ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION
4th & 5th Floors, Singareni Bhavan, Red Hills, Hyderabad-500 004

O.P.No. 39 of 2009
&
I.A. No. 17 / 2009

Dated: 13. 06.2011

Present

Sri A. Raghotham Rao, Chairman
Sri R.Radha Kishen, Member
Sri C.R.Sekhar Reddy, Member

Between

M/s. Spectrum Power Generation Ltd

…. Petitioner

And

1. Transmission Corporation of Andhra Pradesh Ltd
2. Central Power Distribution Company of A.P.Limited
3. Southern Power Distribution Company of A.P.Limited
4. Northern Power Distribution Company of A.P.Limited
5. Eastern Power Distribution Company of A.P.Limited
6. A.P. Power Co-Ordination Committee

... Respondents

This petition coming up for hearing on 16.04.2010 in the presence of Sri.S.Ravi, Advocate for the petitioners and Sri. P. Shiva Rao, Advocate for the respondent, the Commission passed the following:

ORDER

On 07.07.2009 petitioner filed a petition u/s 86 (1) (f) of the Electricity Act, 2003 (for short, ‘the Act’) (a) to declare the contents of the Letter No. CE/Comml/ DEBPP/ADE-2/F.ROE17.17/D.No. 535/03 dated 20.8.2003 of the respondents as bad, illegal, arbitrary in nature, unenforceable and not in accordance with the statutory Notification No. S.O. 251 (E) dated 30.03.1992 as well as the provisions of the Power Purchase Agreement (for short, ‘PPA’) and (b) to pass an order directing the respondents to implement and give effect to the statutory

Notification No. S.O. 251 (E) dated 30.03.1992 in so far as it provides for a Return on Equity (for short, 'ROE') of 16% and not to deduct any amount on this account from the future bills of the petitioner.

2. Along with the said petition, the petitioner also filed a petition u/s 94 (2) of the Act praying that pending disposal of the main petition, the Commission may direct respondents to make monthly payments against the energy bills of the petitioner thereby restraining the respondents from deducting / adjusting the amount of Rs. 8,51,36,123/- or any part thereof or any other amount from the future energy bills of the petitioner.

3. The averments mentioned in the main petition, in brief, are as follows:

i) The petitioner is a generating company within the meaning of Section 2 (28) of the Act and has constructed, commissioned and is operating 208 MW power plant at Kakinada in Andhra Pradesh.

ii) For the purpose of selling the power generated by it, the petitioner entered into a PPA with the then APSEB on 20.06.1993.The said PPA was revised from time to time and the final agreement was entered into by both the parties on 23.01.1997. Under the reform process, Respondent No.1 stepped into the shoes of APSEB for the purpose of PPA.

iii) Thereafter, Respondent Nos. 2 to 5 succeeded Respondent No. 1 with regard to the rights and obligations of the Respondent No. 1 and the erstwhile APSEB under the PPA with the petitioner. Respondent Nos. 2 to 5 are thus burdened by the same obligation to pay the monthly bills of the petitioner under the PPA. Similarly, in the event of any dispute, clause 6.5 of the PPA would continue to operate as against Respondents Nos. 2 to 5.

iv) The PPA is a statutory contract entered into u/s 43 A (1) of the Electricity (Supply) Act, 1948 and provisions relating to calculation of tariff constitute the fundamental part of the PPA. The PPA is a comprehensive document and covers the entire gamut of operations of the petitioner company and its transactions with

the respondents. The tariff is as per the PPA as determined in accordance with the norms relating to the operation and Plant Load Factor (PLF) as laid down by the Central Electricity Authority (CEA). In pursuance of Section 43 A (2) of the said Act, the Government of India made the notification dated 30th March, 1992 and the same has been amended from time to time. The statutory notification was the basis of the provisions relating to the tariff contained in the PPA between the petitioner and the respondents.

v) Respondent No.1 issued Letter No.CE/Comml/DEBPP/ADE-2/F.ROE17. 17/D.No. 535/03 dated 20.8.2003 threatening to adjust /deduct an amount of Rs.8,51,36,123/- from the future energy bills of the petitioner company. The said letter of the respondent is bad, illegal and arbitrary in nature and the same is unenforceable in the eye of law as the same is not supported by any provisions contained in the PPA. As per the clauses of Notification dated 30.03.1992 which forms part of the PPA, ROE shall be computed on the paid up and subscribed capital relatable to the generating unit, and shall be at an annual rate of 16% of such capital. The payment of fixed charges which include the ROE shall be on monthly basis. Articles 1.1, 3.2.1 and 3.3.1 of the PPA deals with the said issue.

vi) In the letter dt. 20.08.2003, Respondent No. 1 stated that ROE works out to 17.17% as payments were made on monthly basis to the petitioner company; and that the said issue has been discussed in the meeting of COPU held on 27.06.2003 and consequently it was decided by them unilaterally to adjust the so called excess amount paid to the petitioner company. In fact Respondent No. 1 has been paying the petitioner company ROE at the rate of 16% only, but not at the rate of 17.17% and the same is evidenced from the letters dated 08.10.1998, 28.05.1999, 11.07.2000, 31.05.2001 and 08.01.2003 written by Respondent No.1 itself.

vii) Respondent No. 1 has issued the impugned letter dated 20.08.2003 without giving the petitioner company an opportunity of being heard and hence the act of Respondent No.1 is in total violation of the principles of natural justice.

viii) Respondent No. 1 has been making payments to the petitioner strictly in accordance with the provisions of the PPA, which is binding on both the parties. It is mentioned in the PPA that the fixed charge constituting various elements shall be calculated prior to each tariff year including ROE at the annual rate of 16% and shall be paid to the rate of one-twelfth of the sum thus arrived at during each month. There is no scope for ambiguity and the allegation of respondents that they are remitting ROE at the rate of 17.17% is only imaginary.

ix) The provisions of the PPA do not allow any party to take a unilateral decision. But the Respondents, time and again, have been resorting to unilateral decisions which are arbitrary resulting in great financial difficulties to the petitioner company. The Commission may restrain the Respondent No. 1 from acting unilaterally and arbitrarily and direct it to make the monthly payments against the monthly energy bills in accordance with the provisions of the PPA. Petitioner will be put to serious and irreparable loss and hardship if the said amount of Rs. 8,51,36,123/- is adjusted by the Respondent No. 1.

x) Payment of tariff under the PPA is, in fact and in law, a payment required to be made under the statutory notification dated 30.03.1992 and hence respondents are obliged to ensure that payments are made to the petitioner in accordance with the said notification. Any variation thereof, would amount to a breach of a statutory duty. Therefore, the Commission may restrain the respondents from adjusting Rs. 8,51,36,123/-. Otherwise the petitioner may be forced to cease all operations, which may cause severe loss to the financial institutions, besides causing undue hardship to the electricity consumers.

xi) The petitioner bonafidely filed a writ petition No. 18165 / 2003 on the above said grounds. The Hon’ble High Court was pleased to issue a stay order and notice to the respondents and the matter was awaiting final disposal. During the pendency of the above said writ petition, the Hon’ble Supreme Court on 13.03.2008 pronounced its judgment in Appeal (Civil) 1940 of 2008 Gujarat Urja Vikash Nigam Ltd Vs. Essar Power Ltd., holding that after the advent of the Act the disputes between the generating company and licensee are to be adjudicated

by the concerned Regulatory Commission and are not to be resolved through the arbitration mechanism as provided in PPAs. In view of the said judgment of Hon’ble Supreme Court of India, on 09.06.2009 the Hon’ble High Court of AP passed an order in W.P.No. 18165 / 2003 stating that the writ petition is dismissed with liberty to the petitioner to approach the Andhra Pradesh Electricity Regulatory Commission on the issue and allowed the already issued stay order to continue for a period of 6 weeks. In view of the said order, the petitioner is filing the instant petition before the Commission for redressal of the above said dispute between the parties.

4. On 07.01.2010, counter is filed on behalf of all the respondents together. The reply of respondents, in brief, is as follows;

i) ROE shall be computed on the paid up and subscribed capital relatable to the generating unit and shall be at an annual rate of 16% of such capital. Payment of fixed charges which include the ROE are paid on monthly basis and the respondents have been paying accordingly since the inception of the COD. However, in view of the CAG Audit report and as per the mathematical calculations, the effective / resultant total ROE works out to 17.17%, for the simple reason that the payments are made on monthly basis yielding an extra 1.17% over and above the agreed 16% ROE at the end of the tariff year. Therefore, the amount of progressive accruing interest on the ROE for the purpose of calculating fixed charges exceeds the proposed ROE payable by the respondents as per the terms of the PPA.

ii) The discrepancy / ambiguity regarding the payment of ROE arose on light of the findings of the CAG Audit and the respondents are statutorily obliged to set right the said anomalies in their statement of accounts. It is in this context, the petitioner was intimated that the amount of excess ROE paid shall be adjusted in the future energy bills as the petitioner is required to return the undue/ unjustifiable benefit accruing contrary to the intention of the parties of the contract.

iii) The issue was discussed in COPU meeting and accordingly decided to deduct the excess amount of Rs. 8,51,36,123/- from the future energy bills. Hence there was no unilateral decision taken by the respondents and in fact, the respondents have been paying the bills to uphold the sanctity of the agreement despite the fact that there is no consensus ad idem as to the variance in the ROE after the findings of the CAG Audit report.

iv) Having regard to the nature of dispute, fact finding enquiry is necessary to determine the actual ROE, that the petitioner is receiving pursuant to the findings of the CAG Audit report.

vi) The petition is barred by limitation as the petitioner was pursuing the same subject matter before the wrong court, in spite of having information that the Regulatory Commission is the competent authority to adjudicate disputes between licensees and generators relating to PPAs. The time spent in pursuing the matter before the High Court cannot be excluded for computation of limitation period because it cannot be said, that the petitioner was prosecuting his case under the *bonafide* mistake that the High Court had the jurisdiction to entertain the petition. Thus, the present petition deserves to be dismissed since barred by limitation.

vii) For the aforesaid reasons, the Commission may be pleased to dismiss the petition and allow the respondents to recover the excess ROE amounting to Rs. 8,51,36,123/- and also pass appropriate orders for payment of the ROE at the annual rate of 16% as per the provisions of the PPA, duly apportioning it month wise.

5. As mentioned in paragraph-2 above, the petitioner also filed petition u/s 94 (2) of the Act and the same is numbered as I.A.No. 17 of 2009. In the said petition, the petitioner requested the Commission to allow the petitioner to refer and rely on the contents of the main petition in O.P.No. 39 of 2009. It is further mentioned that the petitioner has a prima facie case in its favour and the balance of convenience is also in its favour. Any deduction and non-payment from the monthly bill and Supplementary bill would endanger the financial viability and

capacity of the petitioner to continue to generate and supply the electricity to the State and very existence and functioning of the petitioner would be imperiled.

6 On the date of hearing, the counsel for the petitioner while reiterating the averments mentioned in the petition as mentioned in paragraph-3 supra, submitted that CAG audit objection is peculiar and there is no basis for the assumption that payment of 1/12th ROE every month in effect works out to 17.17% or 1.17% over and above the agreed 16% ROE. Therefore, it is prayed that the letter dt. 20.08.2003 of the respondents may be declared as bad in law and further direct the respondents not to deduct any amount, with regard to payment of ROE, from the future bills of the petitioner.

7. On the other hand, the counsel for the respondents while reiterating the averments mentioned in the counter submitted that apportionment of ROE month-wise and paying 1/12th of ROE every month in effect works out to payment of 17.17% or excess of 1.17% over and above the agreed payment of ROE @ 16%. As per Article-3 of the PPA, the Commission is empowered to determine tariff every year. Therefore, it is prayed that the respondents may be allowed to recover the excess ROE amounting to Rs. 8,51,36,123/- and in future allow to respondents to pay ROE @ 16% duly apportioning it month-wise.

8. No interim relief is granted in the Interlocutory Application mentioned above. As the said IA is also coming for hearing along with the main petition, there is no need to pass separate orders in the said I.A.No. 17 of 2009.

9. The issues that arise for consideration of the Commission are:

(i) Whether the petitioner is entitled for declaration that the letter dated 20.08.2003 is bad in law and not in accordance with the statutory notification dated 30.03.1992 as well as the PPA ?

(ii) Whether the respondents are entitled to adjust the amount as pleaded ?

(iii) Whether the relief claimed by the petitioner is barred by time ?

(iv) To what relief ?

Issue No. 3

It is necessary at this stage to answer this issue at the first instance instead of answering issues 1 & 2 as they are coming into picture if this issue is answered in the negative.

10. The very contention of the petitioner is that he has filed a petition before the Hon'ble High Court for appoint of an Arbitrator when the respondents have not cooperated with them in appointment of an Arbitrator. The petition for appointment of an Arbitrator is closed by the Hon'ble High Court by virtue of the judgment of the Apex Court delivered in Gujarat Urja Vikas Nigam Ltd vs. Essar Power Ltd. This gives cause of action for them to file a petition on the ground that the Commission itself is competent to decide the issue involved and time spent by the petitioner in prosecuting the matter before the Hon'ble High court is to be excluded u/s 14(2) of the Limitation Act, as the petitioner has prosecuted the matter bonafidely, that too in accordance with Terms & conditions of the PPA (14(1)). Thus, the petitioner is entitled for the entire amount.

11. Whereas, the learned counsel for the respondents submitted his written arguments in O.P.No. 18 of 2009 and also vehemently opposed the same that the time spent by the petitioner in prosecuting the matter before the Hon'ble High Court will never save the limitation since a specific provision is incorporated in Electricity Act 2003. S.86(1)(f) clearly envisages about the appointment of an Arbitrator by the Commission. The petitioner has also ignored not only the provisions of law, but also the decisions rendered by the Apex Court in several judgments. Even long prior to the judgment of the Apex Court delivered in Gujarat Urja Vikas Nigam Ltd vs. Essar Power Ltd, several decisions have been rendered by the Apex Court barring the jurisdiction of arbitrator u/s 11 of the Arbitration Act. When the Act itself is very clear approaching the court other than the provisions incorporated under the EA2003 can never be said that petitioner bonafidely prosecuted the matter before the High Court, which has no jurisdiction at all to entertain the same and that the approach made by the petitioner does not clothe or save time u/s 14(2) of the Limitation Act.

12. The petitioner has approached the Hon'ble High Court by taking the plea that Arbitration Act itself is a special Act and the Electricity Act is a general Act and the provisions of Arbitration Act overrides the provisions of said Electricity Act, and that the petitioner has misinterpreted the language and the Acts with a view to circumvent the issue and filed this petition claiming exemption of the time spent in the Hon'ble High Court and the petition itself is not maintainable under law and the main petition itself is to be dismissed as the claim from 2001 to 2005 is barred by limitation.

13. It is necessary at this stage to extract the relevant provisions of the Act for better appreciation of the above said issue.

Section 14(2) of Limitation Act reads as follows:

> *"**14. Exclusion of time of proceeding bonafide in court without jurisdiction –** (2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it."*

The following pre-requisite conditions have to be satisfied before invoking S.14(2) of the Act.

> *"(1) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party;*
> *(2) the prior proceeding had been prosecuted with due diligence and good faith;*
> *(3) the failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature;*
> *(4) the earlier proceeding and the later proceeding must relate to the same matter in issue, and*
> *(5) both the proceedings are in a court."*

14. S.86(1) (f) clearly envisages that the Commission is given with the power to adjudicate the issue or to refer the matter for arbitration. Except the powers conferred u/s 11 of the Arbitration Act, the rest of the provisions have to be

followed if the matter is referred for arbitration by the Commission itself, under the above said provision.

15. Here, in this case the petitioner has approached with a plea that he has bonafidely prosecuted the matter before the Hon'ble High Court till the finding of the Supreme Court in Gujarat Urja Vikas Nigam Ltd vs. Essar Power Ltd case and filed this petition well within the time and the same is to be allowed by granting the declaratory relief as sought for.

16. The respondents contention is that even long prior to the decision of the Gujarat Urja Vikas Nigam Ltd vs. Essar Power Ltd, the Apex Court has stated in several judgments holding that the EA 2003 itself is a special Act and Arbitration Act is a General Act and the provisions of the special Act prevails over the general act and the petitioner has filed and prosecuted in the wrong court claiming exemption u/s 14(2) of Limitation Act is not sustainable and the same is liable to be rejected.

17. The learned counsel for the petitioner relied upon the following rulings in support of his contention.

> JT2008 (6) SC 22 (Consolidated Engg. Enterprises vs. Principal Secy. Irrigation Deptt. And Ors.). *In this it was held that*
>
> *"provisions of Limitation Act, 1963 apply to all proceedings under the AC Act, both in court and in arbitration, except to the extent expressly excluded by the provisions of the AC Act."*

No doubt all the provisions are applicable and they have to be followed by the Arbitrator if appointed u/s 86(1)(f) of EA 2003 or under A.P.Electricity Reform Act.

The learned counsel for respondent relied upon a ruling reported in AIR 1994 (SC) 2544. In this it was held that

> *"the matters relating to which there is no direction in the Electricity Act requiring them to be determined by arbitration cannot be the subject-matter of arbitration. This is for the reason of the Electricity Act being not only a special Act on the subject of which disputes covered by the Act*

could be decided by arbitration, but also because it is a later Act than the Arbitration Act."

He has also relied upon another ruling reported in Air 2002 (SC) 2768. In this it was held that

"a person who has registered the objection regarding non-joinder of parties at the initial stage and also at there visional stage and taken the risk of proceeding with the suit without impleading the necessary parties cannot be said to have acted in good faith taking due care and attention; consequently, such person will not be entitled to benefit of S.14 of the Act for excluding the time spent by him in that proceeding in a fresh suit."

He has also relied upon a ruling reported in SCC 1 (2004) 195 BSES Ltd Vs. M/s. Tata Power Co. Ltd. & Ors. In this it was held that

"13. Sub-section (2) of Section 22 empowers the State Government to confer by notification in the Official Gazette various functions upon the State Commission which are enumerated from clauses (a) to (p) in the said sub-section. One of the function which can be conferred under clause (n) is to adjudicate upon the dispute and differences between the licensees and utilities and to refer the matter for arbitration."

He has also relied upon a ruling reported in AIR (SC) (1998) 1761 Grid Corporation Of Orissa Ltd vs. M/s. Indian Charge Chrome Ltd. In this it was held that

"In our considered view High Court has exceeded the jurisdiction while entertaining the application of ICCL u/s 11 of the Arbitration and Conciliation Act, 1996. The High Court erroneously assumed that the Regulatory commission had failed to arbitrate u/s 37(1) of the Reform Act. This finding is factually incorrect because vide application dated 19.07.1997 ICCL asked the Regulatory Commission to adjourn the proceedings pending before it on the ground that it had filed MJC No.229/97 in the High Court. In view of this application the Regulatory Commission did not proceed in the matter. If this be so the High Court in our opinion was wrong in holding that there was failure on the part of Regulatory Commission to arbitrate and consequently the application made by ICCL u/s 11 of Arbitration Act is maintainable. In our considered view the application made by ICCL u/s 11 of the Arbitration Act, 1996 (MJC No. 229/97) was premature and the High Court could not have entertained the same and granted desired relief to ICCL."

18. It is clear from the Limitation Act that the period of limitation for the recovery of amounts is 3 years. The parties have to workout their rights in accordance with the agreement and if there is any liability that arises from the said contract, the claim has to be made within 3 years from the date of accrued cause of action.

19. In this case, according to the respondent the cause of action has arisen on 20.08.2003 which has to be filed within 3 years from the above said date. In this case the petitioner has approached the Hon'ble High Court for the same reliefs by filing a writ petition 18165/2003 on 25.08.2003 which was dismissed on 09.06.2009 as it was withdrawn and now claims exemption u/s 14(2) of Limitation Act incase the objection on the aspect of limitation raised by the respondent is accepted. The said petition filed by the petitioner was dismissed as it was withdrawn basing on the case *Gujarat Urja Vikas Nigam Ltd.* Finally, it was held "*In view of the said submission granting liberty to approach the Commission this writ petition is dismissed as withdrawn. However, the interim order passed by this court on 28.08.2003 shall be in force for a period of six weeks from today, so as to enable the petitioner to obtain appropriate orders from the competent court."*

20. It is clear from the pleadings that the respondent has issued a letter dated 20.08.2003 threatening to adjust / deduct an amount of Rs.8,51,36,123/- from the future energy bills of the petitioner on the ground that the excess ROE was paid by the respondent and that amount shall be adjusted in future bills payable to the petitioner. The petitioner filed this petition to declare the said letter dated 20.08.2003 is bad, illegal, arbitrary and the same is unenforceable. If it is adjusted and if the petitioner claims for refund of the amount, no doubt Art.55 of the Limitation Act would come into picture. On the other hand, if the respondent claims to order for refund of the amount, then also it would come into picture. However, the claim made by the petitioner is two fold.

(i) to declare the letter dated 20.08.2003 as bad under law.

(ii) to implement and give effect to the statutory notification of the 1st respondent No.S.O.251 (E) dated 30.03.1992 in so far as it provides for ROE of 16% and not to deduct any amount on this account from the future bills of the petitioner.

It is a very peculiar case which has come to this Commission on 07.07.2009 though the letter was issued on 20.08.2003. Seeking declaratory relief is covered by Art.58 of Limitation Act. The period of limitation prescribed is 3 years from the date of accrual of the cause of action. The cause of action has arisen on 20.08.2003. It should be filed on or before 19.08.2006. Whereas, the petitioner filed a petition under Art.226 of Indian Constitution for the same relief's now sought in this petition. The petitioner has not sought for appointment of an arbitrator. But pleads that they have bonafidely prosecuted the matter. The other relief sought for is a dispute which has to be decided not by a constitutional bench, since S.86(f) has clearly laid down that the dispute has to be adjudicated by the Commission only.

21. The petitioner is harping upon the observation in the above said writ petition and claims exemption under S.14(2) of the Limitation Act. Whereas, the respondents are claiming that the courts have already held that there is a specific provision in the Act which is a special Act invoking the aid of other forum which has no jurisdiction at all cannot claim the benefit under section 14(2) of the Limitation Act. Merely, because an observation is made it does not mean that the court has given a verdict to receive the application by the Commission even if it is barred by time. The general observation made by the Hon'ble High Court is only with regard to approach to the Commission u/s 86(1)(f) provided the claim is not barred by time. In the final judgment in *Essar Power Ltd. vs Gujarat Urja Vikas Nigam Ltd,* the ATE has clearly observed that the parties in the PPA have to be read subject to statutory provisions. The provisions of the PPA which are contrary to the statutory provision cannot be given effect to. This is a well established law as held in 2000 Vol-3 SCC 379 *Indian Thermal Project Ltd vs State of Madhya Pradesh.*

22. The Apex Court has already held way back in 1998 and 2004 in respect of Section 37 (1) of A.P.Electricity Reform Act and Section 22 (2)(n) of Electricity Regulatory Commissions Act giving power to the Commission to appoint an arbitrator in the respective Acts are also akin to the provision incorporated in the Section 86(1)(f) of the Act. So, the prosecution of the proceeding ignoring specific provision in the Act itself cannot be said that it is done with good faith. At the same time, ignorance of law is also not an excuse to start the lis in a wrong court which has no jurisdiction. Moreover, the A.P.Electricity Reform Act is not repealed u/s 185 of the said Act even if the cause of action is arisen prior to the Act and it continuously follows even after the advent of the Act, the same cannot be wiped out.

23. It is not a concurrent remedy and party has offered one remedy and availed one remedy and he becomes unsuccessful, he cannot get the benefit of S.14 when instituting the alternate remedy. When the Act has specifically confined to approach the Commission u/s 86(1)(f) of the Act which is a special Act to make any claim and the Commission itself can decide or arbitrate by appointing an arbitrator. So it has specifically debarred the jurisdiction any other forum much less Arbitration Act which is a general enactment, since special Act overrides the provisions of general Act.

24. In the light of the above said discussions, we are of the opinion that the claim made by the petitioner is barred by limitation and the petition filed by the petitioner is liable to be dismissed.

25. Issues No. 1 & 2 deal with the declaratory relief sought on the letter dated 20.08.2003 under which the respondents threatened the petitioners to adjust the amount of Rs. 8,51,36,123 to the effect that the same is unenforceable.

26. Issues No. 1 & 2 are framed mainly on the aspect of adjustment going to be effected by the respondents in the future bills and also served a letter dated 20.08.2003 to that effect. It is the claim of the respondents that they have paid excess ROE being paid on monthly basis from the initial tariff year to the previous

tariff year. Whereas issue No. 3 deals with the limitation aspect, since the respondents have pleaded that the claim made by the petitioner is barred by time.

27. The Commission has to conduct an enquiry and adjudicate on the aspect of ROE, while looking into the statutory notification dated 30.03.1992 and arrive at a conclusion, whether the payment is made in excess or otherwise. So, the question of enquiry at this stage does not arise as the very relief claimed by the petitioner is to declare the letter dated 20.08.2003 as bad, illegal, arbitrary and unenforceable. Since the approach is made long after serving the letter dated 20.08.2003. If at all if any adjustment in practical is made, then only it may give fresh cause of action, but the petitioner now cannot ask for a declaratory relief in above said forum. Furthermore, we have already arrived at a conclusion that the relief now sought is barred by time while answering issue no.3; there is no need for us to discuss and give a finding on issues 1 & 2. Hence, answered accordingly.

28. The petitioner herein filed the above said I.A to pass an interim order to implement and to give effect to the statutory notification of the 1st respondent No. S.O. 251 E dated 30th March 1992. No interim order is passed by the Commission. However the relief claimed in the interlocutory application is also merged in the very issue of limitation in the main O.P. itself. Since the main O.P. is liable to the dismissed, the petition is also liable to be dismissed.

29. In the result both the petitions are dismissed. No order as to costs.

This order is corrected and signed on this 13th day of June 2011.

Sd/-	Sd/-	Sd/-
(C.R.SEKHAR REDDY) MEMBER	(R.RADHA KISHEN) MEMBER	(A.RAGHOTHAM RAO) CHAIRMAN

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