

**ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION**  
**4<sup>th</sup> Floor, Singareni Bhavan, Red Hills, Hyderabad – 500 004**

**Dated: 07-02-2015**

**Present:**  
**Justice Sri. G. Bhavani Prasad, Chairman**

**R.P.No.3 of 2014 in O.P.Nos. 8 of 2011, 9 of 2012, 12 of 2012, 22 of 2014 & 25 of 2014**

**Between:**

Eastern Power Distribution Company of A.P. Ltd ..... Petitioner  
AND

1. M/s. Navabharat Ventures Ltd
2. M/s. Etikoppaka Co-Operative Agricultural & Industrial Society Ltd
3. M/s. EID Parry India Ltd  
(formerly M/s. GMR Technologies & Industries Ltd)
4. M/s. Jeypore Sugar Company Ltd
5. M/s. Chodavaram Co-Operative Sugars Ltd ..... Respondents

Counsel for the petitioner : Sri. P. Shiva Rao, Advocate

Counsel for the respondents : Sri. Challa Gunaranjan, Advocate

**S.R. No. 81 of 2014**

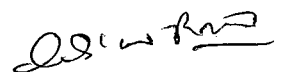
1. Southern Power Distribution Company of A.P. Ltd
2. Eastern Power Distribution Company of A.P. Ltd ..... Petitioners

AND

1. K.M. Power Pvt Ltd.
2. PMC Power Pvt.
3. Manihamsa Power Projects Ltd.
4. NCL Industries Ltd. .... Respondents

Counsel for the petitioners : Sri. P. Shiva Rao, Advocate

Counsel for the respondents : Sri. Challa Gunaranjan, Advocate



**S.R. No. 82 of 2014**

1. Southern Power Distribution Company of A.P. Ltd
2. Eastern Power Distribution Company of A.P. Ltd .... Petitioners

**AND**

1. The Gowthami Solvent Oils Pvt. Ltd.
2. Matrix Power Pvt. Ltd.
3. Varam Power Projects Ltd.
4. Greenko Energies Pvt. Ltd.
5. Shree Papers Ltd.
6. Perpetual Energy Systems Ltd.
7. Sri Kalyani Agro Industries ...Respondents

Counsel for the petitioners : Sri. P. Shiva Rao, Advocate

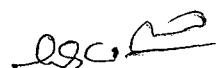
Counsel for the respondents : Sri. Challa Gunaranjan, Advocate

These petitions have come up for hearing on 30-01-2015 and the Commission having considered the submissions and material available on record, passed the following:

**ORDER**

O.P.Nos.8 of 2011, 9 of 2012, 12 of 2012, 22 of 2014 and 25 of 2014 on the file of this Commission were disposed of on merits by a common order dated 05-08-2014 and the generic order determined the fixed cost payable by the respective distribution companies for the 11-20 year period of the operation of all bagasse based NCE projects which completed 10 years irrespective of whether they have approached the Commission or not for such determination.

2. In the matter of determination of tariff of mini hydel power projects to take effect on completion of 10 years of operation from the date of commissioning of the projects, this Commission passed an order on 23-08-2014 determining the fixed cost for the 11-25 year period of the operation of all mini hydel NCE projects which completed 10 years irrespective of whether they have approached the Commission or not for such determination. The generic order fixing the fixed



cost payable by the respective distribution companies also disposed of O.P.No.10 of 2012 on the file of this Commission.

3. In O.P.Nos.11 of 2010, 18 of 2013, 19 of 2013, 48 of 2013, 49 of 2013, 57 of 2013, 23 of 2014, 30 of 2014, 24 of 2014 and 26 of 2014, this Commission pronounced a common order dated 19-07-2014, which determined by a generic order the fixed cost for the 11-20 year period of the operation of all bio mass based NCE projects which completed 10 years irrespective of whether they have approached this Commission or not for such determination, the fixed cost being payable by the respective distribution companies.

4. RP No.3 of 2014 is a petition for review of the common order in O.P.No.8 of 2011 and batch dated 05-08-2014.

5. SR No.81 of 2014 is a petition for review of the order in the matter of determination of tariff of mini hydel power projects to take effect on completion of 10 years of operation from the date of commissioning of the projects dated 23-08-2014.

6. SR No.82 of 2014 is a petition for review of the common order in O.P.No.11 of 2010 and batch dated 19-07-2014.

7. Grounds relied on for seeking of review of the three orders are identical and hence all the three petitions for review are being disposed of by this common order.

8. Arguments of Sri P. Shiva Rao, learned Standing Counsel for the petitioner in all the three petitions and Sri Challa Gunaranjan, learned counsel for respondents in all the three petitions were heard.

9. The first ground on which the review is sought is about this Commission adopting the parameters fixed by the Appellate Tribunal for Electricity in its order dated 20-12-2012 for determining the fixed cost tariff for the 11-20 years of their

operation for the different non-conventional energy projects though the said order is under challenge before the Hon'ble Supreme Court in C.A.Nos.1376-85 of 2013. It was contended that the admission of appeals by the Apex Court which are pending disposal makes the order of the Appellate Tribunal for Electricity one in jeopardy and adopting those parameters is a mistake apparent on the face of the record.

10. In support of this proposition, Sri P. Shiva Rao referred to *Dharam Dutt Vs. Union of India AIR 2004 SC 1295* wherein the Supreme Court held that filing of an appeal destroys the finality of the judgment under appeal. Though the finality of a judgment is subjected to determination of an appeal against it, the mere filing of an appeal will not make a judgment illegal, irregular or untenable and subject to the final judgment in the appeal or any interim orders or directions of the Appellate Court in force during the pendency of the appeal, such a judgment still continues to be legal and valid and the reasoning on which the judgment is based cannot be considered irrelevant or undependable, if identical issues arise for adjudication before a judicial or quasi-judicial forum and a reference to any parameters adopted by such judgment as the basis or a supporting ground for coming to a conclusion in the later case cannot be dismissed as a mistake apparent on the face of the record.

11. Sir P. Shiva Rao, learned Standing Counsel for the petitioner also relied on *Union of India and others Vs. West Coast Paper Mills Limited and another 2004 (1) Supreme 1051* wherein the Apex Court held that if a decree or order is under challenge in a remedy available under the law before a superior forum, its finality is put in jeopardy. Further the Supreme Court itself made it clear that the decree or order under challenge continues to be effective and binding. When the Supreme Court observes that the entertainment of the appeal by the Supreme Court puts the judgment in appeal in jeopardy, it is thus about the subject matter of the *lis* not attaining finality unless determined by the last court. Thus, what can be said to be in jeopardy is the finality of the subject matter of the *lis* or the finality of a decree or order or judgment under challenge, but not the effective and

binding nature of the judgment under appeal so long as it is not set aside or modified or varied by the Appellate Court or suspended or stayed during the pendency of the appeal. To reiterate, mere filing of an appeal without anything more will not make in the present case, due to mere reference to or reliance on the judgment of the Appellate Tribunal for Electricity dated 20-12-2012, the impugned orders vitiated on any ground of mistakes apparent on the face of the record.

12. The common order in O.P.No.8 of 2011 and batch was referring to the order of the Appellate Tribunal for Electricity in Appeal No.150 of 2011 and batch dated 20-12-2012 as formulating the parameters required to be adopted for determining the relevant fixed and variable cost and also the earlier and later events. Though it is true that the parameters in the Appellate Tribunal order dated 20-12-2012 were broadly adhered to by the Commission in the impugned order, the Commission also gave detailed reasons on each aspect as to why those parameters were adhered to. When it decided to continue the existing O & M norm of 4% capital cost for the base year with an annual escalation of 6.69%, it specifically and unambiguously relied on the existing norms as per the Appellate Tribunal order dated 20-12-2012 and the consequent order of this Commission dated 22-06-2013 and it was not an accidental mistake that any other norm said to be indicated by the CERC 2012 regulation was not followed. It was a deliberate and conscious decision based on express reasons, which if incorrect or illegal can be subjected only to an appeal, if available but not to any review.

13. Similarly, the determination by the Commission to permit an incentive at 0.50 ps per unit as against 0.35 ps per unit fixed by the Appellate Tribunal order dated 20-12-2012 is also a conscious decision of the Commission, on examination of the matter with reference to the mandate of the Electricity Act, 2003 to promote generation of electricity from the non-conventional energy sources, offer of similar incentives to thermal plants by CERC Tariff Regulation of 2014 and encouragement of the project developers to enhance their generation.

If the conclusion is considered incorrect or untenable on merits, the remedy would be an appeal and not a petition for review.

14. In the order dated 23-08-2014 in respect of mini hydel power projects, the Commission determined the threshold PLF of 32% for fixed cost recovery which is to be paid upto a PLF of 45% beyond which an incentive of 0.50 ps is to be paid by the Discoms. This decision also was arrived at on the analysis of data furnished by the developers following the orders of the Appellate Tribunal for Electricity. This conclusion based on conscious and expressed reasons can also be subjected only to an appeal and not to a review. For the same reasons, the request in SR No.82 of 2014 about percentage of auxiliary consumption to be considered also does not deserve to be considered in review.

15. Power of review conferred on this Commission by Section 94 of the Electricity Act, 2003 is the same power vested in the Civil Court under the Code of Civil Procedure, 1908. Power conferred on the Civil Court to review by Section 114 read with order XLVII Rule 1 of the Code of Civil Procedure, 1908 is available only when any new and important matter or evidence is discovered or on account of mistake or error apparent on the face of the record or for any other sufficient reason and not on any other ground. None of the three review petitions under consideration herein involve any of the three permitted grounds for review and there can be no review on the ground of a decision being erroneous on merits which ground is appropriate only for an appeal. The extremely limited and restricted jurisdiction of review cannot therefore be invoked in any of the three cases; hence, the petitions should fail.

16. In the result, R.P.No.3 of 2014 is dismissed and SR Nos.81 and 82 of 2014 are rejected. Parties shall bear their own costs in all the three petitions.

This order is corrected and signed on this 7<sup>th</sup> day of February, 2015.



**JUSTICE G. BHAVANI PRASAD**