

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

Dated : 8th August, 2013

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| 1. Sri M.R. Sreenivasa Murthy | Chairman |
| 2. Sri Vishvanath Hiremath | Member |
| 3. Sri K. Srinivasa Rao | Member (will pronounce
separate order) |

RP No.1/2013

BETWEEN :

- 1) Bangalore Electricity Supply Company Limited
K.R. Circle
Bangalore – 560 001
- 2) Mangalore Electricity Supply Company Limited
Paradigm Plaza, A.B. Shetty Circle
Mangalore – 575 001
- 3) Power Company of Karnataka Limited
Cauvery Bhavan, K.G. Road
Bangalore – 560 009

[Represented by M/s.Justlaw, Advocates]

... **Petitioners**

AND

- 1) GMR Energy Limited
No.25/1, 3rd Floor, Skip House
Museum Road
Bangalore – 560- 001
- 2) GMR Energy Trading Limited
No.25/1, 3rd Floor, Skip House
Museum Road
Bangalore – 560- 001

- 3) Government of Karnataka
By its Principal Secretary
Department of Energy
Vikasa Soudha
Dr. Ambedkar Veedhi
Bangalore – 560 001
- 4) Chamundeshwari Electricity Supply Company Limited
No.927, LJ Avenue
New Kantharaja Urs Road
Saraswathipuram
Mysore – 570 009
- 5) Hubli Electricity Supply Company Limited
P.B. Road, Navanagar
Hubli – 580 025
- 6) Gulbarga Electricity Supply Company Limited
Station Road
Gulbarga – 585 101
- 7) Karnataka Power Transmission Corporation Limited
Cauvery Bhavan, K.G. Raod
Bangalore – 560 009
- 8) State Load Despatch Centre – Karnataka
Ananda Rao Circle
Bangalore – 560 009
*[R1 represented by M/s.Shridhar Prabhu Associates and
R5 represented by Shri Prashant, T. Pandit, Advocate]*

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Respondents

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1) This Review Petition is filed on 9.1.2013 by the Review Petitioners, viz., BESCOM, MESCOM and PCKL, praying for review of the Order dated 30.11.2012 passed by this Commission in OP No.47/2011 by majority. The Review Petitioners have also filed two I.As., dated 21.2.2013 – one seeking stay of the said Order dated 30.11.2012 of the Commission and another seeking extension of time stipulated by the Commission in its Order dated 31.11.2012.

2) On Notice, the Respondents 1 and 5 have appeared through their Counsel. Respondent No.1-GMR Energy Limited has filed its Preliminary Statement of Objections dated 21.1.2013 on the maintainability of the Review Petition and an Additional Statement of Objections dated 7.3.2013 on the merits of the Review Petition.

3) The Review Petitioners have also filed Rejoinder dated 18.4.2013 to the Respondent No.1's Statements of Objections. Subsequently, by Memo dated 21.5.2013, the Review Petitioners have furnished certain documents in support of their case. Respondent No.1 in turn has filed its reply dated 3.7.2013 in response to the Memo dated 21.5.2013 of the Review Petitioners.

4) This Commission in OP No.47/2011 filed by *GMR Energy Limited –Vs- Government of Karnataka and others*, by its majority Order dated 30.11.2012, had held that:

“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."

5) Though several grounds have been urged in the Review Petition, the learned senior counsel for the Review Petitioners has confined his submissions only on the following grounds :

(a) This Commission, in its Order dated 30.11.2012 in OP No.47/2011, while fixing the tariff payable to the Petitioner by the Respondents, has not taken into consideration the transmission loss, but has taken only the

- transmission charges and Marketing expenses. These transmission losses need to be deducted from the rate of Rs.7.00 per KWH irrespective of whether the generator bears it or the buyer bears it and only thereafter the net realization by the generator had to be determined by the Commission. Thus, this Commission has committed an error apparent on the face of the record.
- (b) The Commission, in its Order dated 30.11.2012 in OP No.47/2011, has held that the Respondent-distribution licensees (Review Petitioners herein) cannot maintain a claim under Section 11(2) of the Electricity Act, 2003 (hereinafter referred to as the 'Act'). This rejection by the Commission without reserving the liberty to the Respondent / Review Petitioners' right to make its claim in any other appropriate Forum is again an error apparent on the face of the record.
- (c) As per law laid down by the Courts, if a Review Petition is filed first and then an Appeal before the higher Forum is filed, the Review Petition is still maintainable. Therefore, he submitted that the present Review Petition is maintainable and the Order sought to be corrected has to be modified.
- 6) Per contra, the learned counsel for the Respondent-GMR Energy Limited, in his oral submissions, contended that three ESCOMs had not filed Review Petition against the Commission's Order dated 30.11.2012 in OP No.47/2011 and hence the review should be considered only in the case of claims of BESCO /

MESCOM; that the Government of Karnataka being a Respondent in OP No.47/2011, has not filed a Review Petition and hence the Government of Karnataka did not have any issue regarding the Commission's Order; that as the amount awarded in the Commission's Order was only a pass-through, no grievance can be made out; that the allegation made in the Petition is that consumers' interest has been ignored by the Commission while passing the Order, is not correct. He further submitted that the Commission had discussed the Order of the Hon'ble Appellate Tribunal for Electricity (ATE) passed in the Appeal filed against the Commission's Order in OP No.16/2010, and had given sufficient reasons for taking a different view, that if the Review Petitioners are of the view that Hon'ble ATE's Order has not been followed in its letter and spirit by the Commission in OP No.47/2011, then the only remedy available to the Review Petitioners would be preferring an Appeal before the Hon'ble ATE against the Commission's Order. Further, he submitted that the Review Petitioners cannot produce new material now to counter the conclusion arrived at by the Commission in its Order and cannot take that as a ground for review. The learned counsel further submitted that the rejection of the counter-claim of the Respondent/Review Petitioners in OP No.47/2011 by the Commission was a considered Order of the Commission on merits and hence the Review Petitioners cannot take it as a ground for Review, but the same could be a ground in an Appeal before the Hon'ble ATE.

7) Under Section 94 of the Electricity Act, 2003, this Commission has powers as are vested in a Civil Court under the Code of Civil Procedure for reviewing its decisions, directions and orders.

8) The Civil Court, while reviewing its orders, has to follow the provisions of Order 47 Rule 1 of the Code of Civil Procedure, which is reproduced hereunder :

"1. Application for review of judgment.- (1) Any person considering himself aggrieved,—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes,

(d) and who, from the 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 decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order." [Emphasis supplied]

9) The Hon'ble ATE, in its recent Judgment in RP No.12/2012 in Appeal No.17/2012, has also summarized the ground on which review can be sought.

10) We have considered the submissions of the senior counsel appearing for the Review Petitioners and the counsel appearing for the Respondent in the light of the parameters on which the Review Petition is maintainable.

11) The learned counsel for the Review Petitioners has submitted that the observation of the Commission that the transmission losses, if any, are borne borne by the procurer of the energy is incorrect, as in the present case the procurer had not agreed to incur this expenditure on behalf of the generator. Further, it is submitted that the Government Order also does not specify that the transmission expenditure will be to the account of the procurer. He also submitted that the order of this Commission is at variance with the Order of the Hon'ble ATE in Appeal Nos.141 and 142 of 2011 and Appeal No.10 of 2012, because as per the Order of this Commission, which is affirmed by the Hon'ble ATE, both marketing expenses and transmission charges are to be deducted from the rate payable to the generator.

12) We have looked into the majority Order passed by this Commission in OP No.47/2011 in the light of the above submission. While passing the Order, we have not gone by the contract signed by the Review Petitioners, as while determining the rate payable under Section 11 Order for the electricity supplied, we have adopted the general practice prevailing in the market to arrive at the rate payable to the generator. Therefore, the question of the Review Petitioners agreeing to incur expenditure towards marketing and transmission charges will

not be relevant. Therefore, there is no error in the Order passed by this Commission.

13) It is submitted by the senior counsel for the Review Petitioners that the reason assigned by this Commission for rejecting the counter-claim made by them is erroneous, as the Government Orders unequivocally directed all generators to supply at their maximum Plant Load Factor (PLF). Further, the learned senior counsel submitted that while rejecting the counter-claim of the Review Petitioners on the ground of maintainability, this Commission should have reserved liberty in favour of the Review Petitioners to raise the issue in independent proceedings, and therefore, the Order on this aspect needs to be reviewed.

14) We have considered the above submission in the light of the Government Orders dated 30.12.2008, 1.1.2009, 6.1.2009, 6.6.2009 and 22.9.2009. These Government Orders, though use the words, "maximum exportable capacity", have not defined or explained what is meant by maximum exportable capacity, precisely. Further, the Government Orders do not state what should happen if 'maximum exportable capacity' of electricity is not supplied. Considering the Government Orders, this Commission rejected the counter-claim of the Review Petitioners, not only on maintainability, but also on merits. Hence, there is no error in the Order passed by this Commission on this ground also.

15) In view of the above findings, there is no merit in this Review Petition and accordingly it is rejected.

Sd/-

(M.R. SREENIVASA MURTHY)
CHAIRMAN

Sd/-

(VISHVANATH HIREMATH)
MEMBER

No.: N/3/2013

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R5 represented by Shri Prashant, T. Pandit, Advocate]*

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1) In this Review Petition, the Review Petitioners, have specifically prayed that this Commission may be pleased to review / modify the majority Order of this Commission dated 30.11.2012 in OP No.47/2011.

2) In the Review Petition, in regard to the Order dated 30.11.2012 passed by me, it has been stated by the Review Petitioners as follows :

“The learned single Member was pleased to pass a dissenting Order holding that the Petition was liable to be dismissed and that the question of adverse financial impact suffered need not be gone into at this period in view of the proceedings pending before the Hon'ble Supreme Court of India.”

3) It is also noticed in the Review Petition that the Review Petitioners have not sought for review of any of the issues finalized by me in my Order dated 30.11.2012 in OP No.47/2011.

4) In view of the above, I have nothing more to add to my Order dated 30.11.2012 in OP No.47/2011 and the Review Petition is disposed of accordingly.

Sd/-

(K.SRINIVASA RAO)
MEMBER