Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal Nos. 123 & 124 of 2007

Dated: May 8, 2008

Present: Hon'ble Mr. Justice Anil Dev Singh, Chairperson
Hon'ble Mr. H.L. Bajaj, Technical Member

Appeal No. 123 of 2007

M/S.HYDERABAD CHEMICALS LIMITED
Bank Street,
Hyderabad- 500 095
rep. by its Managing Director,
N.Sukumar,
S/o N Rajaramireddy, aged 54 years ….Appellant(s)

Versus

1. Andhra Pradesh Electricity Regulatory Commission,
   Singareni Bhavan, Red Hills, Hyderabad,
   Represented by its Chairman

2. M/s A.P.Central Power Distribution Co. Ltd.
   3rd floor, Singareni Bhavan, Red Hills,
   Hyderabad Rep. by its Chairman & Managing Director
   ….Respondent(s)

Appeal No. 124 of 2007

M/S.HYDERABAD CHEMICALS LIMITED
A-24/25, APIE, Balanagar,
Hyderabad- 500 0937
rep. by its Managing Director,
N.Sukumar,
S/o N Rajaramireddy, aged 54 years ….Appellant(s)

Versus

1. Andhra Pradesh Electricity Regulatory Commission,
   Singareni Bhavan, Red Hills, Hyderabad,
   Represented by its Chairman

2. M/s A.P.Central Power Distribution Co. Ltd.
   3rd floor, Singareni Bhavan, Red Hills,
   Hyderabad Rep. by its Chairman & Managing Director

....Respondent(s)

Counsel for the Appellant : Mr. C.Kodanda Ram

Counsel for the Respondent(s) : Mr. K.V. Mohan &
Mr. K.V. Balakrishnan
for Resp.1
Mr. Sanjay Sen for Resp.2

JUDGMENT

Per Hon'ble Mr. Justice Anil Dev Singh, Chairperson

These appeals arise from common order dated July 9, 2007 passed by Andhra Pradesh Electricity Regulatory Commission (for short 'APERC') in OP No. 40 of 2006 and OP No. 41 of 2006. Therefore these two appeals are being disposed of together. Appeal No.123 of 2007 is being treated as the lead matter.

Appeal No.123 of 2007

2. The facts lie in a narrow compass.

3. The appellant has set up wind based power project at Kadavakkallu Village in Anantpur District for its captive consumption and for sale to APTRANSCO. On March 31, 2005, the project was synchronized and the date was treated as the commercial operation date of the project. The A.P. Central Power Distribution Co. Ltd and the appellant entered into power purchase agreement on June 9, 2006. However, before the execution of the agreement and before the COD was given, the appellant approached APTRANSCO by means of a letter dated February 26, 2005 stating to the effect that in case the appellant pumps the energy into the grid of APTRANSCO before commissioning of the project and before entering into a PPA or necessary banking cum wheeling agreement, APTRANSCO will not be required to pay any consideration for the same. Again, by letter dated March 31, 2005, the appellant informed APTRANSCO to the effect that no claim will be made by the appellant for the power pumped by it into the grid of APTRANSCO, without finalization of the PPA or the wheeling cum banking agreement with APTRANSCO.

4. Subsequently, contrary to its aforesaid letters appellant filed petitions before the Regulatory Commission claiming from the licensee payment for the power pumped into the grid from its generating station with effect from March

31, 2005 to June 8, 2006. But the Commission by the impugned order rejected the petition.

5. Short question involved in the appeal is whether the appellant is entitled to payment for the energy pumped into the grid from its generating station with effect from March 31, 2005 to the date PPA was entered into between the appellant and the second respondent.

6. We have heard learned counsel for the parties. In order to determine the question it will be necessary to refer to two letters of the appellant dated February 26, 2005 and March 31, 2005 and the terms of the PPA with reference to which arguments were addressed by the learned counsel for the parties. There cannot be any controversy with regard to the meaning of the letters dated February 26, 2005 and March 31, 2005. These letters categorically state to the effect that the power generated by the plants of the appellant and pumped into the grid of APTRANSCO shall be free of cost to APTRANSCO until PPA and wheeling cum banking agreement are executed by them.

7. At this stage, it will be appropriate to set out the relevant parts of the letters:

Letter dated February 26, 2005

" *In this context we wish to submit that in case we don't have PPA or necessary Wheeling cum*

Banking agreement entered into with A.P. Transco before commissioning of the project then the energy that is pumped in to the grid of A.P. Transco on commissioning of the project would be to the account of APTRANSCO only for which APTRANSCO shall not pay any consideration. We also state that if we run the power plant without the necessary PPA or wheeling cum banking agreement in place then all such power that is generated and pumped into the grid of APTRANSCO during such period shall be free of cost to APTRANSCO."

Letter Dated March 31, 2005

"With reference to the cited subject we wish to inform your good selves that the generation that is going to be pumped into the grid of A.P. Transco at 132/33 KV Komatikuntala sub station will not be claimed, whenever the plant under operation without finalizing the PPA or banking arrangement or wheeling cum banking arrangement with A.P. Transco.

However we are willing to pay for the consumption during the above operations under HT.I temporary supply."

8. Thus, it is apparent that the appellant clearly stated that it will not charge for the energy pumped into the grid of APTRANSCO before the finalization of the PPA and wheeling cum banking agreement. This means till PPA and wheeling cum banking agreement were not finalized, the energy was to be pumped into the grid by the appellant gratuitously. The aforesaid letters reveal that the energy was not to be paid for by the licensee. Thus, there was no element of sale of energy by the appellant to the licensee.

9. The learned counsel for the appellant urged that the appellant was entitled to be paid for the energy received by the licensee as per the PPA executed between the appellant and the second respondent. With a view to support its plea, learned counsel for the appellant drew our attention to the various Articles of the agreement. The relevant clauses read thus:

> *2.1 All the Delivered Energy at the interconnection point for sale to APCDCL will be purchased at the tariff provided for in Article 2.2 from and after the date of Commercial Operation of the Project. Title to Delivered Energy purchased shall pass from the Company to the APCPDCL at the Interconnection Point.*

2.2 The Company shall be paid the tariff for the energy delivered at the interconnection point for sale to APCPDCL at Rs. 2.70 (Rupees two and seventy paise only) per unit or the Tariff fixed by APERC from time to time; whichever is lower during the Agreement period. Notwithstanding the tariff indicated above there will be a special review of purchase price on completion of 10 years from the date of commissioning of the project, when the purchase price will be reworked on the basis of Return on Equity, O & M expenses.

ARTICLE 7

DURATION OF AGREEMENT

This agreement shall be effective upon its execution and delivery thereof between parties hereto and shall continue in force from the Commercial Operation Date (COD) and until the twentieth (20th) anniversary that is for a period of twenty years form the Commercial Operation Date (COD). This Agreement may be renewed for such further period of time and on such terms and conditions as may be mutually agreed upon by the parties, 90 days prior to the expiry of the said period of twenty years,

subject to the consent of the APERC. Any and all incentives/conditions envisaged in the Articles of this Agreement are subject to modification from time to time as per the directions of APERC with the tariff at Rs. 2.70 (Rupees Two and seventy paise only) per unit or as fixed by APERC from time to time, whichever is lower during the Agreement period."

10. Referring to clause 2.1, the learned counsel for the appellant submitted that all delivered energy, at the inter-connection point, to the licensee is to be purchased at the tariff fixed in Article 2.2. The learned counsel also contended with reference to Article 2.2 that the appellant is to be paid tariff for the energy delivered to the distribution company at Rs. 2.70 per unit. The learned counsel further argued that the respondent distribution company is liable to pay to the appellant for the energy pumped into the grid with effect from the date of commercial operation of the project viz. March 31, 2005.

11. At the first blush, the argument seems to be attractive and plausible. A close look at Article 2.1 leaves no manner of doubt that at the inter-connection point the delivered energy that is for sale to the distribution company will be purchased by the distribution company.

Therefore, it follows that the delivered energy which is not for sale, is also not for purchase and therefore will not be paid for. The letters dated February 26, 2005 and March 31, 2005 show that the energy that was pumped into the grid before execution of PPA & wheeling cum bank agreement was not for sale but was to be supplied free of charge to the licensee. Since there was no sale of energy, consequently, there was no purchase thereof.

12. Article 2.2 read with Article 2.1 will apply only in a situation where sale has taken place. Since no sale of energy has taken place, Articles 2.1 and 2.2 are not attracted.

13. The learned counsel for the appellant laid emphasis on Article 7 of the agreement and canvassed that it gives retrospective effect to the agreement, particularly Articles 2.1 and 2.2. As a sequitur it was submitted that the concession made in the aforesaid letters cannot defeat the claim of the appellant based on actual supply of electricity to the second respondent before the execution of the PPA. We have already held that clauses 2.1 and 2.2 are not attracted. Therefore, even if it be assumed for the sake of argument that Articles 2.1 and 2.2 have a retrospective operation it will still be of no consequence in so far as the claim of the appellant is concerned.

Since there was no sale of energy by the appellant to the licensee till the execution of the PPA between the appellant and the licensee during the period in question, Articles 2.1 and 2.2 have no application.

14. The learned counsel for the appellant submitted that in any event the respondent is bound to make compensation to the appellant for the use of the energy fed into the grid by the appellant under Section 70 of the Contract Act, 1872. It appears to us that Section 70 of the Contract Act cannot be invoked by the appellant as the appellant intended to deliver the energy gratuitously. It is well settled that where a person delivers anything to another person gratuitously, there is no obligation of the person to whom delivery has been made to make compensation to the former. Compensation can be claimed only in such cases where conditions of Section 70 of the Contract Act are satisfied. In this regard, reference can be had to the decisions of Supreme Court in Mulamchand V/s State of M.P., AIR 1968 SC1218, and State of West Bengal V/s B.K. Mandal & Sons, AIR 1962 SC 779.

15. The appellant voluntarily pumped electricity into the grid of the licensee free of charge. Once the power is delivered

into the grid, it is instantaneously consumed and the licensee has no choice to reject the supply.

16. In this view of the matter, the appeal fails and is hereby dismissed but without any order as to cost.

Appeal No.124 of 2007

17. The issues involved in this appeal are similar to the ones raised in Appeal No.123 of 2007. Since appeal No.123 of 2007 has been dismissed, the instant appeal shall meet the same fate. Consequently, the appeal fails and is hereby dismissed but without any order as to cost.

(Justice Anil Dev Singh)
Chairperson

(H.L. Bajaj)
Technical Member

Dated: May 8, 2008