



Order in OP No.70 of 2022

ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION
4th Floor, Singareni Bhavan, Red Hills, Hyderabad 500004

**FRIDAY, THE NINETEENTH DAY OF JANUARY,
TWO THOUSAND AND TWENTY FOUR**

Present

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

OP.No.70 of 2022

Between:

M/s Bharat Heavy Electricals Limited,
Boiler Auxiliaries Plant, Ranipet
Rep by its Manager (WEG & WS)

... Petitioner

AND

1. Andhra Pradesh Power Transmission Corporation Ltd,
(APTRANSCO), Vidyut Soudha, Gunadala,
Vijayawada-520 004, Rep by its Chairman & Managing Director.
2. Andhra Pradesh Transmission corporation Limited,
Vidyut Soudha, Gunadala, Vijayawada,
Rep by its Chief General Manager/commercial
(Power Systems, Planning And Designs),
Vijayawada, Andhra Pradesh.
3. Andhra Pradesh Power Coordination Committee
Dy Chief Controller of Accounts (PP&S), Gunadla,
Eluru Rd, Andhra Pradesh.
4. Andhra Pradesh Southern Power Distribution Company Ltd,



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Rep by Chief General Manager, IPS/SOLAR & RAC,
Tirupathi, Andhra Pradesh.

5. Andhra Pradesh Power Transmission Corporation Ltd.,
represented by its Chief General Manager (Finance),
Vidyut Soudha, Gunadala, Vijayawada 520 004.
6. Andhra Pradesh Power Generation Corporation Ltd,
Vijayawada, Andhra Pradesh, Rep by its Chief Engineer
(HPC & HP).

...Respondents

The Original Petition came up for final hearing before this Commission on 27-12-2023 in the presence of Smt. G.Malati, learned Counsel for the petitioner, and Sri. P. Shiva Rao, learned Standing counsel for the respondents, that after hearing the learned counsel for both the parties and after carefully considering the material available on record, this Commission made the following:

ORDER

1. M/s Bharat Heavy Electricals Limited, Boiler Auxiliaries Plant, Ranipet, (for short “the petitioner”) has filed this petition seeking a direction to the Respondents to pay a sum of Rs.1,90,31,273/- (Rupees one crore, ninety lakhs, thirty one thousand, two hundred and seventy three only) due under Invoice dated 07-12-2019, together with interest at 10% per annum, towards supply of 6012440 units of power generated from its 3 MW wind power project and injected into the Grid at the interconnection point of respondent No.1 for the period from April, 2016 to November, 2019, calculated at the prevalent rate of Rs.3.37 per unit.



2. The pleadings of the petitioner are narrated, in brief, hereunder:

- (a) The petitioner has set up 3 MW Wind Power Project at Ramagiri, Anantapur District of Andhra Pradesh, for sale of wind energy, which was approved by the Non-Conventional Energy Development Corporation of Andhra Pradesh Limited (NEDCAP), vide: its proceedings dated 23-9-1994. The petitioner has entered into a Wind Power Wheeling Agreement (WPWA) dated 18-7-1995 with the erstwhile Andhra Pradesh State Electricity Board for supply of energy from the said plant for a period of 20 years and it has commenced its Commercial Date of Operation (COD) from 06-9-1995. Subsequently, in supersession of the said WPWA, the petitioner and the Andhra Pradesh Power Transmission Corporation Ltd (APTRANSCO), respondent No.1 herein, have entered into the Power Purchase Agreement (PPA) dated 25-7-2002, which provided for sale of delivered energy at the interconnection point of respondent No.1. Accordingly, the respondents utilized the power from the said plant till 06.09.2015. The agreement has also provided for renewal on mutually agreed terms and conditions. But, due to certain disputes arose with regard to



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performance of another project, consisting of indigenously developed 10 x 200 KW (2 MW) Wind Electric Generators (WEGs) manufactured by petitioner's sister unit, viz., BHEL Corporate, R & D, Hyderabad, respondent No.1 has not paid any amount in respect of 12 x 250 KW (3 MW) WEGs installed by the Petitioner at Ramagiri, Anantapur District of Andhra Pradesh, even though it has utilized the power.

- (b) Ultimately the issues were sorted out and the Andhra Pradesh Power Generation Corporation (APGENCO), respondent No.6 herein, vide: its letter dated 28-3-2016, has agreed to take over the 2 MW indigenous WEGs, on as-is-where-is basis, based on commercial settlement arrived at with the petitioner. Accordingly, a settlement in the Handing Over Protocol, dated 24-10-2016, was signed between the petitioner and respondent No.6, wherein it was provided that respondent No.6 would send its consent to APDISCOMs to pay for the energy taken from the petitioner's 12 x 250 KW i.e., 3 MW Wind Farm at Ramagiri, with effect from 01-03-2016. Accordingly, the petitioner has been injecting power from the said plant to the Grid of respondent No.1 and the same has been duly recorded in the Joint Meter



Readings (JMRs). On 27-10-2016 the petitioner sent a letter to respondent No.6 requesting the latter to make payment for the energy taken from the 3 MW Wind Farm at Ramagiri with effect from 01-3-2016, as communicated in its letter dated 28-3-2016.

- (c) On 7-12-2019 the petitioner issued an invoice to respondent No.3 for payment of Rs.1,90,31,273/-, towards sale of 60,12,440 units of power from the said 3 MW plant, for the period from April, 2016 to November, 2019, calculated at the prevalence rate of Rs.3.37 ps., per unit, after deducting the reactive units, but the respondents did not make any payment for the same. Hence, the petitioner filed the present petition for the aforementioned reliefs.

3. Respondent No.6 filed a counter-affidavit, *inter alia*, alleging that the agreement entered into between it and the petitioner came to an end on 01-3-2016, and, as such, the petition is misconceived and not maintainable against it. It is further alleged that the Power PPA, dated 25-7-2002, entered into between the petitioner and respondent No.1 came to end on 06-9-2015; and that supply of any power, without approval from this Commission, is impermissible.



4. Respondents 1 to 5 filed a counter-affidavit, *inter alia*, alleging that respondent No.1 had entered into the PPA with the petitioner on 25-7-2002 and the petitioner continued to inject power, from its 3 MW power plant, to the interconnection point of the respondents till the expiry of the said PPA on 06-9-2015; that on 24-10-2016 respondent No.6 agreed to purchase 2 MW indigenous WEGs from the petitioner, on as-is-where-is basis, and, accordingly, a commercial settlement was arrived at between them; that the obligation under said purchase agreement dated 24-10-2016 is not attributable to these respondents; that, as alleged by the petitioner, neither respondent No.1 nor the DISCOMs have received the Handing Over Protocol dated 26-10-2016 from respondent No.6; that, since no renewal of the existing PPA has been made between the petitioner and the APDISCOMs/APTRANSCO, there is no valid PPA between the parties; that the present claim relates to the post expiry period of the PPA between the petitioner and respondent No.6 and respondents 1 to 5 are not parties to the said contract; that the petitioner injected power into the Grid without any agreement, schedule and consent from the Respondents; that the principle of law as to non-gratuitous act is not applicable to the present petition; and that the claim of the petitioner is barred by



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limitation. In support of the aforesaid contentions, respondent Nos.1 to 5 relied on the Order passed by this Commission in **M/s. TGV SRAAC Limited Vs. Transmission Corporation of Andhra Pradesh and others¹** and the decision of the Honourable Supreme court in **AP Power Coordination Committee Vs. Lanco Kondapalli Power Ltd and others²**.

5. Having regard to the respective pleadings of the parties, the following emerge for adjudication:

1. Whether the respondents are liable to pay for the 3 MW power purportedly injected into the Grid between April, 2016 and November, 2019?
 2. Whether the claims are barred by limitation?
6. **Re-Point No.1: Whether the respondents are liable to pay for the 3 MW power purportedly injected into the Grid between April, 2016 and November, 2019?**

The undisputed fact in this case is that the petitioner entered into the PPA dated 25-7-2002 with respondent No.1. However, consequent on the formation of the DISCOMs, which were entrusted with the functioning of the Distribution and Supply of Power, all the PPAs were transferred from respondent No.1 to the respective DISCOMs. Accordingly, the PPA in the instant case was transferred to respondent

¹) Order dated 20-12-2021 in OP No.65 of 2019 on the file of this Commission.

²) (2016) 3 SCC 468.



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No.4-DISCOM. It is also not in dispute that the PPA, which was for 20 years from the COD, expired on 06-9-2015. Admittedly, no fresh PPA was entered by the petitioner with any of the respondents, much less, with respondent No.4. The petitioner, however, has heavily relied upon the purported assurance of respondent No.6, vide: Letter No: CE (HPC&HP)/SE(Hy-I)/210/Ramagiri-WF/D.No.156/16,dt. 28-3-2016, that it would inform the APDISCOMs for payments for the power generated by the petitioner's 3 MW plant. The petitioner filed copies of the said letter, and the "Handing Over Protocol", which are extracted hereunder:

Letter Dt.28-03- 2016:

"ANDHRA PRADESH POWER CENERATION CORPORATION LIMITED

From
The ChiefEngineer (HPC & HP)
APGENCO, Vidyut Soudha,
Hyderabad - 500 082.
Ph; 040-23499321
Fax: 040-23499323
e-mail: ce-hpc@apgen.co.gov.in

To
M/s.Bharat Heavy Electricals Ltd.,
Boiler Auxiliaries Plant,
Indira Gandhi Industrial Complex,
Ranipet, Tamil Nadu, Pin-632406
Ph: 04172-241192/242003
Fax:04172-241109

Lr.No:CE(HPC&HP)/SE(Hy-I)/210/Ramagiri-WF/D.No.156/16, Dt.28-03-2016

Sir,

Sub; 10X200 kW Wind Farm at Ramagiri in Anantapur Dist - Reg.
Ref: 1)PO No.JM2464/1153/CPH/12I/No.884/WF/PCH-18/92/
D.No.08/93, Dt. 25/1/1993.
(2)Lr. No.RE/HYD/C-452/RMG/2015-16, Dt: 24/08/2015.

This has reference to the letter cited under reference (2) cited, where in you have requested APGENCO to consider to take over all 10x200 Kw machines of Ramagiri wind farm in as-is-where-is condition and relieve BHEL



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of all obligations of the contract and also start giving credit for the power generation from BHEL owned farm (3MW) with effect from the date of agreement.

In this connection it is to inform that, the APGENCO's board in its 145th meeting held On 01/03/2016 accorded approval to accept the proposal of M/s BHEL i.e, to leave 2 MW (10x200Kw) Ramagiri wind farm on as-is-where-is basis with effect from 01/03/2016, so as to both parties i.e.. M/s BHEL and APGENCO, will have no obligation to other parties including outstanding payment, if any, payable to M/s BHEL by APGENCO. The windmills will become the property of APGENCO.

In this regard APDISCOMs will be informed about the settlement between M/s BHEL and APGENCO and consent will be given to pay to M/s BHEL for the energy taken from the 3MW wind farm with effect from 01/03/2016. M/s BHEL may pursue the matter further with AP Discoms.

In view of the above, it is requested to arrange to handover the 2 MW (10x200 Kw) Ramagiri wind farm to APGENCO on as-is-where-is basis".

HANDING OVER PROTOCOL:

"HANDING OVER PROTOCOL OF 10x200 Kw (2MW) WIND ELECTRIC GENERATORS TO M/s APGENCO AT RAMAGIRI/ANANTAPUR DIST. ANDHRA PRADESH ON 24.10.2016 BY M/s BHARAT HEAVY ELECTRICALS LTD/RANIPET.

Members present:

M/s. BHEL M/s. APGENCO

S/Shri
A.S.K.ChellaPandian/SDGM/
Commercial
N.Rajendran/Sr.Manager/New
Products
P.Rajendran/AE/ New Products

S/Shri
P.Rafi Ahmed/DE/O&M/PABRHES/
A'Pur,
B.Venugopal/ADE/O&M/PABR DAM/
A'Pur.

1. BHEL supplied 10 Wind Electric Generators (WEG) to APGENCO (formerly APSEB) of capacity 200 Kw against APGENCO's P.O Ref:JM/2464/1153/CPH/121/N0.884/WF/PCH-18/92/D-NO.08/93, dt.25.01.1993.
2. BHEL has proposed vide letter Ref.RE/HYD/C-452/RMG/2015-16 dtd,24-08-2015 to APGENCO for a Commercial settlement.
3. Vide letter Ref No. CE(HPC&HP)/SE(Hy-I)/ Ramagiri-WF/D.No.156/16 dt.28.03.2016, M/s APGENCO has agreed for the commercial settlement proposed by BHEL and requested BHEL to hand over all the 10 Machines of 200 Kw rated each on "as-is-where-is" condition to



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APGENCO. APGENCO also informed that they will send their consent to AP Discoms to pay for the energy taken from BHEL's 12x250 Kw (3MW) Wind Farm with effect from 01.03.2016.

4. Accordingly BHEL, Ranipet has handed over on 24.10.2016 all the 10 Nos (each machine consisting of Tower, Nacelle Assembly, Blades, Control room with panel) of 200 Kw rated Wind Electric Generators installed in Ramagiri (for APSEB) in "as-is-where-is" condition to M/s APGENCO. M/s APGENCO has taken over all the 10 Nos (each machine consisting of Tower, Nacelle Assembly, Blades, Control room with panel) of 200 Kw rated Wind Electric Generators on 24.10.2016 in "as-is-where-is" condition.
5. The current physical status of all the 10 WEGs is furnished in the enclosed annexure".

From the contents of the above two documents, it appears that an understanding was reached between the petitioner and respondent No.6 on the handing over of the machines of 2 MW capacity, forming part of the petitioner's power plant to respondent No.6. In that context, respondent No.6 has assured the petitioner that it will send their consent to "AP DISCOMs" to pay for the energy taken from 3 MW Wind Farm with effect from 01-3-2016. The petitioner has not filed any further material to show that either respondent No.6 has made a proposal to any of the DISCOMs in the State of Andhra Pradesh, including respondent No.4, or the latter had agreed for the arrangement proposed by respondent No.6 to the petitioner. Indubitably, respondent No.4 and respondent No.6 are separate legal entities, albeit both of them are owned by the State Government. Even if respondent No.6 had given an assurance that it will send its consent to the APDISCOMs for payment for the energy taken from the petitioner, unless such assurance resulted



in a binding contract between the parties, the same is not enforceable. In the instant case, no such contract has been allegedly formed between respondent Nos.4 and 6. Respondent No.4 merely succeeded respondent No.1 in respect of the PPA, which allegedly expired on 06-9-2015. There is no dispute about the payment for electricity received by respondent No.4 till the expiry of the PPA. The petitioner pleaded that even after expiry of the PPA, it has continued to inject power generated from its plant. However, the petitioner has not pleaded that there was any arrangement/understanding between it and respondent No.4 for such injection. The petitioner has merely relied upon the purported JMRs in order to buttress its plea that there was an implied contract with respondent No.4 for sale of power.

In this connection, it is useful to refer to two of this Commission's Orders, which have dealt with various situations. They are, **M/s. Vibrant Greentech India Private Limited Vs. APSPDCL and others³** and **M/s. TGV SRAAC Limited (1 supra)**. In both these cases, the Developer, who injected the power, without there being any formal contract or approval of contract, based their claims on the provisions of Section 70 of the Indian Contract Act, 1872.

³) Common Order dt.05-7-2021 in OP Nos.9 and 20 of 2020 on the file of this Commission.



In **M/s. Vibrant Greentech India Private Limited (3 supra)**, a PPA was entered into between the Developer and the DISCOM (respondent No.4 herein). Pursuant to the said PPA, the plant was synchronized, COD was declared, JMRs were being taken. As respondent No.4 neither filed an application before this Commission for approval of the PPA nor payments were made, the Developer has approached this Commission by way of filing OP Nos.9 and 20 of 2020. Upon considering the respective pleas of the parties, this Commission held that the PPAs between the parties were not validly entered into and that they were not enforceable and binding on the respondents as they were not approved by this Commission. However, one of the Points, (Point No.4), framed therein by this Commission, reads as under:

“4. Whether the petitioners are entitled to receive the price for the power generated by them and let into the respondents Grid from the date of synchronization till the date of disconnection?”

This Commission, on an in depth consideration of Section 70 the Contract Act and the case law thereon, summed up the legal position as under:

- “(i) A claim for compensation lies even though there was no contract or there existed a contract which was not valid and enforceable.
- (ii) Voluntary acceptance and enjoyment of the work by one party creates a cause of action for the other party to make a claim under Section 70.
- (iii) The word “lawfully” indicates that after something is delivered or some-



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thing is done by one person for another not intended to be gratuitous and that thing is accepted and enjoyed by the latter, a lawful relationship is born between the two which forms basis for claiming compensation.

- (iv) Claim for compensation is based on the footing that there has been no contract and that the conduct of the parties in relation to what is delivered or done creates a relationship resembling that arising out of a contract.
- (v) A claim for compensation may not mean the same thing as a claim for damages for breach of contract, if a contract was subsisting between the parties.
- (vi) What Section 70 prevents is unjust enrichment and it applies as much to individuals as to corporations and government”.

On the facts of the said case, this Commission held that, having regard to the fact that the project was synchronized, PPAs were entered and the respondents having allowed the power to be evacuated into the Grid, and JMRs having been taken, the said conduct has constituted a fresh relationship between the parties *de hors* the PPAs, which were held to be unenforceable.

However, **M/s. TGV SRAAC Limited (1 supra)** is a contrasting case, wherein the Wheeling Agreement entered into with the erstwhile Andhra Pradesh State Electricity Board (APSEB) on 27-3-1996 has expired on 27-3-2016. The petitioner-Developer applied for renewal of the said Agreement, though the provisions of the Electricity Act, 2003 did not envisage such a procedure of renewal, and, instead, they provided



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for Open Access. After passage of substantial time, the Developer, which was made to realize that the request for renewal cannot be accepted in view of the change in Law, has applied for Open Access. Until Open Access was granted, the Developer claimed to have continued to inject power into the system. It was the plea of the Developer, as in the present case, that the DISCOM has received the power with its eyes wide open, and, therefore, even in the absence of an express contract, a relationship, resembling the contract, was deemed to have been formed and thereby Section 70 of the Contract Act is attracted. In support of its plea, the Developer has relied upon the order in **M/s. Vibrant Greentech India Private Limited Vs. APSPDCL and others (3 supra)**. Upon considering the respective pleas of the parties, this Commission held that, on its facts, the said case does not fall under Section 70 of the Contract Act. Point No.3 was framed in that case, which reads as under:

“3. Whether the petitioner is entitled to the payment for the power injected into the Grid from the time of expiry of the wheeling agreements upto the grant of Open Access to it?”

This Commission, while distinguishing the order in **M/s. Vibrant Greentech India Private Limited (3 supra)**, held that Section 70 of the Contract Act was not attracted to that case. This Commission further



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held that in **M/s. Vibrant Greentech India Private Limited (3 supra)** the Order was passed on the relevant facts, such as, synchronization of the projects and entering into the PPAs, apart from the DISCOM therein allowing the power to be evacuated and JMRs having been taken. However, this Commission held in **M/s. TGV SRAAC Limited (1 supra)** that there is nothing to bring the said case into the fold of Section 70 of the Contract Act as the relationship between the Developer and the Licensee has ended with the expiry of the Wheeling Agreement and no further relationship exists resembling the contract, which is a *sine qua non* for application of Section 70 of the Contract Act. It was further held that pumping of energy into the Grid, without the knowledge and approval of SLDC, is unlawful, which makes the case fall out of Section 70 of the Contract Act.

The facts in the present case are more or less similar to those in **M/s. TGV SRAAC Limited (1 supra)**. In this case also, after expiry of the PPA on 06-9-2015, no fresh PPA was entered into between the petitioner and any of the respondents. There is no correspondence to suggest that respondent No.4 has given its consent for injection of the power into the Grid. Unlike in **M/s. Vibrant Greentech India Private Limited (3 supra)**, no JMRs were taken, though a plea in this regard has been raised. Having regard to this plea, we have carefully perused



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the purported JMRs, which clearly show that only two persons have signed, viz., Site incharge, RPP Windtech Services, Ramagiri and Site incharge, BHEL Site Office, Ramagiri. None of the officers of respondent No.4 have signed the said JMRs. Therefore, there is no basis for the petitioner to claim that power was injected into the Grid with the tacit consent of respondent No.4. Indeed, once the PPA expires, till a fresh PPA is entered into, the power injected by the Developer cannot be treated as lawfully injected power without the consent of the purchaser and the specific approval of the SLDC or the Regional Load Dispatch Centre (RLDC), as the case may be. In this case, no such consent or approvals have been obtained for injection of power, which shall, therefore, be treated as an inadvertent power.

Having regard to the above discussion, we have no hesitation to hold that the injection of power by the petitioner was not lawful and, in the absence of any relationship between the petitioner and respondent No.4 resembling the contract, Section 70 of the Contract Act is not applicable, and, consequently, the petitioner is not entitled to any payment.

Point No.1 is, accordingly, answered against the petitioner.

Re Point No.2: Whether the claims are barred by limitation?



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In the light of the findings on Point No.1 that the injection of power by the petitioner was not lawful and, in the absence of any relationship between the petitioner and respondent No.4 resembling the contract, Section 70 of the Contract Act is not applicable, and, consequently, the petitioner is not entitled to any payment, this Point need not be delved into and adjudicated.

In the result, the OP fails and the same is, accordingly, dismissed .

Order pronounced on this the Nineteenth day of January, 2024.

**Sd/-
P.V.R.REDDY
MEMBER**

**Sd/
JUSTICE C.V. NAGARJUNA REDDY
CHAIRMAN**

**- Sd/-
THAKUR RAMA SINGH
MEMBER**