

Before the Karnataka Electricity Regulatory Commission, Bangalore

Dated this 9th day of May, 2003

Present

- 1. Sri. Philipose Matthai - Chairman**
2. Smt. Nalini M.K. Menon - Member

Case No.RP - 03/2003

- 1) Karnataka Power Transmission Corporation Ltd.,
'Kaveri Bhavan',
K.G.Road,
Bangalore -2
- 2) Bangalore Electricity Supply Co. Ltd.,
CFC Building, Nrupathunga Road,
BANGALORRE - 560 001
- 3) Mangalore Electricity Supply Co. Ltd.,
PB No. 920, Maroli, Kulshekar PO,
Mangalore
- 4) Hubli Electricity Supply Co. Ltd.,
Navanagar,
HUBLI.
- 5) Gulbarga Electricity Supply Co. Ltd.,
Main Road,
Gulbarga.

(all through their Managing Directors)

- **Applicants**

(By Sri K.N.Shrivastava , M.D. KPTCL for App. No.1)
(By Sri. S.S.Naganand Adv. for Applicants 2 to 5)

This is a Review Petition jointly filed by the above Companies, under section 10 of the Karnataka Electricity Reforms Act 1999 (Shortly 'Act' hereinafter), seeking review of the Tariff Order 2003 passed by this Commission on 10th March 2003. It is stated that Applicants 2 to 5 have authorized Applicant No.1 to file this joint petition on their behalf and the petition is piloted by the Applicant No.1.

2. The applicants had filed applications before this Commission seeking fixation of the electricity tariff for the financial year 2003-04. Based on the tariff filings of the applicants and the information made available by them, the Commission passed a common order applicable to all the 5 Companies, through Tariff Order -2003 dated 10th March 2003.

3. The petition seeks re-consideration of the Tariff Order 2003 on the following grounds:

- (i) Hydro - Thermal Mix
- (ii) Non consideration of revenue gap on account of short fall of hydro generation in FY-03.
- (iii) Disallowance of interest cost
- (iv) Disallowance of MNES power purchase
- (v) Transmission & Distribution Losses
- (vi) Quality of power supply

4. This petition came up for hearing on 2nd May 2003. Sri. K.N.Shrivastava, Managing Director of KPTCL argued the case for Applicant No.1, whereas Sri S.S.Nagananda, learned Counsel argued the petition for Applicants 2 to 5. At the outset, the Commission asked the Applicants that they should address their arguments only in regard to the maintainability of the review petition under Order 47 Rule 1 of the Code of Civil Procedure, 1908. They were informed that the Commission would hear and consider the merits of the various grounds urged

in the petition after it decides the issue of invoking the power of review by the Applicants, under the Act.

5. Sri K.N.Shrivastava, Managing Director of KPTCL, who argued the case for KPTCL, only dealt with the merit of the grounds enumerated in the petition. The Commission repeatedly asked Mr. Shrivastava to limit his arguments to the legal issues and not to argue the merits of the case. However, he continued to narrate the merits of the grounds of the review and the difficulties encountered by KPTCL. At the end after stating that he cannot argue on any legal aspect like admissibility, he submitted that Sri.Nagananda, learned counsel for Escoms, would argue on the legal aspects of the case. Since Sri Srivatsava argued only on the merits of the case, the points mentioned by him are not relevant for the admissibility of this petition and hence they have not been dealt here.

6. Sri S.S.Nagananda, learned counsel for the Applicants 2 to 5, stated that he would confine himself to the legal issues of the petition. He contended that the Licensees provided the Commission with certain information regarding the hydro-thermal mix expecting that those facts will lead to certain assumptions, but the Commission came to a different assumption and that led to different decision of the Commission. He argued that this is an error apparent on the face of the record. He further contended that certain vital data regarding hydro-thermal mix etc, which was not available at the time of tariff filing and at the time decision was taken by the Commission is now available and the applicants want to place it before the Commission since it has a considerable financial implication and it would change the course of the decision of the Commission. He pointed out that these facts couldn't be placed before the High Court, in case they preferred an appeal, because the appeal would be confined to only legal issues. He maintained that the new data that is available after the Tariff Order could only be looked into by the Commission, though there is a remedy of appeal against the Tariff Order. He pointed out that the shortfall in the rainfall, shortfall in the hydro generation, change in the hydro -thermal mix was not available either with the licensee or the Commission at the time of decision

making. He further argued that the Civil Procedure Code could be applied to the extent required, since the Commission is not a Court and that it is a dynamic body that looks into the dynamics of the industry. He maintained that the law does not come in the way of the Commission in a factual situation and if the subsequent event changes the decision then such subsequent event has to be considered by the Commission. He stated that there are rulings of the Supreme Court to that effect and he would produce them. He said that the Commission need not be confined to Order 47 of the CPC and there is no legal impediment for the Commission to look into the changed situation.

7. We have carefully considered the arguments placed before us. The learned Counsel for the Petitioners was of the view that the Commission is not a Court and that it need not be confined to Order 47 of the Civil Procedure Code and that there is no legal impediment for the Commission to look into the subsequent events after its decision etc.. We feel it is necessary to extract Section 10 of the Act. It reads as below:

" 10. Powers of the Commission. - (1) The Commission shall, for the purposes of any inquiry or proceedings under this Act, have the powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (Central Act 5 of 1908), while trying a suit in respect of the following matters, namely -

- (a)
- (b) the discovery and production of any document or other material object producible as evidence;
- (c)
- (d)
- (e)
- (f)
- (g)
- (h) review of its decisions, directions and orders.

....."

It is a settled position of law that the power of review of its orders or decisions is not an inherent power of any statutory authority and must be expressly conferred by the statute. The K.E.R. Act 1999 does not refer to the Commission's power of review except in the above quoted Section. When this is so, that provision of law would have to be strictly applied. This is especially true because the Section starts with making the provisions thereof applicable to "any inquiry or proceedings under the Act", a phrase of widest sweep that definitely comprehends the proceedings leading to the issue of the Tariff Order within its scope. The Commission is not at liberty to follow any procedure to suit the convenience of the parties in litigation before it. Therefore, we cannot be guided by the suggestion of the learned Counsel for the petitioners not to confine ourselves to the CPC. It is our view that Order 47 Rule 1 of the Civil Procedure Code 1908 determines the admissibility of any petition seeking review of our decisions and orders and that it is the mandatory provision of law in such cases.

8. Order 47 Rule 1 of the Civil Procedure Code prescribes the following conditions precedent to any party invoking the power of review:

(a) there must be discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the order was made;

(b) or on account of some mistake or error apparent on the face of the record;

(c) or for any other sufficient reason.

The plain reading of the averments of the review petition shows that there is no discovery of any new and important matter or evidence that could not be produced by the licensees at the time when the order was made. What is being urged before us, is that data on shortfall in rainfall, shortfall in hydro generation, change in hydro-thermal mix that was not available either with the licensees or the Commission at the time of decision-making, is now available. The learned Counsel argued that the subsequent events, which are capable of changing the

course of a decision, should be considered by the Commission, by showing dynamism in its action and decisions. The learned Counsel did not produce any rulings in support of his arguments. However, we would like to rely upon the ruling in the case of *G S Gupta v. Basheer*, (A 1977 Kant 193), wherein the court held that "Happening of a subsequent event is not a ground for review." Though the Commission is very much concerned about the problems of the licensee, it cannot brush aside the law and exercise unbridled powers in the name of dynamism. In any event, the Commission is not convinced by the argument that new data regarding rainfall, hydro availability etc., have become available subsequent to the Commission's order. The Tariff Order was issued on 10th March 2003. The first filing by the licensees was made on 30th November 2002, and additional information was submitted by the licensees throughout the period when the Commission was seized of the matter, and the revised filings by the KPTCL as well as the ESCOMs were filed as late as in February 2003. The Commission also had the benefit of KPCL's hydel generation forecast submitted to the Central Electricity Authority in February 2003. It is well known that rainfall in the catchments areas of the hydro projects in Karnataka takes place, in the main, between June and September each year. There are very negligible inflows thereafter, and almost nil inflows beyond January. As far as the year 2002-03 is concerned, no additional information on rainfall, hydro availability etc. could be available now that was not or could not have been made available in February 2003. As far as the year 2003-04 is concerned, no definite information exists with anybody, as the learned Counsel for the ESCOMs himself readily admits. This argument of the learned Counsel for the ESCOMs is therefore, clearly without any substance. In any case, no such data has been presented in the petition. All that has been stated in the petition is a plea for approving the adjustment formula put forth in the tariff filing, a matter that has already been considered and not accepted by the Commission, while passing Tariff Order 2003.

9. Sri Nagananda contended that the licensees supplied information and data and expected the Commission to arrive at certain assumptions and therefore different assumptions by the Commission become an error apparent

on the face of the record. In other words, what Sri Nagananda is pointing out is, what in his opinion is, an erroneous judgment of the Commission and not an error apparent on the face of the record. If the licensees expect that the data produced by them should lead to a particular conclusion that is different from the one arrived at by the Commission, that would certainly not constitute an error on the face of the record. If the licensee is aggrieved by the conclusions of the Commission, the proper remedy is only an appeal.

10. There was a fervent appeal by the Managing Director of the KPTCL for resolving their financial problems by considering the data now available and review the Tariff Order 2003. However, no new data has been made available, as has been explained above. It would be that after the monsoon of 2003, additional data might become available that could be a ground for revision of tariffs. As far as the financial year 2002-03 that has just got over, is concerned, the petition concedes that the shortfall in hydro generation has been considered by the Commission at Table 105 of the Order. No new information is provided. The Commission, therefore, made a clear provision in Tariff Order 2003, on how it would deal with the actuals for FY 03. In Para 11.1.4 of the Tariff Order 2003, the Commission has stated the following:

"4. The Commission notes that the revenue and expenditure figures furnished in the filing are estimates and the actuals may be different. It would have been ideal to assess the revenue gap after the actual figures are available at the end of the year. However the Commission feels that it would be advisable to indicate in advance the approach of the Commission to the treatment of the revenue gap at the year-end. In the following sections, the Commission provides an indication on how the revenue gap would be considered and how the pass through component would be decided.

5. The total sales by all ESCOMs together is 19656 MU for FY 03 and sales by KPTCL to Hukkeri Society is 137 MU, thus the total sales during the year is 19793 MU. By applying normative loss level of 28%, the input requirement should have been 27490 MU. The total power purchase projected by KPTCL for FY 03 is 28904

Mu. Thus an additional input of 1414 MU has been necessitated by the ESCOMs by not following the efficiency norms prescribed by the Commission. The actual position of the ESCOMs for FY 03 will be only known after the end of the year. With the available information, the Commission is not able to determine with definiteness the additional burden that can be justifiably passed on to the consumers on account of the revenue gap incurred by ESCOMs for FY 03. However, the ESCOMs may approach the Commission as and when the FY 03 actual figures are available and the Commission will review the same and take appropriate decision after duly considering the efficiency norms and other parameters fixed in the earlier Tariff Orders,"

11. As far as the position for 2003-04, after the monsoon is over, is concerned, the Commission has stated as follows in Para 3 of Section 5.2.4 relating to Mix Adjustment Formula:

" 3. The Commission appreciates the intension of KPTCL in proposing this formula to make good the difference is the power purchase cost. The lower hydro availability than approved by the Commission may necessitate purchase of high cost energy by KPTCL, which will increase power purchase cost. The extra amount will have to be raised by KPTCL, which may also involve payment of interest till the extra cost is realized by way of tariff from consumers. KPTCL may approach the Commission during the first week of October 2003 when the hydro inflow position would be largely known with details of extra requirement of funds for power purchase. The Commission will examine the proposal in terms of approved power purchase quantity, approved T & D loss and the shortfall in hydro generation and pass appropriate orders to safeguard KPTCL's finances against the risk of poor monsoon. Needless to say, KPTCL should approach the Commission even where the actual inflow is more than the values used by the Commission for predicting the hydro availability so that the benefit of better than normal availability can also be passed on to consumers."

12. The petition in the present form does not satisfy the parameters prescribed in Order XLVII Rule 1 of the Civil Procedure Code, 1908. The applicants and their Counsel have not been able to convince us about the admissibility of

their petition and they cannot invoke the power of review. The review petition, therefore, is dismissed as not admissible. It is ordered accordingly.

Sd/-
(Philipose Matthai)
Chairman

Sd/-
(Nalini M.K. Menon)
Member