



TELANGANA STATE ELECTRICITY REGULATORY COMMISSION
5th Floor, Singareni Bhavan, Red Hills, Hyderabad-500 004

O. P. No. 4 of 2015

Dated:17.07.2015

Present

Sri. Ismail Ali Khan, Chairman
Sri. H. Srinivasulu, Member
Sri. L. Manohar Reddy, Member

Between

M/s. Gayatri Sugars Ltd.
B-2, 2nd Floor, 6-3-1090,
TSR Towers, Raj Bhavan Road,
Somajiguda, Hyderabad – 500 082
Telangana.

.... Petitioner

AND

Government of Telangana
(Originally filed against Govt. of AP)
Department of Power, Secretariat,
Hyderabad.

Northern Power Distribution Company of Telangana State Limited
(formerly AP Northern Power Distribution Company Ltd.)
H.No. 2-5-31/2, Corporate Office,
Vidyut Bhavan, Nakkalgutta, Warangal – 506001

.... Respondent

This petition coming up for hearing on 27.01.2015, 29.04.2015, 22.06.2015 & 16.07.2015 in the presence of Sri. S.Rambabu, Advocate for the petitioner and Sri. P. Shiva Rao, Advocate on 27.01.2015 and Sri Y. Rama Rao, Advocate on rest of the days of hearing for the respondents and having stood over for consideration to this day, the Commission passed the following:

INTERIM ORDER

This petition is filed under Article 11 of the PPA dated 12-05-2006 by the petitioner seeking adjudication of the dispute between the petitioner and the respondents with prayer to direct the respondents to

- i) to implement the guidelines issued by this Commission to determine the tariff payable to the petitioner;
- ii) to determine the tariff payable to the petitioner for the power supplied from the date of the commercial operation to till date.
- iii) to direct the respondents to implement the tariff order determined by this Commission vide order dated 31.03.2009 in O.P. No. 5 of 2009.
- iv) Pass such other and further order(s) as this commission may deem fit just and proper in the interest of justice.

2. The averments mentioned in the petition, in brief are as follows:

a) The petitioner, M/s. Gayatri Sugars Limited, Nizamsagar's Unit previously known as M/s. GSR Sugars Pvt., Ltd is a company incorporated under the Companies Act, 1956 having its registered office at B-2, 2nd floor, 6-3-1090, T.S.R. Towers, Raj Bhavan Road, Somajiguda, Hyderabad and that it set up a Sugar plant along with Co-generation power plant of 16.25 MW.

b) The petitioner approached the 2nd Respondent and offered to sell the power. The 2nd Respondent agreed to purchase the power. The petitioner strongly believed that the 2nd respondent will treat all power producers equally and with that hope made all arrangements to establish the power plant. It is pertinent to mention that all the power producers shall sell the generated power to the 2nd Respondent only as per the Electricity Act.

c) The Commission prescribed the method for fixing tariff and the 2nd Respondent fixed the tariff based on the said two-tier method prescribed by the Commission.

d) The 2nd Respondent determined the fixed costs for 10 years from the date of commercial operation i.e., from 16-05-2007 to 16-05-2017 and 5 years for the variable costs i.e. up to the year 2009 - 2010. However, the rates offered by the 2nd Respondent are much lower than the tariff assessed based on the guidelines determined by this Commission. Moreover, the 2nd Respondent also

imposed Ceiling limit for the tariff i.e., Rs.2.63 per kWh. The Respondent has not honoured the guidelines determined by the Commission.

e) The Petitioner had executed agreements with the farmers for supply of sugarcane and with the contractors for the supply, erection and commission of the plant. The banks also agreed to sanction loan only upon execution of Agreement with 2nd Respondent. The petitioner was also not allowed to sell the power to any 3rd party agency.

f) The Commission has given the guidelines to fix the tariff based on fixed and variable costs. Thus, the production cost of power per unit will be the same in any Co-generation unit. Therefore, discretion to fix the tariff less than the assessed tariff rate by the Commission is per-se wrong and contrary to the Articles 14 and 301 of the Constitution of India and the respondents actions are not in the best interest of the industries of sugarcane and co-generation units.

g) The petitioner struggled to supply the power at the rates prescribed in the Agreement. The Petitioner approached the 2nd Respondent requesting for revision of tariff as per this Commission orders dated 20-03-2004 and 31-03-2009 and requested the 2nd respondent to treat the Petitioner on par with other competitors in the market. But, the petitioner received no response from the Respondents.

h) The Commission in the matter of R.P.No. 84/2003 in O.P.No.1075/2000 held to assess the variable cost, once in every five years. The control period should be for 5 years. This implies that the tariff cannot be either less or more than what is assessed based on the formula/method determined by the Commission. But the Respondents actions are contrary to the said Commission's Order.

i) It is further submitted that the Commission in its order dated 27-09-2005 in the matter of O.P.No.9 of 2005, held that in case of purchase of electricity other than through long term PPA's, the ceiling tariffs shall be the total tariffs (fixed+variable), as worked out for each source of energy (co-generation, Mini-Hydel etc.) on the basis of the aforementioned order of the Commission.

j) The Commission held in its order dated 31-03-2009 in O.P.No.16 of 2008 as under:

"Ceiling tariffs in the earlier RPPO Order:

The general opinion expressed is that the objective of encouraging RP will be defeated if scope for a negotiated tariff is made available by prescribing a ceiling concept”.

k) The Commission by considering all the variable items determined the variable cost payable to the co-gen unit from the FY 2009-10 to 2013-2014 and directed the Respondents to implement the same, vide order dated 31-03-2009. But, contrary to this order, the Respondents refused to apply the aforementioned variable costs to the Petitioner. Thereby, the very object of this Commission is being defeated. The comparison of the rates determined by this Commission and the rates offered by the Respondents by applying variable cost is as extracted by the petitioner in the petition.

l) The 2nd Respondent fixed the tariff payable to the Petitioner by keeping a ceiling of Rs.2.63 per kWh per unit. The petitioner agreed to the said rate reluctantly under compulsion and undue influence as the Petitioner was under pressure to comply its other contractual liabilities.

m) The 2nd Respondent is well aware that, fixing a ceiling on tariff is unconstitutional and detrimental for healthy functioning of an organization and also contrary to the Electricity Act and orders of this Commission.

n) The Petitioner supplied about 4,21,01,000 units of power till date and it received only Rs.11,07,25,630/- whereas as per this Commission guidelines, the petitioner is entitled for Rs.12,89,59,030/-. Therefore, the balance amount payable to the Petitioner by the 2nd Respondent is Rs.1,83,33,400/- and interest @ 18% p.a from the respective due dates. The said tariff is being offered to several organizations such as Empee Sugars, NDSL etc. Thus, the petitioner is requesting the Respondents to apply the same tariff to it on par with all other organizations and to pay the due amount.

o) Contrary to the tariff orders issued by the Commission, which are equal to all cogeneration plants (as the variable costs will be equal to all the plants) 2nd respondent has imposed on the petitioner, the tariff without considering fixed as well as variable costs as per the procedure prescribed by the Commission.

p) As per the Agreement in question, the tariff has to be negotiated from the year 2009-10. Therefore, the Petitioner is entitled for the revised tariff from the year 2009-10. The Commission has fixed the variable cost as extracted by the petitioner in the petition.

- q) In view of the above read with this Commissions report, the Petitioner is entitled for the tariff mentioned as tabulated by the petitioner in the petition.
- r) The Commission has held that, the objective of encouraging RP will be defeated if scope for a negotiated tariff is made available by prescribing a ceiling concept. Hence, the imposition of ceiling on tariff payable to the producer is contrary to the object of the Electricity Act and also contrary to law of the land.
- s) The petitioner's cash flow is seriously effected due to imposition of ceiling on tariff by the 2nd respondent the petitioner is incurring losses every year and the same may lead to closure of the petitioner's project.
- t) The Petitioner submitted a representation vide letter dated 01-04-2011 to the Respondents requesting to reconsider the tariff as well as reimburse the due amounts. The respondents failed to consider the said application and rejected the Application without assigning any reasons.

3. Originally the O. P. No. 58 of 2011 has been filed by the above named petitioner before the erstwhile Andhra Pradesh Electricity Regulatory Commission (APERC) for determination of the tariff for the project and as the tariff mentioned in the PPA is unviable and it has been shown that the licensee is exercising the dominant position. It has been heard and disposed of by the APERC by an order dated 31.08.2012 duly rejecting the above said petition on the grounds mentioned therein, holding that since the petitioner has rightly signed the PPA with its eyes wide open and hence cannot claim the present relief stated above.

4. The petitioner being aggrieved by the said order originally filed Writ Petition in W. P. No. 30547 of 2012 before the Hon'ble High Court. The Hon'ble High Court at the admission stage has disposed of the writ petition at the request of the petitioner therein seeking to approach the ATE as the order passed by the Commission is appealable.

5. Pursuant thereto, the petitioner has filed a regular appeal before the Hon'ble ATE in Appeal No. 310 of 2013. The said appeal has been contested by the licensee, with the then APERC being a non contesting necessary party. Ultimately the Hon'ble ATE by order dated 20.11.2014 observed as follows. The relevant observations are as under.

“13. The only issue for determination of the present Appeal is a legal issue. The relevant question is whether the State Commission has the power to modify a concluded long term PPA to give impetus to companies generating electricity using renewable resources. This issue is squarely covered in Appeal No. 247 of 2013. However, the Respondent submits that the same can be revised prospectively and not retrospectively.

14. In Appeal No. 247 of 2013 the Appellant Company therein operated its plant only for January 2008 and February 2008 i.e., for two months. It was in those circumstances this Tribunal had held in the said Judgment that the tariff as determined by the State Commission from time to time could only be prospectively applicable.

15. As pointed out by the learned Counsel for the Appellant in the present Appeal, the Appellant has admittedly been operating the plant since the date of Commissioning in 2007 and has been operating at a loss. This loss is further continued by the fact that the Appellant is not permitted to sell electricity to any other party except the distribution company in A.P. Therefore, the Appellant was constrained to sell the electricity only to APTRANSCO and also only at the rates stipulated in the PPA.

16. Hence, the issue of only prospective application of the rates determined by the State Commission would not apply to the present case. Therefore, we hold that the Appellant would be entitled to be paid as per the rates determined by the State Commission pursuant to the various generic tariff Orders dated 31.03.2009 and 16.05.2014 with effect from the date of filing of the Petition before the State Commission which resulted in passing of the Impugned Order.

17. TO SUM UP The Tribunal's finding allowing of the generic tariff as determined by the State Commission in Appeal No.247 of 2013 will apply to the present case. However, the revised tariff has to be allowed to the Appellant with effect from the date of filing the Petition before the State Commission which resulted in passing of the Impugned Order.

18. In view of the above findings, we set aside the impugned Order and remand the matter to the State Commission for considering the revision of tariff in terms of the observation made in the above Judgment. “

6. In view of the findings of the Hon'ble ATE and the matter having been remanded back to the APERC as it was the Commission, which passed the order. However, as the matter belongs to the Telangana state, as this Commission was had come in to existence, the files have been transmitted to this Commission and it has taken up the proceedings as required by the Hon'ble ATE, since the PPA is with the TSNPDCL.

7. The Commission posted the matter for hearing and after the first hearing, the licensee filed its counter affidavit stating the following submissions.

- a) Accordingly, the petitioner filed this petition in OP No. 4 of 2015 with a prayer to decide viable tariff to run the project, and direct the respondents to pay such tariff to the petitioner company as stated supra at para 1 of this counter.
- b) At this juncture it is pertinent to mention that though the Hon'ble ATE, New Delhi after hearing the case details in Appeal No. 310 of 2013 directed this Hon'ble Commission to decide a viable tariff prospectively to run the petitioner's bagasse based power industry in line with the judgment issued in Appeal No. 247 of 2013 between M/s SLT Power & Infrastructure Projects Pvt. Ltd., vs APERC which is a biomass based, the prayer of the petitioner cannot be adopted mutatis-mutandis for the following reasons:
- c) The Appellate Tribunal in a sweeping way applied the observations made in the Judgement rendered in Appeal No. 247 / 2013 to this case. The judgement made in Appeal No. 310 of 2013 is not a reasoned one, for the location of the appellant's Non Conventional energy Generator and the distance at which the required bagasse i.e., the raw material is available does not seem to be examined with documentary evidence.
- d) Also the finding of the Hon'ble APTEL in para 9 of its Judgement in appeal No. 310 / 2013 is not tenable because Hon'ble State Commission after examining the various factors relating to the availability of the raw material vis-à-vis the location of the appellant's generator has conceded to the tariff at Rs. 2.63/- per unit as agreed by the parties to the PPA following provisions contained in Section 62 of Electricity Act, 2003. The Hon'ble APTEL has not taken into account the above facts.
- e) Therefore in compliance of the order dated 27.09.2005 in OP No. 9 of 2005, the respondents negotiated the tariff of appellant, within the ceiling limit as per the order dated 20.03.2004 of Hon'ble APERC and PPA dated

12.05.2006 was entered with mutual consent of both the parties. The PPA is consented by APERC. The tariff agreed by both parties is with a ceiling limit of Rs. 2.63 per unit as per Schedule IA and Clause No. 2.2 of Article 2 of PPA. The said tariff is well within the ceiling limit of the tariff that works out as per the order dated 20.03.2004.

- f) The Article 2.2 of the PPA clearly stipulates that “The Company shall be paid the tariff for the energy delivered at the interconnection point for sale to DISCOM at the rates specified in schedule – 1A or the tariff as fixed by the APERC for bagasse based power projects from time to time, or negotiated tariff whichever is lower during the agreement period’. The schedule 1A of PPA stipulates that “In any year, if fixed charges and variable charges exceeds Rs. 2.63 per unit, the fixed cost is reduced accordingly such that total cost is limited to Rs. 2.63 per unit”. It is to submit that, once the appellant agreed to supply power for Rs. 2.63/- unit and entered PPA, it is binding on the appellant to oblige by the terms and conditions of the PPA dated 12.05.2006.
- g) The appellant filed a petition OP No. 58 of 2011 before APERC in the matter of applicability of APERC tariff order issued by APERC in OP No. 5 of 2009 dated 31.03.2009 to the appellant’s particular negotiated PPA dated 12.05.2006 to re-fix the tariff and to pay the difference of amounts above Rs. 2.63 unit for the electricity generated & supplied to TSNPDCL. The Hon’ble APERC dismissed the petition filed by the appellant vide its order dated 31.08.2012 stipulating the following: “In view of the clear provisions contained in Article 2.2 & schedule 1A as to what tariff is applicable for the petitioner herein, the commission is unable to allow any tariff other than the tariff that forms part of the PPA signed by both the parties and consented by the commission vide letter dated 04.05.2006. As such, the prayer of the petitioner to direct the respondents to apply the tariff issued by the Commission in the order dated 31.03.2009 to the petitioner herein cannot be granted.” There is no merit in the claim of appellant.
- h) Further, it is a fact that many of the NCE power plant developers concluded PPAs under negotiated tariff which are running efficiently and supplying power to DISCOMs as per the terms of PPA, viz., Nizam Deccan Sugars, TRIPCO etc.

- i) In the orders issued by the Hon'ble ATE in Appeal No. 310 of 2013 the APTEL did not give any direction to apply the tariff issued by APERC in the orders dated 22.06.2013 to the petitioner plant, on the other hand directed to determine viable tariff to the petitioner's project. It is also important to mention that the APERC in the orders issued on 22.06.2013 it is clearly mentioned that the revised tariff pursuant to APTEL directions dated 20.12.2012 and 30.04.2013 is applicable for the biomass (also applicable for Industrial Waste), bagasse based co-generation and mini hydel power plants, which were existing as on 31.03.2004 and those commissioned between 01.04.2004 to 31.03.2009 except for the projects covered by negotiated PPAs.
- j) The preferential tariff decided by the then APERC for the NCE plants having long term PPAs for first ten years period is under challenge before Hon'ble Supreme Court of India. Further the tariff for second (10) years period is pronounced by APERC, and the same tariff also sought to be reviewed. Thus the said tariff did not attain finality.
- k) The respondent respectfully submits that the OP No. 4 of 2015 is not maintainable either under law or on facts. The petitioner herein having entered into an agreement by knowing fully all, that the tariff which is going to be fixed is viable, he cannot turndown and re-agitate for fixing of tariff. Hence the petition itself can be dismissed on this ground alone.
- l) It is further submit that any adjudication or revising the tariff fixed in the PPA dated 12.05.2006 which was enquired and consented by the APERC on 04.05.2006 will amounts to reviewing the decision which is not permissible under law, for the reason that it is not a revision of terms of PPA.
- m) It is also submit that the Hon'ble APTEL remanded the matter, at the instance of the petitioner herein to reconsider the matter afresh with regards to revising the tariff. However the learned APTEL did not give any specific directions nor findings on the facts and circumstances of the present case. Therefore these said observations are not having any guiding factor.
- n) However, in view of remanding the matter by the APTEL this Hon'ble Commission may be pleased to hear the OP No. 4 of 2015 afresh by considering the facts and circumstances for fixing the tariff under the PPA dated 12.05.2006.

o) In the circumstances, facts, and reasons explained above, it is prayed that the Hon'ble Commission may dismiss the petition as the negotiated PPA was concluded on mutually agreed terms & conditions at the levelized tariff of Rs. 2.63/- per unit with revised cost parameters as per the direction of commission only.

8. Upon notice issued by the Commission, the Counsel for parties have before the Commission made submissions on several dates as stated above. The Commission heard the arguments which are substantially a reiteration of the submissions made in the pleadings.

9. The Counsel for the petitioner stated that the matter is before the Commission pursuant to remand order passed by the Hon'ble ATE. The petitioner is not claiming any extra relief and seeks determination of tariff in terms of order passed by the erstwhile APERC dated 22.06.2013. It is stated that the Hon'ble ATE relied on the reasoning set forth in the appeal filed by M/s SLT Power and Infrastructure Limited. The Commission is required to pass consequential order determining tariff by applying various orders passed by erstwhile APERC, but limited to from the date of filing of the petition before the APERC. It is further stated that the order passed by the Hon'ble ATE is specific and clear as to re-fixation of the tariff based on the orders passed by the Commission. As directed by the Commission it has filed all the data required for determination tariff including the amounts due in terms of order of the Hon'ble ATE by taking the orders passed by the APERC in to consideration.

10. The counsel for the petitioner further stated that according to the calculations filed before the Commission that total amount of arrears in terms of the order of the Hon'ble ATE are a Rs.9.69 crores and the principal amount is Rs. 7.92 crores based on the energy supplied by the petitioner to the DISCOM. He relied on the data filed by it on 25.04.2015. Accordingly the counsel for petitioner sought passing of the interim order so as to enable the petitioner to sustain and continue supply.

11. On the other hand the counsel for the respondents while elaborating the sequence of events, also reiterated the contentions made in counter affidavit. It is stated that fresh determination has to be done in the matter based on the orders of erstwhile APERC by issuing public notice as contemplated under provisions of the

Electricity Act, 2003. There is no case for passing a consequential order in terms of order of the Hon'ble ATE. Though the petitioner has sought to show that it has supply power, unless a prudent check is done by the Commission, it cannot be said that the energy supplied is based and near to the actuals. Though the Commission directed filing of data, the Counsel was at pains as to what data he has and was not able to pin point or contradict the petitioner claims.

12. Inasmuch as the counsel further argued that the petitioner's case does not fall for fresh determination as it is a negotiated PPA. The Hon'ble ATE did not specifically direct the Commission to make fresh determination, but only fix the tariff in accordance with the applicable orders as were governing the tariff at the relevant time and that to from the date of filing of the petition before the erstwhile APERC.

13. The Commission has considered the rival contentions and the submissions made elaborately by the Counsel for the parties. In the absence of the clear data as regards supply of energy and the amounts due, no final disposal can be made of the case at this point of time. The contentions raised do not enthuse this Commission to undertake final disposal of the matter for the reasons stated above. Therefore it is deemed fit that interim orders have to be passed at this stage to enable the petitioner to honour the commitments under the PPA and continue to supply the power to DISCOM.

14. Therefore, this Commission is of the view that the petitioner and the licensee should come out with clear data relating to supply of energy made by the generator and the amounts due to be paid by the licensee. Pending disposal of the remanded matter, in order to mitigate the present situation, this Commission directs the licensee to pay 30% of the principal amount claimed by the petitioner pursuant to data relating energy and amount filed before the Commission as an interim measure. **This order shall be complied by 24.07.2015.**

15. However, it does not mean that the licensee is estopped from pointing out any discrepancy in the amount of energy or the amount of due claimed by the petitioner, but after complying with the directions as stated above. The licensee is at liberty to file the necessary data and the amounts due by it, on or before 04.08.2015 with a copy to

the petitioner who will also submit any further information with a copy to the licensee on or before 07.08.2015. The next date of hearing is scheduled for 11.08.2015.

This order is corrected and signed on this 17th day of July 2015

Sd/-
(L MANOHAR REDDY)
MEMBER

Sd/-
(H SRINIVASULU)
MEMBER

Sd/-
(ISMAIL ALI KHAN)
CHAIRMAN

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