

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No.20/MP/2012

**Coram: Dr. Pramod Deo, Chairperson
Shri S.Jayaraman, Member
Shri V.S.Verma, Member
Shri M.Deena Dayalan, Member**

Date of hearing: **28.2.2012**

Date of order: **16.5.2012**

IN THE MATTER OF

Approval of provisional tariff in respect of 3 x 350 MW Kamalanga Thermal Power Plant of GMR-Kamalanga Energy Limited (GKEL).

AND

IN THE MATTER OF

GMR-Kamalanga Energy Limited, KarnatakaPetitioner

Grid Corporation of Orissa Limited, OrissaRespondent

Parties Present

1. Shri M.G.Ramachandran, Advocate, GKEL
2. Ms. Swapna Seshadri, Advocate, GKEL
3. Shri Anil Varna, GKEL

ORDER

The petitioner, GMR-Kamalanga Energy Limited (GKEL), has filed this petition under Section 62 and Section 79(1)(b) of the Electricity Act, 2003 ('the 2003 Act') read with the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 ("the 2009 Tariff Regulations") for approval of provisional tariff for the

first phase of 3 x 350 MW Kamalanga Thermal Power Plant (hereinafter 'the generating station') for the period 2011-14.

2. GMR-Kamalanga Energy Ltd, is a Special Purpose Vehicle (SPV) set up by GMR Energy Ltd, consisting of the first phase of 1050 MW (3 x 350 MW) capacity and second phase for an additional capacity of 350 MW at Kamalanga Village in Dhenkanal district of the State of Odisha. Pursuant to the Memorandum of Understanding (MoU) dated 9.6.2006 signed by the State Government of Odisha, Power Purchase Agreement (PPA) was entered into by GMR Energy Ltd with the respondent, GRIDCO on 28.9.2006, for the period of 25 years, effective from the date of execution of PPA. Subsequently, the PPA was amended on 4.1.2011 to include the additional capacity of 350 MW. Under the said PPA, the respondent, GRIDCO is to purchase upto 25% of the power from the generating station, till the term of PPA.

3. The petitioner, in its petition has submitted that subsequent to the execution of PPA, the respondent GRIDCO had filed a petition before the Orissa Electricity Regulatory Commission ('the State Commission') seeking approval of PPA dated 28.9.2006 and the State Commission by its order dated 20.8.2009 approved the said PPA. It has also been submitted that the State Commission while approving the said PPA, had by the said order directed both, the respondent and the petitioner herein, to file a petition before the Central Commission for approval of tariff of the generating station in accordance with Section 79(1)(b) of the Act. The relevant portion of the order dated 20.8.2009 is extracted as under:

"We hereby direct GRIDCO as well as the IPPs to file their petitions before CERC for approval of the tariff of their respective thermal projects in accordance with Section 79(1)(b) of Electricity Act, 2003 as all these projects are Inter-State Generating projects."

4. The petitioner has submitted that the present petition has been filed in terms of the above directions, contained in the order of the State Commission dated 20.8.2009. It has also been submitted that the petitioner is a generating company as defined under Section 2(28) of the Act and having agreements for sale of power in more than one state and the Commission is vested with the jurisdiction to regulate the tariff of the generating companies owned or controlled by the Central Government and other generating companies having composite scheme for generation and sale of electricity in more than one State as envisaged under Sections 79(1) (a) and (b) of the Act respectively.

5. Subsequently, the Commission by its letter dated 17.10.2011, directed the petitioner to submit clarifications as to:

(a) How the generating station i.e. GMR Kamalanga Ltd can be considered to be an Inter-State Generating Station under Section 79 (1) (b) of the Electricity Act, 2003?

(b) Whether any Power Purchase Agreement (PPA) for sale of power from the petitioner generating station was entered with the beneficiaries of more than one State prior to 30/09/06, since after the said date the private developers can only come through Competitive Bidding Process?

(c) Whether the petition for provisional tariff is maintainable in the absence of petition for final tariff determination?

6. In response, the petitioner by its affidavit dated 17.1.2012 has clarified that it is obligated to sell only 25% of the capacity of the generating station to the respondent, GRIDCO in terms of the PPA dated 28.9.2006 read with its amendment dated 4.1.2011 and that there was no other agreement which the petitioner has executed with any other beneficiary, for which tariff is to be determined under Section 62 of the Act. It has also submitted that in terms of Section 63 of the Act, it was selected as a successful bidder for supply of power through PTC to the distribution utilities of the State of Haryana (300 MW) and the Bihar State Electricity Board (260 MW) and PTC had accordingly entered into Power Sale Agreements on 7.8.2008 and 9.11.2011 respectively. Hence, the determination of tariff for the said supply was beyond the purview of Section 62 of the Act. The petitioner has further submitted that the present petition has been filed invoking the jurisdiction of the Commission under Section 62 read with Section 79(1)(b) of the Act, in terms of the directions contained in the order of the State Commission dated 20.8.2009, wherein, the generating station of the petitioner has been considered to be an inter-State generating station for which tariff is to be determined by this Commission under Section 79(1)(b) of the Act and on the basis that the petitioner would be selling electricity in more than one State, though such sales would be under separate agreements with different tariffs. The petitioner has also submitted that the sale to the respondent, GRIDCO was negotiated and finalized prior to the date specified for competitive bidding and it has not entered into any agreement with any other State after September, 2006. It has further submitted that the petition for provisional tariff has been filed in line with the order of the Commission dated 27.1.2009 granting provisional tariff to Sipat STPS Stage-II generating station of NTPC Ltd.

7. During the hearing, the learned counsel for the petitioner was asked to make his submissions on the question of 'jurisdiction' of the Commission to determine tariff of the generating station. The learned counsel pointed out that in compliance with the directions of the Commission, the Petitioner has filed detailed written submissions vide its affidavit dated 17.1.2012 and prayed that the same may be considered. He also submitted copies of the following judgments of the Appellate Tribunal and orders of the Commission on the question of 'jurisdiction' and prayed that the petition be disposed of accordingly:-.

- (a) Commission's order dated 27.1,2009 in Petition No.145/2008
- (b) Commission's order dated 26.10.2009 in Petition No.153 of 2009
- (c) Order of the Commission dated 29.3.2006 in Petition No.103 of 2005
- (d) Judgement of the Appellate Tribunal for Electricity dated 7.12.2010 in Review Petition 15 of 2010 in Appeal 183 of 2009

8. Heard the learned counsel for the petitioner. It has been submitted that the present petition has been filed by the petitioner in terms of the directions contained in the order of the State Commission dated 20.8.2009.

9. The preliminary question which arises for consideration at the threshold is as to whether this Commission has the jurisdiction to determine the tariff of the generating station of the Petitioner presented in the petitions? Our analysis is discussed in the subsequent paragraph.

10. Section 62 (1)(a) of the 2003 Act provides that the appropriate Commission shall determine the tariff in accordance with the provisions of the Act for supply of electricity by a generating company to a distribution licensee.

11. Clause (b) of sub-section (1) of Section 79 of the Act reads as under:

“Section 79 (Functions of Central Commission)

(1) The Central Commission shall discharge the following functions, namely:-

(a)

(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;

12. A combined reading of Section 79(1)(b) and Section 62(1)(a) reveals that the Central Commission would have the jurisdiction to determine the tariff of the generating company / generating stations which have a composite scheme for generation and sale of electricity in more than one State to distribution licensees. Under Section 10(2) of the 2003 Act, a generating company may supply electricity to any licensee and open access consumers in accordance with the provisions of the 2003 Act and Regulations made thereunder. There is, though, no provision in the 2003 Act or Regulations made by the Commission requiring determination of tariff of a generating company / generating station for supply to any licensee other than a distribution licensee. Hence, if a

generating company / generating station has a scheme for generation and sale of electricity in more than one State to electricity traders and entities other than distribution licensees, there will be no question of determination of tariffs under section 79(1)b read with section 62(1)(a). The law, as it stands, does not confer jurisdiction on us to determine tariffs for sale and supply of power by generating companies / generating stations to electricity traders and entities other than distribution licensees. But inadequacy of the law can hardly be a substitute for overzealousness. In such a case, the reasonableness of the rate at which power would be sold by generating companies / generating stations to electricity traders and entities other than distribution licensees and in turn purchased by distribution licensees does not go unregulated. The State Commission has the mandate under Section 86(1)(b) of the 2003 Act to -

“(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;”

Moreover, Regulation 2 of the 2009 Tariff Regulations is applicable in case of the generating station wherein tariff is to be determined under Section 62 of Act read with Section 79 thereof. Therefore, supply of electricity by a generating company to anybody other than a distribution licensee cannot be determined by this Commission.

13. The petitioner in its response filed vide affidavit dated 17.1.2012 has submitted that 25% of the capacity is to be sold to the respondent, GRIDCO based on the terms

and conditions as contained in the PPA dated 28.9.2006 (amended on 4.1.2011). Apart from the above said PPA, no other agreement has been executed by the petitioner with any distribution company either inside or outside the State of Odisha.

14. The petitioner is stated to have, through PTC Ltd., participated and was selected as a successful bidder for supply of 300 MW capacity to the distribution utilities of the State of Haryana and for supply of 260 MW power to BSEB. Power Sale Agreements have been entered into by PTC Ltd with BSEB and the distribution companies of Haryana on 9.11.2011 and 7.8.2008 respectively. The petitioner has submitted that such bidding was under Section 63 of the Act and did not require determination of tariff under Section 62 of the Act. The supply of power to the distribution companies of the successor of the Haryana State Electricity Board and BSEB through PTC is outside the scope of determination of tariffs under Section 79(1)(b) read with 62(1)(a) of the 2003 Act. Therefore, the petitioner does not satisfy the requirements of Section 79(1)(b) read with Section 62(1)(a) of the Act. In view of this, the petition is liable to be dismissed as not maintainable.

15. We have examined the orders of the Commission and the judgement of the Appellate Tribunal relied by the petitioner and referred to in para 7 of this order. The order dated 27.1.2009 in Petition No.145 of 2008 pertains to determination of provisional tariff of Sipat STPS Stage II. of NTPC. The petitioner has relied this judgement to say that the Commission has the power to determine provisional tariff. We

do not have any doubt about our power to determine the provisional tariff but the same can be done only if the petition is maintainable before us under the relevant provisions of the Act. In the Commission's order dated 26.10.2009 in Petition No.153 of 2009, the question of maintainability of the petition was considered in the context of in-principle approval of capital cost of 1000 MW Karchan Wangtoo Hydro Electric Project and was rejected since neither section 79(1)(b) read with section 62(1)(a) of the Act nor the 2009 Tariff Regulations provided for such approval. In order dated 29.3.2006 in Petition No.103 of 2005, the question for determination was whether the Commission has the jurisdiction to determine the tariff of the hydro-generating stations of Uttaranchal Jal Vidyut Nigam Limited where the electricity was supplied to State of Himachal Pradesh in lieu of the usage right of water of River Yamuna and its tributaries. The Commission after examining the facts of the case and the legal provisions relating to inter-State sale through a composite scheme came to the following conclusion:

"28. A regards the interpretation of the expression "composite scheme" as provided in clause (b) of sub-section 1 of section 79(1) (b) of the Electricity Act, 2003, although the expression has not been defined in the Act, the Commission is of the view that 'composite scheme' is one in which a generating station is originally conceived for the purpose of meeting the power requirements of more than one State. The generating station could be set up in one State but the beneficiaries would be pre-identified and be in more than one State. Traditionally the central generating stations have been set up as 'composite scheme'. Such generating stations had, at their very inception, inter-State beneficiaries identified and consequently the sale from such stations involved more than one State.

29. In this context, it would be relevant to discuss the general approach to grant of jurisdiction of the CERC across the Act and also specifically, in the context of the two clauses (a) and (b) of sub-section (1) of section 79(1) of the Act. The basis of CERC's jurisdiction is 'inter-State' operation. Under clause (a) of sub-section(1) of section 79 of the Act, the powers of fixation of tariff of Central Government owned generating companies were vested in CERC largely because such generating stations were inter-State in nature, with clearly identified beneficiaries, from the very beginning, in more than one State. Clause (b) of sub-section (1) of section 79 of the Act is a complementary provision

for clause (a) of the said section, with the difference that clause (a) covers the Central Government owned generating stations while clause (b) covers primarily private projects. This follows that the expression 'composite scheme for generation and sale of electricity in more than one State' in clause (b) of sub-section (1) of section 79(1) of the Act should be interpreted to mean a composite scheme on lines of central generating companies where the generating stations were envisaged from the very beginning to have generation and sale in more than one State.

30. It also follows from the above that that a composite scheme is an inter-State scheme under which tariff applicable to all the beneficiaries of a project would also be the same. However, in the case of five inter-state hydro plants of UJVNL in question, it has been submitted by the petitioner in its affidavit dated 19.12.2005 that the agreement specifies that UJVNL will supply 25% of the electricity generated in Dhakrani, Dhalipur, Chibro and Khodri plants and 20% of the electricity generated in Kulhal plant to HPSEB at costs, i.e. excluding returns (excluding cost of servicing debt, return on equity and taxes). Hence the electricity supplied to HPSEB is at a lower rate than that for UPCL”.

31. In our opinion therefore, the hydro-stations in question do not qualify to be a 'composite scheme', as required under clause(b) of sub-section (1) of section 79(1) (b) of the Act”.

16. As per the above order, the composite scheme under Section 79(1)(b) of the Act has been interpreted to mean a composite scheme on the lines of the Central Generating companies where the generating stations were envisaged from the very beginning to have generation and sale of electricity in more than one State. In the present case, the petitioner has entered into a PPA with the State of Odisha to supply 25% of the power generated and there is no scheme with identified beneficiaries in other States for sale of electricity. Considered in the light of the said order, the generating station does not fulfill the conditions of Section 79(1)(b) of the Act for the purpose of determination of tariff by the Commission. The next judgement i.e. in the Review Petition No. 15/2010 in Appeal No. 183/2009, the Appellate Tribunal for Electricity has clarified that there is no error in its judgement dated 14.9.2010 wherein it has been held that Yamuna Hydel Scheme is not a composite scheme constructed for

the purpose of meeting the power requirements of more than one State and determination of its tariff is outside the jurisdiction of the Central Commission. In that case, it was argued before the Tribunal that since power is supplied from Yamuna Hydel Scheme to the State of the Himachal Pradesh, It is a composite scheme requiring determination of the tariff by Central Commission. Considering the agreement between the States of UP and Himachal Pradesh which provided for specific share of electricity from the hydro project for Himachal Pradesh "at cost of generation", the Tribunal has upheld the determination of tariff by Uttarkhand State Electricity Regulatory Commission. This judgement, in our view, does not advance the case of petitioner for determination of tariff by the Commission, especially when it does not have any scheme to supply power from the generating station to the distribution companies outside the State of Odisha.

17. We are of the view that as and when the petitioner enters into or otherwise has a composite scheme for generation and sale of electricity in more than one State to distribution licensees, the petitioner could file an appropriate application before this Commission for determination of tariff of the generating station in terms of the requirements under Section 79(1)(b) read with Section 62(1)(a) of the 2003 Act.

18. We had by our letter dated 17.10.2011 directed the petitioner to submit certain clarifications. As to the question at point (a) in the said letter, the generating station of GMR Kamalanga Ltd cannot be considered to be an Inter-State Generating Station under Section 79 (1) (b) of the 2003 in view of the our findings in the foregoing

paragraphs. The other questions at point (b) and (c) of our letter dated 17.10.2011 have not been examined as the present petition is liable to be dismissed at the threshold on the preliminary point of maintainability.

19. In the circumstances, the present petition is dismissed as not maintainable with liberty to file an appropriate application before this Commission for determination of tariff of the generating station as and when the petitioner enters into or otherwise has a composite scheme for generation and sale of electricity in more than one State to distribution licensees.

Sd/-
(M.DEENA DAYALAN)
MEMBER

sd/-
(V.S.VERMA)
MEMBER

sd/-
(S.JAYARAMAN)
MEMBER

sd/-
(DR.PRAMOD DEO)
CHAIRPERSON