TELANAGANA STATE ELECTRICITY REGULATORY COMMISSION
5th Floor, Singareni Bhavan, Red Hills, Hyderabad-500 004

R. P. (SR) No. 59 of 2016
in
O. P. No. 94 of 2015

Dated 10.07.2017

Present
Sri. Ismail Ali Khan, Chairman
Sri. H. Srinivasulu, Member

Between:

1. Chairman & Managing Director,
   M/s. Southern Power Distribution Company of
   Telangana Limited, # 6-1-50, Mint Compound,
   Hyderabad – 500 063.

2. Chief General Manager (Comml & RAC),
   M/s. Southern Power Distribution Company of
   Telangana Limited, # 6-1-50, Mint Compound,
   Hyderabad – 500 063.

… Review Petitioners / Respondents

And

M/s. MLR Industries Private Limited,
4E, 4th Floor, Surya Towers, S. P. Road,
Secunderabad – 500 003.

… Respondent / Petitioner.

This petition came up for hearing on 20.06.2017. Sri. Y. Rama Rao, Standing Counsel for the review petitioners alongwith Sri. B. Vijay Bhaskar, Advocate and Sri. M. Mohan Rao, Advocate for the respondent / original petitioner are present on 20.06.2017. The review petition having stood for consideration to this day, the Commission passed the following:

ORDER

The respondent licensee has filed a review petition under sec 94 (1) (f) of the Act, 2003 read with clause 32 of the Conduct of Business Regulation, 2015 seeking review of the order dated 04.08.2016 in O. P. No. 94 of 2015.

2. The review petitioner stated that O. P. No. 94 of 2015 was filed by the M/s. MLR Industries Limited seeking directions for approving the banking facility for the solar power exported on exclusive captive utilization basis by the petitioner. The Commission by its order dated 04.08.2016 in O.P. No. 94 of 2015 and I. A. Nos. 3 & 4 of 2016 opined that, neither the Act. 2003 nor regulations made by the Commission contemplated entering into any agreement in the event of captive consumption or for that matter in respect of banking of energy. The Commission by the said order has directed the review petitioner / respondent:

a) To approve the banking facility for the power exported on exclusive captive utilization basis by the respondent company with effect from the date of synchronization i.e., from 16.10.2014.
b) To give credit for the exported power approximately 1.3 million units actually exported from 16.10.2014 to 30.09.2015.
c) To calculate the power exported to the grid from 01.10.2015 till the credit is given to the petitioner and then treat all the energy as banked.
d) To release such banked energy at the request of the petitioner as per its requirement after collecting the banking charges in kind.
e) To pay the petitioner the relevant tariff applicable from time to time as per regulation in force, if the total energy cannot be banked and released.
f) To ensure banking facility in the future and after entering into an agreement with the petitioner.
g) To release the amounts due to the petitioner if the energy already required to be banked but cannot be banked, within a period 4 weeks from the date this order.
h) To file a report about compliance of this order within a period of 6 weeks.

3. The review petitioner has stated that from the beginning the respondent M/s. MLR Industries Private Limited is required to enter into an agreement for seeking the facility of banking of energy. For that matter the respondent was requested to

approach CE / SLDC for availing banking facility. But the respondent did not choose to do so for the reasons best known to it.

4. The review petitioner stated that as per Regulation No. 2 of 2014 issued by APERC being the second amendment to the Regulation No. 2 of 2006, banking is defined under clause 2 (c) of the principal regulation and appendix – 3 is also substituted in the principal regulation which lays down the method of providing banking facility. The review petitioner therefore stated as follows.

i. The Commission has not issued any regulation or order for providing the banking facility for captive generators. In the absence of such regulations, the DISCOM has to follow the existing regulations that is Regulation 2 of 2006 and its subsequent amendment that is 1 of 2013 and 2 of 2014 for providing the banking facility to the petitioner.

ii. As per the clause 5 of Regulation 2 of 2006 (Interim Balancing and settlement code for Open Access transactions),

"The Nodal Agency for all the long term open access transactions is State Transmission Utility (STU) and for short term open access transaction, the nodal agency is State Load Dispatch Centre (SLDC)."

iii. Clause 12 of the said Regulations reads as follows:

"Based on the intimation by the Nodal Agency to the open access applicant, the applicant shall execute an open access agreement with the concerned licensees.

iv. Clause 7 of above said regulation clearly states that:

"SLDC shall undertake the accounting of energy for each time block on monthly basis with the assistance of the Energy Billing Centre (EBC) of the State Transmission Utility (STU) in respect of the Open Access Generators, Scheduled Consumers and the OA consumers who are connected to the transmission system, in respect of the open access generators, scheduled consumers and the OA consumers who are connected to the distribution system, it is the EBC that shall be responsible for energy accounting and settlement in co-ordination with the DISCOMs."

v. Clause 13 of Regulation 2 of 2006 reads as follows:

"Dispute Resolution

All disputes and complaints shall be referred to the SLDC for resolution, which shall not decide a matter without first affording an opportunity to the concerned parties to represent their respective points of view. The decisions of the SLDC shall be binding on all parties."

5. The review petitioner stated that from the above regulations, it is clear that the nodal agency is the processing entity and for all the banking facility settlements EBC of the STU is the concerned authority for processing such settlements which was clearly mentioned in the written submissions and clause 13 of Regulation 2 of 2006 also clearly states that any disputes on implementation of provisions under the regulation is to be referred to the State Load Dispatch Center (SLDC) for resolution, but the Commission has not considered the role of nodal agency.

6. The review petitioner stated that the nodal agency is an independent entity that is not under the jurisdiction of DISCOM. In order to implement the order passed by TSERC dated 04.08.2016, the SLDC will be concerned nodal agency for carrying the energy settlement for the generators, who are availing banking facility. Hence it would be just and proper to implead nodal agency SLDC as the party and upon reviewing the objections / suggestions from the concerned nodal agency on the petition filed by M/s. MLR Industries Private Limited in O. P. No. 94 of 2015 and I. A. Nos. 3 & 4 of 2015, the subsequent order as suitable may be passed where the nodal agency is the final executing entity in the concerned case for providing banking facility to the petitioner.

7. The review petitioner stated that the DISCOM has not given any consent to the developer for allowing the banking of energy and moreover as per the prevailing regulation, the DISCOM is not the nodal agency. Hence consideration of the entire energy as banked energy from the date of synchronization till the date of order and arrangement of payment for the back period without any valid agreement are not possible.

8. The review petitioner has stated that the Commission in paragraph (45) observed as follows.

i) “The respondents ought to have taken advantage of the renewable source generation and benefitted from it. Alas the DISCOM is neither understanding the peculiar situation nor it has stopped the occurrence of generation and feeding into the grid at the first instance itself.”

It is stated that in fact the DISCOM suffered huge financial loss due to unscheduled and inadvertent power injected by the respondent M/s MLR Industries Private Limited into the grid, as a result of which the grid discipline of the distribution system stood disturbed. Consequently the deviation charges for frequency deviation were paid by DISCOM to the nodal agency, and number of generators (who have entered short term PPA) were forced to back down their generating stations due to inadvertent and unscheduled power injected without prior intimation by the M/s. MLR Industries Private Limited which collapsed the demand and generation side management system.

ii) In paragraph (43) of the order the Hon’ble Commission observed that, “It has itself allowed the project to get synchronized and allowed the energy to be pumped. It is in the teeth of the communication requesting for agreement to be entered and also for payment for the energy delivered in to the grid.”

In this context, it is stated that the petitioner while according approval for synchronization of the power plant to the grid system made it clear to the M/s. MLR Industries Private Limited to contact the CE / SLDC for availing the banking facility which itself proves that the DISCOM never intended to cause loss to the M/s. MLR Industries Private Limited and also never intended its unjust enrichment. If the respondent failed to follow the said request, the petitioner (DISCOM) cannot be blamed.

9. The review petitioners have sought the following prayer in the petition.

a) To direct impleadment of the nodal agency (SLDC) as a party in the case filed by M/s. MLR Industries Private Limited in O. P. No. 94 of 2015 and I. A. Nos. 3 & 4 of 2015.

b) To consider the objections / suggestions received from the nodal agency (SLDC)

c) To review the order by providing the procedural method or rules or regulations and draft agreement to enable the petitioner to provide banking facility to the M/s. MLR Industries Private Limited as directed in the order dated 04.08.2016.

d) May also be pleased to direct to provide the banking facility prospectively.

10. We have heard the counsel for the review petitioners and the original petitioner. We also examined the submission placed in the review petition as well as the order passed by us. We have directed the counsel for the parties to file written submissions in the matter within a period of one week on the date of hearing. However, till this date the same is not received by us. Hence, we are constraint to proceed in the matter and pass the order in the matter.

11. The counsel for the parties have made detailed submissions in the matter and we have recorded the same in a nutshell. The same is recapitulated below.

"The standing counsel for the DISCOM stated that there were errors that have crept in to the order contrary to the record available on file and one aspect of the case that is agreement was required to be framed by the Commission under its regulatory power. It is his case that the necessary respondent SLDC has not been made party to the original proceedings and that fact has been stated in the counter-affidavit also. However, it escaped the attention of the Commission. It is also his case that much prior to the filing of the petition, the original petitioner was put to terms including obtaining clearance from the SLDC, which has not been complied with and which was required to be considered by the Commission.

The counsel for the original petitioner sought to deny that there are errors in the order passed by the Commission and that the power generated by the original petitioner has already been drawn and enjoyed by the DISCOM. At this stage, it is not fair on the part of the licensee to take benefit and also deny reasonable return to the generator. It is the case of the counsel for the petitioner that the generator itself came forward to enter in to any agreement as may be decided by the licensee and that too gave it in writing. The counsel for the original petitioner pointed out that the order has not been complied with eventhough ten months have passed by.

The Commission pointed out the DISCOM instead of providing banking has enriched itself from the power pumped into the grid by the generator.

Eventhough, the SLDC may be required to certify, it is ultimately the licensee, which has to provide banking. Nothing stopped the licensee from entering into an agreement with the generator at earlier point of time, which was in any case subject to regulatory scrutiny. Now the Commission has also issued necessary regulation in this regard. There is no reply from the counsel from the respondent except accepting the observation of the Commission."

12. Initially when the issue was considered by us, we had noticed a deficiency in the regulation subsisting as of that date and needed amendment to the same. In order to check the deficiency, this Commission had initiated necessary process for amending the Interim Balancing and Settlement Regulation, 2006 and notified the Telangana State Electricity Regulatory Commission (Interim Balancing and Settlement Code for Open Access Transactions) Third Amendment Regulation in March, 2017 duly catering to the requirement of the DISCOMs insofar as the issue that has arisen in the original petition. We are astonished that even now the review petitioner is canvasing about the requirement of the agreement for which the Commission had already made the provision in the regulation. Therefore, at the outset the review petition lacks merit.

13. The grounds and contentions made in the review petition as well as the arguments by the counsel for the review petitioners neither satisfy nor bring out the correct position in the factual matrix of the case. The argument that the errors have crept in the order of the Commission are either invented for the purpose of this petition or raised as a matter of delaying the implementation of the orders of the Commission passed in the original petition.

14. The contention that the petitioner should have made the Load Dispatch Centre as party to the main petition could not have been raised by the review petitioner at the fag end of the case and it should have been the preliminary objection. It is also to be stated that the arguments of the review petitioners in the original petition never highlighted the facts. For its omissions and commissions in the arguments set forth by

the review petitioners, they cannot turn round and state that errors are crept in the order.

15. When the original petitioner itself sought to enter into agreement with the review petitioners, they neither responded nor undertook any steps for the said purpose. Instead it is now submitted that agreement required for such purpose should have been notified by the Commission. It is surprising that the review petitioners have estopped themselves from approaching the Commission with a draft agreement catering to the purposes like the one that has arisen in this petition. In fact, it is the responsibility of the licensees to bring to the notice of the Commission that such a situation has arisen which does not fit into existing the scheme of Acts and Rules and what course to be adopted. Nothing of this sort has been acted upon by the licensees, at this stage they cannot complain of the same.

16. Understandably, the licensees intimated the requirement of obtaining permission from the SLDC, at the same time synchronizing the power plant with the grid and have drawn the power. Had it been the case of compliance of requirements of the permission from the SLDC, then the licensees ought not to have allowed injection of power. While there may be lapse on the part of the generator, equally if not less are the lapses on the part of the licensee. Weighing with the above facts, there is no case for review as no prudent action has been shown by the review petitioners to revisit our findings. Therefore, review cannot be sustained.

17. At the stage, it is relevant to state the conditions for review. A review petition can be entertained by the Commission on the following aspects under the Code of Civil Procedure Code, 1908.

a. Where there is a typographical mistake that has crept in the order.
b. When there is an arithmetical mistake that has crept in while effecting calculation or otherwise.
c. When there is a mistake committed by the Commission, which is apparent from the material facts available on record and / or in respect of application of Law.
d. When the Commission omitted to take into consideration certain material facts on record and ‘law on the subject’ and that if on taking into

consideration those aspects, there is a possibility of Commission coming to a different conclusion contrary to the findings given.

e. If the aggrieved party produced new material which he could not produce during the enquiry in spite of his best efforts and had that material or evidence been available, the Commission could have come to a different conclusion.

18. The submissions made by the review petitioner neither disclose nor provide the errors as they can be brought under any of the above points. No pleading is made with regard to any arithmetical mistake, typographical error or omission of fact, which would have otherwise resulted in a different decision, much less, any new fact, which the review petitioners diligently could not have placed the same at the time of hearing.

19. The specific contention with regard to non-joinder of parties cannot be at the stage of the review as such plea has to be taken at the first instance when the Court or Authority would entertain the petition or claim as the case may be. It is stated that non-joinder of parties was contended in the counter-affidavit, but alas such fact did not find place in the arguments if the same was more relevant than others. Even otherwise, the distribution company having enriched itself for the energy pumped from the generating plant failed to act in a fair manner in guiding the generator to follow the Act and Regulations.

20. The other contention that is raised in the review petition is that the agreement for providing banking facility is not given by the Commission. This fact can neither be a new fact nor a fact which is not within the knowledge of licensee. As stated earlier, the licensee ought to have undertaken steps to enter into agreement before synchronizing the plant and allowing energy to be pumped into the grid. Likewise, allowing energy to be pumped into the grid without examining the system exigencies for allowing such power to be pumped into the grid is also not correct on the part of the licensee.

21. All the submissions made in the review petition do not enthuse us to undertake the review of the original order. While passing this order, we also came across an order passed by the Hon'ble ATE in Appeal No. 120 of 2016 and I. A. No. 272 of 2016 between Kamachi Sponge & Power Corporation Ltd., Chennai V. Tamil Nadu

Generation and Distribution Corporation Ltd. (TANGEDCO), Chennai and Anr. Wherein identical facts have emerged if not similar to the present case. We are concerned with two issues

"**10. After having a careful examination of all the aspects brought before us on the issues raised in Appeal and submissions made by the Appellant and the Respondents for our consideration, our observations are as follows:-**

a. The present case pertains to the decision of the State Commission vide its Impugned Order regarding treating the entire energy pumped by the Appellant during the periods 21.10.2011 to 00.00 hours on 16.11.2011, 00.00 hours on 16.11.2011 to 22.11.2011 and 23.11.2011 to 27.11.2011 till meter reading as unauthorized and denial of payment thereof.

b. On Question No. 6 (a) i.e. Whether after having accepted as many as 23,03,008 (Twenty three lakh three thousand and eight only) units of energy without demur and after gainfully utilising the same over a period of 30 days, was the Respondent right in not making any payment for the power utilised?, we observe as follows:

i. The break-up of energy pumped into the grid by the Appellant during the period under dispute is as below:

Sl No.	Period	Energy claimed to have been pumped
(a)	21-10-2011 to 00.00 hrs. on 16-11-2011	11,60,707 units.
(b)	00.00 hrs. on 16-11-2011 (COD Date) to 22-11-2011	7,77,826 units
(c)	23-11-2011 to 27-11-2011	3,64,475 units

The energy at Sl. No. (a) above is infirm power from synchronisation to COD of first unit of the Appellant. At Sl. No. (b) above is the surplus energy pertains to period from COD till availing of short term open access by the Appellant and at Sl. No. (c) is the surplus energy pertains to the period from availing of short term open access till the meter reading taken by official of Respondent No.1 after meeting the requisite condition of becoming short term open access consumer.

ii. The grid connectivity granted to the Appellant by TANTRANCO clearly spells out terms and conditions for connectivity. S.No. 23 and 25 of the said approval are reproduced below:

……..

23. This approval is for grid connectivity of 1x 35 MW generator alone, the company shall not inject any power into the grid.

……

25. Any excess energy pumped into grid without valid contractual agreement and open access will not be accounted for payment.

……

The short term open access granted to the Appellant by TANTRANCO vide letter dated 18.11.2011 clearly spells out terms and conditions for open access. S.No. 10 and 18 of the said grant are reproduced below:

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10. The generation over and above the committed power by M/s kamachi Sponge & Power Corporation Ltd. will not be accounted.....

.....

18. If the HT consumer does not draw the committed power, the generator will not be compensated by TANGEDCO.

……

The energy pumped by the Appellant on all the three occasions as indicated above is clear violation of the above terms and conditions of the connectivity/ open access granted by TANTRANSCO as there was no contractual agreement with the Respondent No.1 and there is also no provision for accounting of injection of excess energy during the period under dispute by Appellant as per connectivity and open access grant by TANTRANSCO.

iii. The relevant provisions of CGP Order are reproduced below:

…….

……..

The intention of this order is to enable the CGP holder to sell his surplus power to the Distribution Licensee. The surplus in CGP can be categorised as

(a) Surplus a priori which is the maximum firm commitment (referred as firm supply in the policies / guidelines etc.,), a CGP holder can offer at the best. (b) Surplus resulting from reduced captive usage due to various factors such as factory closure, reduction in production level etc.,, which is dynamic and an infirm offer (referred as infirm supply).

Accordingly, whenever the order refers to scheduling / commitment, with respect to the transactions of CGP and Licensee, it pertains to the firm / infirm supply and should not be confused with firm power / infirm power definitions.

The Appellant was also not clear between the terms firm supply and infirm supply vis a vis firm power and infirm power which the CGP Order clearly distinguished as above. Therefore the argument of the Appellant of injection of infirm power to the grid as per CERC/ TNERC Tariff Regulations is not sustainable.

Further, the CGP Order also clearly spells out the requirement of energy purchase agreement as below:

(*f) Energy Purchase Agreement (EPA)*

The CGP Holder shall sign an EPA with Distribution Licensee or Third Party consumers for sale of power of minimum 1MW (i.e. equivalent to 700 units per hour). The above criterion shall be applicable for "Firm" as well as "Infirm" power. Any power injected into the grid for the purpose of selling to the Distribution Licensee or the Third Party which is less than 1 MW shall not be considered while billing by the Distribution Licensee.

It is not intended that the Commission would approve EPA for each CGP Holder individually. Distribution Licensees shall draft EPA taking cognizance of the Tariff provisions and EPA-related principles elaborated in this Order.

A short tenure such as 1 year for Firm power purchase agreement considered to be inadequate for CGPs to provide investment / financial related details to the lending agencies / institutions while seeking financial assistance. Therefore, the Distribution Licensee should sign an EPA for a minimum of 3-years and a maximum period of 5-years,

with the CGP Holders, for both 'Firm' as well as 'Infirm' power purchase from CGP.

It means that any sort of energy (Firm/Infirm) is to be purchased by a Distribution Licensee by entering into EPA and that too for a longer duration of time at the rates specified in the CGP Order. It means that there was a clear requirement of contractual agreement between Appellant and Respondent No. 1 for sale/purchase of any power for shorter duration from the CGP at the tariff approved by the State Commission. The Appellant should have taken appropriate steps to deal with the situation at an appropriate time. Ignorance of the provisions of the appropriate regulations does not absolve the Appellant from its wrong doing.

From the combined reading of all the above provisions and the communications exchanged between the Appellant and the Respondent No.1, it is clearly established that the Appellant has pumped the energy on its own without entering into any contract with Respondent No. 1 and without the knowledge / schedule from SLDC. The energy pumped into the grid during the period under dispute by the Appellant is unauthorised and does not call for any payment by the Respondent No.1.

x x x x x

h. On Question No. 6 (h) i.e. Whether the statement of the first Respondent is sustainable, when they accept that the connectivity to the grid is established, energy supply is received and accepted and further sold to end customers and huge profitable income is generated, however the Respondent is not agreeable to share a minimum amount from the income generated from the energy supplied by the Appellant and in turn categorises the energy as illegal supply?, we decide as below:

i. Based on the facts and circumstances of the case as discussed in the preceding paragraphs, the Appellant is not entitled to any payments of its unauthorised action of pumping of electricity to the grid during the period under dispute and hence this issue is also decided against the Appellant."

22. A cursory understanding of the facts would reveal that the appellant therein had huge capacity of 2 X 35 MW whereas in the present case it is a meagre 2 MW plant. The appellant therein sought to sell the additional energy generated by it to the grid,

whereas in the instant case, the original petitioner sought to take back the energy generated by the captive plant for its own use during off peak hours that too by paying the necessary banking charges in kind. Therefore, application of the principles and the finding set out in the said appeal are distinguishable in the present case with that of the appeal. The reasoning set out by the Hon'ble ATE in the said appeal cannot be applied to the facts of the present case mutatis-mutandis.

23. Further, the appellant therein is governed by specific regulation in respect of sale of power from the captive plant, whereas in the instant case, the Commission had allowed the banking facility only under the applicable regulations. The sale of banked energy would arise only, if the generator or captive consumer has not consumed the same before February of the financial year. Such power was required to be procured by the licensee at 50% of the pooled cost rate. Since the original petitioner offered to consume the energy by itself, what all was required to be done by the review petitioner is to bank the additional energy and release it to the consumer in off peak by collecting banking charges. Thus, the said judgment is not applicable to the facts of the present case.

24. Considering the contentions and submissions made by the parties and the finding set out by us in the preceding paragraphs, we do not find any reason to undertake review of the original order dated 04.08.2016 passed in O. P. No. 94 of 2015. Accordingly, the review petition is rejected but in the circumstances without costs.

This order is corrected and signed on this the 10th day of July, 2017.

Sd/-	**Sd/-**
(H. SRINIVASULU)	**(ISMAIL ALI KHAN)**
MEMBER	**CHAIRMAN**

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