

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Review Petition No. 35/RP/2017
in
Petition No. 154/MP/2015**

Coram:

**Shri P.K. Pujari, Chairperson
Shri A. K. Singhal, Member
Shri A. S. Bakshi, Member
Dr. M. K. Iyer, Member**

Date of order: 5th of July, 2018

In the matter of

Petition for review of order dated 31.7.2017 in Petition No. 154/MP/2015 under Section 94 (1) (f) of the Electricity Act, 2003 Read with Order 47 Rule 1 of the Code of Civil Procedure and Regulation 103(1) of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999.

And

In the matter of

Gujarat Urja Vikas Nigam Limited
Sardar Patel Vidyut Bhawan,
Race Course circle,
Vadodara-390 007 Gujarat

....Review Petitioner

Vs.

Adani Power Mundra Limited
(Formerly Adani Power Limited)
Shikhar Near Mithakhali Circle,
Navrangpura, Ahmedabad-380 009
Gujarat

...Respondent

Parties Present:

Shri M.G. Ramachandran, Advocate, GUVNL
Ms. Ranjitha Ramachandran, Advocate, GUVNL
Shri Amit Kapur, Advocate, APML
Ms. Abiha Zaidi, Advocate, APML
Shri Tanmay Vyas, APML



ORDER

Gujarat Urja Vikas Nigam Limited, (hereinafter referred to as “GUVNL” or “the Review Petitioner”) has filed the present Review Petition under Section 94 (1) (f) of the Electricity Act, 2003 read with Order 47 Rule 1 of the Code of Civil Procedure, 1908 and Regulation 103 (1) of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, for review of the order dated 31.7.2017 in Petition No.154/MP/2015 on the grounds of errors apparent on the face of the record, new and important evidence and otherwise for sufficient cause. The specific aspects of the impugned order of which review has been sought are as under:-

- (a) Interpretation of the minutes of meeting dated 31.12.2010 in regard to conditions subject to which the claim of Adani is admissible against GUVNL;
- (b) The consideration of quantum of 992.06 units allegedly supplied under compulsion of GUVNL; and
- (c) Computation of compensation by consideration of rate of merchant sale by GUVNL instead of the rate at the Power Exchange as well as PPA tariff with rebate.

2. Notice was issued to the Respondent, Adani Power Mundra Limited (APML) (formerly “Adani Power Limited) to file its reply. APML vide its affidavit dated 13.10.2017 has submitted that the allegations/contentions raised in para 1(a) and (b) above have been considered and decided by the Commission in the impugned order after taking into account the submissions of both parties and analysis of the MoM



dated 31.12.2010 and letter dated 1.2.2011 from GUVNL to Gujarat SLDC. Therefore, these grounds do not qualify for review. As regards the contention raised in para 1(c) above, APML has submitted that this point was never raised by GUVNL before any forum and is a new plea being raised for the first time in this review petition and therefore does not fulfil any of necessary conditions for review. APML has submitted that the Review Petitioner is seeking review of the order for the sake of rehearing and fresh decision in the case which falls outside the scope of review. APML has submitted that the review petition of GUVNL is not maintainable.

3. During the hearing of the review petition on merit on 18.5.2018, the learned counsel for the Review Petitioner and the Respondent made detailed submissions which have been recorded in the Record of Proceedings and are not being repeated for the sake of brevity. The Commission after the hearing, directed the Review Petitioner and the Respondent to file their written submissions which have been filed by the Review Petitioner and APML vide affidavits dated 28.5.2018 and 23.5.2018 respectively.

4. We have considered the submissions of the parties and perused the documents on record. Now, we proceed to deal with each of the three aspects on which the Review Petitioner has sought review in the light of the provisions of Order 47 Rule 1 of the CPC, the decision in the impugned order and submission of parties.

(A) Interpretation of the Minutes of Meeting dated 31.12.2010 in regard to the conditions subject to which the claim of Adani is admissible against GUVNL.

5. According to the Review Petitioner, the MoM dated 31.12.2010 specifically stipulated that APML may sell power in the open market to third party on behalf of



GUVNL in consultation with GUVNL in such a way that the sale transaction to GUVNL is identified and therefore, APML has the responsibility of identifying the sale. When APML approached GUVNL for consent for sale of power through power exchange, GUVNL refused permission on the ground that the sale of power through Power Exchange is a collective transaction involving multiple sales by the generator on behalf of the other party and on behalf of generator itself and therefore, such transactions cannot be identified separately. According to the Review Petitioner, APML could not have sold power in the Power Exchange and by its letter dated 1.2.2011, GUVNL refused to agree to the proposal of APML for sale of power through the Power Exchange. The Review Petitioner has submitted that APML did not respond to the letter dated 1.2.2011 nor suggested any methodology for identification of the sale transactions through the Power Exchange.

6. The Review Petitioner has submitted that in the impugned order, the Commission proceeded on the basis that the sale transaction can be identified and GUVNL ought to have worked out a formula. The Review Petitioner has submitted that the conclusion of the Commission in the impugned order suffers from error apparent on the face of record as it has placed the burden on GUVNL to have worked out a formula in consultation with APML when APML had not proposed any such formula in response to the letter dated 1.2.2011. GUVNL has submitted that it was the responsibility of APML to identify the buyer and therefore, it was the responsibility of APML to suggest or propose a formula or mechanism to identify the transaction in the Power Exchange. The Review Petitioner has submitted that in the absence of any proposal from APML, the conclusion in para 50 of the impugned order that GUVNL by not permitting the Petitioner to sell power in the Power



Exchange and by compelling the Petitioner to inject the power has not acted in accordance with the MoM dated 31.12.2010 is contrary to the settled principles of estoppel by conduct and acquiescence. The Review Petitioner has submitted that APML vide its letter dated 5.2.2011 (written after the GUVNL's letter dated 1.2.2011) submitted a proposal for sale of power to Jharkhand State Electricity Board through PTC India Ltd during February 2011 without contesting the stand taken by GUVNL in its letter dated 1.2.2011 and consent to APML's proposal was by granted by GUVNL. Further, APML approached GUVNL in March 2011 and from July 2011 for which consent was granted by GUVNL. The Review Petitioner has submitted that during the above period, APML did not raise the issue of sale of power through Power Exchange. The contention of GUVNL on principles of limitation, estoppel, waiver, acquiescence raised with regard to the action of APML in accepting the letter dated 1.2.2011 was not considered by the Commission in the impugned order which is an error apparent on the face of record.

7. The Respondent in its written submission has submitted that the issue regarding interpretation of the MoM were raised by the Review Petitioner in its reply dated 29.7.2016. The Commission after considering the submissions of both Review Petitioner and APML came to the conclusion in paras 47 to 49 of the impugned order that MoM dated 31.12.2010 recognised that GUVNL was entitled to electricity prior to SCOD of Unit 5 subject to outcome of the dispute settlement mechanism to be resorted to by APML and GUVNL. GUVNL being surplus in power at that point of time, APML could sell GUVNL's share of power in open market for and on behalf of GUVNL, subject to certain conditions. The Respondent has further submitted that by its letter dated 1.2.2011, GUVNL instructed Gujarat SLDC to permit sale of power by



APML to third party in case of bilateral transactions only and if APML fails to arrange bilateral transactions, the power must be scheduled to GUVNL. The Commission in the impugned order held that the letter dated 1.2.2011 in so far as it puts restrictions on the ability of APML to sell GUVNL's share at the Power Exchange was not in conformity with the MoM dated 31.12.2010 and was unilateral and arbitrary. The Respondent has further submitted that on analysis of MoM dated 31.12.2010 and the letter dated 1.2.2011 and after duly considering the rival contentions of the parties regarding consideration of energy sold from Units 1 to 4, the Commission came to the conclusion that 992.06 MUs were supplied to GUVNL from Units 5 and 6 by APML under compulsion and for the said quantum APML is entitled for compensation. The Respondent has submitted that GUVNL's submissions in the Review Petition are to substitute a view that has been considered and duly rejected by the Commission in the impugned order, and the power of review cannot be used to substitute a view as held by the Hon'ble Supreme Court in Union of India Vs. Sandur Manganese and Iron Ores Limited {(2013) 8 SCC 337}.

8. We have considered the submission of the parties. The basic contention of the Review Petitioner is that the MoM dated 31.12.2010 and the GUVNL's letter dated 1.2.2011 have not been interpreted by the Commission in their proper perspective and the submissions of the Review Petitioner in this regard have not been considered. GUVNL filed its reply vide affidavit dated 29.7.2016 in Petition No.154/MP/2015 and the submissions of GUVNL with regard to interpretation of the MoM dated 31.12.2010 and letter dated 1.2.2011 have been recorded in para 19 of the impugned order. Further, GUVNL's contention in its written submission in respect of these documents has been recorded in para 21 of the impugned order. In para 46



of the Impugned order, the Commission has noted the gist of the submissions of GUVNL while analysing the dispute with regard to sale of power to third parties. The Commission thereafter proceeded to examine both these documents in the context of the dispute between the parties. In this connection, para 47 is extracted as under:

“47. We have considered the submissions of the Petitioner and GUVNL. Both GERC and the Appellate Tribunal have held that the Petitioner was not obliged to supply power to GUVNL in terms of the PPA prior to SCOD of Units 5 & 6 of Mundra Power Project. In other words, the Petitioner was free to sell power before SCOD to any third party without seeking the consent of GUVNL. However, generation and sale of power from Units 5 & 6 have taken place prior to the order of GERC. Therefore, the question under consideration is whether the Petitioner was given consent by GUVNL to sell power to third party or the Petitioner was compelled to supply power to GUVNL for which it needs to be compensated. At the core of the dispute are two documents, namely, MoM dated 31.12.2010 and GUVNL’s letter dated 1.2.2011 to Gujarat SLDC....”

9. After discussing the provisions of the MoM dated 31.12.2010, the Commission examined the condition imposed through letter dated 1.2.2011 regarding sale at the Power Exchange in the following terms:

“48. One of the conditions for sale of GUVNL’s power to third party was that sale transaction of GUVNL’s share of power should be identified. There is nothing on record which shows that the parties have agreed to any arrangement of formula for identifying the sale transaction for GUVNL’s share of power. However, GUVNL vide its letter dated 1.2.2011 addressed to Gujarat SLDC has instructed to permit sale of power to third party by the Petitioner in case of bilateral transactions only and in case of failure of the Petitioner to arrange bilateral transactions, the power has to be scheduled to GUVNL. The said letter is extracted as under:

“In this regard, it is to inform you that GUVNL’s share from Unit No.5 (660 MW) of Mundra Power Project is allowed to be sold by M/s APML on behalf of GUVNL, but only through Bi-lateral arrangements and not through Power Exchanges, and if M/s Adani cannot sell power of GUVNL’s share through bilateral arrangements, in that case it is to be scheduled to GUVNL. Therefore you may allow/grant Open Access for selling GUVNL’s share of power only with prior concurrence/consent of GUVNL.”

The above instructions clearly put transactions through power exchange outside the purview of third party sale, thereby impairing the ability of the Petitioner to explore the available mechanisms for third party sale. It is also noted that though the third party sale was agreed in the MoM dated 31.12.2010, no restriction was placed on third party sale through power exchange. It is a unilateral decision by GUVNL and there is



nothing on record to show that Petitioner was consulted as to what would constitute third party sale in terms of the MoM dated 31.12.2010. The letter dated 1.2.2011 debarring the Petitioner from sale through power exchange had huge impact on the ability of the Petitioner to sell power to third party in the open market.”

10. As regards the submission of GUVNL regarding the conduct of APML by not challenging the letter dated 2.1.2011 and seeking concurrence for bilateral transactions, the Commission rejected the said contention by recording detailed reasons in para 49 of the impugned order as under:

“49....In our view, only because the Petitioner did not challenge the letter dated 1.2.2011 cannot be held against the Petitioner to claim compensation on account of restrictions placed by GUVNL on sale to third party except through bilateral transactions. Firstly, GUVNL was aware that the Petitioner was not agreeing to supply power to GUVNL prior to SCOD which has been duly recognised in MoM dated 31.12.2010 and GUVNL’s share in power generated prior to SCOD is an interim arrangement subject to the outcome of the appeal or dispute resolution mechanism to be resorted to by the Petitioner. Secondly, GUVNL was aware of the consequence that if the issue is decided in favour of the Petitioner, GUVNL would have no right over the said power and consequence of not allowing the Petitioner to sell to third party through Power Exchange would follow. Thirdly, if GUVNL wanted that transactions through power exchange should be excluded, it should have decided the same in consultation with the Petitioner.”

11. The Commission also considered whether the condition put by GUVNL for third party sale through Power Exchange is capable of implementation. In this connection, the Commission observed as under:

“50. From the submissions of the Petitioner and GUVNL, it emerges that the Petitioner was selling power from its merchant capacity from phase I (Unit 1 to 4) and phase II (Unit 5 & 6). Since, scheduling for sale through Power Exchange is given stage-wise / phase wise, sale of power from phase I or phase II of Mundra Power Project of the Petitioner can be easily identified. As regards identification of the share of different entities from sale of power in the Power Exchange from the same stage or phase is not possible, the Petitioner could not have sold the power from unit 5 & 6 severally for GUVNL share and the Petitioner share. However, as submitted by the Petitioner, the share of GUVNL and the Petitioner could be obtained by prorating the power schedule through Power Exchange between the GUVNL share and the Petitioner’s untied capacity. Further, GUVNL failed to consider that apart from collective transactions, there are transactions in Contingency and Term Ahead Market in the Power Exchange which are bilateral in nature. We are of the view that GUVNL instead of unilaterally refusing consent for sale of power through Power



Exchange should have worked out a formula in consultation with the Petitioner so that the Petitioner could have sold the balance power of GUVNL's share through the Power Exchange. GUVNL by not permitting the Petitioner to sale power in the Power Exchange and by compelling the Petitioner to inject the power (other than the power sold through bilateral transaction) has not acted in accordance with the MoM dated 31.12.2010. After it was decided by GERC and Appellate Tribunal that the Petitioner was not obligated to supply power to GUVNL prior to SCOD, GUVNL becomes liable to compensate the Petitioner for the power which the Petitioner was compelled to supply to GUVNL."

12. From the above discussion, it is clearly apparent that the Commission has considered all contentions of the Review Petitioner raised in the review and has recorded its decisions on these issues. If there is any infirmity or illegality in the said decision, it is a subject matter of appeal and cannot be reargued on merit through review. In the case of Lily Thomas & others. Vs. Union of India & Others {(2000) 6 SCC 224}, Hon'ble Supreme Court has held as under:

"56. It follows, therefore, that the power of review can be exercised for correction of a mistake and not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not a ground for review...."

Further, in the case of Union of India Vs. Sandur Manganese and Iron Ores Limited & others{(2013) 8 SCC 337}, the Hon'ble Supreme Court held as under:

"23. It has been time and again held that the power of review jurisdiction can be exercised for the correction of a mistake and not to substitute a view. In Parsion Devi & Others Vs. Sumitri Devi & Others, this Court held as under:

"9. Under Order 47 Rule 1 of CPC, a judgement may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 of CPC, it is not permissible for an erroneous decision to be "reheard and corrected". A review petition, it must be remembered has limited purpose and cannot be allowed to be "an appeal in disguise."



In the light of the principles of law enunciated in the above judgements, we are of the view that the contention of the Review Petitioner that the Commission did not appreciate the submissions of the Review Petitioner in correct perspective cannot be accepted as a valid ground for review.

13. The Review Petitioner has relied upon the judgments of the Hon'ble Supreme Court in Board of Control for Cricket in India Vs. Netaji Cricket Club [(2005) 4 SCC 741]. In BCCI case supra, the Hon'ble Supreme Court has held that the mistake on the part of the Court which would include the mistake in the nature of the undertaking may also call for review of the order. In the present case, there is no mistake on the part of the Commission with regard to appreciation of any facts or question of law in the impugned order and therefore, the judgment in BCCI case is not applicable. The Review Petitioner has also cited some more judgments which are not relevant.

(B) Consideration of quantum of units alleged by supplied under compulsion to GUVNL;

14. The Review Petitioner has submitted that in Paras 51 to 53 of the impugned order, the Commission has held that APML was forced to supply a total of 992.06 MUs to GUVNL from March 2011 based on the reasoning that out of 1250.86 MUs supplied by APML to GUVNL, APML could have supplied 258.8 MUs from GUVNL's share instead of its merchant share in Units 5 and 6. By the same logic, the Commission should have considered 510.9 MUs as sold at the Power Exchange from Units 1 to 4 which were supplied under Lol dated 11.4.2011 and revised Lol dated 28.6.2011 to UPPCL and the said quantity should have been deducted from 1250.96 MUs which were supplied to GUVNL. The Review Petitioner has submitted that there is an error apparent on the face of record with regard to quantum



considered as sold by APML from the merchant capacity as the total quantity sold to UPPCL was 769.70 MUs (258.80 MUs + 510.90 MUs) and not merely 258.80 MUs and APML had the opportunity to sell 510.90 MUs from Units 5 and 6 in the same manner as it supplied 258.80 MUs. The Review Petitioner has submitted that APML has not disclosed that it sold power from its merchant capacity of Units 1 to 6 to others in bilateral transactions and the total sale including sale to UPPCL was 1271.06 MUs (462.86 MUs from Units 5 and 6 and 808.20 MUs in Units 1 to 4). The Review Petitioner has further submitted that after the order of GUVNL dated 21.12.2011 permitting APML to sell power outside prior to SCOD, APML has supplied 6.684500 MUs to GUVNL in November, 2011 at its free will and the said quantum cannot be considered as quantum of power being sold to GUVNL under compulsion.

15. The Respondent has submitted that the Commission after duly considering the rival submissions of the parties regarding consideration of energy sold from Units 1 to 4 has taken the view that APML ought to be compensated only for 992.06 MUs as against the claim of 1250 MUs (258.80 being merchant capacity sold from Unit 5 and 6).

16. We have considered the submissions of the parties. The Commission decided the issue in para 51 of the impugned order as under:

“51. Another issue which has been raised by GUVNL is that the Petitioner instead of supplying the full capacity from GUVNL’s share to UPPCL against the contract of 600 MW, has chosen to sell only 283-325 MW from GUVNL’s share and has sold the remaining capacity from alternative sources. The Petitioner has submitted that the Petitioner had a merchant capacity of 200 MW from Units 1 to 4 and merchant capacity of 234 MW from Units 5 & 6 and during the period under consideration, the Petitioner has supplied 510.9 MUs from Units 1 to 4 and 258.8 MUs from Units 5 & 6 to UPPCL. The Petitioner has submitted that as the capacities tied up through PPA/disputed



capacity and merchant capacity are parts of the same Units, generation of power takes place simultaneously from both these capacities. Since power generated cannot be stored, it ought to be supplied or sold and therefore, the Petitioner had to supply the power generated from merchant capacities of Unit 1-4 and Unit 5 to UPPCL. We have considered the rival submissions of the parties. Admittedly, the Petitioner has not sold its merchant capacities in the Power Exchange. It has sold part of the merchant capacities through bilateral transactions to UPPCL and partly injected power into the State grid. The Petitioner is not claiming any compensation for the merchant capacities which it sold to UPPCL. The Petitioner sold 258.8 MUs to UPPCL from its merchant capacities in Units 5 & 6 and 510.9 MUs from Units 1 to 4. GUVNL has raised a pertinent point that there was no embargo on the Petitioner to sell power from merchant capacities in Unit 5 & 6 in the Power Exchange since the letter dated 1.2.2011 was confined to the share of GUVNL only. Therefore, for sale of power from the merchant capacities of 234 MW in Units 5 & 6 in the power exchange, no permission of GUVNL was required. However, from the data produced, it is noticed that no power has been sold by the Petitioner from its merchant capacity in the Power Exchange and during the period of consideration, the Petitioner has sold about 258.8 MUs to UPPCL from its merchant capacity in Units 5 & 6 which could have been sold at the Power Exchange and corresponding power from GUVNL's share could have been sold to UPPCL. We are of the view that had the Petitioner sold its merchant capacity in the Power Exchange and sold corresponding power from GUVNL's share to UPPCL, injection of power to Gujarat would have been reduced to that extent. In other words, the Petitioner has claimed to have sold 1250.86 MUs to GUVNL under compulsion which would be reduced to 992.06 MUs (1250.86 – 258.80)."

17. APMIL entered into the Power Purchase Agreement dated 2.2.2007 with GUVNL for sale of 1000 MW of electricity generated from Units 5 and 6 of Phase III (2x660 MW) of Mundra Power Project at tariff discovered through competitive bidding process. The SCOD of the Units under the PPA dated 2.2.2007 was 60 months from the date of the PPA i.e. 2.2.2012. On 7.12.2010, APMIL wrote to GUVNL informing that Unit 5 would be in a position to generate electricity by the end of December 2010 and further informed that the Petitioner was not liable to supply electricity prior to SCOD of the Unit. However, GUVNL vide its letter dated 20.12.2010 replied that GUVNL was entitled to electricity from the synchronised units even prior to SCOD. The issue was resolved between the parties as per the MoM dated 31.12.2010. APMIL commissioned Units 5 and 6 of Mundra Power Project on 26.12.2010 and 20.7.2011 respectively. Therefore, the parties agreed to adopt a



certain formula in respect of sale of power before SCOD from Unit 5 and 6. Sale of power from Units 1 to 4 was completely outside the purview of the MoM dated 31.12.2010. Both GERC and the Appellate Tribunal have held that APML was not obliged to supply power to GUVNL in terms of the PPA prior to SCOD of Units 5 and 6 of Mundra Power Project. APML approached the Commission for quantification of its claim vis-à-vis GUVNL in the light of the decision by Appellate Tribunal. Since the dispute related to generation and sale of power from Units 5 & 6 before SCOD and actual generation and supply had taken place prior to the order of GERC and Appellate Tribunal, the Commission framed the issue in para 47 of the impugned order whether the Petitioner was given consent by GUVNL to sell power to third party or the Petitioner was compelled to supply power to GUVNL for which it needs to be compensated. Therefore, the dispute regarding sale of merchant capacity by APML before SCOD was confined to Units 5 & 6 which were covered under PPA dated 2.2.2007. Since generation and sale of power from Units 1 to 4 was governed by different PPA which was outside the scope of dispute, merchant sale from these units were not considered and the findings of the Commission in para 51 of the order was confined to generation and sale of power from Units 5 and 6 only. Taking into account the submissions of GUVNL that no permission was required for sale of power by APML from its merchant capacity in Unit 5 & 6, the Commission proceeded to identify that during the period of dispute, APML has sold 258.50 MUs to UPPCL which could have been sold at the Power Exchange and corresponding quantum of GUVNL share could have been sold to UPPCL. To that extent, quantum of power sold to GUVNL under compulsion has been reduced i.e. from 1250.86 MUs to 992.06 MUs. Non-consideration of the power sold to UPPCL from Units 1 to 4 was a



conscious decision of the Commission which cannot be considered as an error apparent on the face of record and review sought on this ground is rejected.

18. GUVNL has submitted that as per the information available with GUVNL obtained from State Energy Accounts by SLDC/Regional Energy Accounts by WRPC for the Months of March, 2011 to November, 2011, APML has sold power to other entities from its merchant's share from Units 1 to 4 and Units 5 to 6. The Review Petitioner has submitted that during the said period, APML has sold 462.86 MUs (including 259.67 MUs to UPPCL) through bilateral transactions from Units 5 and 6 and 808.02 MUs (including 527.01 MUs to UPPCL). The Review Petitioner has submitted that APML has not disputed the veracity of the above quantum in its reply to the review petition. The Review Petitioner has submitted that after the order of GERC, APML has sold 6.684500 MUs to GUVNL even though it had no compulsion to supply and therefore, the said quantum should be reduced from the quantum of power sold under compulsion as per the finding of the Commission. On perusal of the submissions of the Review Petitioner, it is revealed that APML has sold power from Units 5 and 6 through bilateral transactions to UPPCL, MSEB, JVVNL, NDPL, BRPL and IEX bilateral. We note that except for the power sold to UPPCL, the Review Petitioner has not raised the issue of sale to entities other than UPPCL in the main petition. Moreover, the Review Petitioner has submitted that it obtained the information from Gujarat SLDC and WRPC. Since the information was available with the Review Petitioner but was not revealed during the consideration of the main petition by the Commission, it cannot be said to be a new evidence for the purpose of review. Therefore, these documents do not qualify as new evidence which were



not within the knowledge of the Review Petitioner during the pendency of the main petition before the Commission. Review on this ground is rejected.

(C) Computation of the compensation to be paid by GUVNL

19. The Review Petitioner has submitted that in para 54 of the impugned order, the Commission has considered the weighted average merchant sale rate of power by GUVNL instead of the weighted average rates in the Power Exchanges that APML would have obtained, had APML sold the power in the Power Exchanges. Further, the cost incurred by APML for sale of power in Power Exchange such as transmission charges and losses, exchange margins and SLDC/RLDCs charges, etc. would have to be factored. The Review Petitioner has submitted that the measure of compensation for the damages under Section 73 of the Indian Contract Act, 1872 can only be the prevalent average rates in Power Exchanges on relevant dates which APML would have got, had GUVNL allowed the sale through Power Exchanges. The measure of compensation cannot be what GUVNL had got under its bilateral agreement on sale of its surplus power, according to the Review Petitioner such a claim by APML is contrary to the terms of the Minutes of the Meeting dated 31.12.2010. The Review Petitioner has further submitted that consideration of PPA tariff with applicable rebate @ 2% is for payment of tariff prior to the due date. Since APML has received the payment prior to the due date and has enjoyed the cash flow, the PPA tariff is to be considered for computation without consideration of any applicable rebate. The Review Petitioner has submitted that the Commission has not given any reason for consideration of rebate in the tariff. The Review Petitioner has submitted that these are error apparent on the face of record within the meaning of Order 47 Rule 1 of the CPC.



20. APML has submitted that there is no arithmetic error or error apparent on the face of record nor the Review Petitioner has disclosed any new material which would qualify for review. APML has submitted that APML had placed its claims way back in 2012 based on weighted average rate at which GUVNL had sold surplus power including the power supplied by APML. Further, GUVNL's reply dated 29.7.2016 is silent on this aspect and for the first time GUVNL has raised the issue regarding energy rate at which GUVNL is required to reimburse compensation to APML in the review petition. APML has submitted that since the mechanism for reimbursement ought to be revenue neutral, there is no other way than consideration of weighted average price at which GUVNL sold surplus power including the power supplied by APML. APML has further submitted that average exchange rate depends upon number of factors including quantum of power being sold, demand, congestion in market, etc. APML has submitted that there are multiple avenues of selling power through the Power Exchange and the average exchange rate of collective transaction cannot be considered at all for the purpose of calculating the compensation. With regard to consideration of 2% rebate, APML has submitted that GUVNL is not entitled to rely on PPA provisions before SCOD in terms of the order of GERC, Appellate Tribunal and this Commission and therefore, GUVNL cannot take advantage of the 2% rebate. APML has submitted that there is no error in the decision of Commission and hence does not qualify for review.

21. We have considered the submissions of the parties. The Commission in para 54 of the impugned order decided the issue of compensation payable to the Petitioner. The said para is extracted as under:-



“54. The Appellate Tribunal in its judgment dated 4.10.2012 in Appeal No 185 of 2011 has held that the Petitioner was not obliged to supply power to GUVNL prior to SCOD of Unit 5 and 6 of Mundra Power Project. It therefore follows that the Respondent was not entitled for supply of power prior to SCOD of these units. Therefore, the Petitioner is entitled to receive compensation for the power which was compelled to schedule as GUVNL’s share prior to the SCOD. The compensation shall be worked out on the basis of weighted average merchant sale of power by GUVNL during the corresponding period. Accordingly, the Petitioner shall be entitled for compensation at the rate of the difference between the weighted average merchant sale rate of power by GUVNL for the corresponding months and the PPA tariff (with applicable rebate @ 2%) for 992.06 MUs supplied to GUVNL.”

22. As per the above para, the Commission noted that in terms of the Judgment of the Appellate Tribunal, APML was not obliged to supply power to GUVNL prior to SCOD and accordingly, GUVNL was not entitled for supply of power prior to SCOD of these units. The Commission further came to the conclusion that since the Petitioner was compelled to schedule power to GUVNL prior to SCOD, it was entitled for compensation. APML in para 51 of the main petition had submitted that it had considered the rate of Rs.3.93 per unit while calculating its claim for supply of 1250.86 MUs to GUVNL based on the weighted average rate of sale of surplus electricity of GUVNL. However, GUVNL in its reply did not comment on the rate at which the compensation should be paid. The Commission after considering the submissions of the parties decided that GUVNL would be liable to pay compensation to APML at the rate of difference between the weighted average merchant sale rate of power by GUVNL for the corresponding months and the PPA tariff (with the applicable rebate of 2%) for 992.06 MUs supply to GUVNL. In our view, this is a conscious decision by the Commission and is not an error apparent on the face of record. Therefore, review with regard to weighted average merchant sale rate of power by GUVNL is rejected.



23. As regards the rebate, the Review Petitioner has paid the PPA tariff for the power injected by APML prior to the SCOD after availing 2% rebate. GUVNL has paid the tariff within the stipulated time and has availed the rebate and APML has also enjoyed the benefit of early payment. In our view, the rebate availed by GUVNL with corresponding benefit to APML in the form of early payment should not be taken away now while allowing the compensation in terms of our order. To this extent, we feel that the order needs to be reviewed. Accordingly, the last sentence of para 55 of the impugned order shall be modified as under:

“Accordingly, the Petitioner shall be entitled for compensation at the rate of the difference between the weighted average merchant sale rate of power by GUVNL for the corresponding months and the PPA tariff (without the applicable rebate @2%) for 992.06 MUs supplied to GUVNL.”

24. Review Petition No. 35/RP/2017 is disposed of in terms of the above.

sd/-
(Dr. M. K. Iyer)
Member

sd/-
(A. S. Bakshi)
Member

sd/-
(A.K. Singhal)
Member

sd/-
(P.K. Pujari)
Chairperson

