



ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION
4th Floor, Singareni Bhavan, Red Hills, Hyderabad 500 004

SATURDAY, THE SIXTH DAY OF OCTOBER
TWO THOUSAND EIGHTEEN

:Present:
Justice G. Bhavani Prasad, Chairman
Dr. P. Raghu, Member
Sri P. Rama Mohan, Member

O.P.Nos. 20 to 22 of 2018

O.P.No.20 of 2018

Between:

M/s. KCT Renewable Energy Private Limited ... Petitioner

A N D

Andhra Pradesh Southern Power Distribution Company Ltd
& 2 others ... Respondents

O.P.No.21 of 2018

Between:

M/s. Ostro Anantapur Private Limited ... Petitioner

A N D

Andhra Pradesh Southern Power Distribution Company Ltd.
& 2 others ... Respondents

O.P.No.22 of 2018

Between:

M/s. KCT Renewable Energy Pvt Ltd
(Formerly M/s. Karam Chand Thapar & Bros (Coal Sales) Ltd. ... Petitioner

A N D

Andhra Pradesh Southern Power Distribution Company Ltd.
& 2 others ... Respondents

All these Original Petitions have come up for hearing finally on 29-09-2018 in the presence of Sri Challa Gunaranjan, learned counsel for the petitioners and Sri P. Shiva Rao, learned Standing Counsel for the utilities. After carefully considering the material available on record and after hearing the arguments of the learned counsel for both parties, the Commission passed the following:

COMMON ORDER

O.P.Nos.20 to 22 of 2018 are the petitions by the respective petitioners to direct the 1st respondent in all the petitions to open Irrevocable Revolving Letters of Credit in their favour respectively for their wind power projects in terms of Article 5.4 of the respective Power Purchase Agreements, to declare the action of the respondents in all the petitions in claiming rebate on the power bills of the respective petitioners contrary to Article 5.2 and Article 5.4 of the respective Power Purchase Agreements and to direct the respondents to pay the respective amounts with interest as claimed by the petitioners in terms of Article 5.2 of the respective Power Purchase Agreements.

2. The petitioner in O.P.No.20 of 2018 is a generating company with wind power projects of capacities of 18.7 MW and 20.4 MW respectively at Molagavalli, Aspari Mandal, Kurnool District with a Power Purchase Agreement dated 03-03-2016 with the 1st respondent.

3. The petitioner in O.P.No.21 of 2018 is a generating company with wind power project of a capacity of 100.0 MW at Honnura Palturu, Anantapuram District with Power Purchase Agreement with the 1st respondent dated 31-05-2016.

4. The petitioner in O.P.No.22 of 2018 is a generating company with a 24 MW capacity wind power project at Borampalli / Kalyandurg in Ananthapuram District with a Power Purchase Agreement dated 21-10-2015 with the 1st respondent.

5. As the questions in controversy between the parties in all these three matters are identical and as all the petitioners are seeking identical reliefs against the 1st respondent in all the petitions and its officers based on similar causes of action and as the pleadings are identical on the questions of fact and law raised, though different only in respect of the capacities and location of the different wind power projects and the dates of the Power Purchase Agreements, all the petitions are being disposed of by this common order, more so, in view of the terms and conditions of the Power Purchase Agreements in issue in all the cases being identical.

6. All the petitioners broadly contend that they are independent wind power generating companies, who entered into Allotment Agreements with the New and Renewable Energy Development Corporation of Andhra Pradesh Limited. They claimed to have consequentially entered into Power Purchase Agreements with the 1st respondent (who is the successor of the erstwhile Central Power Distribution Company of Andhra Pradesh Limited in respect of Anantapur and Kurnool Districts as per the Andhra Pradesh Re-organization Act, 2014). The petitioners claimed to have ultimately synchronized their projects on the specified dates and to be selling power to the 1st respondent as per the Power Purchase Agreements. They complained that the 1st respondent did not open and maintain Irrevocable Revolving Letters of Credit in favour of the respective petitioners as per Article 5.4 of the respective Power Purchase Agreements and to be claiming and availing rebate at 2% or 1% respectively of the bills, as the case may be, for supply of power by the

respective petitioners unilaterally, though the 1st respondent never settled the bills before the due dates. Under Article 5.2 of the Power Purchase Agreements, rebate of 2% or 1% respectively, as the case may be, shall be allowed only either for payment through Letters of Credit or for payments otherwise within one month of presentation of bills and the 1st respondent shall have to pay interest at the existing SBI base rates plus one percent or any reduced rates thereof for any payment beyond the due date of payment. The grievance of the petitioners is that in spite of demands by the respective petitioners, the 1st respondent never opened a Letter of Credit and never returned the 2% or 1% rebate deducted for payments without a Letter of Credit beyond the due dates. As the Power Purchase Agreements provide for Dispute Resolution amicably, the petitioners claimed to have followed that procedure but in vain. Hence, the petitioners sought for the reliefs claimed in the respective petitions specifying the principal amounts due respectively.

7. The respondents in their counters submitted that they were unable to pay the bill amounts in time, as their financial condition is very bad, in spite of their best efforts. The petitioners failed to take recourse to Articles 10.2 and 10.3 of the Power Purchase Agreements for resolution of the disputes or differences and hence the petitions are premature and not maintainable. Without prejudice to the said contentions and without admitting the liability, the respondents expressed their readiness to pay the rebate amount, if the petitioners do not press the claim for interest. The petitioners never insisted for Letters of Credit when Commercial Date of Operation was declared and the same is waived by the conduct of the parties. Even otherwise, the Distribution Companies are unable to provide the Letters of Credit in view of their financial position and the petitioners are at liberty to terminate the contract as per the terms of the respective Power Purchase Agreements.

8. The petitioners in their rejoinders claimed that the poor financial position of the respondents is due to contractual infractions and not acting as per the provisions of the Power Purchase Agreements. As a onetime waiver, the petitioners are acceptable to waive 75% of late payment surcharge for illegal amounts deducted till date under Article 5.2 of the Power Purchase Agreements, if the respondents adhere to the conditions that no further rebate or deductions will occur in future and that the respondents will pay the rebate amount and surcharge within a period of thirty days as well as open a Letter of Credit for realization of the amounts. Any request or demand by the petitioners for Letters of Credit is not a pre-condition and the obligation of the respondents in this regard cannot be considered waived. The petitioners are entitled to seek specific performance of the respective agreements under Article 9.1 of the Power Purchase Agreements. The details of the amounts due were given by the petitioners.

9. On the above pleadings and with the above factual background, two points arise for consideration in these petitions. The first is the entitlement of the petitioners to claim payment of the amounts deducted towards rebate by the respondents with interest under Articles 5.2 and 5.4 of the respective Power Purchase Agreements and the second is the right of the petitioners to enforce against the 1st respondent Article 5.4 of the respective Power Purchase Agreements to have Irrevocable Revolving Letters of Credit opened by the 1st respondent in favour of the respective petitioners.

10. In O.P.Nos.21 to 27 & 35 of 2017 and O.P.Nos.1 and 7 of 2018, this Commission adjudicated identical questions of law and fact and the common order dated 14-06-2018 has decided on merits, all the questions in controversy between the parties in this regard. The facts in the present batch and the earlier batch are

identical, the pleadings are similar and the points arising for consideration are the same. The common order dated 14-06-2018 can therefore be read as part and parcel of this order. The conclusions arrived at and the relief granted therein, squarely apply to the facts of the present batch of cases. In that batch of cases, the respondents admitted their default in payment by the due dates and expressed their readiness to pay the rebate amount, if the interest claim is not pressed. The petitioners therein agreed to waive 50% of the interest payable subject to there-being no future default and opening of Letters of Credit. Subsequently, an understanding was reached between the parties therein to restrict to the interest component due under Article 5.2 of the Power Purchase Agreement to 25% of what was due, if the principal rebate amount is paid within thirty days. The liability to pay the principal rebate amount with interest @ 25% was therefore a matter of consensus in respect of opening irrevocable revolving Letters of Credit. After detailed discussion, the Commission concluded that a reasonable time has to be given to the 1st respondent to make an effort to comply with Article 5.4 and hence the petitions were disposed of with appropriate directions granting six months time to the 1st respondent to open Letters of Credit in favour of the respective petitioners, giving liberty to the parties to approach the Commission for appropriate reliefs in this regard, in case of inability or default by the 1st respondent.

11. In view of the identical nature of the subject matter, the pleadings and the facts in issue, these three petitions can also be disposed of with similar directions in the interests of justice. The petitioners themselves offered to have the dispute resolution amicably on the same lines as in the earlier batch of cases and as there is no financial or administrative or legal prejudice or loss to the respondents by the same, these petitions are ordered with similar directions.

12. Accordingly,---

- (a) In so far as the refund of the amounts deducted towards rebate under Articles 5.2 and 5.4 of the respective Power Purchase Agreements, the petitioners shall be paid such amounts due towards any amounts deducted towards rebate without any entitlement for the same, along with 25% of the late payment surcharge within thirty days from today after recording waiver of the remaining 75% of the late payment surcharge;
- (b) In so far as opening of the Letters of Credit is concerned, the 1st respondent is granted six months time from now as per Article 5.4 of the respective Power Purchase Agreements and in case of any inability or failure or default in so opening Letters of Credit, the 1st respondent shall approach the Commission on merits in accordance with law for appropriate orders on refund of the amount.
- (c) The petitioners are respectively entitled to approach the Commission with appropriate Interlocutory Applications concerning any balance amounts still payable out of the subject matter of the petitions after giving credit to payments already made by the 1st respondent, if the parties could not reach an understanding regarding the same within thirty days from the date of this order.
- (d) The parties shall bear their own costs in all the petitions.
- (e) All the Original Petitions are ordered accordingly.

This common order is corrected and signed on this the **6th day of October, 2018.**

Sd/-
P. Rama Mohan
Member

Sd/-
Dr. P. Raghu
Member

Sd/-
Justice G. Bhavani Prasad
Chairman