

*HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY
+W.P.Nos.30327, 30531, 30515, 30602, 30763, 30782, 31219,
31607, 31610, 32530, 32542, 33601, 33611, 33647, 34974,
35681, 35986, 35990, 36000, 37713, 38702, 38841, 27241 of
2014 & batch

% 31-12-2014

W.P.No.30327 of 2014

Rain CII Carbon (Vizag) Limited,
Represented by its Authorised Signatory
Mr. C.H. Krishna Prasad, Hyderabad ..
Petitioner

And

\$ The Government of Andhra Pradesh,
Represented by its Secretary,
Department of Energy, Secretariat,
Hyderabad and others
..Respondents

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>HEAD NOTE:

! Counsel for petitioner : Mr. S. Ravi, Senior Counsel
for Mr. Ch. Pushyam Kiran

^ Counsel for respondent No.1 : Government Pleader for
Energy

Counsel for respondent No.2 to 4 : Mr. O. Manohar Reddy

Counsel for respondent No.5 : Mr. Anand Seshu

Counsel for respondent No.6 : Mr. T. Uma Shankar

? CASES REFERRED:

1. 2010(4) SCC 603

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The Court made the following :

COMMON JUDGMENT:

Prelude:

In the aftermath of the division of the State of Andhra Pradesh, transmission and distribution of electricity generated by private entrepreneurs across the two resulting States has become a serious, nay, a complex issue. All these Writ Petitions raised this issue. The form of the prayers in these Writ Petitions may vary, but the subject matter of the dispute is common.

The background facts:

All the petitioners are independent generators generating electricity through different sources. Barring the petitioner in W.P.No.30602 of 2014, all the generating plants are situated in the residuary State of Andhra Pradesh. The electricity generated by them is being utilized for captive purpose of their industrial units situated in the erstwhile Telangana region, presently the Telangana State. The surplus power is being supplied to third party consumers who are described as

schedule consumers under the Power Wheeling and Power Purchase Agreements (PW&PPAs) entered into between erstwhile the A.P.State Electricity Board or its successor, the A.P. Transmission Corporation, as the case may be, and the private generators. If any surplus remains under such agreements, the same is being sold to the respective Distribution Companies (DISCOMs) under the agreements. In all these cases, the industrial units utilizing the power for captive purpose and the schedule consumers are situated in the State of Telangana. Converse is the case in W.P.No.30602 of 2014 where the generating plant is situated in the State of Telangana and the supply is being made to the consumers in the residuary State of Andhra Pradesh.

The Andhra Pradesh Reorganisation Act 2014 (for short “the Reorganisation Act”) came into force w.e.f., 2-6-2014, on which date the new Telangana State and the residuary State of Andhra Pradesh were formed. Thereafter, for two months power was wheeled without any hassles by the respective DISCOMs. The Executive Director, HRD & Planning, A.P. TRANSCO, Vidyut Soudha, Hyderabad, addressed letter No.ED/HRD&PIg/DE-Comml/ADE-1/F-OAusers/D.No.228/14, dated 2-8-2014 to the Chief General Manager (Commercial and RAC), A.P. Eastern Power Distribution Company Limited (APEPDCL), Visakhapatnam, Chief General Manager (P&MM&IPC), A.P.Southern Power Distribution Corporation Limited (APSPDCL), Tirupathi and the Chief General Manager (Commercial&RAC), Telangana State Southern Power

Distribution Company Limited (TSSPDCL), Hyderabad, which reads as under :

“Consequent to the bifurcation of Andhra Pradesh and Telangana states and as per the note approved by CMD/APTRANSCO on 30-7-2014, the OA Users were informed the following :

- (a) To change the exit points within the State so that the transactions will become inter-state. In this case the existing agreements will remain valid till their expiry. The concerned STU will give necessary approval. Necessary LTOA agreements will be concluded by the respective STU & exit point Discom.
- (b) If OA user have no provision to change to exit points to fall within the same State as that of the generator to make it become inter-state transaction then to follow the CERC Open Access regulations as the transfer of power shall be treated as inter-state power.
- (c) Apply for Short term or Medium term inter-state open access or Long Term inter-state open access to PGCIL after obtaining concurrences or NOCs from both SLDCs/from both TRANSCOs depending upon the time period.
- (d) For approvals of SRLDC/PGCIL concurrences or NOCs by SLDCs and Transcos will be issued immediately without seeking any fresh feasibility from the DISCOMs as these are existing open access transactions.
- (e) Obtain proper approvals from SRLDC/CTU depending upon the type of transactions before 31.08.2014 and to enter fresh MTOA/LTOA agreement with CTU duly canceling the existing LTOA agreements for that no penalty for premature closure of LTOA agreements.
- (f) Long term Open Access will be allowed upto 31.08.2014 only and from 1-9-2014 onwards OA transactions will not be allowed under any circumstances.

Following the said letter, the respective DISCOMs have

addressed letters to the petitioners. As the correspondence is more or less similar, except to the extent of variation in dates, it will suffice if the correspondence in one Writ Petition is narrated as illustrative.

In W.P.No.30327 of 2014, the Chief General Manager, Commercial&RAC, APEPDCL, Visakhapatnam, has addressed letter

No.CGM/Comm&RAC/EPDCL/VSP/GM/PP/F./D.No.2296,dated

28-8-2014 to the petitioner therein. The said letter reads as under:

“The copy of the letter received from the ED/HRD&Planning/APTransco under reference cited is herewith enclosed.

In pursuant to the guidelines of the ED/HRD&Planning/APTransco, I am directed to inform that, all the existing interstate wheeling transactions will be allowed upto 31.08.2014 only and from 01.09.2014 onwards interstate wheeling transactions will not be allowed under any circumstances.

Hence, you are requested to change the exit points within the state for wheeled energy to avoid interstate open access charges. If interstate wheeling is continued, you have to follow CERC open access regulations.

In reply to the said letter, the petitioner has sent its reply dated

30-8-2014 wherein it has protested the proposed change requiring it to either change the Exit Point to make the transmission and distribution Intra-State or to follow the Central Electricity Regulatory Commission Open Access Regulations. The petitioner has relied upon the provisions of the modified power wheeling and power purchase agreement and asserted

that under the said agreement, it has a right to supply power to its scheduled consumers and that any change in the arrangement would seriously jeopardize its interests. As there was no change in the stand of respondent Nos.4 and 5, the petitioner has filed W.P.No.25561 of 2014 for continuing the existing arrangement of power wheeling. By interim order dated 9-9-2014, this Court has directed to maintain status quo.

On 22-9-2014, the Chief General Manager (Commercial and RAC), of the Transmission Corporation of Telangana Limited-respondent No.2, has informed the petitioner that for transfer of power from one State to another State, Inter-State Regulations are applicable; that necessary "CTU Transmission and RLDC charges" and also losses in kind shall be applicable in addition to both the State "STU Transmission and SLDC charges" and also losses in kind as per the respective States Electricity Regulatory Commission Open Access Regulations; and that in view of the same the petitioner has to obey CERC Open Access Regulations in addition to both States' ERC Regulations from 2-6-2014 onwards and it has to follow the SLDC directions for obtaining prior clearances from the authorities concerned, like SRLDC and CTU, or else the petitioner may change the Exit Points to fall within the same State as that of the generator so that its transmission becomes Intra-State transmission. For the month of September 2014, respondent No.3 has issued Bill dated 26-9-2014 in which the electricity generated by the petitioner and fed into the Grid in the State of Andhra Pradesh and supplied to

Rain Cements Limited was not included. Questioning this action, the petitioner filed W.P.No.30327 of 2014.

The stand of the respondents:

Similar Writ Petitions have been filed questioning the insistence of the Transmission Corporations and DISCOMs of both the States and the generators either to change the Exit Points or obtain Open Access licences and also to include the units generated and fed into the Grid of the respective States by them.

The Chief General Manager (RAP and Projects-3), APEPDCL, Visakhapatnam, filed a counter affidavit in W.P.No.27241 of 2014. Mr. P. Anand Seshu, learned Standing Counsel appearing for the APEPDCL has submitted that as the stand taken in the counter affidavit is common in all the cases, the same may be permitted to be adopted by the APEPDCL for all the cases.

Mr. O. Manohar Reddy, learned Standing Counsel for the Transmission Corporation of Telangana Limited and Southern Power Distribution Company of Telangana Limited, addressed his submissions based on instructions without filing a formal counter affidavit.

In his counter affidavit, the Chief General Manager, APEPDCL averred that Schedule 12-C(2) of the Reorganisation Act deals with only the power purchase agreements but not power wheeling agreements-cum-power purchase agreements under which power wheeling is done in respect of the power generated by the petitioners and supplied

to the consumers and that therefore these agreements do not fall under the said clause. Alternatively, it is averred that the power wheeling-cum-power purchase agreements were entered into prior to coming into force of the Electricity Act 2003 (for short “the 2003 Act”) and the Reorganisation Act; that under the changed legal regime, Inter-State transmission requires Open Access licences as per the provisions of the 2003 Act and CERC Regulations made thereunder and that if the power wheeling agreements are not in conformity with the provisions of the 2003 Act, the same are not saved under Section 185 of the 2003 Act. The counter affidavit relied upon the Judgment of the Apex Court in **P.T.C. India Limited Vs.**

CERC^[1] in support of the plea that a Regulation made under Section 178 of the 2003 Act by the Central Electricity Regulatory Commission (CERC) as a part of regulatory framework intervenes and overrides the existing contracts between the regulated entities while asserting that the petitioners need to obtain Open Access if they are not willing to change their Exit Points. It was also suggested alternatively that option is left to the petitioners to sell the power to the APEPDCL as per the rate fixed under the power wheeling and power purchase agreements if the petitioners are not willing to obtain Open Access.

The submissions and consideration :

I have heard Mr. S. Ravi, learned Senior Counsel, Mr. Challa Gunaranjan and Mr. Sri Charan Telaprolu, learned Counsel appearing for the respective writ petitioners, Mr. O.

Manohar Reddy, learned Standing Counsel for the Transmission Corporation of Telangana State and the Southern Distribution Company Limited of the Telangana State and Mr. P. Anand Seshu, learned Standing Counsel for APEPDCL.

The principal contention of the learned Counsel appearing for the petitioners is that the power wheeling-cum-power purchase agreements are saved by the provisions of Clause C(2) of the Twelfth Schedule of the Reorganisation Act. They have also relied upon the proceedings No.APERC/SECY/113(A)/2014, dated 13-6-2014 of the APERC whereunder the Commission has granted permission to the APEPDCL and TSSPDCL to avail power supply through Inter-State distribution lines between APEPDCL and TSSPDCL for importing/exporting power through the existing Inter-State distribution lines between the said companies and submitted that a similar arrangement could be made in the matter of transmission and distribution of power being generated by the petitioners and supplied to their schedule consumers.

Mr.O. Manohar Reddy, learned Standing Counsel, submitted that the predominant purpose of power wheeling agreements is to enable the private power generators to consume power for their captive purposes and also supply the same to their own consumers who are called schedule consumers and that only in the event of their consumers not availing the power, the same will be purchased by the DISCOMs. He has further submitted that Clause C(2) of the

Twelfth Schedule of the Reorganisation Act deals with only power purchase agreements which necessarily mean the power purchase agreements entered into by private generators with the respective Distribution and Supply licensees under which they have agreed to sell the power generated by them to the latter. He has further submitted that even in the absence of application of Clause C(2) of the Twelfth Schedule, the Transmission Corporation of Telangana Limited and the DISCOMs functioning in the State of Telangana have no intention of refusing to transmit and wheel the power generated by the petitioners to their scheduled consumers; that the only constraint in this regard is that due to the division of the State, the nature of transmission has become Inter-State, requiring Open Access licence and that they have no objection to wheel the power according to the existing wheeling agreements if Open Access licenses are secured by the petitioners. The learned Standing Counsel has taken this Court through the relevant provisions of the 2013 Act, the Regulations framed by the CERC and those framed by the APERC.

The learned Standing Counsel for APEPDCL, while reiterating the averments contained in the counter affidavit of the Chief General Manager referred to above, further submitted that the power injected by the petitioners whose generating stations are situated within the area of operation of the APEPDCL, is deemed to have been banked and that an option is left to the petitioners either to sell the power as per Clause 3.12 of Article 3 of the Revised Power wheeling and power

Purchase Agreements or to obtain Open Access and utilize the banked energy thereafter.

I have carefully considered submissions of the respective counsel and perused the record.

Legal Environment: Prior to 1998, the activities of generation, transmission, distribution and supply of electricity were governed by the provisions of the Indian Electricity Act, 1910 (for short “the 1910 Act”) and the Electricity Supply Act, 1948 (for short “the Supply Act”). The first step towards reforms in electricity field was initiated through the amendment to the Supply Act by introducing Section 43-A to the said Act under Act 50 of 1991 which came into force w.e.f., 15-10-1991. Prior to the said amendment, the activity of generation of electricity was not made available to private sector. By the said Amendment Act, the definition of “generating company” under Section 4-A was amended throwing the gates open to the private sector. Section 43-A was introduced by the said Amendment Act under which the generating company registered under the Companies Act 1956 is permitted to sell electricity generated by it to the Electricity Boards or any of the States in which the generating station is located and to any other person with the consent of the competent Government or Governments.

Electricity reforms were further carried forward by the Parliament in the year 1998 by enacting the Electricity Regulatory Commissions Act 1998 (for short “the 1998 Act”). The said Act was enacted by the Parliament with a view to

overcome the problems of power sector and to address the fundamental issues being faced by it, namely, lack of rational retail tariffs, the high level of cross-subsidies, poor planning and operation, inadequate capacity, the neglect of the consumer, the limited involvement of private sector skills and resources and the absence of an independent regulatory authority (Vide Statement of Objects and Reasons of the Electricity Regulatory Commissions Act 1998). The 1998 Act envisaged constitution of Central Electricity Regulatory Commission (CERC) at the Central level and State Electricity Regulatory Commissions (SERCs) at the State levels. While the CERC was entrusted with the functioning of regulation of tariff of generating companies owned or controlled by the Central Government, to regulate the tariff of the generating companies other than those controlled by the Central Government, if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State, to regulate Inter-State transmission of energy, including tariff of transmission utilities, to promote competition, efficiency and economy in the activities of electricity industry, and to aid and advise the Central Government in the formulation of tariff policy (See : Section 13). This Act made constitution of SERCs optional at the State level. The SERC is entrusted with the same regulatory powers as the CERC was conferred in respect of Intra-State transmission, distribution and supply of electricity. The 1998 Act also provided for grant of licenses to any person for

transmission and supply of electricity in a specified area. The tariffs proposed by the licensees are required to be approved by the State Regulatory Commission. Certain provisions of the 1910 Act and the Supply Act were exempted from application in the State of Andhra Pradesh. This Act has divested the State Electricity Boards of their power under the Supply Act to fix tariffs and conferred the power of fixation of tariff vested in the State Electricity Boards on the Electricity Regulatory Commissions, wherever the respective State Governments have chosen to constitute SERCs. However, the Supply Act was not repealed and the same is allowed to occupy the field except to the extent of omission of sub-section (2) of Section 43-A of the said Act. Section 52 of the 1998 Act has also given overriding effect of its provisions over any other enactment if they are inconsistent with its provisions, except to the extent of the provisions of the Consumer Protection Act, 1986 or the Atomic Energy Act 1962.

The State of Andhra Pradesh has thought it fit to enact a separate legislation for introducing reforms in the field of electricity in the State. Accordingly, it has enacted the A.P. Electricity Reform Act 1998 (for short "the 1998 Reform Act), which has received the assent of the President on 21-10-1998. The main object of this Act was to unbundle the integrated power sector, recognize generation, transmission and distribution functions into compact commercially viable entities, providing operational, managerial and functional autonomy to the successor entities. The Act proposed to

constitute two corporations, one for generation and the other for transmission and distribution of electrical energy by creating entities incorporated under the provisions of the Companies Act 1956. The Act has also proposed to constitute subsidiary or associated transmission and supply companies or corporations. It has also proposed to establish and incorporate an autonomous statutory Electricity Regularity Commission to balance the interests of the stakeholders in the electricity industry and to permit healthy growth of the power sector in the State. The Electricity Regulatory Commission of the State will be vested with the regulatory functions while the State Government shall have the power to issue policy directions in the over-all planning and co-ordination and the matters concerning electricity in the State. The functions of the Commission under this Act are akin to the functions of the State Commissions envisaged under the central enactment.

Under this Act, the Electricity Board was initially divided into A.P. GENCO and A.P. TRANSCO for generation and transmission of electricity, respectively. The properties and interests of the State Electricity Board were divided between the said two Corporations under a transfer Scheme framed by the State Government titled 'The A.P. Electricity Reform (Transfer Scheme) Rules 1999 (for short "the 1999 Rules). Contracts, agreements, interest and arrangements to the extent they are associated with or related to transmission and distribution activities are included in 'Miscellaneous' Part-1(V) of Schedule B thereof. Accordingly, the assets and liabilities

were apportioned among the A.P. TRANSCO and A.P. GENCO. Later, four Distribution Companies were incorporated for distribution and supply of electricity in the State of Andhra Pradesh. They are the A.P. Eastern Power Distribution Company Limited, the A.P. Southern Power Distribution Company Limited, the A.P. Northern Power Distribution Company Limited and the A.P. Central Power Distribution Company Limited. The function of distribution and supply of electricity which were hitherto being undertaken by the A.P. TRANSCO were entrusted to these Distribution Companies within their designated areas and a second transfer scheme titled 'The Andhra Pradesh Electricity Reform (Transfer of Distribution Undertakings from A.P. TRANSCO to Distribution Companies) Order 2000' has been enacted. Under the said Order, all the current contracts, agreements etc., are entrusted to the respective Distribution Companies within their area of operation. Under both the transfer schemes, contracts and deeds were included in the definition 'asset'.

The above discussed statutory provisions reveal that the A.P. TRANSCO and the Distribution Companies in the State of Andhra Pradesh, have succeeded to the A.P. State Electricity Board along with its assets and liabilities which include power purchase as well as power wheeling agreements with the third parties. Accordingly, the rights acquired and the obligations incurred under these agreements have been inherited by the A.P. TRANSCO and the Distribution Companies.

Electricity Act 2003: The electricity regime in the country has

taken a decisive turn with the enactment of the Electricity Act 2003 (for short “the 2003 Act”). With a view to usher in more reforms in the field of electricity, the 2003 Act has been made. The statement of objects and reasons of the said Act gives a proper insight into the evolution of electricity laws in the country. The reforms include delicensing of generation, unfettered freedom for captive generation, constitution of load dispatch centers at National and Regional levels, provision of Open Access system, granting of licenses for trading to private persons etc. This Act has repealed the 1910 Act, the Supply Act and the Electricity Regulatory Commission Act 1998 with certain savings. Section 25 of the 2003 Act provided for Inter-State, regional and inter-regional transmission. Under this provision, the Central Government is empowered to make region-wise demarcations of the counting and freedom to make such modifications therein as it may consider it necessary for the efficient, economical and integrated transmission and supply of electricity, and in particular, to facilitate voluntary inter-connections and co-ordination of facilities for the Inter-State, regional and inter-regional generation and transmission of electricity. Under Section 26, the Central Government is vested with the power to establish a Centre at the National level to function as National Load Dispatch Center (NLDC) for optimum scheduling of dispatch of electricity among the Regional Load Dispatch Centres (RLDCs). The Central Government is also empowered to prescribe the constitution and functions of the NLDC. Section 27 envisaged constitution

of RLDCs to be established by the Central Government for each region with territorial jurisdiction as determined by the Central Government. Section 28 enumerates the functions of the RLDC which include its responsibility for optimum scheduling and dispatch of electricity within the region in accordance with the contracts entered into with the licensees or the generating companies operating in the region, monitor grid operations, keeping of accounts of quantity of electricity transmitted through the regional grid, exercise of supervision and control over the Inter-State transmission system and the responsibility for carrying out real time operations for grid control and dispatch of electricity within the region through secure and economic operation of the regional grid in accordance with the Grid Standards and the Grid Code. The RLDC is empowered to levy and collect such fees and charges from the Generating companies or licensees engaged in Inter-State transmission of electricity as may be specified by the Central Commission. Under Section 29, the RLDC is empowered to give directions to every licensee, generating company, generating station, sub-station and any other person connected with the operation of the power system which shall be complied with by them. It is also conferred with the power to exercise such supervision and control as may be required for ensuring stability of Grid operation and for achieving the maximum economy and efficiency in the operation of the power system in the region under its control.

Section 31 of the 2003 Act provides for constitution of

State Load Dispatch Centres (SLDCs) for the respective State Governments. Section 32 prescribes functions of the SLDCs which are identical to that of the RLDCs in respect of Intra-State transmission of electricity. The same powers which were vested in the RLDC in case of Inter-State transmission under Section 29 have been vested in the SLDCs in case of Intra-State power supply by Section 33 of the Act. Section 34 laid down that every transmission licensee shall comply with such technical standards of operation and maintenance of transmission lines in accordance with the Grid standards, as may be specified by the authority. Section 40 charged the transmission licensees to build, maintain and operate an efficient, co-ordinated and economic Inter-State transmission System or Intra-State transmission System as the case may be; to comply with the directions of the RLDCs and the SLDCs as the case may be; and to provide non-discriminatory Open Access to its transmission System for use by any licensee or generating company on payment of the transmission charges, or any consumer as and when such Open Access is provided by the State Commission under sub-section (2) of Section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission. Section 42 charged the distribution licensee to develop and maintain an efficient co-ordinate and economical distribution system in his area of supply and to supply electricity in accordance with the provisions of the Act. Under Sub-section (2) thereof, the State Commission shall introduce Open Access

in such phases and subject to such conditions within one year of the appointed day. However, such Open Access shall be allowed on payment of surcharge in addition to the charges of wheeling as may be determined by the State Commission.

Under Section 79 of 2003 Act, the CERC has framed regulations called the Central Electricity Regulatory Commission (Open Access in Inter-State Transmission) Regulations 2004 (for short “the 2004 Regulations”). These regulations provide for long term and short term Open Access. Under the regulations, applications for Open Access shall be made to Nodal Agency, which in case of long term transmission access, is the Central Transmission Utility, if its system is used and in other cases, it shall be transmission licensee in whose system the drawal point of electricity is situated. In case of short term Open Access, RLDC shall be the Nodal Agency for the region where point of drawal of electricity is situated. Regulation 13 provides for procedure for short term Open Access in respect of Inter-State transmission. The application shall contain information such as capacity needed, point of injection, point of drawal, duration of availing open access, peak load, average load and such other additional information that may be specified by the RLDC. The regulations prescribed the charges under different categories such as scheduled inter-change charges, reactive energy charges, charges for average energy losses in transmission system besides the Open Access charges.

The APERC framed the Open Access Regulations

governing the Intra-State transmission/wheeling of electricity within the State called the A.P. Electricity Regulatory Commission (Terms and Conditions of Open Access) Regulation 2005 (for short “the 2005 Regulations”). Under these regulations, the State Transmission Utility is the Nodal Agency for long term Open Access and SLDC is the Nodal Agency for short term Open Access transactions. However, the SLDC shall allow short term Open Access only after consulting the concerned transmission and/or distribution licensee(s) whose network(s) would be used for such transactions. The Regulations envisaged criteria for Open Access, the charges payable for such Open Access etc. Regulation 13 provides for installation of energy metres capable of measuring active energy, reactive energy, average frequency and demand integration in each 15-minute time block, with a built-in calendar and clock and conforming to BIS/CBIP Technical Report/IEC standards at all entry and exit points. Regulation 14 laid down the procedure for determining the available capacity of transmission and distribution (T&D) networks.

The A.P. State Reorganisation Act 2014: This Act has changed the the nature and complexion of transmission and distribution of electricity within the erstwhile State of Andhra Pradesh. With the division of the State of Andhra Pradesh into two States, namely, the State of Telangana and the State of Andhra Pradesh, the Intra-State transmission and distribution of electricity has become Inter-State transmission and

distribution where such transmission and distribution take place across the two regions. This Act has contained provisions for distribution of assets and allocation of resources, such as, water, coal, oil, power generation, transmission and distribution etc. Part-X of the Reorganisation Act deals with infrastructure and special economic measures. Section 92, falling in that Part ordained that the successor States shall follow the principles, guidelines, directions and orders to be issued by the Central Government on or from the appointed day on matters relating to coal, oil and natural gas, and power generation, transmission and distribution as enumerated in the Twelfth Schedule. Clause-A(1) of the said Schedule provided the ratio of the total equity of Singareni Collieries Company Ltd., between the Government of Telangana and the Government of India as 51 and 49, respectively. It has also saved the existing coal linkages of Singareni Collieries Ltd., without any change. Clause-B provided for allocation of oil and gas and Clause-C deals with power. Under sub-clause (1) of Clause-C, units of A.P. GENCO shall be divided based on geographical location of power plants. Under sub-clause (2), of Clause-C, the existing power purchase agreements with respective DISCOMs shall continue for both on-going projects and projects under construction. Under sub-clause (3), the existing APERC shall function as a joint regulatory body for a period not exceeding six months, within which time separate SERCs shall be formed in the successor States. Under sub-clause (4), the existing SLDC shall function for both successor States for a

period not exceeding two years within which time separate SLDC shall be set up for each successor State. During this period, the existing SLDC shall function under the control of Southern RLDC at Bangaluru. Sub-clause (5) of Clause-C, which is pivotal for the present cases, reads as under :

“Transmission lines of APTRANSCO of 132 KV and higher voltage cutting across the successor States shall be deemed as Inter-State Transmission System (ISTS) lines. The transmission lines falling within the territory of each successor State shall be transferred to the respective State Transmission Utilities. The maintenance of ISTS lines shall also be done by successor States in their respective jurisdictions.”

The letter dated 2-8-2014 addressed by the Executive Director, HRD& Planning, A.P. TRANSCO, and the consequential letter dated 28-8-2014 addressed by the Chief General Manager, Commercial & RAC, APEPDCL, Visakhapatnam to the petitioner, require to be understood in the light of the provisions of the 2003 Act and the regulations framed by the Central and the State Regulatory Commissions and the provisions of the Reorganisation Act.

Whether the Reorganisation Act saved the revised Wheeling and Power Purchase Agreements?

As could be culled out from the long title of the Reorganisation Act, it was enacted for reorganization of the existing State of Andhra Pradesh. While the division of the State of Andhra Pradesh by formation of Telangana State is the principal aim of the Act, it has also attempted to address the allocation/distribution of expenditure and revenue (Part-V),

apportionment of assets and liabilities (Part-VI), control and administration of certain corporations (Part-VII), distribution of employees (Part-VIII) and infrastructure and special economic measures between the two States (Part-X) etc. Section 92 falling under Part-X reads as under:

Successor States to follow principles, guidelines, etc., issued by Central Government :- The principles, guidelines, directions and orders issued by the Central Government, on and from the appointed day, on matters relating to coal, oil and natural gas, and power generation, transmission and distribution as enumerated in the Twelfth Schedule shall be implemented by the successor States.

The Twelfth Schedule provided for apportionment of the resources of coal, oil and natural gas and power generation, transmission and distribution referred to in Section 92. On a careful analysis of these provisions, it is clear that they deal with distribution, allocation or apportionment of the said resources pertaining to different fields, one such resource being 'power'. Clause-C of the Twelfth Schedule, which deals with this item, accordingly divided the generating units of the A.P.GENCO, the transmission lines of the A.P. TRANSCO and the power generated by the central generating stations between the two States. In the context in which the expression "Power Purchase Agreements" is used, it should be understood as the agreements entered into between the independent generators and the DISCOMs for purchase of power by the latter from the former. With reference to such agreements, sub-clause (2) of Clause-C has apportioned those

agreements to the respective DISCOMs. For instance, in respect of the agreements with APEPDCL, neither the other DISCOMs in the State of Andhra Pradesh nor in the State of Telangana can make a claim for purchasing the power. Thus, the sole intendment behind this Clause is to confer right on the respective DISCOMs to purchase power under the existing power purchase agreements and not with a view to save any agreement in order to protect the interests of generators or suppliers. Therefore, it would be a fallacy if sub-clause (2) of Clause-C of the Twelfth Schedule is interpreted to mean that it is intended to serve any purpose other than allocating the power purchase agreements among the DISCOMs.

As rightly pleaded by the respondents, the revised power wheeling and power purchase agreements do not fall within the definition of the expression ‘Power Purchase Agreements’ mentioned in Clause-C of the Twelfth Schedule. This is because, the predominant object of these agreements was to enable the generators to supply power either for their captive needs or for sale to third parties. It is only the residuary power which remained unutilized or not supplied, as the case may be, that will be appropriated by the respective DISCOMs at the price indicated in the agreement itself. At the most, that part of the agreement under which the DISCOMs have the right to utilize the residuary power may fall within the expression ‘Power Purchase Agreement’ under sub-clause (2) of Clause-C of the Twelfth Schedule.

While the legal position is what is discussed above,

however, it needs to be observed that not much turns upon the interpretation of Section 92 r/w. Clause 3(C) of the Twelfth Schedule, for, neither APEPDCL nor the TSSPDCL has been refusing to wheel the power being generated by the petitioners and fed into the respective Grids by disregarding the agreements, but they plead their inability for such wheeling due to the various constraints under the provisions of the 2003 Act. It is their pleaded case that with the division of the erstwhile State of Andhra Pradesh, the Intra-State transmission system has become Inter-State transmission system between the two newly created States. Wherever transmission of power through Inter-State transmission lines is involved, both the licensees and the consumers are bound to follow the Central Regulations as well as the State Regulations. As discussed hereinbefore, as the Regulations provide for long term and short term Open Access, consumers need to make applications to the respective Nodal Agencies for providing such Open Access. The RLDCs as well as the SLDCs are charged with the responsibility of supervising and controlling of the Inter-State transmission system and the Intra-State transmission system, respectively. They must also ensure maintenance of proper Grid standards according to Grid Code as envisaged under Section 79 of the 2003 Act. The consumers have to install the energy meters capable of measuring active energy, reactive energy, average frequency and demand integration in each 15-minute time block with built-in calendar and clock etc. In the light of these strict statutory

parameters laid down under the 2003 Act and the Regulations, the plea of the petitioners that under the existing power wheeling and power purchase agreements the respective TRANSCOs and DISCOMs of both the States are under an obligation to wheel the power involving Inter-State transmission and distribution without following the provisions of the 2003 Act and the Regulations, is wholly misplaced, besides being unacceptable. If such a plea is accepted, it would not only render the provisions of the 2003 Act and the Regulations otiose, but also severely affect the transmission and distribution system. Unless Open Access licences are granted to consumers after examining the Grid position in consultation with the respective TRANSCOS and the DISCOMs, no licensee can undertake transmission and distribution of power under the existing legal regime. Therefore, even if the licensees have the best intention of serving the consumers under the revised power wheeling and power purchase agreements, they cannot render their services without the consumers obtaining Open Access licenses. It is precisely for this reason that the Executive Director, HRD, Vidyut Soudha, addressed letter dated 2-8-2014 and the Chief General Manager (Commercial & RAC), APEPDCL, Visakhapatnam addressed letters dated 28-8-2014 to the petitioners. On a careful consideration of the facts and the legal position in their entirety, this Court is of the opinion that the said letters refusing to take into consideration the power fed into the Grid by the petitioners, except the petitioner in W.P.No.30602 of 2014, in

the residuary State of Andhra Pradesh, and in raising the bills without considering the power fed into the Grid by them and the action of APEPDCL in raising the bill without taking into consideration the power fed into the Grid by the petitioners in W.P.No.30602 of 2014 in the State of Telangana, reflect the true and correct position in law and no exception can be taken to the same.

In the light of these facts, the issue whether the existing agreements are saved by the provisions of the Regularisation Act has become purely academic, for, even if these agreements are saved, they cannot override the provisions of the 2003 Act and the Regulations made thereunder. Under Section 174 of the 2003 Act, the provisions override any other law except the provisions of the Consumer Protection Act and the Atomic Energy Act 1962 and the Railways Act 1989 or any instrument having the effect by virtue of any law other than the provisions of the 2003 Act to the extent they are inconsistent with the said Act.

In **PTC India Limited (supra)**, a Constitution Bench of the Supreme Court held that a Regulation made under Section 178 of the 2003 Act as a part of the regulatory framework intervenes and even overrides the existing contracts between the regulated entities, inasmuch as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said Regulation.

Therefore, even if the respective TRANSCOS and the DISCOMs are under obligation to wheel the power, such

wheeling shall not be inconsistent with the provisions of the 2003 Act and the Regulations made thereunder. As the 2003 Act and the Regulations made thereunder mandate obtaining of Open Access for Inter-State transmission, the petitioners cannot insist on continuing the arrangement which existed prior to the division of the erstwhile State of Andhra Pradesh.

How to treat the power fed into the Grid by the petitioners?

: The APEPDCL has fairly admitted that the petitioners who hold power wheeling and power purchase agreements have been feeding the power into its Grid and that due to legal constraints, they could not send the power across to the State of Telangana. As noted above, the learned Standing Counsel for APEPDCL has fairly submitted that the power which has been fed into the Grid but billed by the TSSPDCL may be treated as having been banked. The learned counsel for the petitioners have stated that their clients are not willing to exercise the option of sale of power to APEPDCL. Similarly, the learned counsel for the petitioner in W.P.No.30602 of 2014 has stated that his client is not willing to sell the power to TSSPDCL. In this peculiar fact situation, I feel that it is appropriate if the power which is fed by the petitioners into the Grid in the area of operation of the respective DISCOMs shall be treated as having been banked which may be wheeled and supplied by them either for captive purposes or to the scheduled consumers of the petitioners as per the respective wheeling agreements, if and when Open Access licences are obtained by them. The petitioners are allowed a period of three

months from the date of receipt of this Judgment for this purpose. If the petitioners fail to obtain Open Access licences within this period, the respective DISCOMs are entitled to treat the same as having been appropriated and the cost of the power as provided under the existing agreements shall be paid to the petitioners.

The Writ Petitions stand disposed of accordingly.

As a sequel to the disposal of the Writ Petitions, the Miscellaneous Applications filed in the respective Writ Petitions are disposed of as infructuous.

Justice C.V. Nagarjuna Reddy

Date : 31-12-2014

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[\[1\]](#) 2010(4) SCC 603