



TELANGANA ELECTRICITY REGULATORY COMMISSION
'Vidyut Niyantran Bhavan', G.T.S. Colony, Kalyan Nagar, Hyderabad 500 045

O.P.No.20 of 2023

Dated 28 .10.2024

Present

Sri. T. Sriranga Rao, Chairman
Sri. M. D. Manohar Raju, Member (Technical)
Sri. Bandaru Krishnaiah, Member (Finance)

Between:

M/s Sarda Metals & Alloys Limited,
Regd. Office at: 125, B-Wing, Mittal Court,
Nariman Point, Mumbai, Maharashtra 400 021.

... Petitioner

AND

1. Telangana State Power Co-ordination Committee,
TSPCC, Vidyuth Soudha,
Hyderabad 500 082.
2. Southern Power Distribution Company of Telangana Limited,
Corporate Office, # 6-1-50, Mint Compound,
Hyderabad 500 063.
3. Northern Power Distribution Company of Telangana Limited,
Corporate Office, H.No.2-5-31/2,
Vidyut Bhavan, Nakkalagutta, Hanamkonda,
Warangal 506 001.

... Respondents

(Respondent No.1 is deleted by the Commission)

The petition came up for hearing on 21.08.2023, 21.09.2023, 15.11.2023, 14.12.2023, 11.01.2024 and 25.01.2024. Sri Challa Gunaranjan Advocate for petitioner has appeared on 21.08.2023, Sri Deepak Chowdary, Advocate representing Sri Challa Gunaranjan, Advocate for petitioner appeared on 15.11.2023, 14.12.2023 and 11.01.2024, Sri Challa Gunaranjan Advocate along with Sri Deepak Chowdary, Advocate for petitioner appeared on 25.01.2024. Sri Mohammad Bande Ali, Law Attaché for the respondents has appeared on 21.08.2023, 21.09.2023, 15.11.2023,

14.12.2023, 11.01.2024 and 25.01.2024. The matter having been heard and having stood over for consideration to this day, the Commission passed the following:

ORDER

M/s Sarda Metals and Alloys Limited (petitioner) has filed a petition under Section 86(1)(f) of the Electricity Act, 2003 (Act, 2003) seeking directions to the respondents to pay the surcharge on account of delay in payment of regular power supply bills and backdown compensation along with interest.

- a. It is stated that the petitioner is a company incorporated under the provisions of the Companies Act, 1956 bearing CIN No.U51420MH2008PLC187689 and is engaged in manufacture and export of manganese based ferro alloys. The petitioner is highly energy intensive industry. In order to meet its energy requirement for uninterrupted power supply, the petitioner has installed 1 x 80 MW coal based captive power plant within the same premises of its manufacturing unit situated at APIIC, Industrial Park, Kantakapalli, Kothavalsa, Vizianagaram, Andhra Pradesh.
- b. It is stated that the 1st respondent being Telangana State Power Co-ordination Committee (TGPCC) (now deleted by the Commission from the array of parties) had called for tenders vide RFP notice dated 19.03.2019 for procurement of power on short-term basis for the period 01.08.2019 to 30.11.2019. The petitioner participated in the said tender and its bid for supply of 24 MW was accepted for a tariff of Rs.4.90 paisa, which was after re-negotiations.
- c. It is stated that the TGPCC on behalf of the Southern Power Distribution Company of Telangana Limited (TGSPDCL) and Northern Power Distribution Company of Telangana Limited, (TGNPDCL) issued purchase order No.CE (Comm1) TSPCC/SE (Comm)/DES (STPP/PO) No.11/19-20/D. No.97, dated 27.05.19 (purchase order) for the supply of 24 MW at a tariff of Rs.4.90 paise for the period 01.08.2019 to 30.11.2019.
- d. It is stated that the following are the relevant clauses from the purchase order for the instant case:
 - i. *As per clause 6 which is the Compensation clause of the Purchase Order, the respondents are obligated to seek NOC/standing clearance from the TSSLDC as per the procedure contemplated by the CERC, both the seller and purchaser are obligated to ensure that the actual scheduling does not deviate by more than 30% of the contracted energy*

as per the approved open access capacity on monthly basis, further under sub-clause (c), the TGSPDCL and TGNPDCL are obliged to pay compensation at the rate of 20% of tariff per KWH for the quantum of shortfall in excess of permitted deviation of 30% of contracted energy, while continuing to pay open access charges as per the contract and under subclause (d), compensation was to be computed cumulatively every month for the deviation beyond 30% of contracted power.

- ii. As per clause 8 of purchase order, the delayed payment surcharge of 1.00% per month shall be leviable on all dues remaining unpaid for more than 30 days from the date of receipt of bill, Surcharge will be liable for payment for the period beyond 30 days till date of payment.*
- e. It is stated that the petitioner has supplied power to the respondents as per the contractual terms of the purchase order. However, for the contractual period between 01.08.2019 to 30.11.2019, the TGSPDCL and TGNPDCL had failed to consume power as per the open access schedule and the quantum of shortfall was in excess of permitted deviation of 30% of contracted energy. Therefore, the petitioner had raised invoices claiming for compensation in terms of clause 6 of the purchase order.
- f. It is stated that in view of the same, the petitioner had addressed letter dated 17.12.2019, stating that there has been a deviation from procurer side in excess of 30% backing down energy for which the TGSPDCL and TGNPDCL was required to pay compensation in terms of invoices bearing bill No.SMAL/TSPCC/266 dated 17.12.2019 raised for an amount of Rs.3,67,95,792.60 towards compensation to be paid for the excess backdown energy from 01.08.2019 to 30.11.2019.
- g. It is stated that further vide letter dated 08.07.2020, the petitioner had addressed a letter to the TGPCCL raising invoice bearing Bill No.SMAL/TSPCC /268, dated 08.07.2020 for an amount of Rs.39,66,306/- towards delayed payment surcharge from 01.08.2019 to 30.11.2019 as there was a delay of more than 30 days from the date of receipt of invoices raised by the petitioner for supply of power.
- h. It is stated that the respondents have paid Rs.3,62,91,570/- on 26.03.2021 towards backdown compensation, after deducting an amount of Rs.5,04,223/- on account of alleged POC losses. The petitioner had immediately addressed letter dated 31.03.2021 to the TGPCCL, wherein it acknowledged receipt of the above compensation amounts, but reminded of the interest component on delayed payment receivables valued at Rs.92,16,486/- (Ninety-two Lakhs

Sixteen Thousand Four Hundred and Eighty-six only) on account of both for supply of power and backdown compensation.

- i. It is stated that therefore, the principal amount that fell due as surcharges on backdown/compensation for the period between 16.01.2020 to 25.03.2020 is Rs.92,16,486/-.
- j. It is stated that, the petitioner had sent a reminder letter dated 14.06.2021 for payment of the outstanding surcharge payments. The TGPCC vide letter bearing Lr.No.FA& CCA/TSPCC/Dy.CCA/SAO(PP&S)/D.No.262/21, dated 18.06.2021, stated that the amount claimed vide the two Invoices have not been reconciled with TSDISCOMs and that TSDISCOMs have paid all PP bills and compensation claims from time to time.
- k. It is stated that vide letter dated 29.06.2021, the petitioner reiterated that the compensation claims and regular power bills were paid belatedly beyond 30 days, attracting surcharge as per clause 8 of the purchase order and accordingly, the petitioner was entitled to delay surcharge amount as claimed.
- l. It is stated that the petitioner after many requests and reminders to the TGPCC along with TGDISCOMs for the payment of the amount due were left with no option but to issue a notice of demand, dated 29.01.2022, as mandated under Section 8 of the Insolvency and Bankruptcy Code, 2016. It is stated that, the TGPCC and TGDISCOMs gave their reply dated 22.02.2022, 25.02.2022 and 23.02.2022 respectively, denying their liability and making false allegations that the same were subject to special conditions under clause 12 of the purchase order.
- m. It is stated that the petitioner had issued another demand notice dated 12.03.2022, through its counsel, demanding payment as per the Insolvency and Bankruptcy Code, 2016. It is stated that the TGPCC and TGDISCOMs gave their reply dated 29.03.2022, 31.03.2022, and 01.04.2022 denying their liability and making false allegations again to avoid their liability of payment of dues.
- n. It is stated that the petitioner had filed a corporate insolvency resolution process against the respondents before the NCLT, Hyderabad Bench, however the tribunal disposed-off the petition for want of pecuniary jurisdiction, since the debt claim did not cross the monetary threshold and redirected the petitioners to file an application before the appropriate court/authority having jurisdiction

within 45 days vide its order bearing CP (IB) No.233/9/HDB/2022 date 25.05.2023.

- p. It is stated that the petitioner is left with no choice but to file the instant petition against the TGPCC and TGDISCOMs for payment of the due amount as the TGPCC and TGDISCOMs are time and again making false allegations to escape the payment of the dues. Further, the petitioner states that there are no other pending cases before any other fora as on the date of the filing of this petition regarding the debt amount in question.

2. Therefore, the petitioner has sought the following relief in the petition.

- “(i) *Direct the respondents to pay the surcharges on delayed payment of regular power supply bills and backdown compensation amounting to Rs.92,16,486 (Ninety-two Lakhs Sixteen Thousand Four Hundred and Eighty-Six only) in terms of purchase order dated 27.05.2019.*
- (ii) *Direct the respondents to pay the surcharges on delayed payment of regular power supply bills and back down compensation along with interest at the rate of 12% per annum.”*

3. The TGPCC and the TGSPDCL have filed the counter affidavit as extracted below.

- a. It is stated that the petitioner has supplied round the clock (RTC) power of 24 MW from its coal based captive power plant with an installed capacity of 1 X 80 MW situated at APIIC, Industrial park, Kantakapalli, Kothavalasa, Vizianagaram, Andhra Pradesh for a period from 01.08.2019 to 30.11.2019 at an accepted tariff of Rs.4.90/- as per the purchase order dated 27.05.2019 placed by the TGDISCOMs.
- b. It is stated that the petitioner is claiming surcharge on account of delay in payment of regular power supply bills and backdown compensation in terms of short-term purchase order. It is stated that at the outset, the Commission has no jurisdiction to entertain this petition. These respondents are filing this counter restricting its plea to the jurisdiction only. These respondents reserve their right to file detail counter in case the Commission comes to the conclusion that the petition can be maintained by it.
- c. It is stated that the Hon'ble Supreme Court in para 22 of the case in Energy Watchdog Vs CERC as reported in 2017 (14) SCC 80 held that the moment generation and sale takes place in more than one state, the central commission

becomes the appropriate Commission under the Act, 2003. The relevant paragraph is extracted below:

“22. The scheme that emerges from these Sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79 (1) itself in subSections (c), (d) and (e) speaks of inter State transmission and inter-State operations This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression “within the State” in sub-clauses (a), (b), and (d), and “intra-state” in subclause(c). This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. The State Commission’s jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. What is important to remember is that if we were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are constrained to observe that the expression “composite scheme” does not mean anything more than a scheme for generation and sale of electricity in more than one State.”

- d. It is stated that in the present case the generator is in the state of Andhra Pradesh and it supplied power to DISCOMs of Telangana in the state of Telangana. It thus become clear that generation and sale of power in the present case took place in more than one state. As such Section 86 does not get attracted as held by the Hon’ble Apex Court, but Section 79 of the Act, 2003 comes into play. Consequently, the CERC gets jurisdiction to entertain such petition. Therefore, in view of the aforementioned dictum of the Hon’ble Supreme Court the petitioner cannot maintain the present petition before the Commission. Hence, the Commission has no jurisdiction to entertain this petition.
- e. It is stated that NCLT Hyderabad bench by order dated 25.05.2023 in CP(IB) No.233/9/HDB/2022 has directed the petitioner to file an application before the appropriate court/authority having jurisdiction.

f. It is stated that this Commission does not have jurisdiction as per the settled law. Hence, it is prayed the Commission to dismiss the present petition.

4. The respondent No.3 has filed its memo stating as follows.

"It is submitted that the respondents No.1 and 2 have filed their counter in O.P.No.20 of 2023 before the Commission.

Further, it is submitted that Chief General Manager/IPC/TSSPDCL is authorized to file petitions, affidavits/vakalatnamas, counter affidavits and other documents in various forms on behalf of respondent No.3 Northern Power Distribution Company of Telangana Limited (TSNPDCL).

It is submitted that the defence of all the respondents in the above case is one and the same. Therefore, this respondent No.3 does not want to file a separate counter.

Hence it is prayed that the Hon'ble Commission may be pleased to treat the counter filed on behalf respondents 1&2 as the counter of Respondent No.3 i.e., Northern Power Distribution Company of Telangana Limited (TSNPDCL)."

5. The Commission has heard the parties to the petition and also considered the material available to it. The submissions on various dates are noticed below, which are extracted for ready reference.

Record of proceedings dated 21.08.2023:

"... .. The counsel for petitioner stated that the matter is coming up for hearing for the first time. The respondents have to file counter affidavit in the matter. The representative of the respondents sought time for filing counter affidavit for four weeks. In view of the request of the representative of the respondent, the matter is adjourned."

Record of proceedings dated 21.09.2023:

"... .. The representative of the respondents sought time to file counter affidavit, if any, in the matter, though the matter is covered by the orders of the Commission, one particular aspect of the petition is required to be answered. In view of the request of the representative of the respondent, the matter is adjourned. However, the counsel for the petitioner Sri Deepak Chowdari made appearance at the fag end of the proceedings for the day and by that time the Commission has already adjourned the matter."

Record of proceedings dated 15.11.2023:

"... .. The counsel for petitioner stated that till date the counter affidavit is not filed by the respondents. The representative of the respondents sought further time for filing counter affidavit. In view of the request of the representative of the respondents, the matter is adjourned."

Record of proceedings dated 14.12.2023:

"... .. The counsel for petitioner stated that he has received counter affidavit in respondent of TSSPDCL, but has not received the counter affidavit filed by the TSNPDCL. Also, he is required to file rejoinder to the counter affidavit of TSSPDCL. In view of the submission of the counsel for petitioner, the representative of the respondents has been directed to file counter affidavit in

respect of the other DISCOM and the petitioner is required to file rejoinder thereafter by the next date of hearing. Accordingly, the matter is adjourned.”

Record of proceedings dated 11.01.2024:

“... .. The counsel for petitioner stated that the counter affidavit insofar as TSPCC is concerned, has not been filed by it. On enquiry, the representative of the respondents also stated that he would ascertain and ensure filing of the same. At the time of hearing, the Commission pointed out that the counter has to be filed immediately and a rejoinder if any has to be filed by the date of hearing and arguments will be heard on the next date of hearing. However, while preparing this record, the Commission noticed that it had deleted the TSPCC from the array in the title to the petition. Accordingly, no notice has been issued to the said committee. In these circumstances, the matter is simply adjourned for hearing and the parties shall make their submissions on the next date of hearing without the necessity of filing of the counter affidavit by the TSPCC, as otherwise the pleadings are completed except for the rejoinder from the petitioner.”

Record of proceedings dated 25.01.2024:

“... .. The counsel for petitioner stated that the petitioner was awarded with supply of power on short term basis in the year 2019. For that purpose, the DISCOMs have issued a purchase order. The conditions imposed in the purchase order include the liability of the DISCOMs to pay compensation towards backing down of more than 30% of the quantum of power contracted and any dispute arising out of the purchase order is subject to jurisdiction of the Commission.

The counsel for petitioner stated that now a counter affidavit is filed stating that the petition is not maintainable before this Commission, which is contrary to the understanding between the parties. A reliance is placed on the judgment of the Hon'ble Supreme Court in the matter of M/s Energy Watchdog decided in the year 2017 but the said judgment is inapplicable in this case. It is stated that the Hon'ble High Court of Andhra Pradesh as then was, had in the matter of M/s A.P. Gas Power Corporation Limited vs. APERC held that the Commission is required to decide all the issues including the preliminary objections at one stretch and not in a piece meal, hence the Commission may decide the matter on merits.

The representative of the respondents stated that the petitioner is a generating company in the state of Andhra Pradesh and is supplying power to DISCOMs in Telangana and as such, it becomes an interstate project, which constitutes a composite generation. In terms of Section 79 of the Electricity Act, 2003, the petitioner has to approach the Central Commission to settle the issue as it involves a composite generation and supply. He emphatically relied on sec 79 of the Act, 2003 to demonstrate that it is a composite scheme and a decision of the Hon'ble High Court for the States of Andhra Pradesh and Telangana in the matter of jurisdiction of the Commission. The said judgment relating to M/s GVK Industries and others had opined that where the generation is taking place in one state and supply is undertaken in another state, it would amount to a composite scheme and thereby the jurisdiction of the Central Commission is attracted. As such, this petition is liable to be agitated before the Central Commission only. The petitioner ought to have filed this petition before the CERC in view of the decisions of the Hon'ble High Court and Hon'ble Supreme Court.

The representative of the respondents stated that DISCOMs are relying on the decision rendered in M/s Energy Watchdog by the Hon'ble Supreme Court, wherein the interpretation has been made to sec 79 of the Act, 2003, specifically with relation to the composite scheme wherein the petition also fits into the case. Therefore, the Commission may refuse to entertain the petition filed by the petitioner. Also, it is stated that issue of deciding on merits would arise only if the petitioner succeeds in the preliminary issue. There are good number cases rendered by the Hon'ble Supreme Court and the Hon'ble High Court wherein it had been pointed out the preliminary issue has to be taken at first instance. Thus, the petition may be rejected as not maintainable.

The counsel for petitioner stated that the respondents could not have taken the preliminary objection in the teeth of the fact that Section 79 of the Act, 2003 is not attracted. There is subtle distinction between Section 86(1)(f) with Section 79 of the Act, 2003. Section 86(1)(f) is widely encompassed with the words licensees and generators and does not rely on other functions of the Commission for adjudication, whereas sec 79 is self-restrained with a limitation to look into only the issues arising out of clauses (a), (b), (c) and (d) only of that particular sec for adjudication. Thus, the present petition is maintainable before the Commission.

The counsel for petitioner stated that definition provided in the Act, 2003 at Sections 2(38), 2(39) read with Section 14 would make it clear that it is the licensees only in whose cases the state Commission is empowered to adjudicate. The licensees relating to distribution are not amenable to the Central Commission jurisdiction directly. Moreover, the clauses in the purchase order are specific and clear and as such, jurisdiction of the Commission is not ousted. Therefore, the Commission may consider deciding the matter on merits. Having heard the parties to the petition, the matter is reserved for orders."

6. The core issue in this petition is with reference to payment of surcharge by the distribution licensees for making the late payment in respect of regular power bills and backing down compensation. A preliminary issue has been raised by the distribution licensees that the Commission has no jurisdiction to entertain the present petition as it involves sale/purchase of DISCOMS in two different States.

7. From the facts it is noticed that the distribution licensees in the State of Telangana have floated a tender for procurement of 24 MW round the clock power for the period 01.08.2019 to 30.11.2019 under the bid the petitioner was allotted the capacity at a tariff of Rs.4.97 per kWh. Upon conclusion of the period the petitioner raised invoices for the same by letter dated 17.12.2019 and pointed out that there were deviations on the procurer side to the extent of more than 30% which attracts 20% of the tariff. By this letter the petitioner has claimed an amount of Rs.3,67,95,792.60.

8. The petitioner in this case is seeking backing down compensation towards the short-term purchase made by the distribution licensee in the State of Telangana. Though the petitioner has established the power plant in the State of Andhra Pradesh, the distribution licensees have sought to procure power from on all India basis and therefore the petitioner succeeded in the bid for such procurement. Merely because generation station is in one State and supply is affected in another State, it by itself would not constitute an interState transaction of sale though two States for which the jurisdiction to resolve the disputes rests with Central Electricity Regulatory Commission under Section 79 of the Act, 2003.

9. Reliance placed by the distribution licensees on the judgement in the matter of Energy Watchdog Vs CERC as reported in 2017 (14) SCC 80 is absolutely irrelevant for reason that in the instant case there is no sale of energy by the petitioner to another discoms in another state simultaneously along with distribution companies in the state of Telangana. The distribution licensees appear to be under misunderstanding and seeking to misinterpret the findings rendered by the Hon'ble Supreme Court. The emphasis on 'composite scheme' is not given credence. The distribution licensees have floated the tender and procured the power for their use and distribution within there area of supply. The transaction does not involve sale of power in two States. Thus, the ingredients set out by the Hon'ble Supreme Court are not satisfied.

10. Having negated the issue of jurisdiction the Commission now turns to payment of compensation for delayed payment made by the distribution licensees. The distribution licensee have floated the tender and also specified specific clauses with regard to compensation on account of short supply or intake of power. Elaborate provisions have been made in the purchase order itself which constitutes the contract in this case. Therefore, the distribution licensee cannot claim they are not liable for any compensation.

11. Though petitioner initially approached the National Company Law Tribunal, the said authority realising that it had no authority to entertain the petition disposed of the same with a liberty to approach the appropriate forum. Therefore, the petitioner is before the Commission invoking Section 86(1)(f) of the Act, 2003. The present petition is maintainable and is accordingly decided by the Commission.

12. The Commission is of the view that as the amount due to the petitioner has not been paid in a timely manner in terms of the purchase order, it is entitled to compensation as provided thereof, further the purchase order itself also provides for surcharge for late payment, but the petitioner has sought surcharge for delayed payment and back down compensation in terms of the purchase order.

13. Accordingly, the distribution licensees are directed to pay the surcharges on delayed payment of regular power supply bills and backdown compensation in terms of the purchase order dated 27.05.2019.

14. For the forgoing reasons and direction in paragraph No.13 the petition stands disposed of but with no costs.

This order is corrected and signed on this the 28th day of October, 2024.

Sd/-
(BANDARU KRISHNAIAH)
MEMBER

Sd/-
(M. D. MANOHAR RAJU)
MEMBER

Sd/-
(T. SRIRANGA RAO)
CHAIRMAN

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