

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

I.A.No. 6 of 2011

In

O.P.No. 16 of 2010

Dated: 22-08-2011

Present

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

Between

Central Power Distribution Company of A.P. Ltd.
Southern Power Distribution Company of A.P. Ltd.
Northern Power Distribution Company of A.P. Ltd.
Eastern Power Distribution Company of A.P. Ltd.
Transmission of Corporation of A.P. Ltd.

.... Applicants

(Respondents in O.P.No. 16 / 2010)

And

Tata Power Trading Company Ltd.

..... Respondent

(Petitioner in O.P.No. 16 / 2010)

(Parties herein are referred to as in the Interlocutory Application mentioned above)

This application coming up for hearing on 18.06.2011, in the presence of Sri. P Shiva Rao, Advocate for the Applicants and TRILEGAL, Advocates for the Respondent, and having stood over for consideration to this day, the Commission delivered the following:

ORDER

On 30.09.2010 the respondent trading company filed petition u/s 86 (1) (f) read with Sec. 86 (1) (b) of the Electricity Act, 2003 (for short '*the Act*'), seeking for a declaration that deduction of Rs. 9.72 Crs and 96.48 lakhs by the applicant towards compensation for non-supply of short term power by the respondent herein as illegal

and wrongful. The said main petition filed by the Respondent herein is taken on file of the Commission as O.P.No. 16 / 2010 .

2. During the course of proceedings of the said main petition, the applicants herein filed an application for rejection of the said petition for want of jurisdiction and the same is taken on file as I.A.No. 6 of 2011. In the said application it is stated that;

(a) As per section 86 (1) (f) of the Act, Commission is vested with jurisdiction to decide disputes only between the generator and licensee. The Hon'ble Supreme Court of India also held that all disputes between generator and licensee would be within the jurisdiction of Regulatory Commission

(b) The respondent herein and the petitioner in O.P.No. 16 / 2010 is a trading company and indisputably, a licensee. It is not a generator so as to bring the dispute within the ambit of section 86 (1) (f) of the Act. The respondent also did not claim the status as that of a generator.

(c) At Paragraph-21 of the main petition, the respondent herein (petitioner in O.P.No. 16 / 2010) tried to invoke the jurisdiction of this Commission on the ground that all disputes arising out of power purchase, *dehors* the fact that the dispute concerned to generator or not and the said contention is not correct in law. As per the judgment of the Hon'ble Supreme Court in *Gujarat Urja Nigam Limited* case, all disputes between generator and licensee fall within the ambit of section 86 (1) (f), but not disputes other than generators. The reason is obvious that when a generator supplies power under PPA, same would be approved / consented by the Commission and thus the terms of such agreement are also approved.

(d) In view of the above the subject matter of the petition filed by respondent herein (petitioner) in O.P.No. 16 / 2010 cannot be entertained by the Commission. The respondent herein ought to have approached Civil Court for the said relief.

(e) Under clause 55 of Business Regulations, the Commission has inherent power to pass any order to prevent abuse of process of law. This is a case where the Commission needs to exercise that power and reject the main petition filed by the respondent in O.P.No. 16 / 2010 for want of jurisdiction.

3. On 17.01.2011 the respondent herein filed 'reply', stating that:

(a) The contention of the petitioners herein for rejection of O.P.No. 16 / 2010 suffers from two fallacies namely; (i) applicants have misconstrued the provisions of Section 86 (1) (f) of the Act, in contending that disputes between two licensees cannot be adjudicated by the Commission and (ii) applicants are not correct in stating that Power Purchase Agreements (PPAs) under which short-term suppliers like the respondent herein supplies power are not approved / consented by the Commission and therefore, such PPAs lack regulatory oversight and disputes arising thereunder cannot be gone in to by the Commission .

(b) Bare reading of sub-section (1) of section 86 of the Act reveals that the Commission is practically entrusted with each and every aspect relating to governance of the electricity sector, including regulating electricity purchase and procurement process. Section 86 (1) (f) casts a responsibility on the Commission to adjudicate upon dispute between the licensees and generating companies. Section 86 (1) (f) of the Act, is in *pari materia* to section 22 (2) (n) of the repealed Electricity Regulatory Commissions Act, 1998 (for short '*ERC Act*'). The nature and scope of State Commission's adjudicatory jurisdiction in the context of section 22 (2) (n) of the ERC Act, was examined in the case of Dabhol Power Company vs Maharashtra State Electricity Board & others in W.P.No. 1205 of 2001. For the State Commission to exercise its adjudicatory jurisdiction, it is not necessary that the dispute must only be between a licensee and a generating company. Disputes or differences amongst two licensees, as in the present case, is also to be decided by the State Commission u/s 86 (1) (f) of the Act.

(c) The applicants have wrongly relied upon the judgment of the Supreme Court in *Gujarat Urja Nigam Limited* case reported in (2008) 4 SCC 755 in this regard. Construction of the term '*between*' as existing in Section 86 (1) (f) was not an issue for consideration before the Hon'ble Supreme Court. The said case in fact supports the cause of respondent herein. In this judgment, Hon'ble Supreme Court upheld the exclusive and absolute jurisdiction of the State Commission to determine every dispute amongst licensees and generating companies under the Act.

(d) In the case of *Tata Power Company Limited Vs Maharashtra Electricity Regulatory Commission & Others*, reported in 2009 ELR (SC) 246 while interpreting Section 86 (1) (b) it is held that as a part of regulation, Regulatory Commission can also adjudicate upon disputes between the licensees and generating companies in regard to the implementation, application or interpretation of the provisions of an agreement for procurement of power by the distribution licensee.

(e) A 'trading licensee' like the respondent herein is entitled to supply electricity to the applicants / distribution companies operating in the State and such procurement of power by the applicants is as per the Power Procurement Plan approved by this Commission. Clause 3.4 of the APERC (Terms and condition for determination of tariff for supply of electricity by a generating company to a distribution licensee and purchase of electricity by a distribution licensee) Regulation 2008, provides that a distribution licensee may undertake short-term purchases of electricity without the prior approval of the Commission. Therefore there is no legal basis for the applicant's argument that short-term PPAs lack of regulatory control and so the disputes arising thereunder cannot be gone into by the Commission .

(f) In the light of the above submissions, it is prayed by the respondents herein that the I.A.No. 6 / 2010 filed by the applicant herein may be dismissed.

4. Heard the arguments of the counsel for the parties concerned.

5. On behalf of the applicants herein it is reiterated that the respondent herein is not a generator. As per the judgments reported in AIR 2008 SC 976 and that APGPCL vs. APERC, Regulatory Commission has limited jurisdiction in respect of disputes arising between generating company and licensee. Based on the said judgments, the main petition filed by the respondent in O.P.No. 16 of 2010 is liable to be dismissed. Several disputes may arise between the parties under the Contract Act and the Sale of Goods Act. Parliament did not contemplate disputes that arise under the said Acts to be resolved by Electricity Regulatory Commissions. Clauses (b) and (f) of sub-section (1) of Section 86 of the Act stand on different footing and they cannot be conjoined. Eventhough, procurement process is approved by the Commission, it cannot adjudicate the present dispute between the parties herein.

6. On behalf of the respondent, its counsel submitted that the expression used in section 86 (1) (f) of the Act, i.e. “*adjudicate upon the disputes between the licensees and generating companies*” includes power to adjudicate disputes between licensees *interse*. The word “*and*” in the above expression may be used disjunctively as well as conjunctively. In the *Dabhol* case while appreciating the scope and ambit of Section 22 (2) (n) of the ERC Act which is in *pari materia* with that appearing in Section 86 (1) (f) of the Act at paragraphs-37,38,43 it is emphasized that the meaning of the word “between” also means “among”. The judgment of the Bombay High Court is not binding on the Commission, but it has persuasive effect. Therefore, this Commission has power to adjudicate the dispute between the parties herein.

(a) In the case of *Gujarat Urja Vikas Nigam Ltd*, the Hon’ble Supreme Court of India while stating that Section 86 (1) (f) of the Act is a special provision, took a liberal view and clarified that there is no restriction in that Section about the nature of the dispute. Similarly, the Appellate Tribunal for Electricity in Appeal No. 209 of 2009 examined the language of Section 86 (1) (f) of the Act and stated that all disputes between licensees fall within the jurisdiction of the State Commission.

(b) As per Clause 11 ‘Dispute Resolution’ of APERC Intra-State Electricity Trading Regulation No. 6 of 2005, Commission is entitled to adjudicate upon the disputes between the Trader and any other licensees. Maharashtra Electricity Regulatory Commission is entertaining disputes between licensees. Similarly Punjab Electricity Regulatory Commission also adjudicating disputes between licensees.

(c) For all these reasons it is prayed that this Commission has power to adjudicate the dispute raised by the respondent herein (petitioner) in O.P.No. 16 of 2010 and I.A.No. 6 / 2010 filed by the applicant herein is liable to be dismissed.

7. In reply the counsel for the applicants that the issue that arose for consideration before the Bombay High Court in *Dabhol* case was under ERC Act. Scope and ambit of Section 22 (2) (n) of the ERC Act which was discussed in that case is not in *pari materia* with that appearing in Section 86 (1) (f) of the Act, as the word ‘generating companies’ does not appear in the former provision of law and absence of the said expression makes lot of difference. Similarly the thrust in Gujarat

Urja Case is with reference to clarification of the word 'and' so as to mean 'or', otherwise it will lead to an anomalous situation as a State Commission cannot both decide a dispute itself and also refer it to some arbitration. The ATE case referred to by the counsel for the respondent will not help its cause as the facts of the said case are altogether different. Lastly, with regard to the Inter-State Electricity Trading Regulation relied upon by the counsel for the respondent it is stated that it is only a Regulation made by the Commission in exercise of sub-ordinate legislative powers and it cannot outweigh the relevant provision of the Electricity Act. Thus there is no merit in the contentions of the counsel for the respondent and therefore, the main petition filed by the respondent in O.P.No. 16 / 2010 may be rejected for want of jurisdiction. Lastly, the counsel for the applicants herein relied on judgment of the Hon'ble Supreme Court in the Maharashtra Electricity Regulatory Commission v. Reliance Energy Ltd., in Civil Appeal No. 3551 of 2006 to substantiate the proposition that the adjudicatory function of the Commission is limited to the matter prescribed in Section 86 (1) (f) of the Act.

8. The issue that arises for consideration is

“Whether the petition filed by the respondent herein (petitioner) in O.P.No. 16 / 2010 is liable to be rejected for want of jurisdiction”

9. Power to adjudicate disputes between / among licensees is the short point that arises for consideration of the Commission in this application.

10. Respondent herein and the petitioner in O.P.No. 16 / 2010 is a trading licensee. Applicants 1 to 4 herein are the distribution licensees. In the main petition viz., O.P.No. 16 / 2010 the respondent herein which is a (trading) licensee invoked jurisdiction of the Commission principally u/s 86 (1) (f) of the Act, against (four distribution) licensees. According to the counsel for the applicants herein the scope and nature of section 86 (1) (f) of the Act, is limited in the sense that they being a licensees can invoke jurisdiction of this Commission either individually or jointly against generating company or companies only. Similarly a generating company or companies can only invoke jurisdiction of this Commission against the applicants herein either individually or jointly who are admittedly licensees. In other words one

of the parties to the dispute to be brought before the Commission u/s 86 (1) (f) of the Act, must invariably be a generating company.

11. After carefully considering the rival contentions on the interpretation of the expression used in section 86 (1) (f) of the Act, viz., “*adjudicate upon the disputes between the licensees and generating companies*”, it is difficult to accept the narrow interpretation of the said expression as sought to be propounded by the counsel for the applicants herein and more particularly to the meaning given to the word ‘and’ appearing in the said expression. According to well established ‘Principles of Statutory Interpretation’, the word ‘or’ is normally disjunctive and ‘and’ is normally conjunctive but at times they are read as vice versa to give effect to the manifest intention of the Legislature as disclosed from the context (*M.Satyanarayana v. State of Karnataka*, (1986) 2 SCC 512, p. 515 : AIR 1986 SC 1162).

12. Perusal of all the case law relied upon by the counsel for the respective parties herein reveals that the Hon’ble Supreme Court has held that the Electricity Act, 2003 is conceived to be a complete code in itself. Further careful reading of the said case law also reveals that the Hon’ble Supreme Court has asserted that Section 86 (1) (f) of the Act is a special provision and it overrides other relevant provisions with regard to adjudication of disputes, for example, the Arbitration and Conciliation Act, 1996. While examining the scope and nature of Section 86 of the Act, it is also clear that restrictions on the jurisdiction of the Electricity Regulatory Commissions with regard to adjudication of disputes pertaining the sector are sought to be minimized.

13. A slightly different question “*whether the State Commission has got jurisdiction over a dispute between a licensee within its State and a licensee who had not been granted a license by the State Commission under Section 86(1) (f) of the Act*” arose before the Hon’ble Appellate Tribunal for Electricity (ATE) in Appeal No. 200 of 2009. In the said appeal, both the appellant as well as the respondents are licensees. While rejecting the challenge that the appellant not being a licensee of the Karnataka State Commission cannot be proceeded with by the said State Commission which does not have jurisdiction to entertain the dispute between the

appellant and the licensee of its own State, ATE had an occasion to deal with Section 86 (1) (b) of the Act also.

14. However, while dealing with power of State Commissions u/s 86 (1) (f) of the Act to adjudicate disputes between licensee, the ATE at paragraph-18 of the judgment stated that *“Thus the scope of Section 86 (1) (f) is very wide as it covers all disputes between the licensee which relate to the regulatory jurisdiction of the State Commission. In other words, there is no restriction in Section 86(1) (f) regarding the nature of the licensee. Thus, all disputes relating to the regulatory jurisdiction of the State Commission which involves the Distribution Licensee or a trading licensee or a transmission licensee shall have to be adjudicated upon exclusively by the State Commission”*. Further, while comparing the provisions of Section 79 and Section 86 of the Act, ATE held that *“Thus, it is clear that only adjudicatory power of the Appropriate Commission for adjudication of disputes between Distribution Licensee and Trading Licensee has been vested with the State Commission under Section 86 (1) (f) of the Act”*. Eventhough, the question that fell for consideration of the ATE in Appeal No. 200 of 2009 is slightly different as mentioned supra, the *ratio* of the said judgment is that disputes between licensees are within the adjudicatory jurisdiction of the State Commission.

15. Respondent herein claimed that is has been granted Inter-State Trading License in Category 1 u/s 14 of the Electricity Act, 2001 by the Central Electricity Regulatory Commission to undertake trading in electricity as an inter-state trader. As per Clause 9 *“Inter-State Trading Licence”*, notified by Gol vide G.S.R. 379(E) in the Gazette of India dt. 8-6-2005, respondent herein need not take a separate licence for inter-state trading from this Commission. It is very clear in the above said decision delivered by APTEL in Appeal No.200/2009 dated 23.02.2011 that the State Commission has got jurisdiction u/s 86(1)(f) of the Act to adjudicate a dispute between licensees within its State and the licensees who have not been granted a licence by the State Commission. Paragraph 37 (I) of the said order is extracted hereunder:

“37. (I) The present case involves a dispute between the Distribution Licensee of Karnataka, the Respondent and the Appellant which is an inter-State licensee. The Appellant is selling power to the Distribution Licensee Respondent in the State of Karnataka, thereby having a nexus to the State.

Since the procurement of power by the Distribution Licensee from the Trading Licensee is being done in the State of Karnataka, the Appellant falls within the jurisdiction of the State Commission under Section 86(1)(b) of the Act. The procurement of power has a direct nexus with the State of Karnataka as the supply is to the Karnataka Distribution Licensee. There is no restriction on the location of the Trading Licensees to determine the jurisdiction of the State Commission. The supply of electricity, namely, the Appellant being at a different place does not oust the jurisdiction of the State Commission under Section 86(1)(f) to adjudicate upon the dispute between the licensees. Therefore, we hold that so long as the Distribution Licensees are involved in procurement of power in the State, the State Commission alone will have the jurisdiction under Section 86(1)(f) to adjudicate upon the dispute. The 1st point is answered accordingly”.

16. Maharashtra Electricity Regulatory Commission passed order in Case No. 50 of 2009 Dated 15.10.2009 on petition filed by Tata Power Company Limited – Distribution (TPC-D) seeking approval of operating procedures for supplying power to consumers in the common area of license of Reliance Infrastructure Ltd., - Distribution (Rinfra-D), using each other’s existing distribution network. Maharashtra Electricity Regulatory commission’s jurisdiction to adjudicate between licensees was not all questioned. Therefore contention that Commission has no jurisdiction to adjudicate between licensees cannot be accepted.

17. Apart from this, it is very clear from the very wording of S.86(1)(f), the Commission has got power to adjudicate upon the disputes between the *licensees* and the *generating companies*. It has not used the words *licensee* and the *generating company*. The singular usage of words connotes the conjunction of words in the above said section but the plural wording *licensees* and *companies* denotes ‘and’ meaning ‘or’ and some times ‘or’ meaning ‘and’ as laid down by the Hon’ble Supreme Court in 2008 (4) SCC 75. Had it been the intention that the word ‘and’ is in the sense of conjunction, they would have used only singular wording but using the plural wording denotes the very intention as ‘or’. Even by the very reading of the section clearly shows that disputes between licensees i.e, among licensees and generating companies i.e, among generating companies and in between the licensees and generating companies. The very reading of the above said section denotes the above said meaning and most of the State Electricity Regulatory Commissions as stated supra in the country are adjudicating the disputes between / among licensees.

18. For the reasons mentioned above there is no merit in the contention of the applicants herein that u/s 86 (1) (f) of the Act, Commission has no power to adjudicate disputes between two licensees and in order to invoke its jurisdiction, one of the parties to such dispute must necessarily be a generating company.

19. Accordingly, I.A.No. 6 of 2011 filed for rejection of main petition in O.P.No. 16 / 2011 for want of jurisdiction is dismissed.

The order is signed on this 22nd day of August, 2011

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

Sd/-
(A.Raghotham Rao)
CHAIRMAN

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