

(2013) 06 AP CK 0075

In the Andhra Pradesh High Court

Case No : Writ Petition No's. 4118 and 4163 of 2013

National Energy Trading and Service Limited and Others	APPELLANT
Vs	
Central Power Distribution Company of A.P. Ltd. and Others	RESPONDENT

Date of Decision : 03-06-2013

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Electricity Act, 2003 — Section 14(c), 181, 2(71), 23, 61

Citation : (2013) 4 ALD 585 : (2013) 4 ALT 381

Hon'ble Judges : Sanjay Kumar, J

Bench : Single Bench

Advocate : Challa Gunaranjan and Sri P. Radhve Reddy, for the Appellant; O. Manohar Reddy and Sri P. Srinivasa Rao, Counsels, for the Respondent

Final Decision : Allowed

Judgement

Sanjay Kumar, J.—The Central Power Distribution Company of Andhra Pradesh Limited (APCPDCL) floated Short Tender Notice dated 11.04.2012 stating that it and the other Distributing Companies (DISCOMs) intended to purchase upto 2000 MW power per month on short-term basis between June, 2012 and May, 2013 from various trading licensees/State utilities/Captive Power Plants (CPPs)/ Distribution Licensees/State Electricity Boards. Each bidder was required to submit an undertaking from the generator that he was with the bidder and had not quoted with any other trader. The "Conditions for Evaluation" in the tender notice provided for constitution of a Committee by the DISCOMs for negotiation and evaluation of the bids. The Annexure to the tender notice reflected that the "source of power, i.e., the name of the source" was to be disclosed by the bidder. The "Guidelines for short-term (i.e. for a period less than or equal to one year) Procurement of Power by Distribution Licensees through Tariff based bidding process" published by the Ministry of Power, Government of India, in the Gazette of India (Extraordinary) in May, 2012, make it clear that the tariff quoted by the bidders should be constant and there should be no escalation during the contractual period. However, if bids were invited for different time slots, the tariff

could be different for each such slot. Guideline No. 10.4 therein provides that if the quantum of power procured and the tariff determined are within the blanket approval granted by the Appropriate Commission in the Annual Revenue Requirement (ARR) of the respective year, then the same would be considered to have been adopted by the Commission. It is only in other cases that the procurer is required to submit a petition to the Commission for adoption of the tariff within two days from the signing of the Power Purchase Agreement (PPA) and the Commission is to communicate its decision within seven days thereafter. These guidelines were issued by the Government of India in exercise of the powers conferred by Section 63 of the Electricity Act, 2003 (for brevity, "the Act of 2003").

2. National Energy Trading & Service Limited, Gurgaon, the first petitioner in W.P. No. 4118 of 2013, and GMR Energy Trading Limited, Bangalore, the second petitioner in W.P. No. 4163 of 2013, responded to the above tender notice and submitted their bids. These two companies are electricity traders licensed u/s 14(c) of the Act of 2003. "Trading", as defined by Section 2(71) of the Act of 2003, means purchase of electricity for resale thereof.

3. National Energy Trading & Service Limited, Gurgaon, purchases power from Lanco Kondapalli Power Limited, Hyderabad, the second petitioner in W.P. No. 4118 of 2013, a generating company/Independent Power Producer (IPP), which has a generating station at Kondapalli in Ibrahimpatnam Mandal of Krishna District. Therein, it established a 368.144 MW power project initially in Stage-I and thereafter, a 366 MW power project in Stage-II. These power projects are operated on natural gas. The first and second petitioners in W.P. No. 4118 of 2013 entered into an agreement on 19.10.2009 whereby the power produced by the second petitioner from its Stage-II project was to be sold to the first petitioner trading licensee, which would in turn sell it to the APCPDCL. Significantly, the second petitioner has no medium term or long term PPA with the APCPDCL or any other DISCOM. The first petitioner submitted its bid to the APCPDCL offering to sell on short-term basis 125 MW power, purchased by it from the second petitioner, at Rs. 5.99 paise per KWH. Thereafter, on revision/negotiation of the price, the APCPDCL finally issued purchase order/Letter of Intent (LoI) dated 31.05.2012 to the first petitioner for supply of 125 MW power on firm basis from 01.06.2012 to 30.05.2013 at Rs. 5.51 paise per KWH. The source of the power was indicated as LKPPL-II, the unit of the second petitioner. This purchase order was issued subject to approval of the ceiling rate by the Andhra Pradesh Electricity Regulatory Commission (APERC).

4. Similarly, GMR Energy Trading Limited, Bangalore, submitted its bid offering to sell 90 MW power for the periods specified at Rs. 4.94 paise (average) per KWH. It sources its purchase of power from GMR Energy Limited, Bangalore, the first petitioner in W.P. No. 4163 of 2013, which is a generating company/IPP with a 220 MW power plant in Kakinada, East Godavari District. The fuel for this power plant also is natural gas. The APCPDCL placed purchase order/LoI dated

31.05.2012 upon GMR Energy Trading Company, Bangalore, for supply of 90 MW power on firm basis from the first petitioner's plant from 01.06.2012 to 30.05.2013 at the specified rates for different time slots which average to Rs. 4.94 paise per KWH. This purchase order also was subject to approval of the ceiling rate by the APERC.

5. Pertinent to note, the APCPDCL, just one day prior to issuance of the above two purchase orders, addressed letter dated 30.05.2012 to the APERC requesting its approval for short-term procurement of power from June, 2012 to May, 2013. Therein, the APCPDCL referred to the Tariff Order 2012-13 of the APERC approving the energy requirement at 90,402 MU and pointed out that the energy available from all sources was only 77,121 MU, leaving a gap of 13,281 MU. This energy deficit was proposed to be met through other short-term sources. Adverting to Para-70 of the Tariff Order, wherein the APERC had fixed the maximum ceiling price for purchase from external/short-term sources, the APCPDCL brought it to the notice of the APERC that the rates quoted by the bidders were in the range of Rs. 4.94 to Rs. 7.39 per unit which, after negotiations, were revised to the range of Rs. 4.11 to Rs. 5.76 per unit. Referring to the fact that the APERC had earlier fixed the ceiling price of short-term purchases for the years 2010-11 and 2011-12 at Rs. 5.50 paise per unit, the APCPDCL requested the APERC to consider revision of the ceiling price approved in the Tariff Order at Rs. 4.17 per unit for purchase of power RTC (Round the Clock) on short-term basis for the financial year 2012-13 to the approved ceiling price of the last year i.e. financial year 2011-12.

6. Thereupon, the APERC issued letter dated 31.05.2012 noting the circumstances explained by the APCPDCL in its letter dated 30.05.2012 and revising the ceiling price for short-term purchase of power during the financial year 2012-13 to Rs. 5.50 paise per unit on par with the ceiling limit prescribed in the Tariff Orders for the financial years 2010-11 and 2011-12.

7. Pursuant to this development the APCPDCL, after due negotiations, issued amended purchase order dated 13.06.2012 to the National Energy Trading & Service Limited, Gurgaon, amending the rate for purchase of 125 MW power on firm basis from Rs. 5.51 per KWH to Rs. 5.46 per KWH. This purchase order stated that the amended rate would be subject to the tariff to be determined by the APERC or the rate offered by the National Energy Trading & Service Limited, Gurgaon, in its letter dated 11.06.2012, whichever was less. As the price quoted by GMR Energy Trading Limited, Bangalore, accepted by the APCPDCL in the purchase order dated 31.05.2012, was less than the ceiling rate fixed by the APERC, no amendment was necessary thereto.

8. The record also reflects that the APCPDCL addressed letter dated 21.05.2012 to the APERC requesting it to take a decision on tariff fixation with regard to Lanco Kondapalli Power Limited, Hyderabad, and GMR Energy Limited, Bangalore, the two subject IPPs, so as to avoid cancellation of gas allocation to these projects after 30.05.2012. A similar letter was addressed to the APERC by

the Andhra Pradesh Power Co-ordination Committee (APPCC), a body constituted by the Government of Andhra Pradesh for co-ordination between the DISCOMs, stating that these two generating companies were not considered during finalization of the bids for medium term power purchase but had emerged successful for supply of power through their trading licensees for short term power purchase by the DISCOMs. The APPCC therefore requested the APERC to fix the tariff in respect of these two power plants for the period 01.06.2012 to 30.05.2013 as gas was allocated to them by the Government of India at a rate equivalent to that extended to other IPPs which had already entered into long term PPAs. The APERC however responded under letter dated 31.12.2012 seeking a clarification as to on what basis and under which provision it was required to fix the tariff for procurement of power from these two gas based plants under the short-term method. The APERC pointed out that short-term procurement of power by the DISCOMs for the financial year 2012-13 was to be in strict compliance with the proceedings issued by it on 07.05.2012 and within the ceiling price fixed by it in its letter dated 31.05.2012 for short-term purchase of power.

9. The APCPDCL replied vide letter dated 28.01.2013 stating that Section 86 of the Act of 2003, dealing with the functions of the APERC, vested it with the power to approve power purchases, including short-term purchases. The APCPDCL pointed out that the cases of the subject IPPs stood on a different footing as they were supplied gas at a regulated price and requested the APERC to issue notice to them and determine/approve the regulated price for the power purchased from them on short-term basis.

10. As the APERC failed to take action as requested by it, the APCPDCL issued the letters dated 07.02.2013. By the first letter dated 07.02.2013 addressed to Lanco Kondapalli Power Limited, Hyderabad, the APCPDCL stated that it had already filed an application with the APERC to determine the tariff payable for the power supplied which was pending and as Lanco Kondapalli Power Limited Stage-II had not agreed to any of the proposals with regard to entering into long term/medium term PPAs, it proposed to restrict the short-term power purchase rate of Lanco Kondapalli Power Limited on par with the long term PPAs of new IPPs such as Gowthami and others with immediate effect. The APCPDCL further stated that after tariff determination was completed by the APERC, necessary truing up would be made. The APCPDCL therefore requested Lanco Kondapalli Power Limited, Hyderabad, to give its concurrence within two days for amendment of the Lois dated 31.05.2012 and 13.06.2012, agreeing to the tariff at the unit rate paid to GVK-II, Gowthami GMR Vemagiri and Konaseema power projects for supply of power. Non-compliance entailed action by the APCPDCL for giving effect to the said tariff for supply of power.

11. By the second letter dated 07.02.2013 addressed to Lanco Kondapalli Power Limited, Hyderabad, the APCPDCL, while reiterating the contents of its other letter of the same date, stated that it proposed to recover the differential unit

rate paid under short-term from the benchmark unit rate paid to Gowthami and others under long term PPAs from the already paid amounts for the power supplied under short-term from 01.06.2012 till date. The APCPDCL again stated that after tariff determination by the APERC, necessary truing up would be made. It therefore called upon Lanco Kondapalli Power Limited, Hyderabad, to concur within two days for the proposed recovery so as to bring it in compliance with the conditions for allocation of gas and threatened that non-compliance would obligate the DISCOMs to take appropriate steps for recovery of the differential amounts.

12. Identical is the import of the letters dated 07.02.2013 addressed by the APCPDCL to GMR Energy Limited, Bangalore. The only difference is that similar letters were also addressed to GMR Energy Trading Company, Bangalore, the trading licensee. The letters dated 07.02.2013 addressed by the APCPDCL to the petitioner companies in these two cases are impugned presently.

13. By separate orders dated 12.02.2013 passed in the two writ petitions, this Court recorded the undertaking of Sri O. Manohar Reddy, learned standing counsel for the APCPDCL, that no coercive steps would be taken to enforce the impugned orders till 20.02.2013. Thereafter, by order dated 22.02.2013 passed in both the writ petitions, this Court suo motu impleaded the APERC as the fourth respondent in W.P. No. 4118 of 2013 and as the sixth respondent in W.P. No. 4163 of 2013 and invited its response.

14. Per its counters filed in the two cases, the stand of the APCPDCL is that Lanco Kondapalli Power Limited and GMR Energy Limited were allocated domestic natural gas at subsidized rates on par with other IPPs which had entered into long term PPAs with the DISCOMs and were supplying power at Rs. 3.10 paise per KWH (regulated tariff). As these two companies failed to enter into medium term/long term PPAs with the DISCOMs and were providing power under short-term purchase method through their trading licensees, the APCPDCL sought to justify its action in bringing them on par with the other IPPs. This, according to the APCPDCL, was done to benefit the ultimate consumer. The APCPDCL pointed out that it had already approached the APERC for fixation/determination of the tariff even for short-term power purchase from these two companies, but in the meanwhile as these units were operating on much lesser Plant Load Factor (PLF) owing to depleted gas supply, there would no possibility of recovering the differential amounts from future generation of power by these plants. On this ground the APCPDCL sought to justify its move to recover the differential amounts even before the awaited determination of the tariff by the APERC. The APCPDCL referred to its attempts to get these companies to club/divert their gas supply between their power plants/units under common ownership as per the guidelines issued by the Ministry of Petroleum, Government of India, under letter dated 01.01.2013. However, the companies did not choose to accept the proposals of the APCPDCL in this regard. Reference was made to the letter dated 22.03.2012 addressed by the Government of India to the Government of Andhra

Pradesh in the context of these two gas based power generating companies stating that gas supply to these two companies would not be suspended till 30.05.2012 after which the supply would be suspended if they failed to comply with the conditions specified by the Empowered Group of Ministers (EGOM) of the Government of India for supply of domestic gas, which are as under:

The existing and future allocations of NELP gas to power plants be subject to the condition that the entire electricity produced from the allocated gas shall only be sold to the Distribution Licensees at tariffs determined or adopted (in case of bidding) by the tariff regulator of the power plant. The gas will be supplied only for the duration of the Power Purchase Agreement (PPA) and supply of gas will start only after the signing of PPA. The PPA may initially be for one year (short term PPA) during which electricity shall be sold at the tariff determined by the regulator and the subsequent PPA should be for medium term or long term.

15. The Government of India therefore requested the Government of Andhra Pradesh to take suitable action so as to avoid cancellation of gas supply to these projects after 30.05.2012. However, it is an admitted fact that the gas supply was not stopped and neither of these companies was found suitable for medium term power purchase. Further, no long term PPA was entered into with them. It is only because these companies are availing gas supply on par with other IPPs which already entered into long term PPAs with the DISCOMs, that the APCPDCL seeks to strike parity of rate amongst them even for short-term purchase of power.

16. The APERC filed a common counter in the writ petitions succinctly stating that determination of tariff for purchase of power on short-term basis from these two gas based power plants did not fall within its purview. The APERC categorically stated that the question of determination of tariff by it for sale of electricity by a specific generator to a DISCOM on cost plus basis for short-term purchase did not arise. Such purchases, according to it, have to be made by the DISCOMs following the guidelines and in this regard, its role was restricted only to fixation of the maximum ceiling rate. As it had already fixed the ceiling rate at Rs. 5.50 per KWH for the financial year in question, the APERC stated that it had no further role to play in the matter. The prices for short-term purchases of power were to be decided by the DISCOMs themselves as per the guidelines within the specified maximum ceiling rate prescribed by it and the APERC stated that it could not fix the tariff in individual cases as requested by the APCPDCL.

17. A reply was filed in W.P. No. 4118 of 2013 contesting the claim of the APCPDCL that gas allocation to Lanco Kondapalli Power Limited, Hyderabad, was at a subsidized rate. The petitioners pointed out that the APERC had not chosen to determine the tariff in so far as they were concerned despite the repeated requests of the APCPDCL and asserted that it was not open to the APCPDCL to unilaterally alter the rate agreed to by and between the parties on extraneous considerations. Various other factual aspects were raised by the petitioners which are of no relevance to the present dispute. A rejoinder on similar lines was also

filed by the petitioners in W.P. No. 4163 of 2013.

18. Heard Sri E. Manohar and Sri D. Prakash Reddy, learned senior counsel appearing for the petitioners in these cases, Sri O. Manohar Reddy, learned standing counsel for the APCPDCL, and Sri P. Srinivasa Rao, learned standing counsel for the APERC.

19. The short question that falls for consideration is whether the APCPDCL is legally justified in unilaterally modifying the terms of the contracts entered into by it to the detriment of the other contracting parties and proposing recovery of amounts pursuant thereto.

20. At the outset, Sri O. Manohar Reddy, learned standing counsel, raised the issue of maintainability of these writ petitions on the ground that the remedy of arbitration was available under the contract for resolving disputes. This Court, however, is not impressed. Ordinarily, this Court would not be inclined to entertain contractual disputes in a writ petition. All the more so, when an arbitration clause exists in such a contract. That being said, this self-imposed restraint would have to be exercised keeping in mind the factual backdrop of the individual case presented before the Court. This Court must also be conscious of the overriding requirement of fair-play in action by a State instrumentality even in contractual matters. Normally, disputes that arise purely from and within the ambit of a contract would be best left to the adopted mode of dispute adjudication i.e. arbitration. However, if faced with an arbitrary and one-sided alteration of the terms of a contract by the dominant contracting party, the State instrumentality, violating the norm of acting fairly, justly and reasonably, this Court would not hesitate to interfere in exercise of its extraordinary jurisdiction under Article 226 of the Constitution even in a contractual matter. Useful reference in this regard may be made to the observations of the Supreme Court in *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*,

The impact of every State action is also on public interest. ... It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters.

21. Referring to the above observations, the Supreme Court in *ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others*, held that once the State or its instrumentality is a party to a contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India, and if, by the impugned repudiation of the claim of the other party, the instrumentality of the State has acted in contravention of the requirements of Article 14, a Writ Court could issue suitable directions to set right the arbitrary actions of such State instrumentality.

The Supreme Court recognized the following legal principles in the context of maintainability of such a writ petition:

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable.

22. In the present case, the facts are admitted and are not at all in dispute. Having entered into contracts with National Energy Trading & Service Limited, Gurgaon, and GMR Energy Trading Limited, Bangalore, the trading licensees, the APCPDCL unilaterally seeks to re-write the terms of the said contracts in the context of the rate at which power is to be purchased by it from these companies. Ostensibly, this move is on the assumption that the generating companies from which these trading licensees purchase power should sell the same at a rate on par with other IPPs which were also supplied gas. Pertinent to note, these generating companies did not participate in the bidding process pursuant to the tender notice dated 11.04.2012 and they were not parties to the purchase orders dated 31.05.2012 and 13.06.2012 issued by the APCPDCL to National Energy Trading & Service Limited, Gurgaon, and the purchase order issued by the APCPDCL on 31.05.2012 to GMR Energy Trading Limited, Bangalore, respectively. There was thus no privity of contract between the generating companies and the APCPDCL. Payments pursuant to the above purchase orders dated 13.06.2012 and 31.05.2012 are stated to have been made only to the trading licensees.

23. Admittedly, the trading and the generating companies in these two cases are independent companies incorporated under the provisions of the Companies Act, 1956. Even if they are sister companies, they are separate and independent legal entities. The tender notice dated 11.04.2012 made it clear that except for an undertaking from the generating company that it would stand by the bidding trading licensee, no further participation from such generating company was required. There is also no evidence of further participation by either of the generating companies in these two cases in so far as the subject contracts are concerned. In such circumstances, the action of the APCPDCL in addressing the impugned letters to the two generating companies is incomprehensible. No satisfactory answer is forthcoming from Sri O. Manohar Reddy, learned standing counsel, in so far as this aspect is concerned. Given these circumstances, availability of an alternative remedy would not bar this Court from entertaining these writ petitions.

24. The constant refrain of the APCPDCL is that the APERC is yet to determine the tariff applicable to the subject purchase orders. This contention falls to the

ground in the light of the unequivocal stand of the APERC that it has no role to play in individual cases of tariff determination in so far as short-term power purchases are concerned. This stand of the APERC is fortified by Guideline 10.4 of the guidelines for short-term power procurement promulgated by the Government of India which makes it abundantly clear that once the tariff determined for power procurement on short-term basis is within the blanket approval granted by the Commission it would have to be considered to have been adopted by the Commission. The guidelines also posit that the price must remain constant throughout the contractual period and the bidder cannot escalate the same. Needless to state, the APCPDCL would be equally bound to respect the agreed price and not reduce the same during the said period. Notably, it was at the behest of the APCPDCL itself that the APERC enhanced the ceiling rate for short-term power purchase during the financial year 2012-13 to Rs. 5.50 per KWH. Admittedly, the rate determined for purchase of power in these two cases is within the aforesaid ceiling rate. That being so, these agreed rates are deemed to have been adopted by the APERC and Regulation 10.4 would not permit tariff determination by it afresh. Regulation 10.4 makes it clear that only in cases where the tariff is more than the ceiling rate, the procurer has to approach the Commission for adoption of the tariff within two days from the date of signing of the PPA. This procedure was not followed in these cases as the rates determined were within the ceiling rate fixed by the APERC.

25. Sri O. Manohar Reddy, learned standing counsel, contends that it would be within the power of the APERC to determine the tariff for the subject short-term power purchase contracts. He places reliance on Sections 62 and 86 of the Act of 2003.

26. Section 62 of the Act of 2003 deals with determination of tariff and, to the extent relevant, reads as under:

62. Determination of tariff. -- (1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for-

(a) supply of electricity by a generating company to a distribution licensee:

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

(b)

27. Section 86 of the Act of 2003 deals with the functions of the State Commission and, to the extent relevant, reads as under:

86. Functions of State Commission. -- (1) The State Commission shall discharge the following functions, namely:--

(a)

(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;

(c)

28. It is however the stand of the APERC that neither of these provisions would permit it to undertake determination of the tariff in individual cases of short-term power purchase within the ceiling price fixed by it. This Court is inclined to agree.

29. Reading the proviso to Section 62(1)(a) with Section 86(1)(b) of the Act of 2003, certain aspects become clear. The tariff applicable to short-term purchase of power can be at variance with the rate applicable to medium or long term power purchases. That is the reason why the proviso to Section 62(1)(a) specifically states that such short-term power purchases should not exceed one year and would be permissible only when there is shortage of electricity supply. In these circumstances, the Commission is empowered to fix the minimum and maximum ceiling of tariff for sale or purchase of electricity on short-term basis so as to ensure reasonable prices of electricity.

30. Section 86(1)(b) is wider in ambit and more general in nature. It provides that one of the functions of the State Commission would be to regulate electricity purchase and procurement process, including the price at which electricity should be procured. This provision must be read in conjunction with the proviso to Section 62(1)(a). Understood so, it is clear that upon the APERC fixing a ceiling rate for purchase of power on short-term basis, not exceeding a year, it would be within the discretion of the DISCOMs to settle the price in individual cases at less than such ceiling rate. This discretion was clearly exercised in these cases as the rate settled by the APCPDCL for GMR Energy Trading Limited, Bangalore, was Rs. 4.94 (average) while it was Rs. 5.46 for National Energy Trading & Service Limited, Gurgaon.

31. Further, as per Regulation-4 of the "Terms and Conditions for Determination of Tariff for Supply of Electricity by a Generating Company to a Distribution Licensee and Purchase of Electricity by Distribution Licensees" (Regulation No. 1 of 2008) issued by the APERC in exercise of powers conferred by Sections 61, 62, 86(1)(b) read with Section 181 of the Act of 2003 for short-term procurement of electricity, the distribution licensees shall follow the procedure as laid down by the APERC from time to time, the latest instructions being as per the directive of the APERC in Tariff Order 2008-09 at paragraph 231. This para reads to the effect that in times of shortage, the APERC, if required, may fix the floor and ceiling prices for short-term power purchases, the two guiding principles therefor being requirement/need of power and the competitiveness of the price. Given this background, the APERC is entirely correct in taking the stand that it has.

32. Reliance is placed by Sri O. Manohar Reddy, learned standing counsel, on Tata Power Company Ltd. and Another Vs. Reliance Energy Ltd. and Others, and more particularly, para 105 thereof:

105. Section 86 provides for the functions of the State Commission, clause (a) of sub-section (1) whereof empowers it to determine the tariff for generation, supply, transmission and wheeling of electricity. Clause (b) empowers it to regulate electricity purchase and procurement process of distribution licensees. Inevitably it speaks of PPA. PPA may provide for short-term plan, a mid-term plan or a long-term plan. Depending upon the tenure of the plan, the requirement of the distribution licensee vis-?-vis its consumers, the nature of supply and all other relevant considerations, approval thereof can be granted or refused. While exercising the said function necessarily the provisions of Section 23 may not be brought within its purview. While even exercising the said power the State Commission must be aware of the limitations thereto as also the purport and object of the 2003 Act. It has to take into consideration that PPA will have to be dealt with only in the manner provided therefor.

33. Significantly, in the above case, the Supreme Court was not concerned with the interplay between the proviso to Section 62(1)(a) and Section 86(1)(b) of the Act of 2003 and the observations extracted supra do not support the APCPDCL at all. Further, Section 63 of the Act of 2003 makes it clear that notwithstanding the provisions of Section 62, the Commission shall adopt the tariff, if such tariff has been determined through a transparent process of bidding in accordance with the guidelines issued by the Central Government. That being the situation obtaining in the present cases, the APERC is vindicated in stating that once such bidding process resulted in fixation of a rate less than the ceiling rate fixed by it, it had no role to play in the matter.

34. The APCPDCL also seeks to justify its actions on the ground that the generating companies which sell power to the contracting trading licensees in these cases availed gas allocation on par with other IPPs and would therefore be bound to sell power at the same rate applicable to such IPPs. However, there is no legal or logical basis for the same. Admittedly, the other IPPs which availed gas allocation on par with the generating companies in these cases entered into long term PPAs with the DISCOMs. Such was not the case with Lanco Kondapalli Power Limited, Hyderabad, or GMR Energy Limited, Bangalore, which did not even enter into medium term PPAs, let alone long term PPAs, with the APCPDCL or any other DISCOM. Though the letter dated 22.03.2012 of the Government of India cautioned that gas supply to these two generating companies would be stopped after 30.05.2012 in the event there was a violation of the conditions specified therein, the fact remains that the gas supply was not stopped. Having continued supply of gas to these two power generating companies and having failed to enter into medium term/long term PPAs with them, the APCPDCL chose to entertain the bids submitted by the trading licensees, who purchased their power from these two generating companies, for short-term power purchase at

rates permissibly different from those applicable to medium and long term power purchases. There is no explanation forthcoming from the APCPDCL as to why it adopted this course of action.

35. It is also a fact that concluded contracts emerged from this process between the APCPDCL and the trading licensees, embodying specific rates at which power was to be purchased, within the ceiling rate fixed by the APERC. As the APERC has rightly disowned responsibility in terms of fixing the individual tariff in these two cases, the argument of the APCPDCL that such determination and fixation is awaited no longer survives. Any issue that the APCPDCL has with the generating companies with regard to violation of undertaking(s) given or conditions imposed by the Government of India would have to be taken up with them independently and the same cannot form the basis for re-writing the terms of the concluded contracts entered into by it with the trading licensees which are independent concerns having separate legal identity and status.

36. Though a controversy is also raised with regard to allocation of gas to the two generating companies in these cases and as to whether any subsidy was extended to them, the same is not germane to the present dispute. Irrespective of whether these generating companies availed the alleged subsidized allocation of gas, the ineluctable fact is that these companies were not parties to the subject contracts for short-term power purchase and only the trading licensees, which purchased power from them, figured as parties thereto. That being so, it would not be open to the APCPDCL to club the trading licensees and the generating companies as one, overlooking their independent identities and legal status, and initiate action en-bloc against them by desultorily re-writing the settled contracts. Being a State instrumentality, the APCPDCL is a trustee of public interest and constitutional values which would, in consequence, demand of it fairness in action.

37. In the words of Aharon Barak. J., President of the Supreme Court of Israel, in *Zarzevsky V/s. Prime Minister* 45 (1) P.D. 749, 841:

Trusteeship requires fairness, and fairness requires integrity, relevance, equality, and reasonableness. This list of principles derived from the position of trusteeship is not closed, and the list of values derived from the duty of fairness is not fixed. Values and principles, by nature, are on the one hand stable and on the other hand evolving. They are sown in the soul of the nation and are not subject to passing trends. They are full of vitality, and they evolve to provide fitting solutions to new problems.

38. Elucidating further on this principle in "The Judge in a Democracy" authored by him, the learned Judge states:

Case law recognizes a long line of secondary principles derived from the trusteeship of public officials and their duty to act with fairness. Here is a partial list: the duty to act reasonably, the duty not to discriminate among persons, the duty to refrain from acting arbitrarily, the duty to act in accordance with the rules

of natural justice, the prohibition against being subject to a conflict of interests, the duty to respect promises and agreements, the duty to refrain from making political appointments, the duty to disclose political agreements, the duty to disclose public information to the individual, the duty to act with professional ethics, the duty to take distributive justice into account.

(Emphasis added)

39. The State and its instrumentalities are avowed role-models for the citizens and are expected to conform to certain standards in their actions and conduct. One such expected standard is that they would honour their contractual commitments and abide by the settled terms of their contracts. Variation of a concluded contract would be legally permissible only with the consent of both contracting parties and would ordinarily be before the performance of contractual obligations by either of them. Unilateral modification of contractual terms subsequently by one contracting party to the detriment of the other would be against the principle of consensus ad idem - the very foundation of a contract. The action of the APCPDCL in unilaterally reducing the tariff at which it agreed to purchase power on short-term basis from the trading licensees in these two cases therefore militates against the standards of fair-play in action expected of a State instrumentality and the basic tenets of contract law. Further, such variation, even according to the APCPDCL, was attributable to grounds wholly extraneous to the contracting parties as the reduction of the price was allegedly necessitated by issues relating to the two generating companies which were not even parties to the subject contracts.

40. On the above analysis, this Court holds that the impugned letters dated 07.02.2013 issued by the APCPDCL and the recoveries of differential amounts proposed thereunder are without the sanction of law and are wholly unsustainable. The Writ Petitions are accordingly allowed. W.P. M.P. Nos. 5142 and 5201 of 2013 in these writ petitions shall stand closed in the light of this final order. In the circumstances, there shall be no order as to costs.