

No.N/100/11

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,
BANGALORE**

Dated : 30th November, 2012

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|-------------------------------|----------|
| 1. Sri M.R. Sreenivasa Murthy | Chairman |
| 2. Sri Vishvanath Hiremath | Member |
| 3. Sri K. Srinivasa Rao | Member |

OP No.47/2011

BETWEEN :

GMR ENERGY LIMITED
No25/1, 3rd Floor, Skip House
Museum Road
BANGALORE-560 001

[Represented by M/s. Shridhar Prabhu Associates, Advocates]

..

Petitioner

AND

- 1) Government of Karnataka
By its Principal Secretary
Department of Energy
Vikasa Soudha
Dr.Ambedkar Veedhi
BANGALORE-560 001
- 2) Karnataka Power Transmission Corporation Limited
K.R. Circle
BANGALORE-560 009
- 3) State Load Despatch Centre – Karnataka
Ananda Rao Circle
BANGALORE-560 009
- 4) Power Company of Karnataka Limited
Cauvery Bhavan
K.G. Road
BANGALORE-560 001
- 5) Bangalore Electricity Supply Company Limited
K.R. Circle
BANGALORE-560 001

- 6) Chamundeshwari Electricity Supply Corporation Limited
No.927, L.J. Avenue
New Kantharaj Urs Road
Saraswathipuram
MYSORE – 570 009
- 7) Hubli Electricity Supply Company Limited
Navanagar
HUBLI – 587 117
- 8) Mangalore Electricity Supply Company Limited
Paradigm Plaza
A.B. Shetty Circle
MANGALORE-575 001
- 9) Gulbarga Electricity Supply Company Limited
Station Road
GULBARGA -585 101
- 10) GMR Energy Trading Limited
No.25/1, 3rd Floor, Skip House
Museum Road
BANGALORE-560 001 ..

Respondents

*[R2 to R9 represented by M/s. Justlaw, Advocates
R10 represented by Shri D. Manjunatha Rao, Advocate]*

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ORDER**PER SHRI M.R. SREENIVASA MURTHY, CHAIRMAN, KERC AND****SHRI VISHVANATH HIREMATH, MEMBER, KERC :**

1) The Petitioner is a Generating Company, which had a barge-mounted Naphtha-based Power Plant at Mangalore. In October, 2008, Respondent No.4 had called for Tenders on behalf of Respondents 5 to 9 for supply of 700 Mega Watts of electricity for the period from November, 2008 to January, 2009. The Petitioner, through Respondent No.10, which is a Trader, had participated in the

said Tender. Consequent to acceptance of its Bid, the Petitioner was given a Letter of Intent (LoI) on 14.11.2008 to supply electricity at the rate of Rs.8.85 per Unit, between 1.12.2008 and 31.1.2009. During the existence of the said LoI, the Government of Karnataka issued two Orders dated 30.12.2008 and 1.1.2009 in exercise of the powers conferred on the Government under Section 11(1) of the Electricity Act, 2003 (hereinafter referred to as the 'Act'), directing all the Generating Companies to generate and supply electricity to the State Grid at the rate of Rs.5.50 per KWH.

2) The validity of the Government Orders referred to above, was questioned by the Petitioner in Writ Petition Nos.590 & 591 of 2009 before the Hon'ble High Court of Karnataka, on various grounds. The Division Bench of the Hon'ble High Court of Karnataka dismissed the Writ Petitions on 26.3.2010, upholding the validity of the Government Orders and directing the Petitioner to approach the competent Authority for adjudication of its rights, in accordance with law.

3) The Petitioner and others have filed Special Leave Petitions (SLPs) against the above Order of the Hon'ble High Court of Karnataka before the Hon'ble Supreme Court in S.L.P.Nos.12629 and 12630 of 2010. It is reported that these SLPs have been admitted by the Hon'ble Supreme Court on 28.4.2011, but no Interim Order staying the operation of the Order of the Hon'ble High Court has been granted. However, at the instance of the Petitioner, the Hon'ble Supreme Court has, on 1.9.2010 granted liberty to the Petitioner to approach this Commission

and has also permitted the Petitioner for withdrawing Prayer No.2 made in the Appeals, at its own risk.

4) It is submitted by the Petitioner that pursuant to the liberty granted by the Hon'ble Supreme Court, and the observations of the Hon'ble High Court of Karnataka in W.P.Nos.590 and 591 of 2009 that a Generating Company, which has suffered adverse financial impact, if any, may approach the Commission under Section 11(2) of the Electricity act, 2003, the Petitioner has filed the present Petition before this Commission, seeking the offsetting of the adverse financial impact suffered by it on account of the Government Orders issued under Section 11(1) of the Act.

5) It is submitted by the Petitioner that on account of the directions issued by the Government of Karnataka under Section 11(1) of the Electricity Act, 2003, it was forced to supply electricity to the State Grid only and had to receive the price fixed by the Government of Karnataka at Rs.5.50 per Unit. However, the price fixed by the Government is less than the commercial rate and has resulted in an adverse financial impact on it. It is submitted that according to the Letter of Intent dated 14.11.2008 issued on behalf of the Respondents by Respondent No.4 – Power company of Karnataka Limited (PCKL), it could have realized Rs.8.85 per Unit for the electricity supplied for the month of January, 2009 and difference between Rs.8.81 and Rs.5.50 comes to Rs.44.94 Crores, and for the months of February, 2009 to May, 2009, it could have realized the rate prevailing in the market, which would have additionally fetched it Rs.121.57 Crores. This

needs to be offset by this Commission as per Section 11(2) of the Electricity Act, 2003.

6) It is also submitted by the Petitioner that once an Order is made under Section 11(1) of the Electricity Supply Act, 2003, the Petitioner gets a right under Section 11(2) of the Act for offsetting the adverse financial impact suffered by it, even though the word 'may' is used in the said provision. In support of this contention, that 'may' shall have to be read as 'shall', and the right to get the adverse financial impact offset by the Commission accrues to the Petitioner the moment the Government exercises its powers under Section 11(1) of the Electricity Act, 2003, the learned Counsel for the Petitioner has cited several Judgments.

7) The Respondents have appeared through their Counsel and have filed detailed Statement of Objections on 26.4.2012.

8) It is submitted on behalf of the Respondents that the claim of the Petitioner has to be rejected firstly on the ground that the Petitioner has approached this Commission belatedly, i.e., after a lapse of more than three years from the date of the Government Orders referred to above. Secondly, this Commission, in OP No.08/2009, has already approved the rates fixed by the Government of Karnataka at Rs.6.50 per Unit and in the absence of challenge to the said Order, it has become final and therefore the Petitioner cannot seek separate determination of adverse financial impact suffered in its case. Further,

it is submitted that the Petitioner had a Power Purchase Agreement (PPA) till 2008 with the Respondents, and through the said PPA, it has recovered the entire capital cost of the Plant and it can recover only the variable cost of Rs.4.241 per Unit towards fuel, etc., which is less than the rate fixed by the Government at Rs.5.50 per Unit. Therefore, the Petitioner cannot contend that it has suffered adverse financial impact on account of the Government Orders, which needs to be offset. The Government Orders being Statutory Orders under Section 11 of the Electricity Act, 2003 issued in extraordinary circumstances, the Petitioner is bound by them. It is further submitted that a direction under Section 11(1) of the Act was only to the Generators and therefore the Trader cannot complain of adverse financial impact and seek offsetting the same.

9) It is also submitted by the Respondents that the Petitioner, in violation of the Government Orders, short-supplied the electricity to the extent of 335.60 Million Units. Therefore, the Petitioner has become liable to compensate the Respondents for the short-supply in a sum of Rs.223,53,42,270/-. Further, it is submitted that for violation of the Government Orders, the Petitioner is liable to be proceeded under Sections 142 and 146 of the Electricity Act, 2003.

10) We have considered the submissions made in the Petition, the Rejoinders and the Statement of Objections, and the written submissions. We have also heard the counsel appearing for both the parties.

11) From the material placed before us, it is noticed that the Petitioner through Respondent No.10 was supplying electricity to the Respondents at the rate of Rs.8.85 per Unit pursuant to the Letter of Intent (Lol) dated 14.11.2008, issued by Respondent No.4 – Power Company of Karnataka Limited (PCKL) on behalf of the Respondent Nos.5 to 9. The Government of Karnataka, in exercise of its powers conferred under Section 11(1) of the Electricity Act, 2003, issued two Orders – one dated 30.12.2008 and the other dated 1.1.2009. In the Government Order dated 30.12.2008, all the Generating Companies operating within the State of Karnataka were directed to generate electricity to the maximum exportable capacity and supply the same to the State Grid, i.e., to all the Distribution Companies. In the Government Order dated 1.1.2009, the Petitioner was, in addition to the mandate given in the Order dated 30.12.2008, directed to supply electricity at the rate of Rs.5.50 per Unit, as against the rate provided in the Lol. The validity of these two Government Orders was challenged in Writ Petition Nos.590 and 591 of 2009 by the Petitioner, before the Hon'ble High Court of Karnataka unsuccessfully. The Division Bench of the Hon'ble High Court of Karnataka, by its Order dated 26.3.2010, dismissed the Writ Petitions, upholding the validity of the Government Orders.

12) The Petitioner, against the Order of the Division Bench of the Hon'ble High Court, has filed Special Leave Petitions (SLPs) in S.L.P.Nos.12629 and 12630 of 2010 before the Hon'ble Supreme Court. It is reported that these SLPs have been admitted and converted into Civil Appeals and pending decision. No stay of the Order of the Hon'ble High Court is also granted.

13) During the pendency of the SLPs before the Hon'ble Supreme Court, the Petitioner has come up with the present Petition, seeking offsetting of the adverse financial impact suffered, according to it, under Sub-Section (1) of Section 11 of the Electricity Act, 2003.

14) The Issues that arise for consideration and decision in the light of the pleadings of the parties are :

- (1) Whether the Petitioner is entitled to seek offsetting of the adverse financial impact under the provisions of the Electricity Act, 2003?
- (2) Whether the Petitioner is entitled to a sum of Rs.166.75 Crores towards adverse financial impact?
- (3) Whether the Respondents 2 to 7 and 9 can make a prayer for issuance of a direction to the Petitioner to pay a sum of Rs.223,53,42,270/- to Respondent No.5, in view of non-compliance of the Government Orders by the Petitioner?

ISSUE No.1 :

15) It is submitted by the Petitioner that under Section 11(1) of the Electricity Act, 2003, it was mandated to supply electricity only to the State Grid. Consequently, it has a right to seek offsetting the adverse impact suffered by it.

16) For considering the contentions of the Petitioner, we deem it necessary to extract Section 11 of the Electricity Act, 2003, as under :

“11. Directions to generating companies

(1) The Appropriate Government may specify that a generating company shall, in extraordinary circumstances operate and maintain any generating station in accordance with the directions of that Government.

Explanation : For the purposes of this section, the expression "extraordinary circumstances" means circumstances arising out of threat to security of the State, public order or a natural calamity or such other circumstances arising in the public interest.

(2) The Appropriate Commission may offset the adverse financial impact of the directions referred to in sub-section (1) on any generating company in such manner as it considers appropriate."

17) On reading of Section 11 of the Electricity Act, 2003, and in particular Section 11(2), we have no manner of doubt that a Generating Company, which suffers adverse financial impact because of the directions issued under Sub-Section (1) of Section 11 of the Act, may seek offsetting of the same by the Appropriate Commission in such a manner as it considers appropriate.

18) The 2nd Respondent – Karnataka Power Transmission Corporation Limited (KPTCL) has also submitted in the Objections filed before the Hon'ble High Court of Karnataka (which is noticed at Paragraph-25 of the Order dated 26.3.2010 of the Hon'ble High Court passed in W.P.Nos.590 and 591 of 2009), that :

“... The petitioners cannot take exception to the same. At any rate, petitioners cannot be aggrieved by such action, as the

generator will be appropriately compensated towards adverse financial impact as specified in Section 11(2) of the Act. ..."

19) The same was the submission made by the learned Senior Counsel appearing for the Respondents, which is noted by the Hon'ble High Court of Karnataka at Paragraph-38 of its Order dated 26.3.2010. It was submitted that :

"... Even if the price specified is less as contended by the petitioners and if it were to have any adverse financial impact on them, Section 11(2) provides for mechanism to remedy such adverse financial impact. ..."

20) The Hon'ble High Court of Karnataka at Paragraph-114 of its Order dated 26.3.2010 has also observed that :

"...Even otherwise Section 11(2) comes to the rescue. If the impugned orders have any adverse financial impact on any generating company, the Appropriate Commission under the Act is empowered to offset such adverse financial impact in such manner as it considers appropriate. Therefore, a remedy is provided to a generating company to approach the Appropriate Commission and get the adverse financial impact offset in accordance with the Act. ..."

21) Further, the Hon'ble High Court, in the very same Paragraph-114, has proceeded to direct that :

"... However, if and when the Petitioners were to approach the Competent Authority either under the Act or in any other forum for

adjudication of the rights in this regard, the said authority shall decide the rights of the parties on its merits and in accordance with law, without being in any way influenced by the observations made by this Court in this order. That would meet the ends of justice."

22) The Hon'ble Supreme Court, in the Appeal filed by the Petitioner against the Order of the Hon'ble High Court of Karnataka, has not granted any stay.

23) In view of the above, we are of the opinion that the present Petition filed by the Petitioner is maintainable under Section 11(2) of the Act and this Commission has to consider the claim of the Petitioner that it has suffered adverse financial impact, and if accepted, it has to be offset by this Commission. In view of this conclusion, in our view, it is not necessary to refer the various Judgments cited by the Petitioner's Counsel in support of its right to claim offsetting of the adverse financial impact suffered by it.

24) The contention of the Respondents that the Petition has to be rejected on the ground of delay, in our view, cannot be accepted, in view of the specific directions issued by the Hon'ble High Court of Karnataka at Paragraph-114 of its Order dated 26.3.2010 that, "if and when the Petitioners were to approach a Competent Authority either under the Act or in any other forum, for adjudication of the rights in this regard, the said authority shall decide the rights of the parties on its merits and in accordance with law" [*Emphasis supplied*].

25) In the light of the above, we conclude that the Petitioner has a right to seek offsetting of the adverse financial impact alleged to have been suffered by it on account of the exercise of the powers by the Government of Karnataka under Section 11(1) of the Electricity Act, 2003. Accordingly, Issue No.1 is answered in favour of the Petitioner.

ISSUE No.2 :

26) The claim for offsetting the adverse financial impact is submitted by the Petitioner in two parts – one for January, 2009 and the remaining for the period from February, 2009 to May, 2009.

27) For the month of January, 2009, it is submitted by the Petitioner that it had a Letter of Intent for supply of electricity by the Respondents-ESCOs at the rate of Rs.8.85 per Unit (fixed after participating in a Bid) and pursuant to the said Letter of Intent, it has supplied electricity to the ESCOs at Rs.8.85 per Unit. But for the Government Orders, it would have realized the same price for the month of January, 2009. According to the learned Counsel for the Petitioner, offsetting the adverse financial impact for January, 2009 is the difference between the rate of Rs.8.85 accepted in the Letter of Intent and the rate of Rs.5.50 fixed in the Government Orders, and this Commission has to adopt the principles of restitution. In support of this contention, the Petitioner's Counsel also relied upon the observations of the Hon'ble High Court of Karnataka at Paragraph-84 of the

Judgment dated 26.3.2010 passed in W.P.Nos.590 and 591 of 2009 filed by the Petitioner.

28) Per contra, it is contended on behalf of the Respondents that the Petitioner cannot rely on the Letter of Intent, as the said Letter of Intent gets superseded by the statutory orders issued by the Government of Karnataka under Section 11(1) of the Electricity Act, 2003 and the rates fixed by the Government therein will prevail over the contracted rate. Further, it is submitted by the Respondents that the rate of Rs.5.50 per Unit fixed by the Government of Karnataka was adequate, considering the fact that the Petitioner, under the PPA it had earlier with the Respondents, had already recovered the entire fixed costs and it was only incurring Rs.4.241 per Unit towards the variable cost for generation of electricity.

29) The Hon'ble High Court of Karnataka, while dealing with the meaning of 'adverse financial impact', has held at Paragraph-84 that:

"This meaning is implied from the words used in sub-section (2) of Section 11. It provides that the appropriate Commission may offset the adverse financial impact of the directions referred to in sub-section (1) on any generating company in such manner as it considers appropriate. If the direction given by the Government is only to understand as operate and maintain a generating station and not supply of electricity, the generating company cannot complain of any adverse financial impact, because the electricity so supplied is supplied to its customer or a licensee for the marked price agreed to between the parties. Similarly, no such direction

requires to be given by any Government if it is for commercial supply. Adverse financial impact means the electricity generated by virtue of the direction issued by the Government is not fetching the generating company the price which it would have fetched in the event of their supplying to the licensee or a customer i.e., less than the same. It has adverse financial impact. Their interest is protected under the said provision. It implies if the electricity so produced is supplied to the Government at a price lesser than the commercial price, the said provision intends to protect the generating company from such adverse financial impact. The supply of electricity in pursuance of the direction given by the Government could be clearly gathered from the aforesaid provision. What is intended is appropriate compensation as a consequence of non-commercial supply as considered appropriate." [Emphasis supplied]

30) This Commission had an occasion to deal with the issue of offsetting the adverse financial impact of the Generating Companies, who had supplied electricity as per the statutory Orders issued under Section 11(1) of the Electricity Act, 2003, in OP No.16/2010. After considering the meaning of 'adverse financial impact' as contemplated under Section 11(2) of the Electricity Act, 2003, and duly following the observations of the Hon'ble High Court of Karnataka in its Order dated 26.3.2010 passed in W.P.Nos.590 and 591 of 2009 filed by the Petitioner, this Commission, by its Order dated 24.3.2011, held as under :

"18. We have considered the rival contentions as summarized above. In our view, while interpreting the phrase of 'adverse financial impact' used under Section 11(2) of the Electricity Act, 2003, we have to keep in mind that the entire economics of a

generating company depends upon the revenues received by it over a long period of time and not for a few months only. Unless a generating company has a long term power purchase agreement, its revenues do fluctuate depending upon the price for power prevailing in the market for short term transactions. The Hon'ble Division Bench of the Karnataka High Court at Para 84 of its judgment in Writ Petition No.590 & 591 of 2009 has observed that "Adverse Financial Impact means the electricity generated by virtue of direction issued by the Government is not fetching the generating company the price what it would have fetched in the event of their supplying to the licensee or customer, i.e., less than the same".

19. *In the light of the observations of the Hon'ble High Court cited above, as also the decision of this Commission in OP No. 24/2008, we have come to the conclusion that offsetting adverse financial impact of a generator would mean fixing a rate keeping in view both the revenue that a generator could have realized by selling the power in the short term market, subject to the said rate covering the costs of generation, so that the generating company does not incur a loss. In these cases, we have found that the estimates of the cost of generation were vary from one company to another as also one category of generators to another. We have therefore come to the conclusion that for the present purpose, it would be adequate if the rates determined are generally what generating companies could realize from the market when they are generating power without being compelled by Orders under Section 11 of the Act. The rates prevailing in the market during the relevant period therefore become relevant for our consideration.*

20. *The short term power market mainly consists of power traded through licensed traders, and that supplied on the basis of day ahead bids in two power exchanges. We do not think that the prices prevailing in the power exchanges can be the appropriate basis to fix the rates as the quantum of power traded through the exchange is hardly about 5 % of the total power consumed in the country and the rates in the exchange keep fluctuating very frequently. In our view, the price of power supplied through bilateral contracts and traders offers a better indication of the price that a generating company could have realised for its power for short term sales of a few weeks or months. Even these prices vary from month to month. Further, there are costs associated with marketing of power through traders and transmission costs which need to be suitably discounted to arrive at the revenues realized by the generating companies.*

21. *We have looked at the statistics published by CERC relating to short term power transacted through traders during the period between April and June 2010. The average prices during these months were Rs.5.68 in April, Rs.6.26 in May and Rs.5.57 in June 2010 for energy supplied on round the clock basis. After discounting the marketing expenses and transmission charges involved, it would be reasonable in our opinion to assume that short term sales of power would have resulted in net revenues of about Rs.5.00 per kwh during the above period. We have also seen that the offers received from the traders included a guaranteed price of only Rs.5/- to some of the petitioners in these cases."*

31) The principle adopted by this Commission in the above OP No.16/2010 and connected cases has been upheld by the Hon'ble Appellate Tribunal for

Electricity (ATE), vide its Order dated 3.10.2012 passed in Appeal Nos.141 and 142 of 2011.

32) During the course of arguments, the learned Senior Counsel for the Petitioner has also fairly submitted that what could be considered by this Commission is not the highest market price, but a fair or true market price.

33) The Petitioner, in support of its claim, has relied upon its Agreement with GETL, wherein the Trader has agreed that it would make all efforts to secure the highest possible rate based on market dynamics, which, in other words, means that the Petitioner was expecting, at the most, to get the market Price minus trading margin.

34) In the light of the above Orders of the Hon'ble High Court, the Hon'ble ATE and the Order of this Commission, and the submission made by the learned Senior Counsel appearing for the Petitioner and the Contract with the Trading Company referred to above, we have examined the facts placed before us to determine what is the adverse financial impact suffered by the Petitioner.

35) In our view, the adverse financial impact claimed by the Petitioner for the month of January, 2009 and for the months of February, 2009 to May, 2009, has to be the same and not different, as sought to be made out by the Petitioner.

36) Though it is true that the Petitioner had supplied electricity for the month of December, 2008 at the rate of Rs.8.85 per Unit, as agreed to in the Lol issued by Respondent No.4 – PCKL, the same was modified by the Government of Karnataka in exercise of its powers conferred under Section 11(1) of the Electricity Act, 2003 and the Petitioner was ordered to supply electricity at the rate of Rs.5.50 per Unit. The validity of this Government Order is not before this Commission, nor is this Commission competent to decide on the same under Section 86(1)(f) of the Electricity Act, 2003. Consequently, we have to adopt the principle adopted by this Commission in OP No.16/2010 and connected cases, which has been approved by the Hon'ble ATE, for the months from January, 2009 to May, 2009 in arriving at the adverse financial impact suffered by the Petitioner.

37) We have looked into the rate prevailing in the short-term market during the period from January, 2009 to May, 2009, as published by the Central Electricity Authority (CERC) for bilateral RTC power. The average rates, month-wise, during the said period were as follows :

1)	January, 2009	..	Rs.7.43 per Unit
2)	February, 2009	..	Rs.6.89 per Unit
3)	March, 2009	..	Rs.7.35 per Unit
4)	April, 2009	..	Rs.6.83 per Unit
5)	May, 2009	..	Rs.6.60 per Unit

38) The weighted average price of electricity traded on short-term basis through traders during the period from January, 2009 to May, 2009 works out to Rs.7.00 per Unit. However, the actual price that could be realized by the Generator out of this price will be somewhat less than the nominal price, i.e., after deducting certain expenses like the traders' margin at 4 paise per Unit, charges for Open Access paid to SLDC and 1% to 2% discount often offered on the invoice as normal trade practice. We have seen from a number of Power Purchase Agreements entered between Generators and Traders that the transmission losses from the point of injection to the State Transmission Network by the Generators and up to the delivery point, including inter-State Transmission Network, if any, are borne by the buyers of the energy. Therefore, in our view, the expenses to be deducted from the price mentioned above do not include the transmission losses and transmission charges. While some of the charges stated above vary from case-to-case, we feel that deduction of ten paise per Unit should be adequate to cover such expenses, including the Trader's margin of 4 paise. Therefore, we determine that payment of Rs.6.90 per Unit for the electricity supplied during the disputed period is appropriate to offset the adverse financial impact suffered by the Petitioner. Accordingly, we order that the Respondents shall pay to the Petitioner the difference between Rs.6.90 per Unit and the actual payments already made, i.e., Rs.5.50 per Unit for all the electricity supplied from the date of the Government Order to end of the period mentioned in the Government Order, i.e., 31.5.2009, within 4 (four) weeks from the date of this Order. Issue No.2 is answered in the above terms.

39) As regards the month of June, 2009, we cannot deal with the same in these proceedings, as the Government Order under Section 11(1) of the Electricity Act, 2003, came to an end on 31st May, 2009. Considering that the rate of Rs.5.50 per Unit which the Respondents have paid and supply of electricity was only for six days, we feel the same need not be re-opened.

ISSUE NO.3 :

40) While filing the Statement of Objections, Respondent No.5 has made a claim for compensation for the loss alleged to have been suffered by it on account of lesser supply of electricity by the Petitioner in violation of the Government Order. We have no hesitation in rejecting the claim made by Respondent No.5, as the same is not maintainable in the proceedings initiated by the Petitioner-Generating Company. Under Section 11(2) of the Electricity Act, 2003, it is only the Generating Company which can maintain a Petition for offsetting the adverse financial impact suffered by it and not the beneficiary of the direction under Section 11(1) of the Act. Further, the Government Order did not specify the particular quantum of electricity to be supplied. Therefore, we reject the claim made by Respondent No.5 for compensation. Accordingly, Issue No.3 is answered in the negative.

41) In the light of the above findings, this Petition is allowed in part, in the above terms.

42) However, we make it clear that this Order shall be subject to the final orders to be passed by the Hon'ble Supreme Court in the pending Appeals, as held by the Hon'ble Supreme Court in C.A.Nos.1061-62/1998 in the case of *Union of India –Vs- West Coast Paper Mills Ltd.*

Sd/-

(M.R. SREENIVASA MURTHY)
CHAIRMAN

Sd/-

(VISHVANATH HIREMATH)
MEMBER

ORDER**PER SHRI K. SRINIVASA RAO, MEMBER, KERC :**

Being not in agreement with the views expressed by my colleague-Members in their Order, I am detailing my points in respect of this order as under.

1) This Application / Petition is filed by M/s. GMR Energy Limited under Section 11(2) of the Electricity Act, 2003 (hereinafter referred to as the 'Act'), read with Regulation 21(1) of the KERC (G & C Proceedings) Regulation, 2000, seeking offset of the adverse financial impact of the directives issued under Section 11 of the Act by the Respondent No.1 (R1), viz., Government of Karnataka. The facts in brief are as follows:

a) The Applicant / Petitioner, which is a Generating Company within the meaning of the Act, has established a 220 MW Barge-mounted Project at Tannirbhavi Village, Mangalore, with Naptha as fuel. After the expiry of its Power Purchase Agreement (hereinafter referred to as 'PPA') with erstwhile Karnataka Electricity Board in June, 2008, the Petitioner reportedly was generating and supplying electricity, operating the Project as a Merchant Plant.

b) Arrayed herein as a Proforma Respondent and as Respondent No.10 (R10) is M/s.GMR Energy Trading Limited, a Licensee holding a valid Licence under Section 14 of the Act, to undertake trading in electricity. The

Petitioner had entered into a PPA dated 16.10.2008 (GETL PPA), valid for a period of one year and beyond one year subject to mutual agreement. R10, under the Agreement, had committed to purchase the entire 200 MW of electricity generation from the Project in terms of the GETL PPA.

c) The State Government Orders dated 30.12.2008 and 1.1.2009 (hereinafter referred to as the impugned Orders) issued by R1 (Government Karnataka), in exercise of powers conferred under Section 11(1) of the Act, *inter alia*, directed the Petitioner to supply the entire electricity generated from the Project only to the State Grid at the rate of Rs.5.50 per KWH. The directions pertain to the period between January 2009 to May 2009 and 1st June 2009 to 6th June 2009.

d) Prior to the issue of the directions under the impugned Orders by R1, R10 had participated in a bid process of PCKL, Respondent No.4 (R4), and as finally agreed after negotiations, it supplied energy from the Project of the Petitioner at Rs.8.85, per KWH on RTC basis, during the month of December 2008 on the basis of an Lol dated 14.11.2008 issued by R5, for the period 1.12.2008 to 31.1.2009, and had passed on at Rs.8.81 per KWH to the Petitioner. It is submitted that the Petitioner had also obtained a consent letter from the Rajasthan Power Procurement Centre, Jaipur, dated 24.10.2008 to receive supply of 200 MW from the Petitioner's Project for the entire month of November 2008, on a firm RTC basis, at Rs.8.90 per KWH. Also, for the period 16.11.2008 to 30.11.2008, R10 had supplied 200 MW of

electricity on RTC basis at Rs.8.80 per KWH from the Petitioner's Project to R5 and passed on balance amount to the Petitioner, after deducting its trading margin.

e) It is submitted that till issuance of the impugned Orders by R1, the Petitioner did not have any contractual obligation to supply power to any of the Respondents 2 to 9; on the contrary, it was entitled to supply to R10 and receive the price for the same at the contracted rate. By virtue of the impugned Orders of R1 and the corresponding Letters of Intent (LoI), the Petitioner contends that it was mandated to supply the entire electricity from generated from its Project to Respondents 5 to 9 for the period 1.2.2009 to 31.5.2009 at Rs.5.50 per KWH, and thus, its statutory right to operate as a Merchant Plant and to supply to any Licensee / Consumer, including its right to supply to R10, pursuant to the committed GETL PPA, and obtain the contracted / market price for the same, got curtailed and was subjected to substantial adverse financial impact. Similar was the contention raised for the period 1.1.2009 to 31.1.2009, with a constraint to supply through R10 at the rate of Rs.5.50 per KWH, based on R5's amended LoI dated 1.12.2009 in respect of its earlier LoI dated 14.11.2008.

f) It is submitted that the Petitioner and R10 filed Writ Petition Nos.590-91/2009 before the Hon'ble High Court of Karnataka, assailing the illegality and validity of the impugned Orders and, *inter alia*, praying for quashing the impugned Orders of R1. Eventually, the said Writ Petitions came to be

dismissed by the Hon'ble High Court of Karnataka on 26.3.2010, holding as under :

- (i) *The impugned Orders are upheld;*
- (ii) *All the Writ Petitions are dismissed;*
- (iii) *No costs.*

g) Paragraph-114 of the Order of the Hon'ble High Court of Karnataka dated 26.3.2010, is reproduced hereunder,

"...if the impugned orders have adverse financial impact on any generating company, the Appropriate Commission under the Act is empowered to offset such adverse financial impact in such manner as it consider appropriate ..."

The Petitioner, quoting the above, has submitted that the appropriate Commission under the Act is empowered to offset such adverse financial impact in such manner as it considers appropriate; according to the Petitioner, it was also the view held by the Respondents in the said Writ Petitions in regard to the remedy available under Section 11(2) of the Act.

h) It is further submitted that the Petitioner and R10 filed Special Leave Petition (SLP) Nos.12629-30/2010 before the Hon'ble Supreme Court of India challenging the Order passed by the Hon'ble High Court of Karnataka assailing the legality and validity of the impugned orders therein and that the Hon'ble Supreme Court, on 28.4.2011, admitted the SLPs and the same have been converted into Civil Appeals.

It is seen that the petitioner in its SLP filed on 21-4-2010 has included, as one of its interim prayers, a request for grant of ex-parte ad-interim order staying the operation of the impugned judgment and order dated 26-3-2010 passed by the Hon'ble High Court of Karnataka at Bangalore in W.P. Nos: 590 & 591 of 2009 ; interim prayer No. 2 was to direct the respondent to pay Rs. 6.75 per unit as was per order dated 1-4-2009 passed by the Hon'ble Supreme Court, the copy of which was, however, not made available by the petitioner.

The Hon'ble Supreme Court of India, dated 1st September 2010, in its record of proceedings have recorded as under:

'UPON hearing counsel the court made the following

ORDER

SLP (C) Nos. 12629-12630 of 2010:

Mr. Harish Salve, learned senior counsel appearing for the petitioners seeks leave of this court to withdraw the prayer No. 2 made in the Special Leave Petitions which is in the following terms: "direct the respondent to pay Rs. 6.75 per unit as was per order dated 1.4.2009 passed by this Hon'ble Court".

Mr. Salve further prays that liberty may be given to enable the petitioners to approach the Karnataka Electricity Regulatory Commission, Bangalore.

The petitioners are permitted to withdraw prayer No. 2 with liberty as aforesaid at their own risk.

List all the matters for final disposal on 16-11-2010.

In the meantime, petitioners are directed to complete the service on the unserved respondents.

Sd/-
(Pardeep Kumar)
Court Master

Sd/-
(Shashi Bala Vij)
Court Master'

i) It is the Petitioner's contention that the pendency or the eventual outcome of the said CAs would have no bearing on the instant Claim in the Petition, as this Commission is required to determine and offset the adverse financial impact of the impugned Orders on the Petitioner, even assuming, for the sake of this Petition, that the eventually the said impugned Orders are upheld by the Hon'ble Supreme Court.

j) The Petitioner, by its submission, has stated further that the legality and validity of the very impugned Orders issued by R1 is pending consideration of the Hon'ble Supreme Court and that irrespective of the validity or otherwise of the said impugned Orders, Section 11(2) of the Act would operate and that this Commission is competent to offset the adverse financial impact suffered by the Petitioner consequent to the impugned Orders. It is also submitted that if Section 11(1) of the Act is invoked / imposed, Section 11(2) of the Act would operate and the adverse financial impact suffered by a person consequent to the orders / directions issued under Section 11(1) of the Act would have to be offset under Section 11(2) of the Act.

k) The Petitioner further submitted that while admitting the SLPs filed by the Petitioner and R10, the Hon'ble Supreme Court had observed that the matter has become academic and in view of Section 11(2) of the Act, it would be the Appropriate Commission alone that can determine the adverse financial impact suffered by the Petitioner. Admittedly, the

Petitioner has stated that it should have waited till the disposal of the SLPs and thereafter approached this Commission; Adding that, however, in view of the observations of the Hon'ble Supreme Court and also taking into account the legal position that irrespective of the validity or otherwise of the impugned Orders issued by R1, the adverse financial impact to be set off will have to be determined by this Commission under Section 11(2) of the Act and that under Section 11(2) of the Act, the Petitioner has approached this Commission.

l) It is also the submission of the Petitioner that Section 11(2) of the Act is a statutory remedy available to a Generating Company providing for offsetting the adverse financial impact caused **as a consequence of a direction** [*emphasis supplied*] given under Section 11(1) of the Act. Section 11(2) of the Act being a measure of restitution, the Petitioner has to be restored back to the same financial position in which it would have been, had a direction under Section 11(1) of the Act not been given. The use of the word "adverse" is of great significance, according to the Petitioner, signifying a financial impact, which is adverse / harmful, which would only mean the financial loss incurred by the Generating Company by not being able to realize the market rate as a result of the Order / directions under Section 11(1) of the Act.

m) The Petitioner contends that once a direction is given under Section 11(1) of the Act, Section 11(2) automatically comes into play,

because the direction under Section 11(1) has already vested the Petitioner with a direct consequence, which has had an adverse financial impact. Petitioner has claimed that the *de facto* doctrine applies in the present case, as the fact remains that the directions under Section 11(1) have already been enforced and the Petitioner has already suffered the adverse financial impact and the situation has become irreversible and a *fait accompli*. It is submitted that the nature of the case before this Commission is a *de facto* nature, meaning that the jurisdiction of this Commission is attracted by the fact that the power has been exercised under Section 11(1) of the Act. The Petitioner has quoted citations of the Hon'ble Supreme Court, in support of its claim regarding the impact of the *de facto* doctrine.

2) In their Counter, the Respondents bring out that the Petitioner and R10 have filed the SLP Nos.12629-302010 before the Hon'ble Supreme Court, assailing the legality and validity of the Order passed by the Hon'ble High Court of Karnataka, which is pending before the Hon'ble Supreme Court. The Hon'ble Supreme Court has not stayed the operation of the Order of the Hon'ble High Court of Karnataka and the Interim Prayers sought have been declined. They have also raised the issue that Clause 15 of the Terms and Conditions of the Lol between R5 and R10 dated 14.11.2008 deals with the fact that change in law or restrictions imposed by the Regulator (Central or State) or Government (Central or State) or Appellate Tribunal on any aspect for sale or purchase of electricity and the same shall be binding on both the parties.

3) I have heard learned Counsels for the Petitioner and the Respondents. I have also considered the averments made in the Petition, Rejoinder and the Statement of Objections, besides other material. The Petitioner as well as the Respondents have, in addition, made submissions additionally in respect of the case.

4) In the context of the above, the following Issues emerge for consideration:

(a) Whether based on the facts of submissions in the case, the adverse financial impact, if any, suffered by the Petitioner has to be assessed, at this point of time, by the Commission in the context of consideration for offsetting to the Petitioner?

(b) If so, based on the merits of the case, on account of the impugned Orders of R1(Government of Karnataka), determination of the adverse financial impact on the Petitioner, if any, needs to be carried out in connection with offsetting of the same, in such manner as considered appropriate by this Commission pursuant to empowerment under section 11(2).

5) **Issues:**

5.1. Issue No.4(a) :

(1) On consideration of the above facts, the first Issue that arises is whether the adverse financial impact, if any, suffered by the Petitioner, needs to be assessed at this point of time.

(2) Analyzing the available material in the case, it is seen that :

2 (a)

1) To go into the question of adverse financial impact determination under Section 11(2) of the Act, it is pertinent to reproduce Sections 11(1) and 11(2) of the Electricity Act, 2003, for ready reference:

“11. Directions to generating companies. – (1) The Appropriate Government may specify that a generating company shall, in extraordinary circumstances operate and maintain any generating station in accordance with the directions of that Government.

Explanation. – For the purpose of this section, the expression “extraordinary circumstances” means circumstances arising out of threat to security of the State, public order or a natural calamity or such other circumstances arising in the public interest.

(2) The Appropriate Commission may offset the adverse financial impact of the directions referred to in sub-section (1) on any generating company in such manner as it considers appropriate.”

2) It is clear from reading of Sections 11(1) and 11(2) of the Act, especially from Section 11(2), that , ‘the Appropriate Commission (this Commission, in the present Petition) is endowed and empowered with the role of offsetting the adverse financial impact **of the directions** referred to in Sub-Section (1) of Section 11 of the Act [*emphasis supplied*] on a Generating Company. The important aspect that gets

conveyed by the phrase, 'of the directions' referred to in Sub-Section (2) of Section 11 of the Act is that the relief under Section 11(2) of the Act, as and when is required to be granted, is a consequential relief, as admitted by the Petitioner itself, based on the effect of directions issued under Section 11(1) of the Act. In other words, for grant of any relief to arise [emphasis supplied] under Section 11(2), there should be a clear and unambiguous valid and subsisting direction under Section 11(1). That means, the directions under Section 11(1) should have first of all been accepted for its legality, been acted upon, adverse financial impact suffered and the affected Generator then gets the right to approach the appropriate Commission under Section 11(2). To reiterate, after and only after, acceptance of legality of directions given under Section 11(1), generator becomes eligible for consideration of compensation for offset of adverse financial impact, if any, suffered by it. Thus it is clear that, for **a relief to arise** under Section 11(2), there has to be an acted upon direction under Section 11(1) of the Act, whose legal validity is not under challenge.

3) In the case of the Petitioner, no doubt it has acted upon the directions given under Section 11(1) of the Act, has reported of having suffered adverse financial impact while approaching this Commission for offsetting adverse financial impact suffered by it. The basic aspect not having been fulfilled is that the directions issued have not been accepted and have been assailed for legality and validity, originally

before the Hon'ble High Court and presently before the Hon'ble Supreme Court. The Hon'ble Supreme Court is seized of the matter in the pending Civil Appeal. In my considered view one cannot challenge the validity of impugned orders on the one hand and claim compensation against the effects of the same challenged orders at the same time.

4) Therefore, the question that remains is, in the background of the directions having been challenged by the Petitioner and accepted in Civil Appeal by the Hon'ble Supreme Court, whether the cause of action related to claiming offset towards adverse financial impact, if any, suffered by it at all, arises at this point of time. In my considered view, the cause of action has not yet arisen.

(a) The impugned Orders of R1 had been originally challenged by the Petitioner and R10 in the Hon'ble High Court of Karnataka, assailing their legality and validity. The Hon'ble High Court of Karnataka issued a final Order dated 26.3.2010, observing therein:

"...if the impugned orders have adverse financial impact on any generating company, the Appropriate Commission under the Act is empowered to offset such adverse financial impact in such manner as it considers appropriate ..."

I respectfully agree with the observations of the Hon'ble High Court of Karnataka that the Appropriate Commission under the Act is

empowered to offset such adverse financial impact in such manner as it considers appropriate. I have already dealt with, in detail, to explain why and how I am of the view that presently the time is not ripe for going into the aspect of assessment of adverse financial impact, if any, suffered by / on the Petitioner in view of the fact that the impugned Orders have been challenged in the petitioner's civil appeal before the Hon'ble Supreme Court of India.

b) It is the petitioner's contention that pendency or eventual outcome of the said CAs would have no bearing on the instant claim in the petition, as this commission is required to determine and offset the adverse financial impact of the impugned orders assuming that eventually the impugned orders are upheld by the Hon'ble Supreme Court.

I am in respectful agreement with the Hon'ble Supreme Court's observation – reported by the petitioner - that in view of Section 11(2), it is the Appropriate Commission alone that can determine the adverse financial impact suffered by the petitioner. However, I do not agree with the contention of the petitioner that pendency or eventual outcome of the SLPs/CAs would have no bearing on its instant claim. I have already detailed that the right to compensation for the petitioner u/s 11(2) would not arise nor come into play as long as the impugned orders' legal validity is under

challenge for final determination by the Apex Court. Further, this Commission exercising its powers u/s 11(2) is not independent of the eventual outcome of the CAs, as claimed by the petitioner, for the reason that the relief u/s 11(2) is a consequential one, as admitted by the petitioner itself, and can and would flow only if the impugned orders u/s 11(1) are finally held as legally valid. As long as they are under challenge for validity and under the consideration of the Apex Court, the relief u/s 11(2), which is consequential to effects of orders u/s 11(1), does not flow to the petitioner.

c) To explain further, in the instant case, it is seen that the petitioner is aiming at best of both worlds. On the one hand it is challenging the impugned orders for their legal validity and on the other hand is claiming the consequential relief associated with the same challenged orders. In case the legality of the impugned orders u/s 11(1) are struck down eventually by the Hon'ble Supreme Court, the petitioner would have no claim, since no consequential relief out of the struck- down impugned orders can then flow U/s 11 (2). It will be of interest to note that there will also be no empowerment of this Commission to determine and grant any relief u/s 11(2) once the legality of impugned orders issued U/s 11 (1) is struck down, even assuming that the petitioner had suffered adverse financial impact; on the contrary, the claim of

petitioner would arise U/s 11 (2) for consideration of consequential relief, only when the legality of the impugned orders is upheld by the Hon'ble Supreme Court.

d) Further, Petitioner itself has stated that it should have waited till the disposal of the CAs and thereafter approached this Commission and that it has now approached this Commission in view of the Hon'ble Supreme Court's observation & the legal position that irrespective of legal validity or otherwise of the impugned orders the adverse financial impact has to be offset by this Commission.

On this, I have already dwelt on the legal position in the earlier paragraphs. It is to reiterate that the time is now not ripe and it is premature for one to go into the exercise U/s 11(2) and the petitioner's liberty to approach this Commission at the appropriate time, after the legal validity gets finally upheld by the Apex Court, however remains.

5.1

(3) The respondents have stated that the Hon'ble Supreme Court has not stayed the operation of the judgment of the Hon'ble High Court of Karnataka. The petitioner(s) on their part have contended that although the legality and validity of the impugned orders are under consideration of the Hon'ble Supreme Court this Commission is

competent to offset the adverse financial impact, suffered by it, consequent to the impugned orders, irrespective of the eventual outcome of the proceedings in the Apex court.

The contention of the petitioner has been dealt by me and further gets comprehensively addressed by the judgment of the Hon'ble Supreme Court cited hereunder. The statement of the respondent regarding non-grant of stay of order of the Hon'ble High Court of Karnataka also gets covered by the cited judgment.

a) The Hon'ble Supreme Court in CA No. 1061-62 of 1998 of Union of India & others Vs West Coast Paper Mills & Anr. (AIR/2004/SC/1596) in its judgment delivered on 5th Feb. 2004 by the three-judge bench headed by the Chief Justice of India has dealt on issues related to Doctrine of Merger, Stay of Operation of lower court's order etc. Relevant extracts of the judgment, shown in italics, and my related findings on the issues of the petition are hereunder:

“(i) Article 136 of the Constitution of India confers a special power upon this Court in terms whereof an appeal shall lie against any order passed by a Court or Tribunal. Once a special leave is granted and the appeal is admitted the correctness or otherwise of the judgment of the Tribunal becomes wide open. In such an appeal, the Court is entitled to go into both questions of fact as well as Law. In such an event the

correctness of the judgment is in jeopardy. Even in relation to a civil dispute, an appeal is considered to be a continuation of the suit and a decree becomes executable only when the same is finally disposed of by the Court of Appeal."

In the instant case of the petitioner its Civil Appeal has been entertained and the Hon'ble Supreme Court is seized of both the questions of fact as well as Law and the outcome of the judgment is wide open. As per the Chambers Dictionary, the word jeopardy means 'exposed to chance'. That means the verdict of the Hon'ble Supreme Court could be either way. Under the circumstances, my view that the time is now not ripe to consider the request for offset of adverse financial impact gets substantiated.

b) "ii) -----It will bear repetition to state that a plaintiff filed a suit for refund and a cause of action therefore arose only when its right was finally determined by this Court and not prior thereto. This Court not only granted special leave but also considered the decision of the Tribunal on merit."

The petitioner's claim seeking determination of offset under powers vested with this Commission u/s 11(2) has been held by me as premature and that the cause of action arises only when its right gets finally determined in the Civil Appeal pending consideration of the Hon'ble Supreme Court, which

gets substantiated from the observation of the Apex Court cited herein.

c) "(iii) In the aforementioned cases, [1. Secretary, Ministry of Works & Housing Government of India and others Vs. Mohinder Singh Jagdev and others (1996) 6 Sec. 229. 1. P.K. Kutty Anuja Raja & Another Vs. State of Kerala and another JT 1996 (2) SC 167: (1996) 2 Sec. 496] this Court failed to take into consideration that once an appeal is filed before this Court and the same is entertained, the judgment of the High Court or Tribunal is in jeopardy. The subject matter of the lis unless determined by the last Court, can not be said to have attained finality. Grant of stay of operation of the judgment may not be of much relevance once this Court grants special leave and decides to hear the matter on merit. It has not been and could not be contended that even under the ordinary civil law the judgment of the Appellate Court alone can be put to execution.-----"

Considering the above very important observation it gets clearly established that the petitioner's SLP having been entertained and converted to Civil Appeal, the petitioner is left with no choice but to await the final determination of its Appeal before the Hon'ble Supreme Court, to stake a claim before this Commission u/s 11(2) for consideration. Absence of grant of stay of operation of the order of the Hon'ble High Court also bears no relevance in the light of the observations of the Apex Court. Besides, it is of interest to note that in the case of the petitioner the impugned orders have already been

acted upon by it, the orders have lapsed in time and the impugned orders had no effect on any stake holders warranting a stay of operation of the impugned orders by the Hon'ble Supreme Court. It is clear from the Order dated 1st September 2010 in the SLP Nos. 12629-12630 of 2010 of the petitioner (S) that the Hon'ble Supreme Court, therefore, have not granted ex-parte ad-interim order staying the operation of the impugned Judgment, in order dated 26.03.2010, passed by the Hon'ble High Court of Karnataka at Bangalore in W.P.Nos. 590 and 591 of 2009, as prayed for by the petitioner(s).

Consequently, the consideration by the Commission under Section 11(2) of the Act to determine, whether at all any adverse financial impact has been suffered, and if so, offsetting the same in a manner considered appropriate by it, arises if, and only if, the validity of directions under the impugned Orders of R1 is upheld by the Hon'ble Supreme Court of India.

5.2

Issue No. 4 (b) :

It has been established in the preceding paragraphs that adverse financial impact, if any, suffered by the petitioner, need not be gone into under Section 11(2) of the Act at this point of time by this Commission. Accordingly, going into the merits of this Petition at this point of time does not arise and I have not considered any of the associated merits of this petition at this stage.

6. Under the circumstances, the Prayer of the Petitioner to award compensation to the tune of Rs.166.75 Crores with interest thereon, does not merit any consideration at this point of time.

7. The petition, therefore, is liable to be dismissed and is dismissed, with liberty reserved to the Petitioner to approach this Commission at an appropriate time, if so desired by the petitioner.

8. Ordered accordingly.

Sd/-

(K. SRINIVASA RAO)
MEMBER