

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

IA No.1332 of 2019 IN APPEAL NO. 93 OF 2019

IA No.1331 of 2019 IN APPEAL NO. 94 OF 2019

&

IA No.1333 of 2019 IN APPEAL NO. 95 OF 2019

Dated: 11th November, 2019

**PRESENT: HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER**

IA No.1332 of 2019 IN APPEAL NO. 93 OF 2019

In the matter of:

**M/s. SEI Green Flash Private Ltd.,
10th Floor, Menon Eternity,
Old No.110 (New No.165),
St. Mary's Road, Alwarpet,
Chennai -600018**

Having Office at

Plot No.1131/A, Sai Square Building,
Road No.36, Jubilee Hills,
Hyderabad-500033.

.....

Appellant

Versus

1. Andhra Pradesh Electricity Regulatory Commission

Through its Secretary,
5th Floor Singareni Bhavan, Red Hills,
Hyderabad – 500 004.
Andhra Pradesh

2 Southern Power Distribution Company of Andhra Pradesh Ltd.

Through its Chief General Manger,
Kesavayanagunta, Tirucahnoor Road,
Tlrupati-517 510,
Andhra Pradesh

.... **Respondent(s)**

IA No.1331 of 2019 IN APPEAL NO. 94 OF 2019

In the matter of:

M/s. SEI Arushi Private Ltd.,
10th Floor, Menon Eternity,
Old No.110 (New No.165),
St. Mary's Road, Alwarpet,
Chennai -600018

Having Office at

Plot No.1131/A, Sai Square Building,
Road No.36, Jubilee Hills,
Hyderabad-500033.

.....

Appellant

Versus

1. Andhra Pradesh Electricity Regulatory Commission

Through its Secretary,
5th Floor Singareni Bhavan, Red Hills,
Hyderabad – 500 004.
Andhra Pradesh

2 Southern Power Distribution Company of Andhra Pradesh Ltd.

Through its Chief General Manger,
Kesavayanagunta, Tirucahnoor Road,
Tirupati-517 510,
Andhra Pradesh

.... **Respondent(s)**

IA No.1333 of 2019 IN APPEAL NO. 95 OF 2019

In the matter of:

M/s. Rain Coke Ltd.,
Rain Center,
34, Srinagar Colony,
Hyderabad-73

Having Office at

Plot No.1131/A, Sai Square Building,
Road No.36, Jubilee Hills,
Hyderabad-500033.

.....

Appellant

Versus

1. Andhra Pradesh Electricity Regulatory Commission

Through its Secretary,
5th Floor Singareni Bhavan, Red Hills,
Hyderabad – 500 004.
Andhra Pradesh

2 Southern Power Distribution Company of Andhra Pradesh Ltd.

Through its Chief General Manger,
Kesavayanagunta, Tirucahnoor Road,
Tlirupati-517 510,
Andhra Pradesh

.... **Respondent(s)**

Counsel for the Appellant (s) : Mr. Sanjay Sen, Sr. Adv.
Mr. S. Venkatesh
Ms. Nishtha Kumar
Mr. Vikas Maini
Mr. Somesh Srivastava
Mr. Suhial Buttan

Counsel for the Respondent(s): Mr. K.V. Mohan
Mr. K. V. Balakrishnan
Mr. Rahul Kumar Sharma for R-1

Mr. Nishant Sharma
Mr. R.K. Sharma
Mr. V.V. Hanumantha Rao
Mr. K. Santosha Rao for R-2

ORDER

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

1. These IAs' being IA No.1332 of 2019, 1331 of 2019 & 1333 of 2019 have been presented by the Respondent No.2(APSPDCL) for Vacation of Stay order dated 17.07.2019 passed by this Tribunal, in

the instant matter under Section 120(2) (h) of the Electricity Act. 2003 read with Rule 30 of APTEL Rules, 2007 and Section 151 of CPC. As the issues raised in all IAs are similar in nature, the same are being decided by this common order.

2. Under these IAs, Respondent No.2(APSPDCL) has prayed for the following:-

a) *“Allow the present Application and list the Application for Vacation of Stay filed by Applicant and Application for Directions filed by the Appellant on 15.07.2019 for hearing;*

b) *Pass any other order or orders as the Hon’ble Appellate Tribunal may deem fit and proper in the facts and circumstances of the case”.*

3. The Appellants have filed the instant appeals against common order and judgment dated 24.11.2018 passed by Andhra Pradesh Electricity Regulatory Commission / Respondent No.1 in O.P. Nos. 16 17 & 18 of 2018 which are pending for disposal in this Tribunal. These appeals are filed against the tariff determined by the State Commission for the energy pumped into the grid from the respective COD of the plants till 14.06.2018. The Appellants being aggrieved by the letter 12.07.2019 issued by Respondent No.2(APSPDCL) in these

appeals preferred IA Nos. 1281 of 2019, 1282 of 2019 & 1283 of 2019 seeking directions in the instant appeals for stay of the operation of the letter dated 12.07.2019 and direction to Respondent No.2 to pay the outstanding dues in terms of the PPA executed between the parties and also to continue to pay at the agreed tariff for the energy supplied to the Respondent under the PPA.

4. The said IA Nos.1281, 1282 & 1283 of 2019 were heard at considerable length of time and after careful evaluation of the arguments/contentions of the parties, this Tribunal passed the following order on 17.07.2019:-

“The approved tariff in terms of Power Purchase Agreement (PPA) pertaining to this Unit is Rs.3.74 per KWh. When the Respondent – Commission reduced it to Rs.3/- for certain period, the Appellant filed this Appeal. Meanwhile the Respondent – DISCOM on 12.07.2019 sent a letter to the Appellant reducing the tariff to Rs.2.44 per KWh from the date of commissioning of the project i.e. 27.10.2017.

Prima facie, we find that without any opportunity of being heard to the Appellant, the above stated letter seems to have been addressed. We therefore, opine that the said consequences mentioned in the above letter dated 12.07.2019 have to be stayed till further orders. Further, we direct the DISCOM to pay the tariff at the approved rate of Rs.3.74 per KWh till the next date of hearing.

*List the matter on **26.08.2019**. Meanwhile, objections/reply if any, to IA No. 1281 of 2019 as well as to the main appeal may be filed with advance copy to the other side”.*

5. The Applicant in the instant IAs, Respondent No.2(APSPDCL) in the appeals contended that letters similar to that of 12.07.2019 have

been issued to all the developers i.e. solar power generators as well as wind power generators and if read closely, the said letter dated 12.07.2019 has no threat or precursory statement of termination. It is further contended by the Applicant / Respondent No.2(APSPDCL) that the PPA is not under any duress and energy as agreed is being taken into the grid from the generators. In fact, the Appellant generators through the above applications for directions have admitted to create an illusion that if the Discom is trying to usurp the power of the Commission. But the same is untenable and incongruous to the facts pertaining to the issuance of the said letter.

6. The Applicant / Respondent No.2(APSPDCL) further submitted that the generators participated in the bid process and thereafter failed to comply with the scheduled COD and after the series of litigation and negotiation, the amended PPA was signed and tariff was fixed. The whole premise in the applications for directions was that by the letter dated 12.07.2019, Discom is trying to alter the approved tariff which is unsustainable and falls at the face of it. The nature and intent of the letter is purely a call and request for negotiations and nothing more than that. The Applicant / Respondent No.2(APSPDCL) further contended the referred letter is pursuant to the various events which have led to the issuance of the letter and the instant Appeals

are entirely independent and does not defy the principles of natural justice as it is just an invitation to participate in the negotiations with the High Level Committee and in fact, it has fully complied with the principles of natural justice, most importantly opportunity of a hearing and as such the whole application for seeking direction is nothing but a sheer abuse of process of law.

7. The Applicant / Respondent No.2(APSPDCL) is seeking vacation of the Tribunal's Order dated 17.07.2019 for the reason that there is no violation of principles of natural justice and in fact this letter can be said to be a notice for hearing on the issues mentioned therein. Furthermore, it is pertinent and most crucial to submit that the order dated 17.07.2019 has consequential domino effect on all the Developers who have no disputes and are not before this Tribunal and the same is regarded as a blanket stay. Thus, the vacation of stay is important to the extent that Discom has no issues with the payment of tariff @ Rs.3.74 per unit till the next date of hearing but the stay on the letter severely affects the operation and power procurement patterns and functions of the Discom/Power Coordination Committee. Stating all above, the Applicant / Respondent No.2(APSPDCL) granted that the stay directions vide

Tribunal's order dated 17.07.2019 may be vacated qua the letter dated 12.07.2019 only as it is causing huge loss to the DISCOM.

8. **Per contra**, learned counsel for the Appellants submitted that it was constrained to file the applications being IA Nos. 1281 of 2019, 1282 of 2019 & 1283 of 2019 for directions in view of the impugned letter dated 12.07.2019 issued by APSPDCL which sought further reduction in the tariff of the Appellants' Power station from Rs.3.74/kwh to Rs.2.44/kwh. The impugned letter issued by APSPDCL seeking reduction in tariff from the date of COD i.e. 27.10.2017 was beyond the scope and provisions of the Act and also the Regulations framed by the State Commission thereunder. As per Regulations, the tariff is a subject which lies exclusively within the domain of the Appropriate Electricity Regulatory Commission and accordingly a licensee/contracting party does not have any power whatsoever to unilaterally and arbitrarily fix/alter/amend the existing tariff agreed to between the parties. The Appellant contended that after taking note of the arbitrary action of the Discom in issuing the impugned letter, this Tribunal passed the order dated 17.07.2019 whereby it has stayed the operation of the said letter and further directed to pay the tariff at the approved rate of Rs.3.74 per unit.

9. Learned counsel for the Appellants cited various provisions of the Act relating to the promotion of electricity from RE sources and also various judgments of Hon'ble Supreme Court and this Tribunal which have held and affirmed that the generation of power from RE sources needs to be promoted as mandated under Section 86 1(e) of the Act. However, contrary to these provisions and rulings by various courts, the RE generators are being deprived of promotional measures and instead, are being discriminated in the state.

10. Learned counsel for the Appellants vehemently submitted that the payment last received from the Respondent/Discom was on 20.05.2019 for the energy supplied upto June, 2018 and no tariff payments have been made after 20.05.2019 or after the directions of this Tribunal. Learned counsel for the Appellants alleged that the Respondent/Discom is making erroneous averments through their various affidavits which are misleading and contrary to the factual position on record. Further, the Appellants have been supplying solar energy to the Respondent/Discom and have duly raised invoices for the supplies made but not even a single rupee has been paid after 20.05.2019. This important information has been viciously suppressed by the Respondent/Discom in its affidavit and rather, it

was deposed in the affidavit stating that “only the instalments relating to June, 2019 onwards is pending”.

11. Learned counsel for the Appellants was quick to point out that on one hand, Respondent/Discom is not paying the running bills and also not refunding amount already recovered from Performance Bank Guarantee submitted by the Appellants in four equal instalments, as ordered by the Respondent Commission. Learned counsel alleged that Respondent/Discom is deliberately and wilfully defaulting in payments beyond 15 months towards the supplied energy which has tremendously pre-judiced operation of the Appellants power plants. While summing up the submissions, learned counsel for the Appellants contended that when the Respondent/Discom has no reason to justify non-payment, it has brought up irrelevant arguments for the issues relating to prior period only to mislead this Tribunal and side-track the issue of non-payment. In fact, it has finally avoided giving any specific reasons for non-payment of energy bills even for the period not under challenge before this Tribunal and also, not expressing any commitment to pay.

Our consideration:-

12. We have carefully considered the submissions of the learned counsel appearing for the Appellants and learned counsel for the second

Respondent/ APSPDCL. While looking at the order dated 17.07.2019 passed by this Tribunal in an application filed by the Appellants for seeking direction in view of the impugned letter dated 12.07.2019, it is evident that the Appellants right from their commissioning of the solar plants are subjected to uncertainties not only related to the tariff but also timely payment of the decided tariff. In view of the facts brought out by the parties before us, it prima facie emerged that contrary to the provisions in the signed PPA, the Respondent/Discom is trying to reduce the tariff from solar plants of the Appellants further after enforcing the earlier reduction of Rs.0.74 per unit (from Rs.3.74 to Rs.3.00 per unit) to the extent of as low as Rs.2.44 per unit by forcing the Appellants to negotiate the approved tariff before the High Power Committee. It also became evident from the documents and records placed before us that the Respondent/Discom is not regularly paying even the reduced tariff and the last payment so received by these solar generators was on 20.05.2019 and that too for the energy supplied up to June, 2018. Despite the categorical directions and follow-up, nothing has been paid by the Discom after 20.05.2019.

13. Noting the uncertainties in payments by the Respondent/Discom, this Tribunal during various proceedings directed the Discom to furnish through affidavit the quantum of receipts and their disbursement to

various generators including thermal as well as RE generators. This Tribunal vide its orders dated 02.09.2019 and 11.09.2019 directed the second respondent to file an affidavit as to whether they are paying the dues without any interruption in respect of supply of energy to thermal generators and to also mention whether LCs are opened in favour of thermal generators or not? The second respondent filed the affidavits dated 09.09.2019 and 16.09.2019 under which among others, it was indicated that LCs are given only for thermal projects of central generating companies and none other generators excepting only one provide thermal unit are being given LC and even the state generating thermal projects which has 5010 MW installed capacity are not given LCs. It is noticed from the details submitted by the second respondent / Discom that as far as payment security / commitment of payment to RE generators is concerned, nothing specific have been brought out except the general statement regarding financial crunch in the State.

14. In view of these facts, it may be obviously derived that the second Respondent/Discom has not provided any firm assurance for timely payment of the running bills in lieu of the energy supplied by the solar generators and on the other hand, tried to force the generators to negotiate their already reduced tariff for further reduction as evident

from the impugned letter dated 12.07.2019. It is relevant to note that the dues are outstanding for the bills of June, 2018 onwards and if such trend of payment allowed to continue, the solar power generators may find it extremely difficult or rather impossible to run their plants and in turn, may be forced to shut down. Being small generators with heavy financial liabilities to pay loan and interest etc., the solar generators may not survive for operation and in the process, the State may lose benign source of green power. In a catena of judgments, the Hon'ble Supreme Court as well as this Tribunal has held that generation based on RE sources needs to be promoted as per provisions of the Electricity Act, National Electricity Policy, National Tariff Policy etc..

15. In light of the above, we are of the considered opinion that :-
- (i) There is not sufficient / additional ground made by the Applicant / Respondent Discom so as to consider the vacation of stay granted by this Tribunal vide its order dated 17.07.2019.
 - (ii) Respondent/Discom shall make regular payments for the energy supplied to it by the solar generators / Appellants herein @ Rs. 3.74 per unit.
 - (iii) The instant applications to vacate the stay of our order dated 17.07.2019 deserve to be dismissed.

Accordingly, the applications being IA Nos.1332 of 2019, 1331 of 2019 and 1333 of 2019 are dismissed.

Pronounced in the open court on 11.11.2019.

List the main Appeal Nos. 93 of 2019, 94 of 2019 and 95 of 2019 on 29/01/2020.

(S. D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / NON-REPORTABLE

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