

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

WP.No.33612 of 2018

ORDER :

Heard the counsel for petitioner, and Sri N. Siva Reddy, learned Standing Counsel for respondent nos.3 to 7.

2. The petitioner herein is a solar power generating firm having an installed capacity of 3 M.W. power plant at Nagirimadugu Village of Vayalpadu Mandal, Chittoor District.

3. The project was synchronized and commenced on 13.04.2015.

4. The petitioner entered into agreement to sell power generated by it to its consumers at Vijayawada, Guntur and Tirupati within the State of Andhra Pradesh for which the petitioner is required to pay wheeling charges to the respondents.

5. A short-term open access agreement was entered into by the Andhra Pradesh Southern Power Distribution Corporation Limited (A.P.S.P.D.C.L.) (3rd respondent) with the petitioner on 18.12.2017.

6. On 02.04.2018, the petitioner filed an application to respondent nos.2 and 3, who are nodal agencies to accord open access with contracted capacity of 33 K.V. from the plant of petitioner, and this was approved by the 2nd respondent on 27.06.2018.

7. The petitioner contends that as per G.O.Ms.No.8 Energy, Infrastructure & Investment (PR.II) Department, dt.12.02.2015, solar

power projects are being promoted in the State of Andhra Pradesh and incentives to projects commissioned up to 30.06.2014 were extended in terms of solar tariff policy evolved therein. The petitioner contends that as per Regulation 1 of 2016 issued by the Andhra Pradesh Electricity Regulatory Commission (A.P.E.R.C.), intra-state open access intimation from the respondents to petitioner is required to be communicated within (30) days from the date on which the application was made, and if there is no intimation from the Nodal Agency within (21) days from the date of application, there is a deemed grant of open access.

8. The petitioner further contends that he had earlier filed WP.No.21238 of 2018 before this Court challenging the inaction of respondent nos.3 to 7 in granting open access in terms of the Andhra Pradesh Electricity Regulatory Commission (Terms and Conditions of Open Access) Regulation, 2005. But, after filing of the said Writ Petition, the 2nd respondent informed the petitioner of the proceedings dt.27.06.2018 issued by it approving its application and the petitioner was advised to withdraw the Writ Petition to enable entering into an agreement with the 3rd respondent w.e.f. 01.07.2018 to 31.05.2019, and so the petitioner withdrew the Writ Petition on 03.07.2018.

9. The petitioner further contends that in spite of repeated requests and reminders made by petitioner, the 3rd respondent did not enter into any agreement as was required to be entered into. It was also pointed out that on a request made by petitioner on 24.07.2018 to the 4th

respondent, even the Andhra Pradesh Electricity Regulatory Commission (A.P.E.R.C.) addressed a letter to 3rd respondent on 23.08.2018 and asked the 3rd respondent to look into the issue of 'open access' approval for solar power developers and submit a detailed report by 27.07.2018. The petitioner contends that he requested the Andhra Pradesh Solar Power Developers Association and also gave a report on 30.07.2018 bringing to the notice that it is the 3rd respondent's duty to enter into an agreement with petitioner after receiving feasibility approvals from the 2nd respondent. The petitioner contends that the failure of 3rd respondent in signing agreement for short-term open access is contrary to the policy of the Andhra Pradesh Electricity Regulatory Commission (Terms and Conditions of Open Access) Regulation, 2005, and seeks a direction to respondent nos.1 to 7 to enter into such agreement with petitioner.

10. The petitioner contends that the above inaction of respondents has resulted in the power generation in the solar power plant by the petitioner from 01.07.2018 till date being un-allotted to petitioner's consumers and causing loss to petitioner. The petitioner contends that he wants to extend the agreement entered into by it earlier with the five consumers and also intends to sell power to other entities and if it is disabled from doing so, its power would be treated as power sent to a power bank as per regulations causing further loss to petitioner.

11. Counter-affidavit is filed by respondent nos.3 to 7 denying the contentions of petitioner.

12. While admitting that there is a solar power policy vide G.O.Ms.No.8 dt.12.02.2015 to encourage non-renewable energy sources in the State of Andhra Pradesh which are more economical in comparison to other power sources, reliance is also made on Wind policy notified vide G.O.Ms.No.9 dt.13.02.2015.

13. It is contended that in G.O.Ms.No.9 wind power generators, other than captive users, were permitted to sell their energy to third-parties which fell in HT-1 category only, that petitioner intends to sell power generated by it to HT-1A consumers and HT-2A consumers, and though the solar power policy did not restrict the category of consumers to whom open access is to be allowed as in the case of wind power generators, the same restriction as is indicated in G.O.Ms.No.9 is being made applicable to petitioner also. The reason given for this unusual stand is that because of a number of solar power plants which were commissioned in the State, considerable solar power is available, and if all these developers are allowed open access and permitted to supply power to HT-2 consumers, the 3rd respondent would incur a loss of Rs.131 crores. It is stated that it would then be very difficult to give supply on subsidized tariff rates and also give free power to agricultural consumers in its area. It is stated that it is running at a revenue deficit of Rs.3 crores for the Financial Year 2017-18 and the solar power developers are quoting very less rate of Rs.2.72 per unit and they will not suffer any financial crises if they tie-up with HT-1 category consumers.

14. Under Section 42 of the Electricity Act, 2003 it shall be the duty of a Distribution Licensee like the 3rd respondent to develop and maintain an efficient, coordinated and economical distribution system in its area of supply and to supply electricity in accordance with the provisions contained in the Act.

15. Under sub-Section (2) of Section 42, the State Electricity Regulatory Commission has to introduce open access in phases. Admittedly, the State Electricity Regulatory Commission has already framed the Andhra Pradesh Electricity Regulatory Commission (Terms and Conditions of Open Access) Regulation, 2005.

16. Though 2nd proviso to Section 42 contemplates a surcharge to open access users, it is not disputed that in case of solar power there is an exemption from levy of surcharge. As per the solar power policy, notified in G.O.Ms.No.8 dt.12.02.2015, intra-State open access clearance for the whole tenure of the project or for (25) years, whichever is earlier, is to be granted as per the Andhra Pradesh Electricity Regulatory Commission (A.P.E.R.C.) regulations. The policy also states that if there is no response or intimation from the Nodal Agency to the generator within (21) days, then the application made by the generator is to be considered as having deemed 'open access'. It also states that cross-subsidy surcharge is exempted from third-party sale if the source of power is from solar power projects set-up in the State for a period of five (5) years from the date of commission of the solar power project.

17. Once the petitioner, a solar power producer applied on 02.04.2018 and the Nodal Agency, which is the 2nd respondent approved its application on 27.06.2018, it was incumbent on the part of 3rd respondent to enter into an agreement to facilitate open access to petitioner.

18. When there is no prohibition in the solar power policy notified in G.O.Ms.No.8 dt.12.02.2015 to restrict the open access only to HT-1A consumer category, the respondents cannot import the said restriction on the basis that such restriction is provided in G.O.Ms.No.9 dt.13.02.2015, dealing with wind power generators. This action of the 3rd respondent, is therefore, clearly arbitrary.

19. Merely because allowing people like the petitioner access to HT-2 consumers through open access would reduce its income, the 3rd respondent cannot defeat the policy of open access provided to solar power producers like the petitioner in G.O.Ms.No.8 dt.12.02.2105, particularly when the said policy does not contemplate levy of any cross-subsidy on the petitioner to compensate the 3rd respondent for the loss which it would suffer if it allowed open access to petitioner.

20. Therefore, the Writ Petition is allowed and the 3rd respondent is directed to sign the agreement for short-term open access with the petitioner from 01.07.2018 to 31.05.2019 within two (02) weeks from the date of receipt of copy of this order.

21. The 3rd respondent shall also pay costs of Rs.5,000/- to the petitioner.

22. As a sequel, miscellaneous petitions pending if any in this Writ Petition, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 10.10.2018

Ndr/*

