

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 321 OF 2013

Dated: 4th July 2016

**Present : Hon'ble Mr. Justice Surendra Kumar, Judicial Member
Hon'ble Mr. T. Munikrishnaiah, Technical Member**

IN THE MATTER OF:

1. Transmission Corporation of Andhra Pradesh
Vidyut Soudha, Khariatabad,
Hyderabad-500082, Andhra Pradesh
2. Eastern Power Distribution Company of Andhra Pradesh Ltd.
P&T Colony, Seethammadhara,
Visakhapatnam-530013
3. Southern Power Distribution Company of Andhra
Pradesh Ltd.
D.No. 19-13-65/A, Srinivasapuram
Tiruchanoor Road, Tirupati-517503
4. Central Power Distribution Company of Andhra
Pradesh Ltd.
6-1-50, Corporate Office,
Mint Compound, Hyderabad-500063
5. Northern Power Distribution Company of Andhra
Pradesh Ltd.
H.No.2-5-31/2, Corporate Office
Nakkalagutta,
Hanamkonda, Warangal (AP)-506 004
6. Andhra Pradesh Power Coordination Committee
Vidyut Soudha, Khairatabad,
Hyderabad-500082,
Andhra Pradesh

...Appellants/Petitioners

VERSUS

1. Andhra Pradesh Electricity Regulatory Commission
4th & 5th Floor, Singareni Bhavan, Red Hills,
Hyderabad-500004

2. Spectrum Power Generation Limited
Plot No.241, D.No.8-2-293/82/A/241/A,
SSC-3, Rajala Center, 4th Floor, Road No.
36,Jubilee Hills, Hyderabad-500033
Andhra Pradesh

...Respondents

APPEAL UNDER SECTION 111(1) OF THE ELECTRICITY ACT, 2003

- Counsel for the Appellant(s) : Mr. Anand K.Ganesan,
Ms. Neha Garg
and Mr. Sandeep Rajpurohit
- Counsel for the Respondent(s) : Mr. K.V.Mohan
Mr. K.V.Balakrishnan for APERC
Mr. Matrugupta Mishra for R-2

J U D G M E N T

PER Hon'ble T. Munikrishnaiah, Technical Member

1. The present Appeal, being Appeal No.321 of 2013, filed by the Appellant, **'M/s Transmission Corporation of Andhra Pradesh & Ors.'**, under Section 111 of the Electricity Act, 2003 against the Order dated **16.04.2013**, passed by Andhra Pradesh Electricity Regulatory Commission (hereinafter called the **'State Commission'**) passed in Petition No. 32 of 2009, by which the State Commission has allowed the Petition filed by the Respondent No.2, Spectrum Power Generation Limited. The State Commission considered the short term loan of Rs. 106.60 crore brought in by the Respondent No.2 from S.B.I, Hyderabad

for completion of the project as equity and directed the appellants to pay the incentive on the total amount of 224.53 crore (117.93 crore + 106.60 crore) considering Rs.106.60 crore, SBI loan as equity.

The Respondents' contention is that paying 'Return on Equity' (**RoE**) at 16% on the entire provisional equity of Rs. 224.53 crores, but have been paying incentive only on Rs. 117.93 Crores, while refusing to pay the incentive on the balance amount of Rs.106.60 crores by the Appellants, stating that the equity capital brought in by the promoters is only Rs.117.93 cores. The stand of the Appellants is that the said balance amount of Rs.106.60 crores is only a bridge loan and due to Hon'ble Delhi High Court's order to restrain the equity to 117.93 crores.

2. The Appellants are the successor of the Andhra Pradesh State Electricity Board. The Appellant No. 1, is a Transmission Company and the Appellant Nos. 2 to 5, are the Distribution Companies in the State of Andhra Pradesh. The Appellant No. 6 is an Apex Committee formed to deal with the aspects of Power Purchase on behalf of all the four DISCOMS.
3. The Respondent No.1, the, Andhra Pradesh State Electricity Regulatory Commission is a Electricity Regulator empowered to discharge functions under Electricity Act, 2003. Respondent No.2, is Spectrum Power Generation Ltd. (herein referred to as '**Spectrum**') is a Generating Company and had constructed, commissioned and operating a 208 MW Power Plant at Kakinada in Andhra Pradesh.
4. **Facts of the Case:**
 - 4.1 The Appellants and Respondent No. 2, Spectrum Power Generation Ltd. entered into a Power Purchase Agreement (**PPA**) on 20.06.1993. The said

PPA was revised from time to time and a final agreement was entered into on 23.01.1997.

- 4.2 At the time of entering into PPA, the law applicable governing the terms and conditions of the PPA was the provisions of the Electricity Supply Act, 1948. Section 43 (A) of the Electricity (Supply) Act, 1948 dealt with the terms and conditions and tariff for sale of electricity by the generating companies.
- 4.3 In terms of Schedule (E) of the PPA, the Capital Cost provisionally approved by the Central Electricity Authority in the *Techno Economy Clarifications (TEC)* was to be in the form of debt and equity of Rs. 523.90 crores and Rs. 224.53 crores, respectively. In so far as the equity component is concerned, the promoters of Spectrum brought in an amount of Rs. 117.93 crores, which is the paid up and subscribed capital relatable to the generating company. The balance amount of Rs. 106.10 crores is reported to have been brought in from State Bank of India as a Short Term Loan at an interest rate of 20.75% for completion of the project.
- 4.4 The amount of short term loan of Rs.106.60 crores is not a paid up and subscribed capital and was due to an Order of the Hon'ble High Court of Delhi prohibiting the Respondent No. 2, Spectrum from infusing more equity into the project.
- 4.5 The PPA in **Article 3.10.2**, provides for incentive to be paid to the generating company in a particular manner. In the years, if Spectrum achieved a Plant Load Factor of above 68.49%, the Respondent, Spectrum, could claim the incentive, which is in the nature of additional return on equity as specified in the *Article 3.10.2* of the PPA.

- 4.6. The Appellant at no point of time treated the Rs. 106.60 crores, which was brought in, as a short time loan as equity. The position was clarified by the Appellants to Spectrum by the letters dated 07.09.1998, 08.10.1998 and 03.11.1998.
- 4.7 On 16.06.2003, the Respondent No. 2, Spectrum filed a Writ Petition No.11223 of 2003 before the Hon'ble High Court of Andhra Pradesh seeking directions to the Appellants to make the payments on the incentive in terms of the PPA. Subsequently, the Respondent No. 2, Spectrum, withdrew the Writ Petition on 25.11.2008 and approached the State Commission by filing O.P. No. 32 of 2009.
- 4.8 The State Commission allowed O.P. No. 32 of 2009, and passed an order dated 16.04.2013, and directed the Appellants to pay the incentive on the amount of Rs.106.60 crores as well.
- 4.9 The Appellants moved a Review Petition, being R.P. (SR) No. 53 of 2013, before the State Commission on 10.05.2013 seeking review of the order dated 16.04.2013.
- 4.10 By order dated 12.08.2013, Review Petition No. 53 of 2013, has been dismissed by the State Commission stating that there was no error apparent on the face of the record.
- 4.11 Aggrieved by the Order dated 16.04.2013, the Appellants filed this Appeal, being Appeal No. 321 of 2013, and prayed for the following reliefs:
- (A) Allow the appeal and set aside the Order dated 16.04.2013 passed by the Respondent No. 1, State Commission.

(B) Pass such other order(s) and this Tribunal may deem just and proper.

5. We have heard the arguments of Mr. Anand K. Ganesan, learned counsel appearing on behalf of the Appellants and Mr. Matrugupta Mishra, learned counsel appearing on behalf of the Respondent No.2 and after going through the submissions of the rival parties, the following issues arise for our considerations:

Issue No.-1 : Whether the State Commission erred in considering the short term loan amount of Rs. 160.60 crores borrowed by Respondent No. 2, Spectrum Power Generating Ltd. from SBI, as equity, so as to earn incentive on the borrowed amount of Rs.106.60?

Issue No.-2: Whether the Appellants are liable to pay the interest at the rate of 20.75% on Rs.106.60 crore, if, it is not considered as equity instead of 16% equivalent to ROE?

6. **Issue Nos. 1 & 2, are interwoven and hence both the issues are being taken up together.**
7. **The following are the contentions made by the learned counsel for the Appellants:**
- 7.1 That the State Commission failed to appreciate that the claims of Spectrum had been rejected by the Appellants as early as on 23.06.1998, Spectrum approached the Hon'ble High Court by filing the writ petition only on 16.6.2003 and the claims, firstly before the Hon'ble High Court and thereafter before the State Commission were clearly barred by limitation.
- 7.2 That the State Commission failed to appreciate that the Appellants had rejected the claims of Spectrum by the letters dated 23.6.1998, 07.09.1998, and 08.10.1999 and even considering the last letter dated

08.10.1999, the Writ Petition before the High Court of Andhra Pradesh was only filed by Spectrum on 16.6.2003, i.e. after a lapse of 3 years from 08.10.1999.

7.3 That the State Commission has held (at Para-7 of the Impugned Order) that the plea urged by the Appellants herein on the aspect of limitation is not sustainable and rejected the same, citing this Hon'ble Tribunal's Order passed in Appeal No.90 of 2011. This finding is not correct as the issues in the Appeal No.90 of 2011 and in the present appeal are quite different and the facts of Appeal No.90 of 2011 including the dates of raising the claims are completely different from the facts of the present case.

7.4 That the State Commission has failed to appreciate that the amount of Rs. 106.60 Crores borrowed by Spectrum as a Short term/Bridge loan cannot be qualified or to be treated as equity so as to earn Incentive on the same.

7.5 That the State Commission has failed to appreciate the definition of 'Equity' stipulated in the PPA at Article 1.1.(xxvi) and also ignored the Notification issued by Ministry of Power (MoP) dated 30.03.1992, which is part of PPA and which overrides the PPA provisions in terms of Article 16.8. The Notification dated 30.3.1992 provides as under-

"Clause 1.5(e): *Return on Equity (ROE) shall be computed on the Paid up and Subscribed Capital relatable to the generating company, and shall be 16% of such capital.*

7.6 That the State Commission failed to appreciate that even as per Company Law, the "Paid-up share Capital" or "Share Capital Paid-up" means such aggregate of money credited as Paid-up as is equivalent

to the amount received as Paid-up in respect of Shares issued and also includes any amount credited as Paid-up in respect of Shares of the Company, but does not include any other amount received in respect of such Shares, by whatever name called.

7.7 That the State Commission erred by observing that as the Appellants had provided incentives to the Respondent in the ARR proposals for the years 2000-01 & 2001-02, and so it is inclined to treat Rs.106.60 Crores as part of Equity. In fact, while filing ARR proposals before the State Commission, the Appellants had furnished the projections of all probable expenditure for the ensuing financial years, which would be trued-up at the end of the financial year. As the ARR proposals are provisional, the same cannot be taken into cognizance for giving a finding on an interpretation of the PPA and the statutory Tariff Notification. The context in which the said projections are given is totally different and the same cannot be canvassed in this case.

7.8 That the State Commission failed to appreciate the following salient aspects -

- i) The provisional Capital cost of Spectrum Project approved by the Central Electricity Authority, in Techno-Economic Clearance (TEC) was Rs.748.43 Crores. The Debt & Equity ratio approved at 70:30 would divide the Capital cost as Rs.523.90 Crores & Rs.224.53 Crores respectively.
- ii) It is a fact that Spectrum could not raise the equity of Rs.106.60 Crores against the total equity of 224.53 Crores, which was subsequently brought in as Short term loan/Bridge loan.
- iii) Raising of Short term loan in lieu of shortfall equity was not in consonance with the terms and conditions of Techno Economic Clearance approval given by CEA, for the financial package but had to be agreed due to the Order passed by the Delhi High Court.

- iv) The Appellants continued to pay higher interest on 70% of Debt amount but were not obligated to extend the same rate of interest to the Short term loan of Rs.106.60 Crores as Spectrum alone was responsible for its failure to raise the equity envisaged.

7.9 That the State Commission has held against the Appellants for allowing the Return in Equity @ 16% on the entire amount of Rs. 224.53 Crores. The State Commission had completely omitted to consider the letters of the Appellants to Respondent-2 (Spectrum) wherein it was clearly stated that the Short term loan from SBI would not be treated as Equity and the 16% being paid on the same is an interest on the loan. The State Commission has completely misconstrued by stating that the Appellants paid the 16% on the Rs. 106,60 Crores as a Return on Equity. The observation at Para 13 of the Impugned Order to the effect that the Appellants are paying 16% Return on Rs. 106.60 Crores and not the interest, is not correct and has been rendered without considering the MoP Notification dated 30.3.1992 and the letters of the Appellants. In fact, the State Commission has itself recorded that the Appellants never treated the amount of Rs. 106.60 Crores as equity but has failed to give effect to the said contention.

7.10 That the State Commission erred in overlooking the distinction between the Debt Component and Equity Component, in terms of the Notification dated 30.3 .1992, which states that Paid Up and Subscribed Capital alone shall be considered for payment of Return on Equity. Therefore, the Appellants never treated Rs. 106.60 Crores as equity. Only because the Rs. 106.60 Crores was serviced at 16% does not mean that the Appellants treated the same as equity and paid a Return on the same. The letters of the Appellants on this aspect are absolutely clear.

7.11 That the State Commission failed to appreciate that though the amount brought in as short term loan is invested in the project to bridge the shortfall of equity, yet it does not qualify as equity in terms of statutory provisions. The State Commission overlooked the statutory provisions relating to Paid Up and Subscribed Capital and simply drew an analogy that 16% interest being paid on Rs.106.60 Crores loan, which is akin to ROE of 16% and therefore the loan of Rs.106.60 Crores could be treated as Equity.

8. **Per Contra, the following are the submissions on behalf of Respondent No. 2, Spectrum Power:**

8.1 That in the restrain order of the Hon'ble High Court of Delhi the promoters were restrained from infusing the remaining part of equity into the project, in spite of the fact that the promoters were ready and willing to do so. At that point of time the promoters had no other option than to abandon the project in the mid-way, which would have deprived the Appellants from receiving uninterrupted power from the Respondent's plant at a cheaper rate. The promoters taking into consideration the requirement of power in the State of Andhra Pradesh in particular and India in general, had commissioned the power project by resorting to an alternative option of obtaining loan to fill up the gap occurring in the equity component of the project cost.

8.2 That it is the obligation of the promoters to infuse equity into the project towards the capital cost, therefore it is immaterial to ascertain as to the source from which the promoters have arranged the equity capital. In the absence of such arrangement of funds by the promoters the project could not have been commissioned.

- 8.3 That the loan obtained by the promoters from SBI was exclusively utilised towards the capital cost of the project. It qualifies the fundamental requirement of being called as equity so far as the project is concerned as per the terms and conditions of the PPA as defined under Article 1.1(xxvi) of the PPA.
- 8.4 That as per Article 3 of the PPA tariff shall be determined on the basis of two part tariff, which shall be the sum of the fixed charge, the variable charge payment, the incentive or disincentive payment and taxes on income as set out in Article 3. Return on equity is being defined under Article 1.1(lxxiii) of the PPA, which determines return on equity @ 16% per annum. The Appellants while calculating return on equity as defined under the PPA calculates 16% on the entire equity amount of Rs. 224.30 crores, which also includes Rs. 160.60 crores obtained as loan by the promoters. Therefore, to their own admission the Appellants have been treating Rs. 106.60 crores as equity but on the contrary while calculating incentives as provided under Article 3.10.2, it only takes into consideration Rs. 117.70 crores as equity.
- 8.5 That the version of the Appellants that Rs. 106.60 crores obtained by the promoters is not equity but debt, then as per the provisions of the PPA the Appellants are under obligation to allow interest of 20.75% paid by the promoters towards the loan amount of Rs. 106.60 crores, while determining the fixed charge component of the tariff.
- 8.6 That the parties are bound by the terms and conditions of the contract and the very concept “bridge loan” is extraneous to the terms and conditions of the PPA and as stated above any amount infused or utilised towards the project cost shall have to be either categorised as a debt or equity. Since the debt amount of Rs. 523.90 crores as envisaged under

the PPA has been tied up by the Respondent, the amount of money infused towards equity shall be treated as equity for the purpose of the project and for the implementation of the PPA regardless of the source of such fund, subject to other terms and conditions of the PPA.

- 8.7 That the objective for making provision as to incentive under the PPA is to encourage the power producers to generate and supply maximum possible power with an efficacious utilisation of the resources. Such incentive is a way that becomes beneficial for the State DISCOM and the consumers at large. Under the PPA in order to calculate the amount of incentive payable, return on investment has been taken as the basis. Therefore, the source of fund infused towards equity has nothing to do with the liability of the Appellants towards payment of incentives to the Respondent Company, which has a right to claim such incentive earned by it as a result of efficacious functioning of the power plant.
- 8.8 That the ARR submitted for the year 2000-01 by the Appellant No. 1, the full incentive as due to the answering Respondent was specifically shown and the Appellant No. 1 had benefitted from the same by making the Respondent No. 1 fix up the tariff taking into consideration the entire amount of incentive. The Appellant No. 1 had claimed Rs. 27 crores as liability towards incentive, whereas it had actually paid Rs. 13.17 crores as incentives to the Respondent. Similarly, in the year 2001-02 the Appellant No. 1 had claimed a liability to pay Rs. 18.75 as incentives, whereas it has actually paid Rs. 7.76 crores to the Respondent. This shows the malafide conduct on the part of the Appellant No. 1. Therefore, the denial of treating Rs. 106.60 crores as equity is nothing but a false pretext and an eye wash to conveniently escape from making the full payment towards incentive.

9. **Our Consideration and Conclusion on these issues**

We have cited above the facts of the case, the issues involved and contention of the rival parties in the upper part of the judgement, hence, we have now directly proceed to our own discussion and conclusion on these issues.

- 9.1 The Central Electricity Authority (**CEA**) as per Schedule (E) of the PPA, the capital cost for establishing the project as provisionally approved, shall be raised by means of Debt of Rs. 523.90 crore and equity of Rs. 224.53 crores respectively.

Accordingly, the Respondent No. 2, Spectrum Company fulfilled the debt component by securing loans from various banks and financial institutions. In so far as the equity component is concerned, the promoters of the company brought in an amount of Rs. 117.93 Cores. In view of the restraining order passed by the Hon'ble Delhi High Court, the promoters could not bring in the balance amount of Rs.106.60 Crores as equity component. To complete the project, the promoters of the company brought Rs. 106.60 crore from SBI as a loan by furnishing their personnel guarantee at an interest of 20.75% and completed the project.

- 9.2 The Respondent Spectrum Power Company Ltd., started selling power, being generated by it, pursuant to the terms of the PPA with Appellants.

The generation and sale of power in terms of the PPA commenced on 19.04.1998. The tariff comprises of the (i) Fixed charges which include (a) Interest on debt; (b) Return on Equity; (c) Interest on Working Capital; (d) Depreciation; (e) Operation and Maintenance expenses (f) Foreign Exchange Variation; and (g) Insurance premia, (ii) the Variable charge payment, (iii) the Incentive or disincentive payments, and (iv) taxes on Income as set forth in Article -3 of the PPA.

9.3 The Appellants and Spectrum entered into Power Purchase Agreement (PPA) on 20.06.1993. The said PPA was revised from time to time and a final agreement was entered into on 23.01.1997. The relevant extracts from the PPA are as under:

“Article 1.1 (xvi) Debt : Debt means the amount of any loan, debenture or other similar obligation, contracted or raised and received by the Company under the Financing Documents, as more specifically set forth in Schedule E attached hereto, in accordance with the financing package approved by the Authority in consultation with the Board, but only to the extent that the proceeds of such capital contribution are exclusively utilized on the Capital Cost of the Project, pursuant to Article 1.1(x)”.

“Article 1.1.(xxvi) Equity: means the amount contributed towards the share capital of the Company, as more specifically set forth in Schedule - E attached here to and in accordance with the financial package to be approved by the Authority in consultation with the Board and includes premium raised by the Generating Company while issuing share capital and investment of internal resources created out of free reserve of existing company if any, for the funding of the Project, but only to the extent that the proceeds of such capital contribution are exclusively utilized on the Capital Cost of the Project, including, without limitation, any changes thereof pursuant to Article 1.1(x)”.

Clause 1.5(e): Return on Equity (ROE) shall be computed on the Paid up and Subscribed Capital relatable to the generating company, and shall be 16% of such capital.

3.10.2 Incentives: Where the PLF is above 68.49% (computed including Notional Generation), in any Tariff Year that begins on or after Combined Cycle COD, then in addition to the full Fixed Charge component at the PLF of 68.49% and the full amount of the Variable Charge component for the total energy delivered, the Board shall pay for actual generation and Notional Generation above the threshold level of a PLF of 68.49% an incentive in the nature of increased Return on Equity (ROE) in accordance with the following.

<i>PLF</i>	<i>Level of Incentive</i>
<i>(a) PLF < 68.5 %</i>	<i>None</i>
<i>(b) 68.5 % < PLF < 80.5 %</i>	<i>0.4 % increase in ROE for every 1 % Increase in PLF above 68.5 %</i>

- (c) $80.5\% < PLF < 85.5\%$ 0.5 % increase in ROE for every 1 %
Increase in PLF above 68.5 %
- (d) $PLF > 85.5\%$ 0.6 % increase in ROE for every 1 %
Increase in PLF above 68.5 %

In the case of Tariff Year less than 12 months, the Incentive Payment for the Tariff Year shall be proportionately reduced by reference to the number of days in the relevant Tariff Year.

.....

According to the PPA conditions, the incentive varies from 0.4% to 0.6% of ROE for every 1% increase in PLF above 68.5%.

- 9.4 Before proceeding further, let us examine the impugned order dated 16.04.2013, passed by the State Commission, which is as under:

“10. *The crucial issue that is to be adjudicated by the Commission is whether the amount of Rs. 106.60 Crs which is treated as bridge loan from SBI can be treated as a portion of equity, as urged by the petitioner for the purpose of incentive payments as per the PPA.*

11. *The petitioner has requested this Commission to issue an order on respondents to treat the amount of Rs. 106.60 Crs brought in by promoters of the petitioner – company as bridge loan from the SBI as equity within the meaning of PPA and consider the same for the payment of incentive to the petitioners and the said incentive amount on the entire equity of Rs. 224.53 Crs.*

12. *The petitioner claims that as per PPA it is entitled to 30% of equity and that, though its nomenclature is shown as loan/bridge loan, the amount of Rs.106.60 Crs is a component of equity and therefore the petitioner is entitled to incentive by treating the said amount on par with equity. The respondents, on the other hand, are claiming that the petitioner is not entitled to treat this as an equity, since they have not claimed it as an equity and they have treated the same as loan and are now requesting to treat the same on par with equity unjustifiedly.*

13. *The commission has examined the rival contentions of the parties herein. In the first place, the petitioner could not go ahead with raising further equity in view of the restraint imposed by the Hon’ble Delhi high Court. Notwithstanding the restraint as above, the petitioner herein, in good faith had obtained a loan to the extent of Rs. 106.60 Crs. By*

offering their personal guarantees for the purpose of filling in the gap towards 30% equity (Rs.224.53 Crs) at an interest rate of 20.75%. However, the respondents have been paying only 16% on the amount of Rs. 106.60 Crs. akin to the RoE of 16% and not 20.75% as interest. That being the case the balance of convenience is in favour of the petitioner and the amount of Rs. 106.60 Crs is better treated as equity rather than as loan. Further, the attempt of the respondents to avoid reckoning the amount of Rs. 106.60 Crs as equity by terming it as "bridge loan" does not hold water in as much as the PPA does not define such a thing. The amount of Rs. 106.60 Crs. has to be either treated as loan by paying the appropriate interest thereon or equity by paying the appropriate Return on Equity (RoE). The respondents have been consistently treating it as equity in view of the payment of 16% returned thereon. Further, it was also brought to our notice that the respondents have been following such a method while computing the incentives payable in their ARR proposals for the years 2000-01 and 2001-02. In the circumstances, as above, the Commission is inclined to treat Rs. 106.60 Crs. as part of 30% equity and accordingly directs the respondents to compute and pay the incentive payable to the petitioner herein as per the PPA duly treating Rs. 106.60 Crs. as part of the total equity of Rs. 224.53 Crs."

14. *The respondent filed I.A. No.8/2012 with a request to receive the documents filed by them. The case was reopened and posted for hearing on 19.01.2013. The counsel for the petitioner stated during hearing on 19.01.2013 that the petitioner has no objection to receive the same. Hence, the said petition is allowed and the documents are received for consideration by the Commission. The documents filed by the respondent are as hereunder:*

- (i) The Special Officer/IPC addressed a letter dated 23.06.1998 to the petitioner treating Rs.11792.44 lakhs only as equity for payment of Fixed charges.*
- (ii) The Chief Engineer/Commercial addressed a letter to the petitioner dated 07.09.1998 informing that the internal accruals cannot be taken as equity.*
- (iii) The letter dated 08.10.1998 is also to the same effect.*
- (iv) Member Secretary addressed a letter to the petitioner dated 03.11.1998 to the effect that they are looking into the directions given by the Hon'ble High Court of Delhi.*
- (v) The Chief Engineer/Commercial addressed a letter dated 08.10.1999 to the petitioner showing equity as Rs.117,92,44,454/- and bridge loan as Rs.82,82,60,000/-*

In the above said letters, it was never stated that they have accepted the same as equity. Therefore, the plea urged by the petitioner is not tenable”.

The State Commission without considering the restrained imposed by the Hon’ble Delhi High Court, considered the short term loan of Rs.106.60 crore as equity.

- 9.5 The crucial issue is whether the amount of Rs.106.60 crore is to be treated as portion of the equity or loan. As per the financial package approved by the Central Electricity Authority in the Techno Economic Clearance, the interest allowed on 70% Debt component is @ 19.51% on Rupee Term Loan in addition to 7.82% on Foreign currency loan and 16% was allowed as Return on Equity. However, the Appellants continued to pay actual rate of interest on 70% of Debt amount but were not mandated to extend the same rate of interest to the Short term loan of Rs.106.60 Crores in terms of the approved financial package as Spectrum alone was responsible for its failure to raise the equity as per the TEC.

The contention of the Respondent is that the Appellant paid 16% on Rs.106.60 crore, considering equivalent to percentage specified in the PPA, hence it shall be treated as ROE as the Appellants, paid 16% on the total normative equity amount of Rs.224.53 crore. Further, if it is considered as loan, then the appellant is liable to pay the SBI interest rate of 20.75%.

- 9.6 We have gone through the submissions of the Appellants and noticed that the Appellants in various letters dated 07.09.1998, 08.10.1998 and 03.11.1998, informed to Respondent No.2, Spectrum Power, that they are not considering the short term loan of Rs.106.60 as equity. The

Appellants' letters dated 07.09.1998, 08.10.1998 and 03.11.1998, addressed to Respondent No.2, are as under:

Letter dated 7.9.1998

"This has reference to your letter (2) cited requesting to consider the Bridge loan of Rs. 82.826 crores advanced by State Bank of India, Hyderabad, Main Branch, Hyderabad as equity as certified by the auditors vide certificate dt. 10.6.98, in view of the order of the Hon'ble High Court, New Delhi restraining the company from issuing of any shares to any person until further order against the interim petition filed by STUSA/NTPC

2. In this context, in future, the entire unsubscribed capital should be in terms of Indian Rupees, as the project has already completed subject to court orders.

3. Since the project has achieved COD on 19.4.98, the A.P.S.E. Board is agreeable to reckon the Bridge loan of Rs. 82.826 crores advanced by state bank of India, Hyderabad as loan only and not equity and accordingly allow interest charges on this loan duly limiting the interest rate to 16% for admitting fixed charges till the case is disposed of by the court subject to the condition that this Bridge loan shall not form part of the financial package which is subject to final approval by CEA".

Letter dated 8.10.1998

"The computation / calculation for the fixed charges for the Initial Tariff year have been examined and you are informed as follows:-

(iv) a) Return on equity is adopted at 16% on the Paid Up and Subscribed Capital of Rs. 32.683 crores + US \$ 2.625 crores along with foreign exchange protection at the relevant current rate of exchange as on 17.4.98 as per Article - 1.1 (1 X Xiii) of PPA.

b) Interest on Bridge Loan advanced by SBI is arrived limiting the Interest Rate of 16 % as approved by Board and communicated to you vide Lr.No. CE (Comml)/SPGL/D.No. 40/98, dt 7.9.98....."

Letter dated 3.11.1998

"This has reference to your letter (2) cited requesting to consider the Bridge Loan of Rs. 82.826 Crores advanced by SBI, Hyderabad as equity and adhere to the Debt and Equity structure as set forth in the PPA in accordance with the Financial package.

In this connection you are informed that the Bridge Loan of Rs. 82.826 Crores advanced by State Bank of India, Hyderabad is reckoned as loan only and not as equity and fixed charges payable during the Initial Tariff Year for the years 19.04.98 to 18.04.99 are arrived and communicated vide Board's letter dt. 08.10.1998.

The issue of subscription towards balance equity will be examined based on the outcome of the Court case duly considering the directions, if any of Delhi High Court in the final judgement”.

Thus, the Appellants, in their letters, clarified that the short term loan amount brought in by the Respondent No.2, from the SBI would not be treated as part of equity.

- 9.7 The Central Government issued a Notification No. S.O. 251 (E) dated 30.3.1992 prescribing the factors in accordance with which tariff for sale of electricity by a generating company to the State Electricity Board and to other person shall be determined. The relevant clause from the Notification dated 31.3.1992 issued is as under-

Clause 1.5(e): *“Return on Equity (ROE) shall be computed on the Paid up and Subscribed Capital relatable to the generating company, and shall be 16% of such capital”.*

In terms of schedule E of the PPA, the capital cost provisionally approved by CEA in the Techno Economic Clearance (TEC) was to be in the form of debt and equity of Rs. 523.90 crore and 224.53 crore, respectively.

Thus, the appellants have clarified to Spectrum Power that the short term loan brought in from SBI could not be treated as part of the equity in terms of Clause 1.5(e) of the MOP, GOI Notification dated 30.03.1992.

The Hon'ble High Court of Delhi passed an interim order, restraining the respondent company, Spectrum Power from raising further equity. Thus, as per the Clause 1.5(e), the ROE shall be computed on the paid up and

subscribed capital relating to the generating company's equity amount of Rs.117.93 crore. The Appellants have also considered the interim order of the Hon'ble High Court to treat the loan amount of Rs.106.60 crores as debt.

9.8 According to CERC Tariff Regulations, 2009, if the equity mobilized is less than 30% norm, the actual equity is to be considered for payment of ROE. The relevant extract from the CERC Tariff Regulations, 2009 is as under:

"12. Debt-Equity Ratio. (1) *For a project declared under commercial operation on or after 1.4.2009, if the equity actually deployed is more than 30% of the capital cost, equity in excess of 30% shall be treated as normative loan:*

Provided that where equity actually deployed is less than 30% of the capital cost, the actual equity shall be considered for determination of tariff:

Provided further that the equity invested in foreign currency shall be designated in Indian rupees on the date of each investment.

Explanation.- *The premium, if any, raised by the generating company or the transmission licensee, as the case may be, while issuing share capital and investment of internal resources created out of its free reserve, for the funding of the project, shall be reckoned as paid up capital for the purpose of computing return on equity, provided such premium amount and internal resources are actually utilised for meeting the capital expenditure of the generating station or the transmission system."*

Thus, in terms of, CERC Regulations, 2009, if the equity mobilized is less than 30% norms, then the actual equity is to be considered for paying the return on equity. Though, the amount of Rs.106.60 crore was brought in as short-term loan which was invested in the project to bridge the shortfall of equity, yet, it does not qualify equity in terms of statutory provisions. The State Commission failed to consider the statutory provisions, relating to paid up and subscribed capital and as 16% interest being paid on Rs. 106.60 crore, which is akin to ROE 16% and

therefore, the State Commission wrongly and unjustly treated the loan of Rs.106.60 crore, as equity.

- 9.9 The contention of the Respondent-2 Spectrum Power is that the promoters brought in the amount to complete the project and to fill the shortfall of equity amount of Rs. 224.53 crores. We have gone through the submission and noticed that the Appellants informed to the Respondent Spectrum Power in their letter dated 07.09.1998 that Rs. 82.826 crores the amount advanced by SBI cannot be considered as an equity as per the order of the Hon'ble High Court, New Delhi restraining the company from issuing any shares to any person until further order.

Further, apart from above amount of Rs. 82.826 crores, Respondent No.2, brought an additional amount of Rs. 23.779 crores from SBI and thus the aggregated loan amount brought in was Rs. 106.60 crores. The Appellant clarified in their letters dated 08.10.1998 and 03.11.1998, the short-term loan brought in from SBI cannot be treated as equity and Appellant considered 16% interest only.

- 9.10 The Respondent No. 2, Spectrum Power filed a Writ Petition No.11223 of 2003 before Hon'ble High Court of Andhra Pradesh on 16.06.2003 seeking direction to the Appellant to make payment as the incentive in terms of PPA. The Writ Petition was withdrawn on 25.11.2008 and Respondent approached State Commission by filing O.P. No. 32 of 2009.

- 9.11 The State Commission in the Impugned Order considered that the Appellants are paying 16% on the amount of Rs. 106.60 crores akin to ROE of 16% and not 20.75% as interest and hence the amount has to be treated as part of equity. Further, the State Commission mentioned in

the Impugned Order that the Appellants followed the methodology of considering Rs. 106.60 crores as equity while computing the incentives payable in their ARR proposals for the years 2000-01 and 2001-02, and hence the Commission considered Rs. 106.60 crores as equity.

Further, the Learned Counsel for the Respondent No.2, submitted that making provision for incentive under the PPA is to encourage the power producers to generate and supply maximum power and thereby cost of generation/unit will reduce. It is true that if the generation is more, the cost of generation will reduce and thereby the consumers are benefited.

In the instant case, the SBI loan of Rs. 106.60 crore, if, it is added to promoters investment of Rs.117.53 crores, totalling to Rs.224.53 crore, then, the Appellant has to pay 16% ROE on Rs.224.53 crore upto the useful life of the project. If the loan is added and treated as debt, then the debt amount will gradually reduce due to repayment of loan and there by the interest on the debt, will be reduced year after year and there by the interest burden on the loan will be reduced and the burden on the consumers will be reduced.

- 9.12 After going through the submissions and analyzing the Impugned Order and other submissions of the rival parties, we come to the conclusion that the Impugned Order dated 16.04.2013, is legally not justifiable.

The State Commission submitted that even though the restrain was imposed by the Hon'ble Delhi High Court, the Respondent No.2, herein in good faith had obtained a loan to the extent of Rs.106.60 crores, by offering their personal guarantees for the purpose of filling the gap towards the 30% equity at an interest rate of 20.75% and the Appellants

have paid 16% on the SBI loan of Rs.106.60 crore, against 20.75% interest levied by the bank.

We do not agree with this content of the State Commission for the reason the Respondents had already informed in their letters in the year 1998, itself that the loan brought in from SBI would be considered under debt only and could not be considered as equity as per the statutory provisions. Further, the Counsel of the Respondents submitted that there would be no extra burden on the Appellants or on the consumers, by making the payment of incentive on the entire equity of Rs.224.53 crores. In our opinion, this argument is not tenable because the incentive is related to Plant Load factor and if equity of the promoters is considered as Rs.224.53 crores as against Rs.117.93 crores, then the amount of incentive will increase, as per the level of incentive, as specified in the Article 3.10.2 of the PPA with respect to PLF of the plant.

We find that the State Commission has ignored the notification issued by Ministry of Power, dated 13.03.1992, which is part of PPA. The notification dated 13.03.1992, clearly specifies that the return on equity shall be computed on paid-up and subscribed capital relating to the generating company and shall be 16% of such capital.

9.13 Whether the Respondent-2 is eligible to receive the rate of interest of 20.75% as against 16% akin to RoE.

The Respondent-2 has to raise the capital cost for establishing the project approved by the Central Electricity Authority (CEA), under Techno Economic Clearance (TEC) by means of debt of Rs. 523.90 crore and equity of Rs. 224.53 crore.

The promoters of the company obtained the debt amount of Rs. 523.90 crore by means of loan from various banks and financial institutions and able to arrange an equity of Rs. 117.93 crore only.

The interest charges was payable by the Appellant at the higher rate only on the loan amount approved by CEA i.e on 523.90 crore. The loan amount of Rs. 106.60 crore was not approved by CEA and therefore the Appellant is not liable to pay the claimed interest rate on the said amount. The rate of 16% was paid by the Appellant as interest charges and not as return on equity and the same was communicated by the Appellants to the respondents in various letters.

Further, it is also relevant to mention that in the case of loan, the servicing is on reducing balance for a certain period, but equity is serviced throughout the life of the PPA. Hence, interest rate and rate on equity cannot be compared.

Thus, we feel that the interest rate of 16% against 20.75% for the short-term loan of Rs. 106.60 crore is tenable.

9.14 Therefore, we decide both the issues in favour of the Appellants. The Appellants are not liable to consider the short-term loan of Rs. 106.60 crore as equity and also not liable to pay interest rate as claimed by the Respondent-2. Thus, the Impugned Order is liable to be set aside and the Appeal is liable to be allowed.

ORDER

The Appeal, being Appeal No. 321 of 2013 is allowed and the Impugned Order dated 16.04.2013 of the State Commission, is hereby set aside.

The consequential order if any be passed by the Ld. State Commission within three months from today.

No costs.

Pronounced in the Open Court on this **4th day of July, 2016.**

**(T Munikrishnaiah)
Technical Member**

**(Justice Surendra Kumar)
Judicial Member**

Dated:



REPORTABLE / ~~NON-REPORTABLE~~