.85
Land Cost	27.44	27.44	27.44	27.44	27.44	27.44
Capital Cost, excluding land Cost	3,930.41	3,930.41	3,930.41	3,930.41	3,930.41	3,930.41
Depreciation Rate (%)	5.28%	5.28%	5.28%	5.28%	5.28%	5.28%
Depreciation (Rs Crs)	**207.53**	**207.53**	**207.53**	**207.53**	**207.53**	**207.53**

(ROCE Computations in Rs. Crs)

Item	FY 19	FY 20	FY 21	FY 22	FY 23	FY 24
Capital Cost (GFA)	3957.85	3957.85	3957.85	3957.85	3957.85	3957.85
Accumulated Depreciation		207.53	415.05	622.58	830.10	1037.63
Working Capital	527.86	527.18	526.69	526.40	526.32	526.46
Net asset base (NFA)	4,485.71	4,277.50	4,069.49	3,861.67	3,654.06	3,446.68
% Return on Capital Employed	11.80%	11.80%	11.80%	11.80%	11.80%	11.80%
ROCE	**529.31**	**504.75**	**480.20**	**455.68**	**431.18**	**406.71**

(AFC Computations in Rs. Crs)

Item	FY 19	FY 20	FY 21	FY 22	FY 23	FY 24
Depreciation	207.53	207.53	207.53	207.53	207.53	207.53
O&M Expenses	110.28	117.60	125.41	133.74	142.62	152.09
ROCE	529.31	504.75	480.20	455.68	431.18	406.71
Fixed cost	**847.12**	**829.87**	**813.13**	**796.94**	**781.32**	**766.32**