

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. MP/463/2014

Coram:

Shri Gireesh B. Pradhan, Chairperson

Shri A.K.Singhal, Member

Shri A.S. Bakshi, Member

Date of hearing: 13.01.2015

Date of Order: 27.04.2015

In the matter of

Petition under Section 79(1)(f) of the Electricity Act, 2003 for a direction to the respondents to pay additional fixed charges of ₹0.439/kWh for the balance period of PPA.

And in the matter of

M/s GMR Vemagiri Power Generation Ltd.,
Regd. Office: Skip House, 25/1,
Museum Road,
Bangalore-560 025

...Petitioner

Vs

1. Andhra Pradesh Eastern Power Distribution Company Ltd.
Corporate Office, P&T Colony,
Seethammadhara,
Vishakapatnam-530 013.
2. Andhra Pradesh Southern Power Distribution Company Ltd.
D. No. 19-13-65/A, Srinivasa Puram,
Tiruchanoor Road, Chittoor District
Tirupathi-517 503.
3. Northern Power Distribution Company of Telangana Limited,
H. No. 2-5-31/2, Corporate Office,
Vidyut Bhavan, Nakkalgutta
Hanamkonda,
Warangal-506 001.
4. Southern Power Distribution Company of Telangana Limited,
6-1-50, Corporate Office,
Mint Compound,
Hyderabad-500 063

.....Respondents



Parties present:

Shri Alok Shankar, Advocate, GVPGL
Shri Anjan Kalita, GMR

ORDER

The petitioner, GMR Vemagiri Power Generation Limited (GVPGL) has filed this petition claiming the following reliefs:-

(a) To hold that the petitioner is entitled to compensation of ₹447 crore (on NPV basis as on COD) towards forgone Capacity Charges for the period upto 1.4.2009;

(b) To direct the Respondents No. 1 to 4 to pay Additional Fixed Charges (AFC) of ₹ 0.439/kWh for the balance period of the PPA (to recover the loss on NPV basis based on the computation sheet at Annexure U) and for this purpose to effect necessary amendments to the PPA.

Background

2. The petitioner GVPGL had entered into a Power Purchase Agreement (PPA) with the *erstwhile* Andhra Pradesh State Electricity Board (APSEB) on 31.3.1997. As per PPA, the project cost was to be recovered through guaranteed operation of the plant at 80% PLF and energy charge was linked to the specified Station Heat Rate and the same was a pass through to the respondent discoms. The operation of the plant at 80% PLF was directly linked to the availability of fuel. The fuel for the generating station was 'natural gas' and in the event of non-availability of natural gas, "Naphtha" was to be used. Based on the recommendations of the Govt. of AP (GoAP), the Ministry of Petroleum of Natural Gas (MoPNG) allocated 1.64 MMSCMD of natural gas to the petitioner on 'firm' basis on 5.6.2000.

3. Pursuant to the above, Gas Supply Agreement (GSA) was executed between the petitioner and M/s Gas Authority of India Ltd (GAIL) on 31.8.2001 for the period upto 2010. This GSA was further amended by GAIL extending the period of gas supply upto 31.3.2020. The PPA was amended on 18.6.2003 incorporating the installed capacity of



370 MW with natural gas as the primary fuel and in case of unavailability of primary fuel, other fuels such as Naphtha/LSHS as alternate fuel. Accordingly, Clause 1.127 of the PPA was amended and the Andhra Pradesh Electricity Regulatory Commission (APERC) granted consent to the said amendment.

4. As the respondent discoms agreed to pay fixed cost to the petitioner on account of deemed generation irrespective of the fuel used in terms of the PPA, the respondents filed O.P No. 25/2004 before APERC seeking consent for deletion of the 'alternate fuel clause' permanently from the PPAs in order to avoid payment on account of deemed generation. The anticipated liability of the respondents was to the tune of ₹1020 crore per year. At this point in time, M/s GAIL supplied gas to its customers based on guidelines under which gas was distributed among various customers on *pro rata* basis. Keeping in view the guidelines of M/s GAIL, the GoAP by letter dated 6.12.2004 recommended to the MoPNG to maintain *pro rata* supply of available gas to the four upcoming gas projects including that of the petitioner.

5. Pursuant to the transfer scheme notified by the Govt. of AP on 7.6.2005, the PPA dated 31.3.1997, as amended from time to time, was transferred to the distribution licensees of the State of Andhra Pradesh namely, Andhra Pradesh Eastern Power Distribution Company Ltd (APEPDCL), Andhra Pradesh Southern Power Distribution Company Ltd (APSPDCL), Andhra Pradesh Central Power Distribution Company Ltd (APCPDCL) and Andhra Pradesh Northern Power Distribution Company Ltd (APNPDCL) (collectively referred to as the AP Discoms).

6. The petitioner had declared the COD of the project on 16.9.2006. However, based on the decision taken by the GoAP and MoPNG to make available gas to upcoming gas projects only from new gas sources as and when the same became available, M/s GAIL

stopped supply of gas to the petitioner from 23.9.2006. As a result of this, the power plant of the petitioner was shut down completely for a period of two years from 23.9.2006 to 22.4.2009, except during the period from 17.2.2008 to 30.4.2008 and from 7.12.2008 to 22.4.2009 (when the gas was diverted from LANCO project to meet exigency of short fall in generation in the State).

7. Meanwhile, after protracted discussions between the petitioner and the respondents, the petitioner agreed for deletion of the alternate fuel clause in the PPA, thus foregoing the right to claim full fixed charges in the event gas is not made available. In consideration of the petitioner's consent for deletion of the alternate fuel clause, the respondents agreed to extend the benefits to the petitioner to cover the losses like (a) extension of the PPA from 15 years to 23 years (b) FDSC recovery upto 12th and 13th year and (c) permission for sale of excess capacity of 17.625 MW over and above the PPA capacity to third parties. The entire package was acknowledged by the respondents and the GoAP and forwarded to APERC for consent. APERC while giving consent to the amendments in the PPA vide order dated 30.12.2006 considered the projected losses to the petitioner upto March, 2006. The basic premise for the said amendment was that the gas would be available to operate the plant in accordance with the projections and from April, 2008 onwards full gas would be available to operate the plant. *(i.e projected availability of fuel to the company by GAIL upto end of March 2008 and assuming availability of 1.64 MMSCMD of full gas from April, 2008 onwards).*

8. Thereafter, the petitioner had requested the respondents to amend the PPA for incorporation of a clause for sale of 20% of the plant capacity in open market to third parties to make good the foregone fixed cost entitlements on account of deletion of use of alternate fuel provision from the PPA. This was in line with the agreement reached by

the respondents with other IPPs like GVK Phase-2, M/s Gautami and M/s Konaseema power projects. GoAP agreed to the request of the petitioner and directed the respondent No.5 (APCC) to enter into agreement for amendment of the PPA. The basic premise for the said amendment between the parties was that due to non-materialization of the projected availability of gas between May, 2006 to March, 2009 as per Clause 5.2 A of the PPA dated 2.5.2007, new method of compensating the generating companies had to be evolved. Accordingly, draft amendments duly initialed were submitted by the parties to APERC for consent.

9. During the pendency of proceedings before APERC (OP No. 9-12 of 2009), the petitioner submitted detailed calculations for ₹481 crore in respect of losses incurred by the project between 16.9.2006 to 31.3.2009. On 5.12.2009, APERC rejected the proposed amendments but gave three options to the parties for recovery of the losses as under:-

“(a) Discoms to pay an additional rate per unit for the entire capacity and adjust this quantum and the period of entitlement therefor to balance the foregone fixed charge entitlement amount of IPPs with an element of truing up mechanism.

(b) Discoms to pay higher rate for 20% of the PPA capacity only and adjust the period of this entitlement to achieve balance with the foregone fixed charge entitlement amount of IPPs with truing up mechanism.

(c) Discoms to permit the IPPs to sell 20% PPA capacity plus any tested capacity over and above capacity in the open market with a truing up mechanism.”

10. Also, APERC in the said order had observed as under:

“If the amendments package is suitably reworked on the lines suggested and a fresh proposal is filed before the Commission based on any of the three options indicated with an appropriate true-up mechanism and consent sought therefor, the same can be considered by the Commission as fresh proceeding”

11. Based on the order of APERC dated 5.12.2009, the petitioner exercised option (a) for recovery of its losses and submitted fresh proposal for amendments to the PPA to provide for the mode of compensation for the losses. The petitioner and the

respondents agreed to the above amendments [as per option (a)] and accordingly filed applications before the APERC in May, 2011 and August, 2011 respectively. These applications were pending consideration as on the date of reorganization of the State of Andhra Pradesh.

12. Subsequently, the petitioner submitted an updated statement of losses amounting to ₹447 crore incurred from COD till 10.4.2009 after truing-up mechanism proposing to recover the losses over the balance period of PPA through increase in tariff (*additional fixed cost of ₹0.439/KWh from 1.4.2010 on monthly basis till the expiry of PPA i.e. 15 years from date of COD*) on account of non-availability of gas.

13. The petitioner has submitted that the respondents have failed to certify the losses submitted by the petitioner and this inaction and failure on the part of the respondents has given rise to disputes between the parties. Hence, this petition has been filed by the petitioner with the reliefs as stated in para 1 above.

14. The petition was heard on “maintainability”. During the hearing, the learned counsel for the petitioner mainly submitted as under:

(a) The petitioner and the respondent discoms of the *erstwhile* Andhra Pradesh State Electricity Board entered into PPA on 31.3.1997. As per PPA, the project cost was to be recovered through guaranteed operation of the plant at 80% PLF and Energy Charge was linked to Specific Station Heat Rate and the same was a pass through to the respondent discoms.

(b) The operation of the plant at 80% PLF was directly linked to the availability of fuel and fuel for the generating station was Natural gas and in the event of non-availability of natural gas, Naphtha was to be used. Based on the recommendations of the Govt. of AP,

the Ministry of Petroleum & Natural Gas allocated 1.64 MMSCMD of natural gas to the petitioner on firm basis on 5.6.2000.

(c) In terms of the PPA amended on 18.6.2003, natural gas is to be used as primary fuel and in case of unavailability of primary fuel, Naphtha or Low sulphur heavy stock would be alternate fuel.

(d) In consideration of the petitioner's consent for deletion of the alternate fuel clause, the respondents had agreed to certain benefits to the petitioner (including losses) which was agreed to by the Govt. of AP and the respondents and later approved by APERC in order dated 30.12.2006. Accordingly, based on the projected availability of fuel to the petitioner upto March, 2008 and assuming availability of 1.6 MMSCMD of gas during April, 2008, PPA was amended on 2.5.2007 by insertion of Clause 5.2A.

(e) Since 20% of the plant capacity was permitted to be sold by the petitioner for sale to third parties, the petitioner requested for amendment of the PPA. This was agreed to by Govt. of AP and the APPCC was directed to enter into amendments. However, APERC by order dated 5.12.2009 in O.P. Nos. 9-12 of 2009, rejected the proposed amendments, but gave three options to be exercised with truing-up mechanism.

(f) The petitioner had exercised option (a) wherein the discoms were required to pay an additional rate per unit for the entire capacity and adjust the quantum and the period of entitlement therefor to balance the forgone fixed charge entitlement. As the discoms have failed to certify the losses and comply with the direction of APERC in order dated 5.12.2009, dispute has arisen between the parties.

(g) By virtue of the AP Re-organization Act, 2014, the generating station has evolved into an inter-state generating station and since the matter relates to tariff, the dispute can be adjudicated by this Commission in terms of Section 79(1)(f) read with Section 79(1)(b) of the Act.

15. The learned counsel for the petitioner also clarified that the petitioner has only sought for the quantification of the loss of capacity charge and the tariff payable to the petitioner by the respondents. He further pointed out that in terms of Rule 8 of the Electricity Rules, 2005, the tariff determined by the Central Commission for generating companies under clause (a) or (b) of sub-section (1) of section 79 of the 2003 Act shall not be subject to re-determination by the State Commission.

16. The petitioner in its written submissions filed vide affidavit dated 20.1.2015 has contended as under:

(a) Adjudication of disputes between two states by bodies at a State level could lead to inconsistency and contradictions and hence, a mechanism has been provided for independent adjudication of federal disputes.

(b) The Electricity Act, 2003 is a self-contained code under which the functions of the CERC have been set out under Section 79 of the Act. CERC has exclusive subject matter jurisdiction to regulate the tariff of generating companies having a composite scheme for generation and sale of electricity in more than one State. CERC only can adjudicate disputes involving inter-State generating companies to ensure that two States having competing interest are subject to jurisdiction of a neutral forum.

(c) The above principle has been recognized by the Hon'ble Supreme Court in Hindalco Industries Vs GETCL and others (judgment dated 21.10.2008 in SCA No. 14742 of 2004) and RCI Power Ltd. Vs Union of India and others (2003 (3) ALD 762) and the judgment dated 11.11.2013 of the Appellate Tribunal for Electricity in Appeal No. 51 and 79 of 2013. It is evident from the judgments that CERC alone

can adjudicate disputes between a licensee and an inter-State generating station i.e. generating station having a composite scheme for generation and sale of electricity in terms of Section 79(1)(b) read with Section 79(1)(f) of the 2003 Act.

(d) After passing of the Andhra Pradesh Re-organization Act, 2014, the generating company of the petitioner is an inter-State generating station since two discoms are supplying power in the State of Andhra Pradesh while the other two discoms are supplying power in the State of Telangana. Hence, determination of tariff or any other component of tariff falls within the purview of Section 79(1)(b) as there is generation and sale of electricity in more than one State.

(e) Any dispute in relation to tariff for a generating station having a composite scheme for generation and sale of electricity in more than one State has to be decided by this Commission under Section 79(1)(f) of the 2003 Act.

(f) This petition has been filed by the petitioner for determination on the quantum of loss by foregoing the fixed charges which has to be adjudicated by this Commission in exercise of its power under Section 79. Once the quantum of loss is adjudicated, the Commission has to determine the additional fixed charge which is a component of tariff.

(g) As the quantum of loss has not been adjudicated by the APERC, fresh proceedings had to be initiated in respect of the same which is different from the implementation of the earlier order. The proceedings before the erstwhile APERC were filed after the respondent discoms and the petitioner could not arrive at the actual quantum of foregone fixed charges from the generating station.

(h) Upon the re-organization of the State of Andhra Pradesh, the generating station ceased to be subject to the jurisdiction of any of the newly constituted Commission and became subject to the jurisdiction of the CERC. The casual link between the generating company and the erstwhile APERC was snapped as the subject matter lies within the purview of jurisdiction of this Commission in terms of Section 79(1)(b) of the Act.

(i) Matters of tariff and disputes in relation thereto for generating station having a composite scheme of generation and supply fall in the expressive jurisdiction of this Commission and in view of this specific mandate of the Act, this Commission alone can adjudicate and decide the quantum of loss and additional fixed charges, which is a component of tariff.

(j) The newly constituted APERC and the Telangana State Electricity Regulatory Commission (TSERC) will not have jurisdiction over the generating station of the petitioner.

17. We have carefully considered the submissions of the learned counsel for the petitioner on the maintainability of the petition. The questions which arise for consideration are as under:

(a) Whether the Central Commission has the jurisdiction to regulate the tariff of the generating company after the implementation of the Andhra Pradesh Re-organization Act, 2014;

(b) Whether the present dispute which is in the nature of implementation of the directions of APERC shall be adjudicable by the Central Commission.

Issue No.1

18. Section 79(1) of the 2003 Act provides as under:-

“79(1) The Central Commission shall discharge the following functions namely:-



(a) To regulate the tariff of generating companies owned or controlled by the Central Government;

(b) To regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies entered into or otherwise have a composite scheme for generation and sale of electricity in more than one State.

(c) To regulate the inter-state transmission of electricity;

(d) To determine the tariff of inter-state transmission of electricity;

(e) xxxxxx

(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;

19. A perusal of Section 79 (1)(a) and (b) above would make it clear that the Central Commission has been vested with the power to regulate the tariff of generating companies owned and controlled by Central Government and the tariff of the generating companies other than those owned or controlled by the Central Government, if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State. The generating station of the petitioner does not fall under clause (a) of sub-section (1) of Section 79 of the 2003 Act. The petitioner has claimed that consequent to the re-organisation of the State of Andhra Pradesh, the generating company falls under clause (b) of sub-section (1) of Section 79 of the 2003 Act. Clause (b) of sub-section (1) of Section 79 requires the following conditions to be satisfied:

(a) The generating company is neither owned nor controlled by the Central Government;

(b) The generating company has a composite scheme for generation and sale of electricity in more than one state;

- (c) The generating company has entered into a composite scheme for generation and sale of electricity in more than one state.
- (d) The generating company otherwise has a composite scheme for generation and sale of electricity in more than one state.

20. In the present case, the generating station of the petitioner which is located in the State of Andhra Pradesh is neither owned nor controlled by the Central Government. It was conceived and executed as an intra-state generating station in the undivided State of Andhra Pradesh supplying power to the distribution companies of the erstwhile state and in terms of Section 86(1) of the 2003 Act, the jurisdiction of the generating company was vested with the APERC.

21. While so, the Andhra Pradesh Re-organization Act, 2014 (Act 6 of 2014) was enacted and the State of Telengana had come into existence on and from 2.6.2014 i.e the appointed day. Section 92 of the Act 6 of 2014 provides as under:

“The principles, guidelines, directions and orders issued by the Central Government, on and from the appointed day, on matters relating to coal, oil and natural gas, and power generation, transmission and distribution as enumerated in the Twelfth Schedule shall be implemented by the successor States “

22. Clause (C) of the Twelfth Schedule read with Section 92 of the Act 6 of 2014 provides that:

“C. Power

1. *Units of APGENCO shall be divided based on geographical location of power plants.*
2. *Existing Power Purchase Agreements (PPAs) with respective DISCOMS shall continue for both on-going projects and projects under construction.*
3. *The existing Andhra Pradesh Electricity Regulatory Commission (APERC) shall function as a joint regulatory body for a period not exceeding six months within which time separate SERCs will be formed in the successor States.”*
4. xxxx

23. It is evident from Clause (C) 2 Twelfth Schedule that the existing PPAs with the discoms for ongoing and new projects have been continued under the Andhra Pradesh Re-organization Act, 2014. Out of the four distribution companies located in the erstwhile State of Andhra Pradesh, two distribution companies each have been distributed between the States of Andhra Pradesh and Telengana respectively. As a result of this, the generating company is now supplying power to the two distribution companies located in the States of Andhra Pradesh and two distribution companies located in the State of Telengana. Thus, after coming into effect of the Andhra Pradesh Re-organization Act, 2014 from 2.6.2014, the generating company is generating and supplying power to more than one state. Thus, the second condition of Section 79(1)(b) is fulfilled in this case.

24. The third and fourth condition of Section 79(1)(b) is that the generating company has either entered into a composite scheme or otherwise has a composite scheme for generation and sale of electricity in more than one State. The petitioner company did not enter into a scheme to generate and supply electricity to more than one State at any point of time. The scheme for generation and supply of electricity has emerged with the implementation of the AP Re-organization Act, 2014. The words "*or otherwise have*" used in sub-clause (b) of clause (1) of Section 79 of the 2003 Act have to be given a purposive interpretation. In our view, the words, "*or otherwise have*" do signify to the existence of a composite scheme, which has emerged otherwise than through entering into contract for generation and supply of power to more than one State. In the present case, the composite scheme for generation and supply of electricity to more than one State has emerged on account of operation of AP Re-organization Act, 2014, which allocated the distribution companies of erstwhile State of Andhra Pradesh between

Telengana and Andhra Pradesh. In our view, the case of the petitioner is covered under the expression “*otherwise has a composite scheme for generation and sale of electricity in more than one State.*” Accordingly, we hold that the petitioner company satisfies the condition of clause (b) of sub-section (1) of Section 79 of the 2003 Act. Consequently, the tariff of generating station of the petitioner shall be regulated by the Central Commission and any dispute for adjudication involving the petitioner’s company shall be adjudicable by the Central Commission under clauses (f) to sub-section (1) of Section 79 of the 2003 Act.

Issue No.2

25. The petitioner has submitted that the respondents have failed to give effect to the order of APERC dated 5.12.2009 and have not certified the losses which has been submitted by the petitioner to the respondents on 17.3.2010. The petitioner has submitted that its assessment of the losses should be accepted and a direction should be given to the respondents to pay the additional fixed charges. The petitioner has prayed for grant of compensation for ₹447 crore towards foregone capacity charges for the period upto 10.4.2009 and for a direction on the respondents 1 to 4 to pay additional fixed charges of ₹0.439/kWh for the balance period of the PPA and to effect necessary amendments to the PPA.

26. Since we have decided that the generating station of the petitioner has acquired the character of an inter-state generating station supplying power to more than one State pursuant to the implementation of the AP Re-organization Act, 2014 and is covered under Section 79(1)(b) of the 2003 Act, we deem it appropriate to issue notices to the respondents on the claims of the petitioner in the present petition.

27. Accordingly, the petitioner is directed to serve the copy of the petition on the respondents by 7.5.2015 and the respondents are directed to file their replies, with advance copy to the petitioner on or before 15.5.2015. Rejoinder if any, by petitioner by 22.5.2015.

28. Matter shall be listed for hearing on 9.6.2015. Meanwhile, the parties are directed to complete the pleadings within the due date mentioned above.

Sd/-
(A.S.Bakshi)
Member

Sd/-
(A. K. Singhal)
Member

Sd/-
(Gireesh B. Pradhan)
Chairperson