



ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION
4th & 5th Floors, Singareni Bhavan, Red Hills, Hyderabad - 500004

O.P. No.30 of 2009

Dated 26.11.2012

Sri A.Raghotham Rao, Chairman
Sri C.R.Sekhar Reddy, Member
Sri R.Ashoka Chari, Member

Between:

1. Transmission Corporation of Andhra Pradesh Limited
2. A.P.Central Power Distribution Corporation Limited
3. A.P.Eastern Power Distribution Corporation Limited
4. A.P.Southern Power Distribution Corporation Limited
5. A.P.Northern Power Distribution Corporation Limited

... Petitioners

AND

M/s Spectrum Power Generation Limited

....Respondent

This petition is coming up for hearing on 03.11.2012 in the presence of Sri P.Shiva Rao Advocate for the petitioners and Sri S.Ravi, Advocate for the respondent, the Commission passed the following:

ORDER

The petitioner filed the above said petition u/s 62 of the Electricity Act, 2003 r/w Section 61, 86(a) and (b) and 174 of the Electricity Act, 2003 and Sections 14, 1 and 26(2) of A.P. Electricity Reforms Act, 1998 and Regulatory Commission Business Regulations.

2. The material averments of the petitioner are briefly as follows:

(i) The petitioners are engaged in purchasing Electric power from various generating companies producing electricity and supplying the same to the consumers within the State.

(ii) The respondent is a generating company with whom APSEB (succeeded by A.P.Transco) has entered into power purchase agreement

hereinafter called PPA for brevity for purchase of power on 23.01.1997. The respondent is a company in the private sector which has been set up with the active cooperation, assistance and guidance of the State Government, APTRANSCO and various public sector financial institutions, the latter having provided huge financial assistance towards capital.

(iii) After the enactment of the A.P. Electricity Reforms Act, 1998 and the Electricity Act, 2003 the position was totally transformed. The power and duty of fixing the tariff for all supplied of electricity, whether from the generating company to the transmission licensee or from transmission licensee to consumers, is now vested exclusively in the State and Central Regulatory Commissions. Actually these Commissions have been specifically set up to regulate trade in electricity and are vested with exclusive power.

(iv) The Apex Court in 2004(8) SCC 71 observed that the 1998 Act brought about a substantial change in the manner in which the determination of the tariff has to be made. It not only took away the right of a licensee or utility to determine the tariff but also conferred the said power on the Commission. This was done because of the primary object of the 1998 Act was to create an independent Regulatory Authority with the power of determining the tariff, bearing in mind the interests of the consumers whose rights were till then totally neglected. Sec.62 of the EA, 2003 specifically lays down 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. This section as also the other sections in part VII of the statute make it very clear that no other Authority except the Commission shall have jurisdiction to fix the tariff. Section 61 requires the appropriate Commission to frame Tariff Regulations bearing in mind the matters mentioned therein. Sec 86 of the EA 2003 lays down the functions of the State Commission.

(v) At this juncture, it is necessary to note that after 1998, the freedom of contract enjoyed by generating companies was eliminated. In the constitution, contractual rights were not included among fundamental rights. It

has always been held that contractual rights can be over ridden by statute. (see 1959 A.P. 538, 542). This result will follow whether the rights are expressly referred to and taken away or impliedly destroyed. This aspect has been laid down by the Supreme Court in clear terms in Civil Appeal No. 4660/2001 A.P. Gas Power Corporation Ltd and A.P. State Electricity Regulatory Commission case (2004 SCWR 2202).

(vi) In paragraph 16, of the judgment their Lordships laid down that the Commission has the exclusive power to determine the tariff.

(vii) The power purchase agreement entered into with the respondent is undoubtedly an instrument and the provisions of law are of no avail and should be deemed to be non-existent. The tariff fixed u/s 62 will prevail over PPA tariff. Even without a provision like section 174, the result would be the same.

(viii) The respondent was selected by GoAP for establishment of 208 MW gas based power project with provision for operating with mixed fuel (naphtha and gas) at Kakinada, East Godavari Dist. The target PLF for recovery of full fixed charges is 68.5% PLF. Incentive is payable at 0.4% between 68.5% to 80.5% and 80.5% to 85.5% at 0.5% and beyond 85.5% at 0.6%.

(ix) The respondent entered into power purchase agreement on 23.01.1997 with erstwhile APSEB with a capital cost of Rs.748.43 crs as approved by CEA and installed capacity of 208 MW.

(x) The fixed charges are payable based on the capital cost of Rs.748.43 crs. The fixed charges are calculated for every tariff year and include the following components:

- a. Interest on Debt (Indian & Foreign Debt)
- b. Return on equity at 16%
- c. Interest on Working capital.
- d. Depreciation
- e. O&M expenses as per the formula.

$$\frac{2.5 \times C}{100} \left(\frac{30 \times C_1}{100 \times C_0} + \frac{70 \times W_1}{100 \times W_0} \right)$$

Where C is the capital cost

C_0 is the consumer price index as on CC COD

C_1 is the consumer price index as on 31st Oct of the proceeding tariff year

W_0 is the whole sale price index as on CC COD

W_1 is the whole sale price index as on 31st Oct of the proceeding tariff year

(xi)

- (a) **Return on Equity:** As per CERC (Terms & Conditions of Tariff) Regulations 2004 dated 26.03.2004, Regulation 20 (iii) ROE shall be computed at 14% per annum. ROE may be fixed at 14% as per Regulation 20(iii) of CERC Regulations dt.26.03.2004. Further, ROE at 14%, if payable on monthly basis, works out to more than 14% per annum. The rate of ROE may be fixed taking into consideration the additional income accrued on monthly ROE payments.
- (b) **O&M expenses:** It is requested that O&M expenses may be fixed as per Regulation 20(iv)(c) of CERC Regulation dt.26.03.2004.
- (c) **Insurance:** APTRANSCO is paying insurance at actuals based on the most recent invoices prior to fixed charge computation date, not exceeding 20% of O&M expenses. As per Regulation 14 (xviii) of CERC Regulation, dt.26.03.2004 the insurance is included in the O&M expenses. Therefore, the insurance is not payable in addition to the O&M expenses and CERC Regulation may be followed.
- (d) **Amount of working capital:** APTRANSCO is calculating the amount of working capital based on the following:
- 1/12 of O&M expenses
 - Actual cost of 1 year's inventory of maintenance spares not exceeding 1% of capital cost.

- 2 months receivables of fixed and variable charges. Variable charges for this purposes are based on 68.5% PLF limited to actuals of previous year.

It is understood that the amount of working capital actually borrowed is less than the amount calculated based on above norms.

Therefore, the amount of working capital should be limited to actual borrowings or as per norms whichever is lower.

(e) Interest on working capital: APTRANSCO is paying interest on working capital at the rate specified by State Bank of India as its lending rate offered to its most credit worthy commercial customer. It is requested that CERC regulation may be followed as per 20(v)(b) of CERC and the subjective element removed, while deciding on rate of interest on working capital.

(f) Target availability for recovery of full capacity (fixed charges): As per Regulation 16(i)(a) of CERC Regulation dt.26.03.2004 the target availability for recovery of full fixed charges, for all thermal power generating stations, except NLC and Thanda Thermal Power stations of NTPC is 80%. Recovery of fixed charges below the level of target availability shall be on pro rata basis. At zero availability, no fixed charges shall be payable.

(g) Target PLF for incentive: As per Regulation 16(ii) of CERC Regulations dated 26.03.2004, the target PLF for payment of incentive for all thermal station except NLC, Talcher Thermal power station and Thanda Thermal station of NTPC, is 80%. Similarly, the target PLF for payment of incentive should be fixed as 80% PLF, as per CERC regulations.

(h) Incentive: As per Regulation 23 of CERC Regulations dated 26.03.2004, incentive shall be payable at a flat rate of 25 ps/kwh for ex-bus scheduled energy corresponding to scheduled generation in excess of ex-bus energy corresponding to target plant load factor. It is requested that CERC regulations may be considered and incentive for the project should be fixed as 25 ps/kWh for ex-bus scheduled energy corresponding to scheduled generation in excess of ex-bus energy corresponding to target PLF.

- (i) **Station heat rate:** The station heat rate for the four proposed gas based power projects, which were awarded based on international competitive bidding basis, and are under implementation is 1850 kcal/unit. The PPAs these gas based power projects were consented by this Commission. Therefore, the station heat rate for this project may be restricted to as 1850 kcal/kWh, based on the station heat rate of the four proposed gas based power projects.
- (j) **Auxiliary consumption:** The Commission may also kindly take note of the fact that, at the instance of the State Government, GAIL is supplying gas to the company at the rate of Rs.4607.64/Thousand Cubic Meters (including transportation charges and taxes). More and more gas fields are being discovered in the Bay of Bengal, exploration is going on and there is reasonable hope that gas will be available. The variable charges based on station heat rate of 2200 kcal/unit, auxiliary consumption of 3% works out to 97.47 ps/unit.
- (k) **Reduction of capital cost:** The total amount of above irregularities works out to Rs.97.71 cr (Rs.60.8 cr + Rs.7.11 cr + Rs.29.3crs + Rs.0.5cr). Therefore, it may be construed that SPGL have inflated the capital cost and an amount of Rs.97.71 cr should be deducted from the capital cost of Rs.748.43 crs and the capital cost of the project should be limited to Rs.65.72 crs.

(xii) The PPA presently subsisting between the 1st petitioner and the respondent is not an impediment to exercise power u/s 62 in view of S.174 of EA 2003, as already explained above.

(xiii) Hence, the applicant prays that the Commission may pass appropriate orders by revising the norms for payment of tariff for SPGL u/s 62 of EA 2003, payable to the respondent for electricity supplied by it.

3. The respondent filed its counter and the material averments of the counter are briefly as follows:

a) The instant petition filed by the petitioners is not maintainable and the same is liable to be dismissed in view of the judgment and order dated 28.09.2008 passed by the Hon'ble Appellate Tribunal for Electricity in Appeal No. 90,91,92,93,108,109,110 & 111 of 2006 titled as Rithwik Energy Systems Limited vs. Transmission Corporation of Andhra Pradesh Limited and Ors., wherein, the Hon'ble Appellate Tribunal while dealing with the issue as to whether the Power Purchase Agreements "PPAs" can be reopened, had been pleased to observe and hold that the concluded PPAs cannot be reopened by the Commission unless it is to be reopened for the purposes of encouraging and promoting renewable sources of energy projects pursuant to the mandate of S.86(1)(e) of the Act, which requires the State Commission to promote co-generation and generation of electricity from renewable sources. It is stated that the generating project of the answering respondent is a 208 MW based combined cycle project "Project" and therefore, is not a renewable source of energy. As such, the PPA in respect of the same is not liable to be re-opened in view of the above noted judgment passed by the Hon'ble Tribunal.

b) The instant petition is not maintainable and the same is liable to be dismissed in view of the judgment and order dated 28.09.2006 passed in Appeal No. 4,5,6,9,10,12,13,14 & 23 of 2006, by the Hon'ble ATE, in the matter of Transmission Corporation of AP & Anr. Vs. Andhra Pradesh State Electricity Regulatory Commission & Ors., wherein the Hon'ble Tribunal has been pleased to hold that the "Power Purchase Agreement" is in the nature of a contract between the parties and in the normal course Regulatory Commission will have no jurisdiction to modify it unless mutually agreed to by the involved parties."

c) The review and modification of Amended and Restated PPA dated 23.01.1997 is impermissible in law and totally devoid of any merit. Concluded and legally binding contract between the parties cannot be amended unilaterally. U/s 62 of the Electricity Act, Commission cannot determine tariff in deviation of the terms and conditions of the concluded and binding PPA. The said position of law is settled by a number of decisions of the Hon'ble Supreme Court. Further, Appellate Tribunal for Electricity in its various appeal

emanating from this Commission also considered the said proposition and held that the Commission has no authority to alter or change the PPAs came into existence prior to the constitution of the Commission. The Commission itself in its order dated 24.03.2003 held that “it had no authority to open the PPAs before the Reforms Act came into force”. Therefore, the petition is liable to be dismissed with exemplary costs.

d) In the order dated 18.06.2003 WP No. 1906/1998, in case of GVK Industries Ltd., (a similar IPP with identical parameters) the Hon’ble High Court of AP rejected challenge of the PPA and upheld the legal validity and binding nature of the PPA. Therefore, the question of review of the PPA to the detriment of the respondent by this Commission will not arise. Tariff under the PPA shall have to be in accordance with the provisions there under and not otherwise. The tariff is not subject to review as the same is consistent with the provisions of then applicable laws and notifications issued there under. On this ground also, the petition is liable to be dismissed.

e) Under PPA dated 24.01.1997 certain rights were accrued to the parties there to and the said rights have not been extinguished by Electricity Act, either expressly or impliedly. The provisions of Reforms Act, 1998 and the Electricity Act, 2003 have not superseded the terms of the PPA. As a matter of fact, the provisions of the PPA were saved under the Electricity Act.

f) CERC regulations cannot be applied to the determination of tariff in the present case as they are notified subsequently. The petitioners are not entitled to raise pleas contrary to the PPA and they are liable to pay the respondent for purchase of power as per the PPA, as the PPA is concluded and binding contract.

g) The Commission has no power to revise or review the original terms and conditions incorporated in the PPA entered much earlier to the enactment of Electricity Reform Act and Electricity Act and the Regulations notified by CERC. The Commission in its Tariff order dt.24.03.2003 categorically stated that it has no authority to reopen concluded agreements. It is now well settled

that contractual terms cannot be changed unilaterally. It is submitted that all notifications will operate prospectively, but not retrospectively. An existing notification as on the date of signing a PPA, will override provisions in such PPA which are contrary to regulations of such notification. It is therefore, urged that the CERC regulation dated 24.03.2004 is prospective and that the petitioners cannot seek revision of the provisions of the PPA unilaterally and the petition filed by the petitioners is liable to be dismissed.

h) The Commission has dismissed the petition filed by the petitioners seeking the same relief's against GVK Industries Ltd., a co-IPP having similar operating parameters and provisions of PPA. A copy of the order passed by the Commission in OP No. 26/2009 between APDISCOMs and GVK Industries Ltd.

i) The perusal of the various provisions of the ERC Act makes it clear that the said Act or its provisions or the sections do not apply retrospectively so as to determine the tariff in respect of a generating station. The PPA has been executed in the year 1997 i.e, prior to the enactment of the ERC Act.

j) A perusal of the judgments of the Appellate Tribunal of Electricity would prove beyond doubt that the concluded PPAs between the parties cannot be reopened after the establishment of the Regulatory Commission.

k) The said judgment in 2002(8) SCC 715 has no application or relevance to the facts of the instant case.

l) The Commission has no jurisdiction to adjudicate and reopen the PPA executed between the parties.

m) The PPA executed between the parties had never been executed against the provisions of law and at the time of its execution and even now, is been completely valid, lawful and enforceable under law of this country.

n) The perusal of the said judgment in 2004(1) SCC 195 and order passed by Hon'ble Supreme Court would make it clear that the said judgment did not take into account the fact of reopening the concluded PPAs which was never a question in issue before the Hon'ble Court. Concluded Commercial Contracts between the two parties before the enactment of the Regulatory framework cannot be disturbed, unless and until the legislature specifically provides for the retrospective operation of the regulatory framework, which in fact has not been done.

o) The PPA executed between the parties cannot be construed to be inconsistent with the provisions of the EA, 2003.

p) The petitioner had withheld the legal and valid payments to the respondent which led to asset of the respondent becoming a financial distressed asset and ultimately leading to default in its dues to the lenders. In this scenario, the respondent with its untiring efforts was able to persuade the lenders to restructure the debt by entering into a scheme of arrangement with the lenders and was able to resurrect the plant. The petitioner now cannot under the law go behind a concluded contract and ask for the reopening of the PPA which had been executed prior to the enactment of the ERC Act, 1998, The EA 2003 and the establishment of the Commission after 11 years from the date of the execution of the PPA.

q) The ROE shall be computed on the equity base determined in accordance with regulation 20 i.e., @ 16% for the TY 2001-2004 & @ 14% for the TY 2004-2009 per annum. Provided that the equity in foreign currency shall be allowed a return upto the prescribed limit in the same currency and the payment on this account shall be made in Indian rupees based on the exchange rate prevailing on the due date of billing. Return should attract investments at par with, if not in preference to, other sectors so that the electricity sector is able to create adequate capacity. As far as the equity infusion is concerned, the promoters would be free to have higher quantum of equity investments. The equity in excess of this norm should be treated as loan advanced at the weighted average rate of interest and for a weighted

average tenor of the long term debt component of the project after ascertaining the reasonableness of the interest rates and taking into account the effect of debt restructuring done, if any. In case of equity below normative level, the actual equity would be used for determination of ROE in tariff computations.

r) The contents of para 19 (11) were nothing but same the complaint made by APTRANSCO before CB CID to carry out the investigation on the allegations made in this para. After thorough and deep investigation, CB CID had completed its investigation and reported the same to the court as lack of evidence.

s) Further, the interest rates by the lenders of the SPGL were never reduced and thus there was no effect on the outstanding debt of the answering respondent. The tariff and other statutory requirements of S.43A(2) is concerned the PPAs are statutory instruments. Further a perusal of the judgments of the ATE would prove beyond doubt that the concluded PPAs between the parties cannot be reopened after the establishment of the Regulatory Commissions. The PPA executed between the parties to the instant petition is a concluded contract, the terms of which were not subjected to any modification or change unless otherwise agreed to by the parties and the same had been executed prior to the establishment of the Commission. As such, this Commission shall have no jurisdiction to adjudicate and reopen the PPA executed between the parties.

t) Any reduction in the tariff would result in reduction of operational stability of the project and in fact would lead to the closure of the project.

u) The instant petition is not maintainable and the same is liable to be dismissed, as the present petitioner had already filed a petition before this Commission for the revision of the operating parameters of tariff in respect of the PPA in question, inter-alia on the same issues and cause of action.

v) It is prayed that this Commission may be pleased to dismiss the petition and pass such further or other order(s) as deem fit and proper in the circumstances of the case.

4. On the date of hearing, the learned counsel for the petitioners while reiterating the averments mentioned in the petition, submitted the following aspects while addressing arguments in support of the petitioner.

5. The petitioners are engaged in purchasing electric power from various generating companies producing electricity and supplying the same to the consumers within the State. Previously, the Law relating to Electricity is governed by the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948. Subsequently, the Parliament enacted the Electricity Regulatory Commissions Act, 1998 which came into force from 02.07.1999. The main function of the Electricity Regulatory Commissions constituted under the said Act was to determine tariff wholesale, bulk, grid and retail supply of electricity and to regulate power purchase and procurement process of transmission utilities. The legislature of Andhra Pradesh enacted A.P. Electricity Reform Act, 1998 setting up State Electricity Regulatory Commission with similar objects. Subsequently, the parliament enacted a comprehensive law relating to electricity, viz., the Electricity Act, 2003 and it repealed the Indian Electricity Act, 1910; the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998. The Hon'ble Supreme Court in its judgment reported in 2004(1) SCC 195, while dealing with jurisdiction of Electricity Regulatory Commission held that the Commission has exclusive power to determine tariff.

6. In the light of the above decision, the Commission has to revise or review the norms for tariff payable to the respondent and such power is vested with this Commission. When the Commission fixes tariff by revision of the norms, such tariff operates in future and past applicability of the contract is not affected. Earlier, the interests of consumers have been neglected and the electricity laws governing the subject matter which are remedial in nature

mandate the Commission to revise the parameters as mentioned in the petition.

7. Prior to 1998, Govt used to issue statutory notifications and subsequently that power relating to electricity came to be vested in CERC. Certain parameters for payment of tariff to the respondent are contrary to the Regulation dated 26.03.2009 issued by the CERC and therefore, the Commission may be pleased to allow the petition filed by the petitioners accepting the proposed revision of parameters which are on par with CERC Regulation.

8. On the other hand, the learned counsel for the respondent while reiterating the averments mentioned in the counter, submitted the following points in support of the respondent's case.

9. The Commission has no power to revise / review the original terms and conditions incorporated in the PPA entered much earlier to the enactment of Electricity Reform Act and Electricity Act and the Regulation notified by CERC. It is also further stated that the counsel for the petitioner is asking the Commission for a relief which is already declined by the Commission. The Commission in its Tariff Order dt. 24.03.2003 categorically stated that it has no authority to reopen concluded agreements. It is now well settled that contractual terms cannot be changed unilaterally. It is submitted that all notifications will operate prospectively, but not retrospectively. An existing notification as on the date of signing a PPA, will override provisions in such PPA which are contrary to regulations of such notification. It is therefore, urged that the CERC Regulation dated 26.03.2009 is prospective and that the petitioners cannot seek revision of the provisions of the PPA unilaterally and the petition filed by the petitioners is liable to be dismissed.

10. Basing on the respective pleadings, the following are the points that arise for consideration of the Commission:

- (i) Whether, the petitioners are entitled for the revision of parameters on par with the CERC Regulation dated 26.03.2009?
- (ii) Whether, revision can be entertained in the tariff in deviation of the terms and conditions of the concluded and binding PPA?
- (iii) To what relief?

Point No.1

11. The petitioner has filed the above said petition before the Commission for revision of parameters in view of the Regulation (Terms and conditions of tariff) published by CERC dated 26.03.2004. The parameters are mainly: (a) Return on Equity (ROE), (b) O&M expenses, (c) insurance, (d) Amount of working capital (e) Interest on working capital, (f) Target availability for recovery of full capacity (fixed) charges, (g) Target PLF for incentive, (h) incentive, (i) station heat rate on par with new IPPs to 1850 k.cal/kWh from the existing station heat rate of 2000 k.cal/kWh, (j) to reduce auxiliary consumption from existing 3% to 2.5% on par with BSES, since the respondent has not accepted for the revision of any parameters. Whereas the respondent's contention is that reviewing or revision of the conditions basing on the CERC regulation dated 26.03.2004 is against to law and it has no application to the PPAs entered prior to the advent of Electricity Act, Electricity Regulatory Commissions Act; and that the Commission has no power to compel the respondent to the proposed revision or it has no right to ask for revision unilaterally and the petition itself is not maintainable under law.

12. It is clear from the record that the CERC has made the regulation in exercise of its powers conferred under S.178 of the EA 2003. It says that

- (1) These regulations may be called the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004.
- (2) These regulations shall come into force on 01.04.2004, and unless reviewed earlier or extended by the Commission, shall remain in force for a period of 5 years.

Provided that where a project, including a part thereof, has been commissioned before the date of commencement of these regulations and whose tariff has not been finally determined by the Commission till that date, tariff in respect of such a project or part thereof, as the case may be, for the period ending 31.03.2004 shall be determined in accordance with the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2001.

- (3) Words and expressions used in these regulations and not defined herein but defined in the Act shall have the meaning assigned to them under the Act.

The learned counsel for the petitioner relied upon a decision of APTEL reported in *2002 ELR APTEL 0429. Konark Power Projects Ltd., Karnataka vs. Bangalore Electric Supply Co., Ltd. And KERC, Karnataka*. In this it was held that

“(a) The State Commission as indicated in the impugned order has power to modify the Tariff for concluded PPA in larger public interest.

(b) The guiding principles laid down in Section 61 of the 2003 Act would indicate that the Commission has to maintain a balance so that the generators also may not suffer unnecessarily. In the context of prevailing power situation in the country, it would not be desirable to keep any generating unit out of service for want of “just” Tariff.”

In batch appeals CA No. 296/2006 and others by the Apex Court on 08.07.2010 and remitted the matter to the Commission while holding that

“the ERC has the jurisdiction to determine the tariff which takes within the ambit the purchase price for procurement of electricity generated by the NCE Developers generators in the facts and circumstances of this case.”

Hence, it is clear that the Commission has power to determine the tariff while looking into larger public interest.

13. The above said regulation is issued under section 178 of the EA 2003. If the Commission wants to implement, it may implement the same by taking it

as a guideline in the absence of any specific provision, but it is not mandatory for the Commission to accept the same, since the Commission itself is vested with similar powers u/s 181 of the EA 2003 akin to the powers vested in the CERC u/s 178 of the EA 2003, under which it can make such a regulation. It is pertinent to note that the relief sought by the petitioners to revise/review the original terms and conditions incorporated in the PPA basing on the CERC regulations u/s 178 of EA 2003 is against to law. S.178 of EA,2003 empowers CERC to frame its own regulation. The regulation framed under CERC is not binding on this Commission. There is no provision under the Act empowering CERC to make the SERC's adopt its regulation. When the regulation itself is not applicable, the question of revision/review of terms of the PPA does not arise. It is the prerogative of the Commission to frame its own regulations. In case of framing a regulation the said regulation of the CERC may be taken as a guideline. It is not mandatory for this Commission to adopt the same regulation, ignoring its own powers to make such regulation. Even otherwise, the claim made by the petitioners for revision/review on the basis of the CERC regulation which has come into force with effect from 01.04.2004 is only with prospective effect but not with retrospective effect. The very approach made by the petitioners by asking the Commission to follow the regulation of CERC by filing a petition for revision/review is not only against to the provisions of law but also against to the principles of natural justice. In the absence of a regulation of the State Commission u/s 181 akin to the regulation issued by the CERC u/s178 of EA2003, the petitioners have no right to approach the Commission to revise the parameters on par with those of the CERC regulation dated 26.03.2004. The very approach made by the petitioners invoking the powers of the Commission to adopt the CERC regulation is unknown to law and the same cannot be entertained.

Point No.2

14. It is clear from the judgment of the Apex court in the above said batch of appeals that the Commission is vested with the power to determine the tariff and it is within the ambit of the Commission depending on the demand

and the electricity generated by the NCE Developers. But the very regulation itself, though not applicable, is prospective and the same is incorporated in the preamble of the regulation and hence the said regulation cannot be adopted to the PPAs entered long prior to the said notification. The petitioner ought to have approached the Commission in a different form but not by filing this petition to adopt CERC regulation parameters ignoring the powers of the Commission in fixation of the tariff, etc independently without looking into the parameters defined in the above said regulation. This Commission has already passed an order in O.P.26/2009 filed by the petitioner against M/s. GVK Industries Ltd., on the same grounds and the same was dismissed on 10.03.2011. No appeal is filed against the said order and the finding of the Commission has become final. Hence, this point is also answered in favour of the respondent and against the petitioner.

Point No. 3

15. In the result, the O.P filed by the petitioner is hereby dismissed but in the circumstances without costs.

This order is corrected and signed on this 26th day of November, 2012

Sd/-
(R.ASHOKA CHARI)
MEMBER

Sd/-
(C.R.SEKHAR REDDY)
MEMBER

Sd/-
(A.RAGHOTHAM RAO)
CHAIRMAN