

ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION
4th & 5th Floors, Singareni Bhavan, Red Hills, Hyderabad-500 004

Present

Sri A.Raghotham Rao, Chairman
Sri R.Radha Kishen, Member
Sri C.R.Sekhar Reddy, Member

O.P No. 34 of 2009
and
I.A No. 21 of 2009

Dated: 27-07-2010

Between

M/s. GVK Industries Ltd
156-159, Paigah House, Sardar Patel Road,
Secunderabad – 500 003.

.....Petitioner

and

1. Central Power Distribution Company of Andhra Pradesh Ltd
2. Southern Power Distribution Company of Andhra Pradesh Ltd
3. Northern Power Distribution Company of Andhra Pradesh Ltd
4. Eastern Power Distribution Company of Andhra Pradesh Ltd
5. The Special Chief Secretary to government, Energy Department
Govt. of AP, Secretariat, Hyderabad.

..... Respondents

This petition coming up for hearing on 23.01.2010 in the presence of Sri D.V.S.S. Prasad, Advocate on behalf of Sri. V. Akshaya Babu, Advocate for the petitioner and Sri. P. Shiva Rao, Advocate for respondents No.1 to 4 having stood over for consideration to this day, the Commission delivered the following:

ORDER

This is a petition filed u/s 86(1) (k) read with 11 (2) of the Electricity Act, 2003 (for short 'EA 2003') requesting the Commission to pass appropriate orders / directions to the respondents to bear the additional expenditure involved in

complying with the directions of Government of Andhra Pradesh (for short 'GoAP') and to pass such other order or orders in the interest of justice.

2. In brief, the averments mentioned by the petitioner in the said petition are as follows:

a) GoAP accorded permission to the petitioner to establish and operate 220 MW power project at Kadiam in E.G. District. On 18-06-2003, the petitioner entered into a Power Purchase Agreement (for short 'PPA') with APSEB, the predecessor of respondents herein. However, consequent to third transfer scheme, the PPA was deemed to have been entered into with respondents herein being successors – in – interest of APSEB by operation of law.

b) Even though the petitioner was ready by completing the project in full shape for commercial operation since January, 2006 it could not operate the project for want of supply of natural gas by GAIL. There is also other type of gas i.e R-LNG available at Hazira from other suppliers which was permitted to be used by Central Power Projects by the CERC through GAIL. But cost of R-LNG is higher than the little quantity of gas being supplied to existing projects by GAIL. As per the terms of PPA the price of the fuel including the transportation charges are pass through to respondents, provided that the respondents shall pay the price of invoice of GAIL or other supplier whichever is less. Therefore, the petitioner could not venture to use the R-LNG, though ready having completed the project in full shape long ago.

c) GoAP, with a view to augment the supply of energy by adding some more generation, issued directions u/s 11 of EA 2003 to the petitioner to make use of R-LNG gas for temporary period upto 31.05.2009 and produce the energy, vide letter No. 2043 / Power.I (1) dt. 09.04.2009. In compliance of the said directions, the petitioner has been using R-LNG from 14.04.2009 which is of high cost than the sources of GAIL, and has been supplying the energy to respondents.

d) As per section 11 (2) of Electricity Act, this Commission is empowered to off set the adverse impact on the petitioner in complying with the directions of Govt. of AP. Even though GoAP advised the respondents to pay the values of specified items which are pass through, the respondents are saying unless the nature of off setting

adverse impact is decided by the Commission either directing the GoAP to pay or directing the respondent to pay the same, they are not authorized to pay the bills.

3. On 31-10-2009, the petitioner filed an application u/s 94 (2) of the EA 2003 r/w Regulation 56 of the APERC (Conduct of Business) Regulations 1999 and Order 1 Rule 10 of the Code of Civil Procedure to amend the prayer and stated that:

a) The petitioner entered into Spot Gas Sales Agreement dt. 06-04-2009 with GAIL (India) Ltd., Gas Transportation Agreement with Reliance Gas Transportation Infrastructure Limited dt. 11-04-2009 and Gas Transportation Agreement with GAIL (India) Ltd., dt. 13-04-2009 for purchase of R-LNG gas. The petitioner was supplied R-LNG gas during the period from 14-04-2009 to 10-05-2009. Accordingly, the petitioner generated electricity and sold the same to respondents. The petitioner submitted bill No. 12/09-10 dt. 11-08-2009 to respondents claiming the amount in terms of the direction of GoAP.

b) In the light of the above, it is requested to permit the petitioner to amend the prayer by adding the following to the existing prayer

“Accord authorization to the respondents / AP Discoms for honouring and payment to the petitioner in terms of PPA dt. 18-06-2003, the amount of Rs. 14,78,10,582/- raised under bill 12/09-10 dt. 11-08-2009 with regard to the energy charges on usage of R-LNG gas as per the GoAP directive vide its letter 2043/Power.I (i) / 2009-10 dt. 09-04-2009 and also pass such other and proper order / direction / relief in the interest of justice”

4. The said application filed by the petitioner is taken on record as I.A.No. 21 / 2009.

5. On 04.02.2010 on behalf of all the respondents a common reply is filed inter-alia stating that

a) The petitioner generated power using R-LNG and supplied energy of about 51.373257 Mu to respondents during April and May 2009. Meanwhile by its order dated 28.04.2009, APERC gave its approval for using RIL gas at the rate fixed by EGoM, GoI at 4.205 US\$ / MMBTU. At the said price, the variable charge works out to about Rs. 1.85 / Kwh.

b) While furnishing the provisional bill for R-LNG, the petitioner requested respondents to release payment subject to the outcome of the petition filed before APERC to off set the financial impact. Respondents made payment towards R-LNG (fixed cost as per PPA + variable cost as per actuals) after taking an undertaking from the petitioner that such payment is made subject to fixation of rate by the Commission as required by GoAP in its direction dated 09.04.2009. By availing R-LNG generated power from the petitioner the additional burden borne by the respondents is about Rs. 4.675 crs [i.e., difference between variable cost due to R-LNG and RIL (Rs. 2.78 – Rs.1.87) x 51.373257 MU].

c) In view of the above, the respondents requests the Commission (i) to fix the rate for fixed cost as per the PPA and variable charge as per actuals which is pass through as per the Government letter No. 2043 dt. 09.04.2009 (ii) to offset the financial impact to APDISCOMs which arose due to orders of GoAP vide letter No. 2043 dt. 09.04.2009 and pass orders directing the GoAP to reimburse to APDISCOMs to a tune of Rs. 4.675 crs, since the same was already paid by DISCOMs to petitioner (IPP).

6. Heard the counsel for the petitioner and the respondents on I.A. for amendment of prayer as well as the main petition. There is no representation of respondent No. 5 during different stages of proceedings before the Commission including on 23-01-2010, when the application for amendment of prayer and the main petition were finally heard. After considering the points raised for amendment of the prayer, the application filed by the petitioner in I.A.No. 21 / 2009 is here-by disallowed as payment has already been made by the respondent pursuant to the provisional bill furnished by the petitioner herein and commission is any way deciding the main petition, offsetting the adverse financial impact, by this order.

7. Before proceeding further, it might be necessary to briefly summarise the background against which the directions under Section 11 were given together with the directions themselves and other stipulations as contained in GoAP letter No.2043/Power.1 (1) /2009, dt.09-04-2009 as hereunder:

(a) Background: The background against which the above said directions were given includes:

- (i) Severe shortage of power in the State.
- (ii) Four new IPPs (viz. 370 MW Vemagiri, 220 MW GVK Extn., 464 MW Gowthami and 445 MW Konaseema) remaining idle or running at sub-optimal level because of lack of availability of gas originally contemplated to be provided by GAIL.
- (iii) Natural gas supplies from Reliance KG D-6 fields expected only from 1st week of June 2009.
- (iv) Using R-LNG becoming possible due to Commissioning of East – West pipeline by M/s.RGTIL (Reliance) connecting Gujarat and AP.
- (v) The variable charge with R-LNG being cheaper as compared to variable charge with Naphtha and power procurement from open market being available at an exorbitantly higher price.
- (vi) CERC permitting M/s. NTPC to procure R-LNG from available sources to generate power from their gas based power plants to augment the generation.
- (vii) APPCC proposing to procure R-LNG through GAIL from available sources in Gujarat to utilise the idle capacity of new IPPs to meet ensuing power demand in the State during April 2009 and May 2009 and requesting GoAP vide letter dated 06-04-2009 to cause necessary directions to the new IPPs under Section 11 of E.A Act 2003 to operate their plants using R-LNG round the clock from 14-04-2009 to 10-05-2009.

(b) Directions: The directions given by GoAP keeping in mind the public interest under Section 11 of the Electricity Act 2003 include:

- (i) M/s. GVK Extn., M/s.Gauthami, M/s. Vemagiri, & M/s. Konaseema shall operate the projects using R-LNG Round the clock from 14-04-2009 or from the date R-LNG is made available on directions of APPCC by (a) availing the supply of R-LNG from available sources through GAIL as supplier; (b) by utilising the gas by permissible “swap method” utilising the gas transportation network.

- (ii) IPPs shall enter into necessary Agreements for the implementation of the above directions like Gas Supply Agreement with M/s. GAIL for procurement of R-LNG, Gas Transmission Agreement with M/s. RGTIL for transportation of R-LNG from Gujarat to Andhra Pradesh, and Gas Transmission Agreement with M/s. GAIL for transportation of R-LNG from Oduru in AP to respective IPPs.
- (c) Other stipulations : The other stipulations include:
 - (i) APPCC is advised that variable charge to be paid by AP DISCOMs to IPPs shall include the following which pass through as per standard Regulations like (a) The cost of R-LNG including applicable charges and marketing margin etc., levied by GAIL. (b) Transmission charges including applicable charges like Service charges etc., levied by M/s.RGTIL. (c) Transmission charges including applicable charges like Service charges etc., levied by M/s. GAIL. (d) The applicable taxes if any levied in Gujarat and AP.
 - (ii) APPCC is directed to co-ordinate with GAIL, the RGTIL and the IPPs to operationalise these directions.
 - (iii) Further as provided under Section 11 (2), APERC shall offset the financial impact to IPPs for complying with the directions.
 - (iv) APPCC is directed to take steps to get the concerned order in this regard from APERC.

8. Further to the foregoing, the issues that fall for consideration of the Commission are (i) offsetting the adverse financial impact of the directions referred to in subsection 11 (1) of Electricity Act 2003 on the petitioner consequent to the directions of GoAP (ii) offsetting the financial impact to the respondent due to orders of GoAP vide letter No. 2043, dated 09-04-2009 and pass orders directing GoAP to reimburse to the respondent, since the same was already paid by the respondent to the petitioner.

9. The issues are dealt with as hereunder issue wise:

(a) Offsetting the financial impact on the petitioner consequent to the directions of GoAP: The financial impact on the petitioner is different for different time periods namely period from 14-04-2009 to 27-04-2009 and period from 28-04-2009 to 10-05-2009. This is because of the fact that different provisions apply for different time periods.

Coming to the time period from 14-04-2009 to 27-04-2009, the applicable provisions of the PPA namely clause 3.3 (II) states that in the event of purchase of natural gas from sources other than GAIL, the cost "C" shall be the cost as per GAIL price or the cost of the alternate fuel supplier whichever is less. On the other hand, the directions of GoAP under section 11 of Electricity Act 2003 require the petitioner to operate the plant using R-LNG which is available at a higher cost than the sources of GAIL. The adverse financial impact on the petitioner consequent upon complying with the above said directions is the difference in amount in variable charge worked out with R-LNG as fuel as compared to that using the GAIL price. This needs to be offset to the petitioner for the period from 14-04-2009 (the date on which generation with R-LNG commenced) to 27-04-2009.

As regards the time period from 28-04-2009 to 10-05-2009, the applicable provisions of the PPA stand modified by Commission's orders dated 28-04-2009 in I.A No. 5 of 2009 in O.P.No. 11 of 2009, inter-alia, permitting to avail RIL gas at the price approved by EGoM in supersession of clause 3.3 (case-II) of the existing PPA subject to certain terms and conditions indicated therein. On the other hand, the directions of GoAP under section 11 of Electricity Act 2003 require the petitioner to operate the plant using R-LNG which is available at a higher cost than RIL gas at the price approved by EGoM. The adverse financial impact on the petitioner consequent upon complying with the above said directions, is the difference in amount in variable charge worked out with R-LNG as fuel as compared to that using the RIL gas at the price approved by EGoM. This needs to be offset to the petitioner for the period from 28-04-2009 to 10-05-2009.

In view of the above, Commission hereby directs APPCC to make the payments to the petitioner in line with the respective offset principles mentioned in the two preceding paragraphs, for the respective periods i.e from 14-04-2009 to 27-04-2009 and from 28-04-2009 to 10-05-2009, duly adjusting amounts already paid. Fixed costs are any way to be paid as per PPA only. Further, since the transportation tariff to be levied by GAIL and M/s. RGTIL are only provisional, necessary adjustment has to be made once the actual tariffs are fixed by Petroleum and Natural Gas Regulatory Board (PNGRB).

- (b) Offsetting the financial impact to the respondent due to orders of GoAP vide letter No. 2043, dated 09-04-2009: As regards the request of respondent to offset to them, the financial impact which arose due to orders of GoAP vide letter No. 2043, dated 09-04-2009, Commission is of the view that the prayers of the respondent made in the counter/reply can not be entertained while disposing the petition filed by the petitioner. Even assuming, from the academic point of view, that the prayers made in the counter/reply can be dealt with while disposing the petition filed by the petitioner, a look at section 11 (2) of Electricity Act 2003 reveals that offsetting the adverse financial impact of the directions given by appropriate government **on any generating company** is only covered and not offsetting any consequential adverse financial impacts. In view of the above, Commission is not inclined to give any direction as prayed for by the respondent.

The order is corrected and signed on this 27th day of July, 2010.

Sd/-
(C.R.Sekhar Reddy)
MEMBER

Sd/-
(R.Radha Kishen)
MEMBER

Sd/-
(A.Raghotham Rao)
CHAIRMAN

//Certified Copy//