THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

WRIT PETITION No.2145 OF 2016

ORDER:

Heard Sri Ch.Pushyam Kiran, Counsel for the petitioner and Sri M.Ravindra, Standing Counsel for 3rd respondent.

2. Smt J.Koteshwari Devi, Standing Counsel for 4th respondent adopted the contentions of the 3rd respondent. The Government Pleader for Energy absent.

3. The questions which arise for consideration in this Writ Petition are (1) whether the 3rd respondent is entitled to deduct 2% banking charges from the banked energy allocated to the petitioner's scheduled consumers i.e., respondents 6 & 7; and (2) whether the 4th respondent can object for allocation of banked energy during peak hours to the petitioner's schedule consumer i.e., 5th respondent.

4. Petitioner is an industrial unit which manufactures Calcined Petroleum Coke and has its industrial unit in the Port Area of Visakhapatnam generating an annual average 41 Megawatts electricity as a by-product.

5. A Modified Power Wheeling and Producing Agreement was entered into on 04.11.1994 by the petitioner with the 2nd respondent. Thereafter the 1st respondent accorded to the petitioner permission to generate and sell power under the Electricity (Supply) Act, 1948 (for short 'the Act') vide G.O.Ms.No.102 dt.30.06.1995. The petitioner was also granted exemption from the applicability of Sections 35 to 37 of the Act vide letter No.5850/Pr.II.1/95-7, dt.11.09.1995 of the 1st respondent. By another letter No.3590/ PR.II.1/98-2, dt.19.06.1998, 1st

respondent also conveyed approval of the 1st respondent for sale of power by the petitioner to scheduled consumers in terms of clause 2(iii) of G.O.Ms.No.102 dt.30.06.1995 read with Clause 3(iv) of G.O.Ms.No.148, dt.15.11.1995 with certain stipulations. This permission to sell power to scheduled consumers is valid up to 24.07.2028.

6. During the subsistence of the above agreement, the composite State of Andhra Pradesh came to be bifurcated with effect from 02.06.2014 by the A.P. Reorganization Act, 2014 into two states i.e., the residuary State of Andhra Pradesh and the State of Telangana. While the petitioner's plant was situated in residuary State of Andhra Pradesh, some of its scheduled consumers such as respondents 5 and 6 were in the State of Telangana.

7. On 28.08.2014, the 3rd respondent addressed a letter to the petitioner stating that existing interstate wheeling transactions will be allowed up to 31.08.2014, and from 01.09.2014 interstate wheeling transactions will not be allowed under any circumstances. In the said letter, petitioner was requested to change the exist points to within the state for wheeled energy to avoid interstate open access charges. Petitioner sent its response by letter dt.30.08.2014 to the 3rd respondent.

8. Thereafter, petitioner filed W.P.No.25561 of 2014 challenging the letter dt.28.08.2014 addressed by the 3rd respondent to it and also the letter dt.02.08.2014 addressed by the 2nd respondent to the 3rd respondent. It contended that these proceedings violate Articles 19(1)(g) and 301 of the Constitution of India and Section 92 read with Schedule XII.C.2 of the Andhra Pradesh Reorganization Act, 2014 and

the terms of the Modified Power Wheeling and Purchase Agreement entered into between the petitioner and 3rd respondent on 04.11.1994.

9. The 4th respondent then addressed a letter dt.22.09.2014 to the petitioner stating that for transfer of power from one state to another, inter state regulations are applicable and in addition to the respective States' Electricity Regulatory Commissions Open Access Regulations, the Central Electricity Regulation Commission Open Access regulations also need to be obeyed and the petitioner would have to follow State Load Dispatch Centre directions for obtaining clearances from authorities concerned or to change the exit points to fall within the State as that of the generator, so that the transaction becomes an intra-state transaction.

10. Petitioner then filed W.P.Nos.30327 of 2014, 33601 of 2014, 33611 of 2014 and 38841 of 2014 challenging the inaction of the 4th respondent in including the units supplied by the petitioner in the bill issued to respondents 5 and 6 for the months of September 2014, October 2014 and November 2014.

11. During the course of hearing of the said writ petitions, a statement was made by respondents 3 and 4 that they have not wheeled the said energy. Petitioner then contended that it cannot be put to loss because the Government entity in one State failed or chose not to wheel the power supplied by the petitioner which was meant to be supplied to its scheduled consumers in Telangana State.

12. A common order was passed in the above writ petition as well as other similar writ petitions on 31.12.2014 recording the statement of the Standing Counsel for 3rd respondent that though petitioner had been

feeding power into its grid, the 3rd respondent could not send the power across to Telangana due to legal constraints and that said power which was fed into the grid would be treated as having been banked. Therefore, this Court directed that the power which was fed into the grid of 3rd respondent by the petitioner shall be treated as having been banked which may be wheeled and supplied by the petitioner for captive purposes or to scheduled consumers of the petitioner as per their wheeling agreement if and when open access licenses are obtained by them. Petitioner was given a period of three months for this purpose.

13. Thereafter, the petitioner requested the 4th respondent by letter dt.13.01.2015 to allocate the banked units to KNL 244, a unit of the 5th respondent, which is a scheduled consumer of the petitioner. However, the 4th respondent addressed a letter dt.17.01.2015 to the A.P. Power Coordination Committee stating that there is no provision for banking in the agreement entered into by the petitioner and therefore it is not possible to consider the net allocation of banked units and a similar communication by letter dt.21.01.2015 was sent to the petitioner.

14. Petitioner then filed W.P.No.3275 of 2015 questioning the action of the 3rd respondent in writing the letter dt.17.01.2015 to the A.P. Power Coordination Committee and letter dt.21.01.2015 issued by the 3rd respondent to the petitioner.

15. The said Writ Petition was disposed of on 14.07.2015 holding that the said case is covered by common judgment dt.31.12.2014 in W.P.No.30327 of 2014 and Batch.

16. Thereafter, the banked units were permitted to be allocated to the petitioner's scheduled consumers but not during peak hours.

17. Petitioner then requested respondents by letter dt.14.09.2015 to allocate the banked units during peak hours to KNL 244 for the month of September, 2015 and October, 2015. Petitioner clearly stated therein that banking of units was permitted as per the order passed by this Court in W.P.No.30327 of 2014 and Batch and therefore APERC Regulation No.2 of 2006, Interim Balancing Settlement Code for open access transaction and amendment Regulation No.2 of 2014 do not apply. Petitioner pointed out that these regulations would apply only with regard to renewable energy generation sources like wind, solar and mini-hydel projects and do not apply to the petitioner. Petitioner also received H.T. bills for respondents 6 and 7 wherein 2% charge was levied on the allocated banked units for September, 2015. Petitioner also addressed a letter dt.30.09.2015 to the 3rd respondent stating that such a charge cannot be levied.

18. Since there was no response from the respondents, petitioner had filed the present Writ Petition to declare the action of the 3rd respondent in deducting 2% banking charges equallent to 3,81,486 units from the banked energy allocated to the petitioner's scheduled consumers i.e., respondents 6 and 7, as well as the action of the 4th respondent in not allocating 4,80,943 units of banked energy during peak hours to the petitioner's scheduled consumer i.e., 5th respondent.

19. Counter affidavit has been filed by the 3rd respondent justifying the deduction of 2% banked energy as well as non-allocation of banked energy during peak hours by placing reliance on Regulation 2 of 2006 and an amendment thereto made vide a Regulation 2 of 2014.

20. Counsel for 3rd respondent contended that there cannot be a banking facility for generators other than wind and mini-hydel power generators and that the petitioner cannot be allowed the facility of banking and reliance was placed on Regulation 12.1 of Regulation 2 of 2006.

21. This above contention is without merit in view of the fact that this Court in its order dt.31.12.2014 in W.P.No.30327 of 2014 and Batch directed banking of the petitioner's energy even though the petitioner is not a generator of wind, solar or mini-hydel power energy and the said order was also confirmed by this Court by order dt.14.07.2015 in W.P.No.3275 of 2015.

22. Although it is contended for 3rd respondent that Appendix-III to Regulation 2 of 2006, prohibits banked energy during peak hours and also permits banking charges of 2% of the energy to be deducted and a similar provision is also contained in Appendix III to Regulation 2 of 2014, this contention is also untenable since both these two appendixes to the Regulation 2 of 2006 and Regulation 2 of 2014 deal with only wind, solar and mini-hydel power generator and do not deal with power of the nature which is being generated by the petitioner. Therefore reliance on Appendix-III to these two regulations by 3rd respondent is also misplaced.

23. Any levy of charges by the respondents 1 to 4 from the petitioner must be supported by law. The respondents 1 to 4 cannot be allowed to make any deduction from the banked energy allocated to the petitioner's scheduled consumers without having any authority of law by relying on Regulations which do not apply to the type of energy being generated by the petitioner. Likewise, they cannot also refuse to

allocate the banked energy during peak hours without there being any specific regulation prohibiting them from doing so in regard to the type of energy being generated by the petitioner. No other contention is raised by the counsel for respondents.

24. In this view of the matter, it is declared that the 3rd respondent is not entitled to deduct 2% charges equivalent to 3,81,486 units from the banked energy allocated to the petitioner's scheduled consumers i.e., respondents 6 and 7. It is also further declared that the 4th respondent cannot refuse to allocate 4,80,943 units of banked energy during peak hours to the petitioner's scheduled consumer i.e., 5th respondent.

25. Consequently, the letter dt.13.01.2016 issued by the 3rd respondent as well as the letter dt.24.09.2015 issued by the 4th respondent are both set aside; the 3rd respondent is directed to allocate the deducted 2% banked energy to the petitioner's scheduled consumers in future months; the 4th respondent is directed to adjust the loss suffered by the petitioner (on account of non-allocation of the banked energy of the petitioner during peak hours to the petitioner's scheduled consumer i.e., 5th respondent) of Rs.5,04,990/- against bills for the subsequent months.

26. The Writ Petition is allowed as above. There shall be no order as to costs.

27. Consequently, Miscellaneous Petitions pending if any, shall stand closed.

M.S. RAMACHANDRA RAO, J

10th February, 2016.
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