



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

O.P.No. 4 of 2017
Dated: 01-07-2017

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

Between:

Eastern Power Distribution Company of
Andhra Pradesh Ltd. ... Petitioner

A N D

M/s. Srivathsa Power Projects Ltd. ... Respondent

This petition has come up for hearing finally on 17-06-2017 in the presence of Sri P. Shiva Rao, learned Standing Counsel for the petitioner and Ms. Rashmi G. Kamath, learned counsel representing M/s. Indus Law Firm for the respondent. After carefully considering the material available on record and after hearing the arguments of the learned counsel, the Commission passed the following:

ORDER

Petition under Section 86 (1) (b) & (f) of the Electricity Act, 2003 to direct the respondent to oblige the proposed amendment to Article 2.4 of the Power Purchase Agreement entered by the petitioner with the respondent, costs and other appropriate reliefs.

2. The petitioner's case that in pursuance of the policy to establish private mini power plants brought out by the Government of Andhra Pradesh in 1995, the respondent among others applied for permission to establish a mini power plant of 7.7 MW at Visakhapatnam Export Processing Zone, Visakhapatnam which was

approved by a letter of the State Government dated 28-12-1995. Later change of location to Razole Taluq, East Godavari District and change of fuel to natural gas with enhanced capacity of 17.202 MW were given. In O.P.No.70-A/2001, the Andhra Pradesh Electricity Regulatory Commission directed on 04-05-2001, sale of power by the petitioner to Transmission Corporation of Andhra Pradesh Limited as per the Power Purchase Agreement dated 21-06-2004. The generation was commissioned on 01-04-2003 and the respondent entered into a Gas Supply Agreement with M/s. Gas Authority of India Limited (GAIL) on 29-09-1999 for supply of 65000 SCMD of natural gas on firm basis at APM price. Later, an additional volume of 35000 SCMD was allocated by a letter dated 20-09-2004 on fallback basis at non-APM price temporarily at the request of the respondent subject to availability of additional quantity over and above the contracted quantity. However, supply of full quantum of gas could not be continued beyond February, 2012 and supply of gas on firm basis was stopped from 06-07-2014 to 26-01-2016. Resumption of gas supply by M/s. Gas Authority of India Limited from 27-01-2016 was limited to 35000 SCMD resulting in the plant operating at less than 30% PLF. Even during the non-operating period, the respondent imported energy from the petitioner towards auxiliary consumption of the project, which could not set off the imported energy for more than 1½ years till the operation of the project in January, 2016. The Power Purchase Agreement will expire by 31-03-2018 and the original Article 2.4 of the Power Purchase Agreement did not provide for set off of the avilment of the power supplied by the Discom. For more than 1½ years, as there was no power generation, the auxiliary power consumed was set off only after resuming power generation from January, 2016. Hence, the petitioner requested by a letter dated 28-01-2017 for amending Article 2.4 of the

Power Purchase Agreement by adding that in case APEPDCL could not set off such power for a continuous period of two consecutive billing months, then it shall bill the company for such energy at the applicable tariff of HT-1 consumers. For safeguarding the interest of both parties, such an amendment, for which the respondent did not concur, is necessary and hence the petition.

3. The respondent filed a counter stating that the petition is not maintainable either in law or on facts. Rewriting the agreed terms and conditions as approved by the Commission is impermissible. Consent was given to the Power Purchase Agreement by the Commission on 04-08-2002 to be in force till 31-03-2018. When the Power Purchase Agreement is at the verge of expiry, the present application was filed which was preceded by a letter dated 28-01-2017 claiming that due to non-supply of gas from 06-07-2014 to 26-01-2016, the respondent imported energy from the petitioner towards auxiliary consumption which could not be set off for more than 1½ years till the project came into operation in January, 2016. The respondent gave a reply to the proposal for amendment declining to agree to the amendment through a letter dated 04-02-2017 as it would cause severe financial burden on the respondent. The accident, which the petitioner referred to, was beyond the control of the respondent and its consequences cannot be attributed to the respondent. The power for auxiliary consumption was drawn as per clause 2.4 of the Power Purchase Agreement which was adjusted in the very first bill after resuming the gas supply in January, 2016. The respondent is unable to meet even regular expenses or Operation & Maintenance expenses, due to operating with less than 30% load factor, nominal recovery of tariff, short supply of gas etc. Limited gas supplies drastically impacted on the generation of electricity and economic viability of the plant. They were also forced to shut down the plant beyond two

months and the proposed amendment would make the plant totally unviable. In spite of giving valid reasons, the petitioner filed the petition without any material particulars and the respondent cannot be subjected to any unilateral amendment because of a condition being burdensome or onerous to one party. The respondent already reeling under financial pressures cannot be made unviable by this amendment and hence the petition be dismissed with exemplary costs.

4. The point for consideration is whether the respondent can be obligated to agree to and execute the proposed amendment to Article 2.4 of the Power Purchase Agreement between the parties.

5. Indian Contract Act, 1872 defines in Section 2 that an agreement enforceable by law is a contract, a promise or set of promises, forming consideration for each other is an agreement and a promise is a proposal accepted by the person to whom it is made. It is only an agreement enforceable by law that is a contract and if an agreement is enforceable only at the option of one party and not the other, it is said to be a voidable contract. For an agreement to become a contract, Section 10 of the Indian Contract Act, 1872 makes free consent of the parties competent to contract the first precondition. Consent has been defined as two or more persons agreeing upon same thing in the same sense and a consent is not said to be a free consent if it is caused by coercion, undue influence, fraud, misrepresentation or mistake. A reading together of Sections 2, 10, 13 and 14, coupled with the mandate of Section 19 which states about voidability of agreements without free consent, makes it clear that a consent actuated by any sort of compulsion cannot be considered as free consent and cannot be imposed against the free volition and will of a party.

6. The present petition while narrating the facts and circumstances leading to the relief sought for might have presented the adverse impact on the interest of the Discoms by the terms and conditions of the existing Power Purchase Agreement, but the facts as narrated also may indicate that the discontinuance of supply of the full quantum of gas as originally allocated or additionally approved was not due to the volition or conduct of the respondent, but due to a supervening accident or some other intervening cause for which the respondent cannot be held responsible. The facts are not in dispute and the parties did not contemplate originally or till this petition to have any agreement between them for the distribution company billing the generating company, for any period for which it could not set off the auxiliary consumption of power for a continuous period of two consecutive billing months. If the parties did not contemplate such a proposal or its acceptance and if the respondent is unwilling to agree to any change in its rights and obligations under the original Power Purchase Agreement, due to any intervening circumstances causing any inconvenience or loss to the petitioner being not due to its conduct, forcing it to agree to an amendment imposing any legal obligation on it will be violative of the specific provisions of the Indian Contract Act, 1872 and either the principles of justice, equity and good conscience or the principles of natural justice. If the petitioner did not foresee such a situation originally and did not negotiate for it with the respondent, it has to thank itself and cannot make the consequent burdensome or onerous nature of the contract, a ground to make it burdensome or onerous for the respondent unilaterally.

7. While the difficulties to which the respondent was put to due to the same facts and circumstances need no further probe as the respondent is not seeking

any relief against the petitioner on any such ground, Section 86 (1) (b) or (f) of the Electricity Act, 2003 refer to 'agreements' and 'disputes'. Thus, a dispute essentially requires the preexistence of an agreement before it is adjudicated and an adjudication of a dispute as to whether any terms and conditions can be imposed on an unwilling party to force it to enter into an agreement is not contemplated by Section 86 (1) (b) and (f) of the Electricity Act, 2003.

8. Under such circumstances, the petition and the relief claimed therein do not appear tenable under law and they have to fail. However, the result of this petition will not affect the liberty of the parties to enter into such or any other agreement relating to the subject matter of this petition on their own volition and free will. This order is not an adjudication on the truth or otherwise of the respondent drawing imported energy towards auxiliary consumption nor does it indulge in quantification of such imported energy consumed or its value. If the petitioner is so entitled under law otherwise, it is at liberty to seek any appropriate remedies as per law for recovery of the value of any imported energy consumed by the respondent beyond and independent of the terms and conditions of the Power Purchase Agreement between the parties.

9. Therefore, the petition is dismissed subject to the above observations. The parties shall bear their own costs.

This order is corrected and signed on this the 1st day of July, 2017.

Sd/-
P. Rama Mohan
Member

Sd/-
Dr. P. Raghu
Member

Sd/-
Justice G. Bhavani Prasad
Chairman