

ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION
Hyderabad

Dated : 18-08-2009

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

I.A.No. 13 of 2009
in
O.P. No.11 of 2009

Between

M/s. Konaseema Gas Power Ltd
2nd Floor, Progressive Towers, 6-2-913/914,
Khairatabad, Hyderabad-4.

.....

Applicant

And

1. Central Power Distribution Company of A.P.Ltd.
2. Southern Power Distribution Company of A.P.Ltd.
3. Northern Power Distribution Company of A.P.Ltd
4. Eastern Power Distribution Company of A.P.Ltd.

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Respondents

(Parties are referred to as they are arrayed in the Interlocutory Application)

This Interlocutory Application (IA) coming on for hearing on 18.07.2009 in the presence of Sri P.Shiva Rao, Advocate for the Respondents; Sri M.Venugopala Rao, Special Correspondent, Prajasakti Telugu Daily; Sri K.Raghu, Certified Energy Manager and Auditor; Sri Punna Rao, Convenor, Praja Energy Audit Cell, and Sri Timma Reddy, People's Monitoring Group on Electricity Regulation, objectors; the Commission passed the following:

ORDER

The Applicant filed the above mentioned application under Section 94 of the Electricity Act, 2003 read with clauses 55 and 56 of APERC Business Regulations 1999.

2. The averments mentioned in the said I.A. filed by the Applicant are as follows:

(a) The respondents herein earlier filed O.P. No. 11 of 2009 referred to above before this Commission seeking the latter's approval for amendments to the Power Purchase Agreement dated 31.03.1997 which was amended and restated on 26.05.2003 and subsequently amended from time to time and the last amended on 12.01.2005 (hereinafter referred to as the 'PPA') wherein it is provided amongst others that the applicant is allowed to sell 20% of PPA capacity plus any additional tested capacity to any third party for the PPA period.

(b) In the year 2004, the respondents (successors of APTRANSCO) and the Andhra Pradesh Power Coordination Committee (APPCC) requested the applicant to agree for deletion of alternate fuel clause from the PPA in order to circumvent the obligation of the respondents to pay the fixed charges / capacity charges (in the event of unavailability of fuel) under the said PPA to the applicant.

(c) the applicant could not agree for deletion of alternate fuel clause from the PPA as the same would make its project unviable and also due to the fact that financial institutions which financed the project did not agree to any changes in the PPA. As a result, the respondents had taken an unreasonable stand that they will not honour their obligation under the PPA and also they will not recommend for supply of gas to the applicant's power project until and unless the applicant agrees for deletion of alternate fuel clause from the PPA and during the last few years there have been several deliberate and willful violations under the PPA by the respondents. The applicant's power plant was ready for commissioning in March 2006 in Open Cycle mode.

(d) as a result of deliberate inaction and refusal on the part of the respondents to honour their contractual obligations under the PPA, the applicant suffered huge financial losses and the applicant lost all the warranties given by the manufacturers of its power plant. Even though the applicant would suffer losses by agreeing to deletion of alternate fuel clause from the PPA, in view of the spiraling project cost overruns and in view of its commitments to financial institutions and to other third parties, had no other alternative but to agree to enter into negotiations with respondents to agree for deletion of alternate fuel clause.

(e) the applicant and the respondents have initialed the amendments to the PPA vide amendment agreement dt. 03.10.2008 subject to approval of this Commission. Thereafter, the respondents filed these proposals before this Commission for its approval, which are taken on file as O.P.No.11 of 2009 by the Commission. The applicant craves leave of the Commission to refer and rely upon the contents of the said original petition, pleadings therein and documents filed therein.

(f) Even though these amendments do not fully cover losses suffered by the applicant, it agreed for the same in the public interest to move further towards commissioning and generation of power from its power project. In view of the breaches of the respondents of their obligations under the PPA, the applicant even now has right to invoke Article 9 of the PPA to terminate the PPA and to claim damages from the respondents, in the event the approval of the Commission for amendments is withheld or not approved for any reason.

(g) It is further submitted that even the 20% sale of PPA capacity to third parties is burdened with number of risks which the applicant has to bear. Applicant will not be in a position to sell the 20% of PPA capacity for the entire PPA period due to variety of reasons including the commissioning of upcoming mega power projects, non-availability of gas up to the allocation etc.

(h) It is submitted that the applicant is continuing to suffer losses till 04.06.2009 when the open cycle COD of the project was declared and the project started

generating electricity using natural gas as fuel. During the period between March 2006 to March 2009, the applicant had suffered further losses to the tune of Rs. 557.13 crores. The applicant is continuing to suffer losses as it is unable to sell till date 20% of PPA capacity to recoup its losses.

(i) It is submitted that if the applicant, pending the disposal of the above mentioned O.P., is not allowed to sell 20% of PPA capacity and any other tested capacity of over and above PPA capacity to any third party, the applicant will continue to suffer further losses and the applicant will lose the opportunity that is prevailing at present to sell merchant power. At the same time, no prejudice would be caused to respondents if the applicant is allowed to sell 20% of PPA capacity as agreed by them in the amendments to the PPA which are initialed and submitted to this Commission for approval. Further, the sale of 20% of PPA capacity was already approved by the High Powered Committee as the same is in the public interest.

(j) It is therefore submitted that the applicant has a strong prima facie case and balance of convenience is in its favour. The applicant would suffer irreparable losses, if it is not allowed to sell 20% of PPA capacity to third parties immediately.

(k) Therefore, it is prayed that in the interest of justice and fair play, pending the disposal of the main petition, the applicant may be allowed to sell 20% of PPA capacity and any other tested capacity over and above PPA capacity to any third party and pass such other order / orders as the Commission deems fit and proper.

3. Heard the parties concerned on 18.07.2009, however, there is no representation on behalf of the applicant.

4. The following contentions which are common to all 4 IPPs, in the context of the I.A's, *inter-alia*, emerge from the submissions made by the counsel for the respondents in the 4 I.A's / main O.P's being heard by the Commission in respect of 4 IPPs either part of the IA proceedings or the main O.P proceedings in which the IA's have been filed, are that since the 'amendment to the PPA' is not yet consented

by the Commission, right to sell the 20% of the project capacity has not accrued in favour of the applicant and for that reason, the interim application filed by the applicant cannot be entertained, leave aside passing any orders as such on the said application. Further, the counsel for the respondents also submitted that in view of the fact that the main petition for grant of consent to the 'amendment to the PPA' is at an advanced stage of hearing, there is no justification for passing interim orders in this case. The counsel stated that it is trite law that where the main relief and interim relief are same, an applicant is not entitled for interim relief.

5. During the course of public hearings conducted in this proceedings, either part of the IA proceedings or the main O.P proceedings in which the IA's have been filed, objectors expressed several concerns on the amended agreement submitted for consent of the Commission, more particularly on sharing of capacity in the ratio of 80:20 in different circumstances between the respondents and applicant herein respectively. According to the objectors, the wording in clause 2.1 of the proposed amendments is ambiguous and does not ensure 80% of the capacity being available to the respondents in all situations with the applicant being permitted to use only to the extent of 20% of the capacity to offset its losses. According to the objectors, the word 'solely' appearing in proviso to clause 2.1 of the proposed amendment, in particular, is amenable to several interpretations and respondents may be deprived of their intended share in the capacity to the extent of 80% in certain situations. The objectors requested the Commission to direct the respondents as well as the applicant to clarify the ambiguity regarding 80:20 share of the project capacity between them respectively in different situations to ensure that the respondents get 80% power in all situations. According to the objectors, without clarifying sharing of capacity, the applicant is not entitled for any relief in the interlocutory application. On this issue, the counsel for respondents has stated that a submission on this point, is in the process of being filed by the respondents before the Commission in the main O.P.

6. In view of the above mentioned reasons, the objectors requested the Commission to dismiss the I.A.

7. The issue that arises for consideration of the Commission is;
“whether, pending the disposal of the main case, the applicant is entitled to seek an interim order regarding sale of 20% of PPA capacity and any other capacity over and above PPA capacity to any third party”.

8. Perused the record. On 14.10.2008, the respondents submitted a proposal requesting the Commission to grant consent to the amendment agreement to the PPA earlier executed by all of them with the applicant on 03.10.2008 and the same is taken on the file of the Commission. As per the procedure prescribed, the Commission directed the respondents to publish notice in two prominent newspapers calling for objections / suggestions on the amendments proposed to the PPA. In the meanwhile, examination of the proposal submitted by the respondents revealed that one of the important premises of the amendments made to the existing PPA is with regard to quantum of loss sustained on account of non recovery of fixed cost entitlements under existing PPA and loss recoveries contemplated in the revised PPA by way of allowing the applicant to sell 20% of the PPA capacity and any tested capacity over an above the PPA capacity to the third parties and also by allowing the applicant to recover the loss by extending FDSC payment till the end of the agreement period. Accordingly, by letter dated 20.02.2009, respondents were requested to furnish detailed calculations of actual loss likely to be incurred by the applicant for comparing the same with the quantum of loss recovery that the applicant can be expected to make in terms of changes incorporated in the PPA with due regard to reasonable assumptions regarding sale price at which the applicant sells power to third parties. In spite of several reminders, the respondents did not submit calculations as directed by the Commission. However, in compliance of statutory requirement for grant of consent, the Commission proceeded with public hearing based on objections / suggestions received from all the stakeholders concerned, including the objectors and as a part of such proceedings several hearings were conducted, including on 18.05.2009, 17.06.2009, 19.06.2009, 23.06.2009, 01.07.2009. During the course of such hearings into the matter, the respondents expressed their inability to submit their version regarding the

calculations of loss figures likely to result to the petitioners due to certain proposed amendments to the PPA and the likely projected extent of their getting offset by certain other amendments like permission to sell 20% PPA capacity, etc. The examination of financial figures in the context of balancing loss recovery is thus still in progress and has not yet been completed in the main O.P.

9. As any agreement, including amendment to such agreement, for purchase of electricity by the respondents from the applicant is *void* unless consented by the Commission, respondents (First Party in the main case) submitted the proposal on 14.10.2008 requesting the Commission to grant consent to such amendment agreement entered by them with the applicant (Second Party in the main case) on 03.10.2008. Thus the proceedings in the main case before the Commission are not adversarial in nature as between the applicant and the respondents herein, in the sense that there is no *lis* between the parties herein, except common interest to obtain consent to the amendment agreement executed by them. While it is so, the applicant filed the present application u/s 94 of the Electricity Act, 2003 wherein it is alleged that the respondents are guilty of several acts or omissions, committed breach of contract resulting in financial loss to the applicant, etc., and requested the Commission to allow the applicant to sell 20% of PPA capacity pending disposal of the main case, viz., for grant of consent as stated above. But the respondents who submitted the original proposal for grant of consent by the Commission based on amendments mutually agreed between them and the applicant herein are opposing the present interlocutory application. Thus, as far as the present I.A. is concerned, there is no concurrence between the applicant and the respondents, even though in the main O.P., consent of the Commission has been sought based on mutual agreement between respondents and the applicant.

10. For the first time, the applicant alleged several acts or omissions on the part of respondents in the application for grant of interim relief. Otherwise all along the main proceedings in the O.P., the applicant as well as the respondents have been trying to clarify the inadequacies or shortcomings noticed by the Commission and the concerns or apprehensions expressed by the objectors to the amendment

agreement submitted to the Commission with a common interest to obtain consent to the said agreement. In other words, neither the applicant nor the respondents claimed any relief against each other in the O.P. Therefore, the allegations of breach of conduct on the part of the respondents resulting in inordinate delay in commissioning the power project of the applicant leading to cost overruns and loss of capacity charges, appears to be made only for the purpose of this application. Even if such allegations were true, the applicant categorically stated in its application that instead of exercising legal remedy, it negotiated with the respondents and GoAP to arrive at an amicable solution in the form of amendments to the PPA and in fact entered into amendment agreement on 03.10.2008 which agreement is pending consideration of the Commission for its consent. Thus when a compromise is sought to be arrived between the parties, one of the parties to such compromise cannot be permitted to seek interim relief against the other, even as the main O.P. continues in which the applicant and the respondents are not adversarially placed. There cannot be an I.A. which is not based on concurrence between applicant and respondents as part of an O.P. which is being pursued by both applicant and respondents based on a proposal mutually agreed between them. Thus, in view of the nature of proceedings, the pleadings contained in the proposal submitted on 14.10.2008 for grant of consent and those in the present application, the Commission is of the opinion that the applicant is not entitled to seek any order in its favour with regard to terms and conditions of the amendment agreement dated 03.10.2008, including on sale of 20% PPA capacity and any other capacity over and above PPA capacity to third parties.

11. As regards the prayer of the applicant in its application that prejudice will not be caused to the respondents if the applicant is allowed to sell 20% of PPA capacity as agreed between them in the amendments to the PPA which is initialed and submitted to the Commission for consent, it has to be kept in view that the provision regarding sale of 20% of PPA capacity is itself one of the important issues being adjudicated in the main O.P. As long as the consent is not granted by the Commission, the amendment agreement dated 03.10.2008 is *non est* in the eye of law and therefore, the question whether or not prejudice will be caused if the

Commission, in the present I.A., permits the sale of 20% of PPA capacity, itself does not arise.

12. As regards the prayer of the applicant in its application that it may be permitted to sell its share of 20% capacity of the power project pending grant of consent by the Commission, it has to be noted that the amended PPA under which the idea of permitting sale of 20% PPA capacity has been mentioned for the first time, is itself the subject matter of the main O.P and as on date, the PPA valid in law is the (principal) PPA amended from time to time and the last amended on 12.01.2005, in which there is no such provision regarding sale of 20% PPA capacity by the applicant.

13. Merely because parties have entered into amendment agreement on 03.10.2008 and submitted the same for consent of the Commission it cannot be stated that rights, including power to sell 20% of the project capacity, have accrued in favour of the applicant herein. Grant of consent by the Commission is neither automatic nor an empty formality. In general, before grant of consent the Commission is required to examine the proposal in detail, call for necessary information, seek clarifications, etc., and arrive at a decision after taking into consideration the views and objections, if any, of all the stakeholders, especially those of consumers or consumer organisations. In the case on hand in particular, there are several vital considerations that are required to be examined before taking a decision on grant of consent to the amendment agreement entered between the parties herein on 03.10.2008. It is not out of place here to mention that the power to grant consent includes power to suggest modifications, alterations and to refuse altogether.

14. Whatever it may be, the decision whether or not to grant an interim order has to be taken at a time when the existence of the legal right assailed by the other party. The object of such order is to protect the applicant against injury by violation of its right for which it could not be adequately compensated. The need for such protection has to be weighed against the corresponding need of the other party and the court

must weigh one need against another and determine where the 'balance of convenience' lies. As mentioned above, (legal) right to sell 20% of project capacity has not accrued in favour of the applicant. Therefore, the further question of protecting the applicant from possible violation of such right or determining balance of convenience does not arise.

15. Grant of an interlocutory order during the pendency of legal proceedings is a matter requiring exercise of discretion of a court equally applies to quasi-judicial bodies. While exercising such discretion, a quasi-judicial body also should be satisfied that (i) an applicant has a *prima facie* case; (ii) balance of convenience is in applicant's favour and (iii) the applicant would suffer an irreparable injury if its prayer for interlocutory order is dismissed.

16. In the case on hand, at the time of preliminary scrutiny, by letter dated 21.02.2009, the respondents were requested to offer further explanation on the scope of the amendments proposed to clauses 1.1.35 dealing with 'Installed Capacity' and 2.1 dealing with 'Sale & Purchase of Capacity'. By letter dated 20.03.2009, respondents submitted clarifications and the same are under examination by the Commission in the main O.P. Further, the concerns expressed by the objectors on sharing of capacity in the proposed amendments are also under examination in the main O.P. Unless examination of the proposal submitted for grant of consent is completed, the Commission cannot arrive at any decision in this case and therefore, request for grant of interim orders at this stage is premature. Moreover, for other reasons mentioned above including requirement of clarifications by the Commission and non-accrual of legal right in favour of the applicant to sell 20% of PPA capacity, the Commission is not inclined to accept the contention of the applicant that it has got *prima facie* case in its favour. Similarly the Commission is of the opinion that balance of convenience is not in the favour of the applicant. Moreover, the Commission is of the opinion that grant of interim relief in this case would amount to practically giving principal relief, which practice is deprecated by the Hon'ble Supreme Court. Because the applicant is generating electricity, supplying the same to respondents in pursuance of subsisting PPA and receiving fixed

charges in pursuance of said (principal) PPA, applicant is not suffering irreparable damage warranting the Commission to interfere at this stage. Moreover, the proceedings in the main case viz., grant of consent to the amendment agreement entered between the parties on 03.10.2008 is at an advanced stage and for that reason also, the Commission is of the opinion that the applicant is not entitled for interim order in this case.

17. For all these reasons, the Commission is of the opinion that the applicant is not entitled to seek an interim order and accordingly the application filed by the applicant for sale of 20% of PPA capacity and any other capacity over and above PPA capacity to any third party is dismissed.

The order is corrected and signed on this 18th day of August, 2009

Sd/-
(C.R.SEKHAR REDDY)
MEMBER

Sd/-
(R.RADHA KISHEN)
MEMBER

Sd/-
(A. RAGHOTHAM RAO)
CHAIRMAN

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