

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.106 of 2011

Dated:17 February, 2012

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member,

In the Matter Of

Vidharbha Industries Power Limited
H-Block, 1st Floor, Dhirubhai Ambani,
Knowledge City, Thane Belapur Road,
Navi Mumbai-400 710

Appellant(s)

Versus

1. The Maharashtra Electricity Regulatory Commission
World Trade Centre No.1
13th Floor, Cuffe Parade, Colaba,
Mumbai-400 001
2. Reliance Infrastructure Limited,
Reliance Energy Centre,
Santacruz (East),
Mumbai-400 098
3. Wardha Power Company Limited
8-2-293/82/A/431/A,
Road No.22, Jubilee Hills,
Hyderabad-500 033

Respondent(s)

Counsel for the Appellant:

Mr.C.S. Vaidyanathan,Sr. Adv
Mr. Ankit Shah
Ms. Shikha Sarin
Ms. Shally Bhasin
Mr. Abhinav Agrawal

Counsel for the Respondent :

Mr. Jayant Bhushan,Sr. Adv
Mr. Buddy A Rangandhan for R-1
Mr. Arijit Maitra for R-1
Mr. Sugam Seth for R-1
Mr. Richa Bhardwaja for R-1

Mr. Hasan Murtaza for R-2
Mr. Saswat Patnaik for R-2

Mr. M G Ramachandran for R-3
Mr. Sanjay Sen for R-3
Mr. Hemant Singh for R-3
Ms Shikha Ohri for R-3
Mr. Anurag Sharma for R-3

JUDGEMENT

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

1. Vidharbha Industries Power Limited is the Appellant herein.
2. Aggrieved by the impugned order dated 31.5.2011, passed by the Maharashtra Electricity Regulatory Commission disallowing the increase in quantum of power from 134 MW to 404 MW but allowing the reduction of tariff from Rs.4.80/kWh to Rs.4.24/kWh, the Appellant being the successful bidder, has filed this Appeal. The facts are as follows:

- (a) The Appellant Vidharbha Industries Power Limited, is engaged in the business of generating power. The Reliance Infrastructure Limited is the Second Respondent. It is a generating Company as well as the Distribution Company.
- (b) After completion of the competitive bidding process, the Reliance Infrastructure Limited (R-2) entered into a Power Purchase Agreement dated 16.6.2010 with Vidharbha Industries Power Limited, the Appellant, being a successful bidder for a contract capacity of 134 MW at the tariff of Rs.4.80/kWh.
- (c) Thereupon, the Reliance Infrastructure Limited (R-2) asked the Appellant to increase the contract capacity from 134 MW to 404 MW and simultaneously to reduce the levelized tariff. Accordingly, the Appellant agreed to increase the quantum of power from 134 to 404 MW and to reduce the levelised tariff from Rs.4.80/kWh to Rs.4.24/kWh. On this basis, an Addendum Agreement to the Power Purchase Agreement was executed on 21.1.2011 for the increased supply of 404 MW of power at the reduced rate of Rs.4.24/kWh.
- (d) On the strength of these Agreements, the Reliance Infrastructure Limited (R-2) filed a Petition before the

State Commission u/s 63 of the Electricity Act, 2003 for adoption of tariff for contract capacity of 404 MW at the tariff of Rs.4.24/kWh as per the PPA dated 16.6.2010 and the Addendum dated 21.1.2011 entered into between the Reliance Company and the Appellant Company.

(e) After hearing the parties, the State Commission passed the impugned order on 31.5.2011 approving only a quantum of power of 134 MW as per the PPA executed on 16.6.2010 and disallowing the increase in quantum as fixed in the Addendum to PPA dated 21.1.2011 but reducing the rate from Rs. 4.80/kWh to Rs.4.24/kWh.

(f) Aggrieved by this, the Vidharbha Industries Power Limited has presented this Appeal.

3. According to the Appellant, the State Commission has considered the Addendum partly and not in toto only to the extent that it approved to the rate of 4.24/KWh but not considered the revised quantum as agreed between the parties i.e. 404 MW as finalized in the Addendum. The main prayer in this Appeal is seeking to set aside the impugned order and to approve the Power Purchase Agreement dated 16.6.2010 along with the addendum dated 21.1.2011 for supply of 404 MW power at the levelised tariff of Rs.4.24/kWh.

4. Stoutly opposing this prayer of the Appellant, it is strenuously contended by the Wardha Power Company Limited (R-3) that the prayer made by the Reliance Company (R-2) before the Commission as well as the prayer of the Appellant made before this Tribunal is not bonafide since the original PPA was entered into between the Reliance Infrastructure Limited and Vidharbha Industries Power Limited on 16.6.2010 and during the same period, the Reliance Infrastructure Limited has signed other PPAs with other two bidders namely the Wardha Power Co Ltd (R-3) and AMNEPL and when the Reliance Infrastructure Limited Company filed the petition u/s 63 of the Act in respect of PPA as well as the Addendum executed with Vidharbha Industries Company before the State Commission, the Reliance Company had concealed about the PPA that was executed with the other two bidders and as such, the State Commission has correctly concluded that the addendum dated 21.1.2011 for the supply of additional quantum of 274 MW power is an afterthought and that therefore the Appellant cannot claim the quantum of supply as finalized in the Addendum Agreement dated 21.1.2011.
5. The Learned Senior Counsel appearing for the State Commission (R-1) also contended that taking into consideration the consumer's interest, the State Commission approved the supply of power of 134 MW of power from

Vidharbha Industries Limited to Reliance Infrastructure Limited as per the original PPA dated 16.6.2010 and approved the rate as finalized as per the addendum executed on 21.1.2011.

6. In the light of the above submissions made by the Learned Counsel for the Respondents raising the formidable objection to the prayer made in this Appeal, the Appellant ultimately confined itself with the prayer to approve the PPA dated 16.6.2010 in respect of both the quantum as well as the rate finalized as per the said agreement.
7. Thus, even though the Appellant has sought for a prayer for approving the PPA dated 16.6.2011 and Addendum dated 21.1.2011 in respect of supply of 404 MW of power at the levelised tariff rate of Rs.4.24/kWh, the Appellant has now confined itself to the alternative prayer (c) referred to in the Appeal seeking for the approval of the PPA dated 16.6.2010 with reference to the both the quantum and rate. To this effect an Affidavit also has been filed on 2.2.2012 which states as follows:

“I state that in light of the proceedings leading to the aforesaid order and in order to have amicable settlement of the dispute herein question, Appellant company is willing to confine their relief to their alternative Prayer: ‘Prayer C’. Prayer C is reproduced herein under:

“Alternatively, approve the PPA dated 16.06.2011 for supply of 134 MW power at levelized tariff of Rs.4.80/kWh”.

8. This modified Prayer also is objected by the Learned Senior Counsel appearing for the State Commission (R-1) contending that the reduction in tariff from Rs.4.80/kWh to Rs.4.24/kWh was offered by the Appellant itself to Reliance Infrastructure Company, the procurer without any condition through its letter dated 13.1.2011 and on that basis, the State Commission had to resort to revised tariff and therefore the impugned order is perfectly justified.
9. We have carefully considered the submissions made by the parties.
10. In the light of the above stand taken by the parties, the question now arises as to **“Whether the State Commission who has got the limited powers under Section 63 of the Electricity Act either to adopt the tariff or to reject the same could go into the merits of the tariff and disallow the increase in quantum of power from 134 MW as finalized in the PPA dated 16.6.2010 to 404 MW as finalized in the Addendum and to allow the reduction of tariff from Rs.4.80/kWh as finalized in the original PPA to Rs.4.24/kWh as fixed by the Addendum?”**

11. While dealing with this question, we would like to refer to the findings rendered by the State Commission with regard to the prayer made by the Reliance Infrastructure Limited (R-2). The State Commission has observed that the Vidharbha Industries Limited who is admittedly a sister Company of the Reliance Company had on further negotiations, entered into an Addendum dated 21.1.2011 to the original PPA dated 16.6.2010. increasing the quantum and reducing the rate and the said Addendum was executed between the Reliance Company and its sister Company of Vidharbha Industries Power Company on 21.1.2011 for supply of additional quantum of 270 MW of power in respect of which already a PPA was entered into between the Reliance Company and Wardha Company on 4.6.2010 and therefore, the Addendum is an afterthought and the same was entered into in order to knock off the Wardha Power Company. The relevant observations made by the Commission is as follows:

“After execution of the PPA’s on June 4, 2010 with WPCL and June 16, 2010 with VIPL, the Petitioner herein enters into a further negotiation on tariff with VIPL only. From the documents produced it appears that no negotiation of Tariff was ever attempted with the Intervener and other bidders post execution of PPA’s.

It clearly appears that a line of negotiation was continued with one of the preferred suppliers which line was not open for other suppliers. The addendum dated January 21, 2011 for supply of additional quantum of 270 MW's of power is, thus, an afterthought as same was brought into knock off of the Intervener."

12. This observation about the conduct of the Reliance Infrastructure Limited (R-2) in our view is perfectly justified. However, having come to such a conclusion that the Addendum is an afterthought, the State Commission cannot adopt the tariff as finalized by the Addendum. Admittedly, the State Commission is called upon to decide the Petition filed by the Reliance Infrastructure under Section 63 of the Act. The State Commission while dealing with the Petition under Section 63 of the Act, 2003 could pass any one of the following orders:

(a) Either reject the petition if it finds that the bidding was not as per the statutory framework

Or

(b) Adopt the tariff if it is discovered by a transparent process conducted as per Government of India guidelines.

13. Thus, the scope of Section 63 is limited for adoption of tariff. The perusal of Section 63 would clearly reveal that the State

Commission has to verify merely whether the bid process has been done in a transparent manner and in accordance with the guidelines framed by the Central Government and if it is complied with, the State Commission shall give approval and adopt the tariff recommended by the Committee. Even though the negotiations were permitted under the competitive bidding process, the said negotiations could take place at any time only prior to the declaration of the party as a successful bidder and not thereafter. These principles have been laid down by this Tribunal in Appeal No.82 of 2011 dated 16.12.2011. The relevant observations is as follows:

“(A) The first question relates to the scope of power to be exercised and the method of procedure to be followed by the State Commission under section 63 of the Act.

The powers of the State Commission are limited under Section 63 of the Act. The State Commission while dealing with the petition under Section 63 for adoption of tariff could either reject the petition if it finds that the bidding was not as per the statutory framework or adopt the tariff if it is discovered by a transparent process conducted as per Government of India guidelines. Section 63 starts with non-obstante clause and excludes the tariff determination powers of the State Commission under Section 62 of the Act. The entire focus of the competitive bidding process under Section 63 is to discover the competitive tariff in accordance with the market conditions and to finalize the competitive bidding process in accordance Central government’s guidelines, standard document of Request for Proposal and the PPA. Under

Section 62 of the Act, the State Commission is required to collect various relevant data and carryout prudence check on the data furnished by the licensee/generating company for the purpose of fixing tariff. Hence determination of tariff under Section 62 is totally different from determination of tariff through competitive bidding process under Section 63. Competitive bidding process under Section 63 must be consistent with the Government of India guidelines. Any deviation from the standard Request for Proposal (RFP) and model PPA notified by the Government of India must be approved by the State Commission. This process must discover competitive tariff in accordance with market conditions from the successful bid- consistent with the guiding principles under section 61 of the Act. If the deviations are permitted by failing to safeguard the consumer interests as well as to promote competition to ensure efficiency, it will destroy the basic structure of the guidelines. In this case the above procedure had not been followed. The contention of the Noida Power that under Section 63 of the Act it can negotiate with the 3rd party with the approval of the State Commission even after the bidding process is completed is contrary to the provisions of the Act as well as the bidding guidelines. Even assuming that negotiations are permitted under competitive bidding process, the said negotiation can take place at any time only prior to Noida Power declaring the Essar Power as successful bidder by filing the petition under Section 63 of the Act for adoption of the tariff. Once the petition has been filed on the recommendation of the Evaluation Committee seeking for the adoption of tariff after it is discovered, it is not open for the Noida Power to enter into negotiation with 3rd party to reduce the tariff.”

14. In the light of the above principles laid down in the above judgement and in the light of the findings given by the State Commission in the impugned order the Addendum is an

afterthought and on that basis the State Commission should have rejected the addendum in toto and approved the original PPA dated 16.6.2010 only. On the other hand, the State Commission has passed the order approving the quantum as per the original PPA dated 16.6.2010 and approving the rate as finalised in the addendum dated 21.1.2011. The relevant finding is as follows:

“On perusal of project activities and progress of VIPL units, Commission is of the view that availability of power from April 2012 is unlikely. However, since the quantum and rate etc., are finalized based on competitive bidding process and also considering the PPA is for medium term till March, 2014, the Commission approves supply of 134 MW of power by VIPL to RInfra as per original PPA signed on 16th June, 2010. However, the rate applicable shall be as finalized in January, 2011”.

- 15. “To sum-up, this finding in our view, is not valid as the State Commission, as mentioned above, either should have approved the original PPA dated 16.6.2010 in toto or rejected the same on the grounds mentioned in Section 63 of the Act. Since there are no valid reasons for the rejection of the PPA dated 16.6.2010 in respect of the rate, the State Commission ought to have approved the original PPA in toto in respect of both the quantum and rate”.**

16. In view of the our above conclusion, we direct the State Commission to approve the PPA dated 16.6.2010 in respect of both the quantum and rate specified in the said document and pass a consequential order in terms of our above findings.
17. The Appeal is allowed. The order impugned has been set aside only to the extent indicated above.
18. With these observations, the Appeal is disposed of. However, there is no order as to cost.

(Rakesh Nath)
Technical Member
Dated: 17 Feb, 2012

(Justice M. Karpaga Vinayagam)
Chairperson

Reportable/Not Reportable