

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. 14 of 2009
in
O.P. No.12 of 2009

Between

M/s. Vemagiri Power Generation Ltd.,
Skip House, 25/1, Museum Road,
Bangalore – 560 025.

.... 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.

.... 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 B.Ramesh Babu, Associate Vice President for the Applicant; 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. 12 of 2009 referred to above before this Commission seeking the latter's approval for amendments to the Power Purchase Agreement (hereinafter referred to as 'PPA') dt.02.05.2007 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) Respondents earlier filed O.P.No. 25 of 2004 before this Commission seeking directions for deletion of alternate fuel clause. The same was contested by the applicant as contrary to the basic tenets of the contract law and thus it is not maintainable in law.

(d) Even though the applicant had several options under the PPA and under the applicable law to take legal action against the respondents either to claim damages, or to take extreme step of invoking Article 9 of the PPA to terminate the PPA, the applicant keeping public interest in mind decided to sacrifice above options and agreed for deletion of alternate fuel clause from the PPA even though such deletion was not acceptable to the financial institutions who financed the project. Accordingly,

the applicant signed amendments to the PPA for deletion of alternate fuel clause on 02.05.2007 (second amendment to the PPA).

(e) The estimated loss to the applicant was Rs.275 crores as on 31.03.2008 on account of deletion of alternate fuel clause from the PPA. In order to compensate the above losses, the respondents extended the term of PPA from 15 years to 23 years making good around Rs.219 crores, leaving applicant with uncovered loss of Rs.56 crores. The applicant declared project COD on 16.09.2006.

(f) However, GoAP committee on Energy has agreed to new terms in respect of 3 other gas based power projects viz., M/s. GVK Industries Ltd, M/s. Gautami Power Ltd and M/s. Konaseema Gas Power Ltd, including for sale of 20% power generation to third parties, which are in total variance with the applicant herein. In view of such developments and losses incurred by the applicant it represented to GoAP and APTRANSCO to further amend its PPA providing for sale of 20% of installed capacity to third parties and to revert back the term of PPA from 23 years to original PPA period of 15 years from date of COD on par with proposed terms offered to other 3 IPPs, on equity, fairness and justice.

(g) The aforesaid proposals were considered at length by the High Powered Committee constituted by GoAP and accordingly the committee accepted the said proposals as the same are in public interest and the same will not cause any additional financial commitment to the respondents. Accordingly, the applicant and the respondents have agreed to further amend the PPA dt. 02.05.2007 and initialed the amendment agreement on 27.11.2008. Thereafter, the respondents filed proposal before this Commission vide their letter dt.02.02.2009, seeking consent to the said further amendments executed on 27.11.2008 in line with other 3 power projects mentioned above and the same is taken on file as O.P.No.12 of 2009 by the Commission.

(h) Even though these amendments do not fully cover losses suffered by the applicant, it had agreed for the same in public interest.

(i) 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. If pending disposal of O.P., the applicant 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 it 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, 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.

4. During the hearing, on behalf of the applicant, the averments mentioned in the application were reiterated and it was further submitted that as per the 'Amended Agreement to PPA' signed by the applicant and the respondents on 27.11.2008, respondents are entitled to 80% (eighty percent) of the project tested capacity subject always to a maximum of 296 MW and the balance 20% (twenty percent) is available to applicant for merchant sale to third parties. Therefore, the applicant requested that it may be permitted to sell its share to third parties, subject to rights of

the parties at final hearing stating that permission to sell 20% of the project capacity by the applicant to the third parties would not cause any harm to respondents. The applicant averred that Sub-section (2) of Section 94 of the Electricity Act, 2003 empowers the Commission to pass interim orders in *any proceeding, hearing or matter* before it and therefore, the Commission could pass interim orders in this case and it may impose any condition, as it may deem fit and proper in the interest of justice. He stated that for the reasons, and the circumstances set out in detail in the application, the applicant had suffered and had been suffering financial losses to the tune of crores of rupees and that this was a case where equity was in favour of the applicant. The applicant pleaded that the application filed by them may be allowed and the applicant may be permitted to sell 20% of PPA capacity and any other tested capacity over and above PPA capacity to any third party.

5. 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 Agreement (executed on 27.11.2008) 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 above mentioned 'Amendment Agreement to the PPA' is at an advanced stage of hearing, there is no justification for passing interim orders in this case. The counsel for the respondents also submitted that it is trite law that where the main relief and interim relief are same, an applicant is not entitled for interim relief.

6. 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 Agreements 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 as well as those in other I.As / O.Ps. 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 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.

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

8. 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”.

9. Perused the record. On 02.02.2009, the respondents submitted a proposal requesting the Commission to grant consent to the amendment agreement to the PPA (dated 02.05.2007) earlier executed by all of them with the applicant on 27.11.2008 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 dated 02.05.2007. 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 and 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.

10. 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 02.02.2009 requesting the Commission to grant consent to such amendment agreement entered by them with the applicant (Second Party in the main case) on

27.11.2008. 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.

11. For the first time, the applicant alleged 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. It is admitted by the applicant that it agreed for deletion of alternate fuel clause, for whatever reason and in fact signed amendments to PPA for deletion of alternate fuel clause on 02.5.2007 (second amendment to PPA) and the term of PPA was extended from 15 years to 23 years. Now the applicant wants to be treated on par with other power projects and revert back to original period of 15 years. Whatever it may be, when a compromise is sought to be arrived between the parties herein in the form of amendment agreement to the PPA, 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 02.02.2009 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 27.11.2008, including on sale of 20% PPA capacity.

12. As regards the contention of the applicant 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 27.11.2008 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.

13. As regards the contention of the applicant that it may be permitted to sell its share of 20% capacity of the power project pending grant of consent by the Commission subject to any conditions that may be imposed 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 PPA dated 02.05.2007, in which there is no such provision regarding sale of 20% PPA capacity by the applicant.

14. Merely because parties have entered into amendment agreement on 27.11.2008 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 27.11.2008. 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.

15. 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 will not arise at all.

16. Grant of an interlocutory order during the pendency of legal proceedings is a matter requiring exercise of discretion and while exercising such discretion, a quasi-judicial body 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. 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 dated 02.05.2007 and receiving fixed charges in pursuance of said 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 27.11.2008 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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