

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram

1. Shri D.P. Sinha, Member
2. Shri G.S. Rajamani, Member
3. Shri K.N.Sinha, Member

Review Petition No. 92/2000

in

Petition No.24/2000

In the matter of

Review Petition seeking for review of order dated 26.9.2001 of the Commission in Petition No.24/2000.

IA No. 78/2000

in

Petition No.24/2000

In the matter of

Purchase of Power by PTC from Hirma Mega Power Project and Purchase by SEBs on a back to back basis and amendment of orders dated 5-9-2000 and 26-9-2000.

IA No. 91/2001

in

Petition No.24/2000

In the matter of

Clarification, etc. on orders dated 5.9.2000, 26.9.2000 in Petition No.24/2000

And in the matter of

Mirant Asia-Pacific Ltd.

Applicant/Review petitioner

And in the matter of

Power Trading Corporation of India Ltd.

.... Petitioner

VS

Mirant Asia-Pacific Ltd.& others

.... Respondents

The following were present:

1. Shri Parag Tripathi, Sr. Advocate for MAPL
2. Ms. Mamta Tiwari, Advocate for MAPL

3. Shri Mayank Vaid, Advocate for MAPL
4. Shri Sanjay Kapoor, Country Manager, MAPL
5. Shri Sunil Aggarwal, Hirma Power
6. Shri Sunil Saran, Hirma Power
7. Shri J.P. Chalasani, Reliance Power
8. Shri K.P. Maheshwari, Reliance Power
9. Shri M.G. Ramachandran, Advocate for PTC
10. Shri K.V. Balakrishnan, Advocate for PTC
11. Shri S. Seth Vedanthan, Advisor, PTC
12. Shri O.P. Maken, Vice President (Projects), PTC
13. Shri A. Mohan Menon, Addl.VP, PTC
14. Shri G.S. Dhir, Manager (Law), PTC
15. Shri H. Saran, Manager, PTC
16. Shri Rakesh Nath, PTC
17. Shri Satjit Singh, Dy.Dir, PSEB
18. Shri Satish K. Agnihotri, Advocate, MPEB
19. Shri Anil Pande, Advocate MPEB
20. Shri D.K. Srivastava, XEN, MPEB
21. Shri L.N. Nimawat, XEN, RVPNL
22. Shri R.K. Arora, XEN/T, HVPN
23. Shri Prasanth Sharma, PGCIL
24. Shri Akhil Kumar, PGCIL
25. Shri Vijay Kumar, PGCIL

**ORDER
(DATE OF HEARING 10-10-2001)**

Review Petition No. 92/2000

This application has been filed by M/s. Mirant Asia-Pacific Ltd. under Clause (f) of Section 12 of the Electricity Regulatory Commissions Act, 1998 (for short, "the Act") for review of the Commission's orders dated 5.9.2000 and 26.9.2000 in Petition No. 24/2000. The application for review which is already admitted for hearing, came up before us for final disposal. The facts, in brief, leading to filing of the application are stated hereunder.

2. Power Trading Corporation, (for short, PTC), had filed a petition (No. 24/2000) praying for approval of tariff for the proposed Hirma Mega Power Project

with a net capacity of 3960 MW, comprising of 6 units, to be developed by Southern Energy Asia Pacific Ltd., which subsequently changed its name to Mirant Asia Pacific Ltd., with states of Punjab, Haryana, Rajasthan, Madhya Pradesh and Gujarat as the beneficiaries, (which were impleaded as respondents in the petition) in advance of the implementation of the project. SBI Capital Markets Ltd (for short "SBI Caps") were appointed as the consultants to assist the Commission in the task of determination of tariff. SBI Caps further appointed Black and Veatch of USA as the technical consultants.

3. SBI Caps in its report to the Commission considered various tariff related issues, namely, use of super-critical boiler technology, indexation of O&M, adjustment factor for exchange rate variation before financial closure, PLF/availability at two different levels of 68.5% and 85% and Front Loading of tariff at 74% and 88% , station heat rate, secondary fuel oil consumption and adjustments in tariff in cases of changes in law and recommended a tariff of Rs.1.3646/kWh at constant prices. The Commission in its "summary" order dated 5.9.2000 approved a levelised tariff of Rs.1.33/kWh at constant prices at sub-critical boiler technology at availability of 85% with 74% Front Loading. The parties were, however, directed to assist SBI Caps in arriving at corresponding fixed charges with super-critical boiler technology for both 74% and 88% Front Loading. The review petitioner, however, did not render necessary assistance to SBI Caps since, according to it, the tariff determined by the Commission was not viable. SBI Caps did the working on their own. The tariff equivalent to levelised

tariff of Rs.1.33/kWh for super-critical boiler technology was calculated at Rs.13398/kWh.

4. For arriving at the fixed charges, the Commission proceeded on the assumption that the project would be implemented in accordance with the following schedule:

COD of 1 st unit	:	39 months from the financial Closure
COD of subsequent units	:	At 3 months' interval thereafter

5. The dollar equivalent of the capacity charges had been worked out based on a mix of Dollar and Rupee in the ratio of 46:54 for first 12 years of operation and in the ratio of 23:77 for 18 years, considering the total life of the project as 30 years. The tariff approved by the Commission was applicable for sub-critical boiler technology with net station heat rate of 2411 K cal/kWh.

6. In the "summary" order dated 5.9.2000, also made the following observations,

"The tariff determined above shall be valid provided the Installation Agreement, Fuel Supply Agreement, Power Purchase Agreement and Payment Security Arrangement are concluded by 30th June 2001 and financial closure achieved within 12 months of signing of the last of the above four agreements"

The above observations/directions were reiterated in the “detailed” order dated 26.9.2000, with the liberty to the parties “to seek extension of time” in case of any delay on any of these agreements/arrangements. In the “detailed” order dated 26.9.2000, on the issue of Dollar-Rupee components, the Commission directed as under:

“In our view, so long as SEAP is the promoter of this project, the determination of the tariff is US dollar and rupees should not undergo a change depending upon the means of financing adopted. In case of any change in the promoter of the project resulting in a change in means of financing the same should be subject to our approval when this issue can be considered once again”.

8. The present application for review seeks review of the tariff determined by the Commission, as also the deletion of certain observations/directions of the Commission, which have been reproduced above at paragraphs 6 and 7. The review petitioner has, in addition, prayed for determination of the appropriate tariff at 84% Front Loading and for increase in fixed charges for adoption of super-critical boiler technology be enhanced from 0.74% of Fixed Charges to 0.815%. The detailed grounds made in support of the prayers made in the application for review and briefly stated are:-

- (i) Competitiveness of its tariff: issue of Front Loading at constant prices
- (ii) Competitiveness of its tariff when independently estimated
- (iii) Competitiveness of its tariff at current prices

- (iv) Missing weightage for Flu Gas Desulpharisation plant
- (v) Weightage for Net Station Heat Rate efficiency
- (vi) Weightage for contribution towards infrastructure development fund
- (vii) Weightage for site specific features
- (viii) Weightage for super-critical boiler technology
- (ix) Implementation schedule
- (x) No consent on foreign exchange denomination

9. Under Clause (f) of Section 12 of the Act, the Commission is invested with same powers as vested in a Civil court under the Code of Civil Procedure as regards review of its orders, decisions, directions, etc. The powers of a Civil Court to review its orders are defined under Section 114 read with order XLVII, Rule 1 of the Code. In view of these statutory provisions, a review is permissible on the following grounds:

- (i) Discovery of new or important matter or evidence, which after exercise of due diligence was not within the knowledge of the petitioner, or could not be produced by him, at the time when the order was made, or
- (ii) Mistake or error apparent on the face or record, or
- (iii) Any other sufficient reason

10. As per the law declared by the Supreme Court, powers of review under the Code of Civil Procedure are extremely limited. It follows from the decisions of the Apex Court that a wrong decision on a question of law or fact is not a ground for review. Similarly, that another view is possible on an issue before the court, is also not a ground for review. The power of review can be exercised only to correct a patent error, which strikes one on mere looking at the record and does not require any elaborate arguments. [Smt. Meera Bhanja Vs. Smt. Nirmala Kumari Choudhary (AIR 1995 SC 445) and Ajit Kumar Rath Vs State of Orissa and others (1999) 9 SCC 596]. The grounds urged by the review petitioner in support of its application for review is proposed to be examined in the face of above propositions of law.

11. We in the first place, proceed to consider the review petitioner's prayer for deletion of certain portions of the observations regarding signing of agreements, etc. As we have noted above, the Commission had observed that for the validity of the tariff determined by the Commission, the parties must have signed the Installation Agreement, Fuel Supply Agreement, Power Purchase Agreement and Payment Security Arrangement by 30th June 2001 and financial closure was to be achieved within 12 months of signing of the last of these four agreements. The parties were, however, granted liberty to seek extension of time in case of their failure to conclude these agreements by 30th June 2001.

12. The review petitioner seeks deletion of these observations/directions. It is stated that these agreements/arrangements, particularly the issues of payment security arrangement and time limit for financial closure are principally in the nature of PPA issues and should be left to be worked out by the parties within the appropriate contractual framework, without any direction from the Commission. We have considered the submissions made on behalf of the review petitioner. When tested on the touchstone of the law laid down by the Apex Court and adverted to above, we do not consider these submissions to be valid grounds for review of the observation/direction and their deletion. It amounts to re-opening of the issue on merits through the process of further reasoning which, in our considered opinion, is impermissible through the remedy of review provided under the law. On consideration of the issue on merits either, we feel that signing of different agreements/arrangements cannot be left open-ended at the discretion of the parties. We thus do not find proper justification for deletion of the observations/directions extracted at sub-clause (i)(d) of the "prayer clause" in the application for review and accordingly this part of the prayer stands rejected.

13. We now consider the effect of the observations/directions regarding signing of agreements on the tariff determined by the Commission, because examination of this aspect has a direct bearing on consideration of other issues raised in the application for review. This petition was listed before us on 11.9.2001, when we were informed that negotiations for signing of Power Purchase Agreement were continuing and there was a general consensus on a number of issues. On the

question of payment security arrangement, we were informed that the matter was under active consideration of the Central Government in the Ministry of power. We, therefore, directed PTC to place on record before the Commission the status report on the issue of finalisation of payment security mechanism and adjourned the matter for hearing on 14.9.2001. In obedience of these directions, an affidavit was filed by PTC placing on record the status report. It was found that completion of various steps was held up on account of non-finalisation of payment security mechanism by the Central Government, though action in that regard was stated to be in an advanced stage. We once again adjourned the hearing of the petition to 10.10.2001 with a fresh direction to place on record the latest position on the issue of payment security mechanism. However, no tangible progress in this direction was reported on 10.10.2001 either. We have kept the matter pending so long after conclusion of hearing on 10.10.2001. But, none has placed any material on record to show that any of the milestones set by the Commission has been met. None of the parties has approached the Commission for extension of time. It may be surmised that they do not seem to be interested to pursue the project. For these reasons the tariff determined by the Commission in orders of 5.9.2000 and 26.9.2000 no longer survives.

14. Written submissions had been filed on behalf of the review petitioner wherein it is argued that for the reason that the milestones decided by it had not been met, the Commission has full powers, which it had prior to the passing of the orders on 5.9.2000 and 26.9.2000, to deal with the matter since these were

“conditional orders” but the conditions prescribed in these orders had not been fulfilled. It has been urged that under these circumstances the Commission may “modify or set aside” these orders because the Commission retains of the matter. We do not find merit in this submission. After passing the detailed order on 26.9.2000, the Commission became *functus officio*. Under the applicable statutory, the Commission can acquire *seisin* of the matter only through review. We are satisfied that the issue raised does not fall within the scope of the review proceedings.

15. It is also urged that the Commission is competent to take into consideration the subsequent developments regarding non-compliance of the milestones prescribed by the Commission. In support of this contention, learned Sr. Counsel for the review petitioner has relied upon the judgement of the Supreme Court in *Jai Mangal Oraon Vs Mira Nayak & others* (AIR 2000 SC 2276). In this judgement, the Apex Court has held that subsequent developments of facts and turn of events coming into existence but found relevant in effectively deciding the issues, ought to be taken into consideration by the courts even at the “appellate” stage. In our opinion, his judgement does not the case of the review petitioner. It is established law that the appeal is considered the continuation of the original suit. Therefore, the appellate court has same powers as the trial court and may take notice of the later developments for the purpose of deciding the matter before it in appeal. However, this proposition cannot be extended in case of review proceedings, which as noticed above are limited in their scope.

16. It is next urged that the Commission, in exercise of its inherent powers of doing justice between the parties, conferred under Regulation 111 of CERC (Conduct of Business) Regulations, 1999 may consider the subsequent events to ensure that justice is done. We do not find any force in this submission as well. The inherent powers under Regulation 111 *ibid* cannot be exercised *de hors* the statutory provisions of review prescribed under the code of Civil Procedure and the law declared by the Supreme Court on the subject.

17. In above background, we conclude that the tariff decided by the Commission in its orders of 5.9.2000 and 26.9.2000 cannot be revived which has lapsed by efflux of time and non-observance of the conditions prescribed therein. It is now a dead horse which cannot be brought back to life by any amount of flogging. For these reasons, it is not necessary for us to consider the other points urged by the review petitioner in support of re-determination of tariff for supply of power from the proposed Hirma Mega Power Project. Accordingly, the application for review is liable to be dismissed and we order accordingly.

IA Nos. 78/2000

18. In these IAs filed by Mirant Asia Pacific Ltd. a prayer has been made for executing applicability of Regulation 88 of CERC (Conduct of Business) Regulations, 1999, respect of disputes or differences concerning the proposed Power Purchase Agreement for Hirma Mega Power Project that any difference or

disputes arising out of such agreement shall be dealt with in accordance with the dispute resolution mechanism, if any, contained in the agreement.

IA No. 91/2000

19. This IA has also been filed by Mirant Asia Pacific Ltd praying for examination and finalisation of structured tariff indexation. In this IA directions have also been sought to SBI Caps to make available the avoided cost of power studies for the offstaker states.

20. For the reasons already recorded by us while dealing with the application for review filed by Mirant Asia Pasific Ltd, we do not consider that reliefs sought in the above two IAs can be granted at this stage. Therefore, these IAs are also dismissed along with application for review.

Sd/-
(K.N. SINHA)
MEMBER

Sd/-
(G.S. RAJAMANI)
MEMBER

Sd/-
(D.P. SINHA)
MEMBER

New Delhi dated the 29th April 2002