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

O.P. No.6 of 2008
&
I.A. No.4 of 2008

Dated 15.03.2013

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

Between:
M/s Spectrum Power Generation Limited … Petitioner

AND

1. Transmission Corporation of Andhra Pradesh Limited
2. Central Power Distribution Company of Andhra Pradesh Limited
3. Southern Power Distribution Company of Andhra Pradesh Limited
4. Northern Power Distribution Company of Andhra Pradesh Limited
5. Eastern Power Distribution Company of Andhra Pradesh Limited
6. Andhra Pradesh Power Coordination Committee ….Respondents

This petition is coming up for hearing on 07.07.2012 in the presence of Sri S.Ravi, Advocate for the petitioner and Sri P.Shiva Rao, Advocate for the respondents, the Commission passed the following:

ORDER

On 19.04.2008, the petitioner herein filed a petition before the Commission u/s 86 (1) (f) of the Electricity Act, 2003 (for short, the Act) with a request to direct the respondents to refund the sum of Rs.2,77,90,832/- being the admitted liability towards minimum guaranteed off-take for the period 2002 to 2006 together with interest at 18% per annum from the dates the amounts became due.

2. The averments mentioned in the said petition, in brief, are as follows:

a) For the purpose of selling the power generated by the petitioner, it entered into a Power Purchase Agreement (PPA) with the erstwhile Andhra Pradesh State Electricity Board (APSEB) on 20.06.1993. The said PPA was revised from time to time and the final agreement was entered into by both the parties on 23.01.1997. Respondent Nos.2 to 5 succeeded the respondent No.1 with regard to the rights and obligations of the respondent No.1 and the erstwhile APSEB under the PPA with the petitioner. Respondent Nos.2 to 5 are thus burdened by the same obligation to pay the monthly bills of the petitioner under the PPA.

b) The PPA is a comprehensive document and covers the entire gamut of relations between the petitioner and the respondents. The purchase price of electricity generated by the petitioner i.e., tariff was determined in accordance with the norms laid down by the Ministry of Power, Government of India and the 208 MW capacity Combined Cycle Gas based Power Station was commissioned on 18.04.1998 with natural gas for the operation of the plant.

c) Under the PPA, the tariff rates are determined on the basis of the Two Part Tariff and are fixed for each Tariff Year period. The Tariff shall be the sum of the Fixed Charge, the Variable Charge Payment, the incentive or disincentive payments (if any) and taxes on income, each as set forth in Article 3 of the PPA. Components of the fixed and variable costs are mentioned and stated that the minimum off-take charges which are payable by the petitioner under the fuel supply contracts to the supplier, if the petitioner inter-alia due to the reasons attributable to APSEB is not able to comply with its obligations towards the supplier under the fuel supply contracts.

d) The petitioner entered into a Naptha supply Agreement in consultation with APSEB, with M/s Hindustan Petroleum Corporation Limited (HPCL) on 19.07.1994. As per the said agreement, the

provision for Minimum Fuel Off-take charge was Rs.75 lakh per annum. With the support of respondent No.6, through a joint meeting with HPCL, the Minimum Off-take liability had been brought from Rs.75 lakh to Rs.40 lakh per annum safeguarding the interest of respondent No.6.

e) Respondent No.1 vide its letter dated 16.01.2002 directed the petitioner not to use Naphtha as Supplementary Fuel for the project of the petitioner and limit the generation to the extent of gas availability. The petitioner complied with the instructions of respondent No.1 as it was duty bound to comply with the same under the PPA. Due to such compliance of the instructions, the petitioner was unable to off-take the supply of the Naphtha, that it was entitled to under the Agreement dated 19.07.1994 with HPCL. Under clause 3.9 of the PPA, it was the responsibility of the respondent No.1 to pay the Minimum Off-take charges to the petitioner if the petitioner failed to off-take the fuel under the Fuel Supply Agreement, due to the reasons attributable to respondent No.1. The petitioner following the provisions of the PPA requested respondent No.1 to pay said charges. However, inspite of repeated requests, respondent No.1 did not tender the Minimum Off-take charges to the petitioner which could be paid to HPCL.

f) The petitioner received letter dated 19.01.2007 from S.E. (Grid Operation) directing the petitioner to use Naphtha for generation of electricity. Petitioner in its reply letter dated 20.01.2007 stated that it is taking urgent steps to obtain Naphtha from HPCL, but requested to resolve certain pending issues including to consider making payment of an amount of Rs.2.80 Cr towards pending Minimum Guarantee Off-take (MGO) charges under the Fuel Supply Agreement with HPCL. In response, respondent No.6 wrote a letter dated 12.02.2007 to the petitioner stating that it had considered the release of an amount of Rs.2.89 Cr. out of which Rs.2,77,90,832 was an advance and Rs.2,09,168/- was towards the reimbursement of the Minimum Off-take charges for the period from 2002 to 2006. It was

further mentioned that the amount of advance would be recovered from the monthly bill of April 2007 payable in May 2007.

g) The respondents acknowledged their liability under the said letter dated 12.02.2007, respondents acknowledged their liability. However, the respondents stated that the amount of advance would be recovered from the monthly bill of April, 2007 payable in May, 2007. The petitioner represented against the said statement made by the respondent No.6 as the said amount of Minimum Off-take charges was withheld for a number of years and after acknowledging the same, the respondents are trying to retreat from it.

h) The petitioner filed a petition u/s 9 of the Arbitration and Conciliation Act 1996 numbered as O.P. No.691 of 2007 invoking the dispute resolution mechanism as provided in clause 15 of PPA. Court of Addl. Chief Judge III, Hyderabad vide its order dated 17.07.2007 passed orders in favour of the petitioner. The respondents filed appeal before the Hon'ble High Court of A.P. against the said order. During pendency of the said appeal, the Hon'ble Supreme Court on 13.03.2008 pronounced its judgment in Appeal (Civil) No.1940 of 2008 in Gujarat Urja Vikas Nigam Limited vs. Essar Power Limited holding that after the advent of the Act, the disputes between Generating Company and Licensee are to be adjudicated by the Regulatory Commission concerned and are not to be resolved through the Dispute Resolution Mechanism as provided in PPA. In view of the said judgment of Hon'ble Supreme Court, the Hon'ble High Court of A.P., in C.M.A. No.902 of 2007 granted interim stay vide its order dated 17.03.2008 on the judgment dated 17.07.2007 in O.P. No.691 of 2007.

i) After the Hon'ble High Court grant of stay as mentioned above, the respondents in the monthly bill raised by the petitioner for the month of April 2008 and payable in the month of May 2008 had deducted a sum of Rs.2,77,90,832/-. In view of the above the status quo ante has been reverted. The respondents have failed to pay the Minimum Off-take charges for the period 2002 to 2006 in respect of which

there is a clear acknowledgment of liability, payment of advance on the earlier occasion. In view of the above, a dispute has arisen between the parties in respect of the above mentioned threatened deduction by the respondents, which falls for adjudication u/s 86(1)(f) of the Act by this Commission.

3. On 29.04.2008, the petitioner filed a petition u/s 94(2) of the Act seeking interim directions to respondent Nos. 2 to 6 to refund the amount of Rs.2,77,90,832/- wrongly deducted from the monthly bill of April, 2008 payable in May, 2008 together with interest @ 18% per annum. The said petition is taken on file of the Commission and numbered as I.A. No.4 of 2008 in O.P. No.6 of 2008.

4. On 23.08.2008, counter is filed on behalf of the respondents, the material averments of the counter are briefly as follows:

a) The contention that under clause 3.9 of the PPA, it was the responsibility of the respondent No.1 to pay the minimum off-take charges to the petitioner, if the petitioner failed to off-take the fuel under the fuel supply agreement is not correct. The interpretation placed by the petitioner to the provisions of clause 3.9 of the PPA is not correct. PPA does not define the word 'fuel'. But, 'alternative fuel' and 'supplementary fuel' have been defined under clause 1.1(ii) and 1.1 (i) xxxv. A reading of the word 'alternate fuel', it clearly shows that it is NAPHTHA and to the extent the NAPHTHA is not available any fuel other than gas or NAPHTHA. A reading of the definition of 'supplementary fuel', it is clear that supplementary fuel means NAPHTHA and which is expected to constitute approximately 26% of the projects fuel in normal operation. It is further stated that the 'minimum off-take charges' has been defined under clause 3.9.

b) On a combined reading of the provisions of clause 1.1(ii), 1.1(i)xxxv and clause 3.9 and the explanation to it, it is clear that the minimum fuel off-take charges is attributable only to the fuel and not in respect of the alternate fuel or supplementary fuel. In the explanation, it has been specifically mentioned "in excess of the cost

of gas" and thus it is clear that what was intended to be paid under minimum fuel off-take charges is only towards gas and not in respect of the alternate or supplementary fuel. Though the fuel has not been defined under the provisions of the PPA, the very fact that the definition of supplementary or alternate fuel has been defined, the gas can be taken as fuel. Clause 1.xxx of the PPA deals with Gas supply contract. Explanation 3.9 refers only to a single contract and not in respect of contracts. Hence, the petitioner company is not entitled to any minimum fuel off-take charges in respect of alternate fuel or supplementary fuel and the respondents are not liable to pay any amount to the petitioner company in this regard.

c) Though the petitioner is not entitled for any MGO charges for NAPHTHA under the agreement, the respondent No.6 has released an amount of Rs.2,09,168/- towards the reimbursement of the minimum off- take charges for the period from 2002 to 2006 and also released a sum of Rs.2,77,90,832/- as an advance. At that particular point of time, there was a slight confusion with regard to the interpretation of the minimum fuel off-take charges and the amount was paid. The amount of Rs.2,09,168/- has been arrived taking into consideration that the GAIL has increased the allocation of the gas to the petitioner company, i.e., it has been increased from 0.72 to 0.90 MCMD and thereby the dependence on NAPHTHA was reduced and one week of NAPHTHA was sufficient and it was arrived at 1360 Mts., and on the said amount the minimum off-take charges @ Rs.38.45 (as was stipulated by BPCL to other IPP towards MGO charges was considered) has been paid. The same procedure has been followed even for the period from 01.04.1999 to 31.03.2003 and MGO charges were paid accordingly to the petitioner company.

d) The contention that by letter 12.02.2007, the respondents have acknowledged their liability towards the pending dues of minimum off-take charges for the period 2002 to 2006 is not correct. The petitioner is not entitled for any minimum off-take charges in so far as NAPHTHA i.e., the alternative/supplementary fuel is concerned.

At the time of releasing of the amount, it has been clearly mentioned that the amount of Rs.2,77,90,832/- was paid as advance and the same will be recovered from the energy bill of April, 2007 payable in the month of May, 2007 and the petitioner having utilised the said amount is estopped by conduct from contending that the said amount cannot be deducted from the future bills.

e) As per the terms of the PPA, the petitioner is not entitled for any amount under minimum off-take charges in respect of NAPHTHA, which is an alternate/supplementary fuel and is entitled only for the gas and the same is also evident from the reading of the explanation to clause 3.9. Earlier the amount has been paid to the petitioner under minimum off-take charges even for NAPHTHA on a misinterpretation of the explanation to clause 3.9. The petitioner cannot take advantage of the earlier mistake in payment of the amount in respect of the minimum off-take charges in respect of NAPHTHA and contend that it is entitled for the period from 2002 to 2006. The petitioner cannot retain the amount that has been paid and is liable to refund the amount which has been paid for the period prior to 2002 and further up to 2006 under minimum off-take charges in respect of NAPHTHA being supplementary / alternate fuel.

f) Hence, it is prayed that the Commission may dismiss the petition filed by the petitioner and pass such other order or orders as it may deem fit and proper in the circumstances of the case.

5. The learned advocate for the petitioner argued projecting the following points in support of his contentions:

(i) The petitioner is entitled for refund of Rs.2,77,90,832/- being the admitted liability towards Minimum Guaranteed Off-take (MGO) for the period 2002 to 2006 together with interest at 18% per annum.

(ii) The petitioner entered into a Naphtha supply agreement in consultation with APSEB with M/s. HPCL on 19.07.1994.

(iii) The minimum off-take liability was reduced to Rs.40 lakh per annum from Rs.75 lakh per annum safeguarding interest of respondent No.6.

(iv) As per the letter dated 16.01.2002 from the respondent no.1, the petitioner used Naphtha as supplementary fuel for the project.

(v) The respondents though acknowledged their liability in their letter dated 12.02.2007, they stated that the amount of advance would be recovered from the monthly bill of April 2007 payable in May 2007 is not sustainable and against to their commitment.

(vi) Out of the April 2008 monthly bill payable in the month of May 2008 the respondents have deducted a sum of Rs.2,77,90,832/- inspite of the court's order but they failed to pay the same for the period 2002-2006 though admitted the liability.

(vii) Hence, the petitioner is entitled for refund of the amount of Rs.2,77,90,832/- together with interest as claimed.

6. The learned advocate for the respondents argued projecting the following points in support of his contentions:

(i) It is incorrect to say that minimum off-take charges to the petitioner to be paid by the respondents.

(ii) The petitioner is not entitled to any minimum off-take charges in respect of alternate fuel or supplementary fuel and the respondents are not liable to pay any amount to the petitioner – company.

(iii) At the time of releasing the amount it was clearly mentioned that the same would be recovered from the energy bill of April 2007 payable in May 2007 and the petitioner having utilised the said amount is estopped by conduct from contending that the said amount cannot be deducted.

(iv) As per the terms of the PPA, the petitioner is not entitled for any amount under minimum off-take charges in respect of Naphtha which is an alternate/supplementary fuel and is entitled for the gas and the same is also evident from the reading of the explanation to clause 3.9.

(v) The petitioner cannot retain the amount that has been paid and is liable to refund the amount which has been paid for the period prior to 2002 and further up to 2006 under minimum off-take charges in respect of Naphtha being the supplementary/alternate fuel. The petition is liable to be dismissed.

7. Now the point for consideration of the Commission is whether the petitioner is entitled for minimum off-take charges on Naphtha as per the concluded PPA?

8. In addressing the above issue, the Commission needs to look at Clause 3.9 of the PPA on which both the parties relied, albeit drawing contrary inferences. Clause 3.9 is extracted as hereunder:

> ***Clause 3.9 – Minimum Fuel off-take charges:***
> ***The Board shall reimburse to the company the minimum fuel off-take charges for fuel not taken only, if the failure to take such fuel is attributable to (i) The Board (including Dispatch Instructions, a failure of Board to comply with its obligations under the terms of this Agreement, an Indian Political Event or Non-Political Events affecting the Board) or (ii) an Indian Political Event applicable to the Company.***
>
> ***Explanation: Minimum Fuel off-take charges for the purpose of this Article mean the charges, if any, in excess of the cost of gas actually consumed in energy generation at the Project, that become payable by the Company to the fuel supply contractor, in accordance with the provisions of the fuel supply contract finalised in consultation with Board.***

9. The first portion of Clause 3.9 provides that, the Board shall reimburse to the company, the minimum off-take charges for fuel not taken, only if, the failure to take such fuel is due to two conditions as stipulated therein. We are presently concerned only with the first condition. However, the bone of contention is as to what does the word 'Fuel" mean in the context of reimbursement of minimum off-take charges. The respondents argued that, "Fuel" means gas only by relying on the Explanation provided under Clause 3.9, whereunder, it has been stated that minimum fuel off-take charges for the purpose of this Article mean the charges, if any, in excess of the cost of gas actually consumed in energy

generation at the project. The respondents also further contended that, no where in the PPA, the word "Fuel" is defined but only "Alternate Fuel" and "Supplementary Fuel" are defined and as such the word "Fuel" in Article 3.9 can only mean "Gas" and it cannot include Naphtha which is an alternate fuel.

10. The petitioner has canvassed his case for refund of Rs.2,77,90,832/- (Rupees Two Crores Seventy Seven Lakhs Ninety Thousand Eight Hundred and Thirty Two only) stated to be the admitted liability towards Minimum Guarantee Off-take (MGO) for the period 2002 to 2006 together with interest at 18% per annum on the ground that the petitioner entered into Naphtha Supply Agreement in consultation with APSEB with M/s. HPCL on 19-07-1994 and that the minimum off-take liability was reduced to Rs.40 lakhs per annum from Rs.75 lakhs per annum safeguarding interest of respondent. The petitioner also further argued that, since, the minimum fuel-off take charges are incurred only consequent to the directions of the Respondents not to use Naphtha and to limit the generation to the extent of gas availability; it is just and fair to reimburse the same. But the petitioner could not show any specific clause from the PPA, whereby Naphtha could be brought under the wording of "Fuel" appearing in clause 3.9 of the PPA read together with the Explanation provided there under.

11. Hence, from the working of the PPA, it cannot be held that, Naphtha can be brought under the ambit of the word "Fuel" appearing in clause 3.9 of the PPA and thus qualifying for reimbursement of minimum off-take charges. Hence, the petition stands dismissed.

I.A. 4 of 2008

12. In view of the findings given in the main O.P. itself the relief now sought is in-fructuous. Hence, the same is closed.

This order is corrected and signed on this 15th day of March, 2013.

Sd/-	**Sd/-**	**Sd/-**
(R.Ashoka Chari)	**(C.R.Sekhar Reddy)**	**(A.Raghotham Rao)**
Member	**Member**	**Chairman**