

No.: N/10/2011

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,
BANGALORE**

Dated : 29th May, 2014

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|-------------------------------|----------|
| 1. Sri M.R. Sreenivasa Murthy | Chairman |
| 2. Sri H.D. Arun Kumar | Member |
| 3. Sri D.B. Manival Raju | Member |

I.A.No.1/2013

IN

OP No.4/2011

BETWEEN :

Ugar Sugar Works Ltd.
Mahaveernagar
SANGLI – 416 416 ..
[Represented by Shri Prabhuling K. Navadgi, Advocate]

PETITIONER

AND:

- 1) Karnataka Power Transmission Corporation Ltd.
K.R. Circle
Cauvery Bhavan
BANGALORE – 560 009
- 2) The Chief Engineer
State Load Despatch Centre
Ananda Rao Circle
BANGALORE – 560 009
- 3) Hubli Electricity Supply Company Limited
P.B. Road, Navanagar
HUBLI – 597 117
- 4) Bangalore Electricity Supply Company Ltd.
K.R. Circle
BANGALORE – 560 001
- 5) Mangalore Electricity Supply Company Limited
Paradigm Plaza, 4th Floor
A.B. Shetty Circle
MANGALORE – 575 101

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- 6) Gulbarga Electricity Supply Company Limited
Station Road
GULBARGA – 585 101
- 7) Chamundeshwari Electricity Supply Corporation Limited
No.927, L.J. Avenue
New Kantharaj Urs Road
Saraswathipuram
Mysore – 570 009 ..

RESPONDENTS

[Respondents represented by M/s. Justlaw, Advocates]

1) The Applicants / Respondents 3 to 7 (ESCOs) have filed I.A.No.1/2013 in OP No.4/2011 for rectification of the final Order dated 29.3.2012 passed by this Commission in the above case.

2) The material facts relevant for the purpose of disposal of I.A.No.1/2013 may be stated as follows :

(a) The Petitioner - M/s.Ugar Sugar Works Limited is a Sugar Factory with a Co-generation Plant of 44 Mega Watts (MW) capacity, situated at Khurd, Belgaum District. It had entered into an Agreement dated 4.9.2009 for sale of electricity with M/s.Tata Power Trading Corporation Limited (TPTCL). The Petitioner had filed the above case, viz., OP No.4/2011, for payment of compensation for the electricity injected into the State Grid during the period in which open access was not granted to the Petitioner as required under the concerned Regulations, though applied for well in advance. The Petitioner had injected electricity into the State Grid on 11.11.2009 and 12.11.2009, and also between 20.11.2009 and 26.11.2009.

- (b) After contest by Respondent Nos.1 to 3, this Commission, by its majority Order dated 29.3.2012, allowed the above Petition, directing Respondent Nos.1 and 2 to make payment to the Petitioner. The conclusion, as stated in paragraph-21 of the said majority Order, is as follows:

"In the instant case, the Petitioner has supplied electricity and Respondent No.3 and other ESCOMs have utilized the same, as the 2nd Respondent did not take action and communicate its decision on the application of the Petitioner for Open Access, within the time prescribed. Therefore, in our opinion, as per the principles laid down by the Hon'ble ATE in the above-referred case, and this Commission's Order referred to above, the ESCOMs are liable to pay for the electricity pumped into the System by the Petitioner and utilized by ESCOMs during the period in which the Petitioner's application for Open Access was under consideration, at the rate of generic Tariff fixed for Co-generation Plants at the time, which was Rs.3.59 per Unit."

- (c) Subsequently in R.P.No.5/2012 filed by Respondent Nos.1 and 2, this Commission, by its majority Order dated 21.6.2012, modified its earlier directions insofar as the payment to be made by Respondent Nos.1 & 2, stating that the payments shall be made by Respondent Nos.1 and 2 on behalf of the ESCOMs to whom the power was allocated and subject to recovering the said amount from the ESCOMs concerned.

(d) In essence, the contention of the Applicants / Respondents 3 to 7 is that a reading of the entire majority Order dated 29.3.2012 indicates that the Commission had allowed compensation at the rate of generic tariff fixed for Co-generation Plants at the relevant time for the electricity injected into the State Grid and utilized by the ESCOMs. It is contended that at the relevant point of time when the energy was pumped in, viz., on 11.11.2009 and 12.11.2009, and between 20.11.2009 and 26.11.2009, the generic tariff determined by this Commission was Rs.2.80 per Unit. Therefore it is contended by the Applicants that while passing the Order impugned, a typographical error has inadvertently crept into the Order dated 29.3.2012, wherein the tariff payable has been erroneously mentioned as 'Rs.3.59' instead of 'Rs.2.80'. Therefore, the Applicants have prayed for rectification of the rate of compensation payable to the Petitioner as Rs.2.80 per Unit, instead of Rs.3.59 per Unit as mentioned in the impugned Order. I.A.No.1/2013 has been filed by the Applicants before this Commission on 10.12.2013.

3) The Petitioner has contested I.A.No.1/2013 filed by the Applicants. The gist of the objections is as follows :

(a) I.A.No.1/2013 filed by the Applicants under Regulation No.8 of the KERC (General and Conduct of Proceedings) Regulations, 2000 is barred by limitation and there is a delay of 529 days.

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- (b) The Applicants, in fact, have complied with the Order of this Commission and made payments accordingly.
- (c) Respondents 1 & 2 had filed a Review Petition, viz., RP No.5/2012, before this Commission, wherein they did not urge this contention.
- (d) Respondents 1 & 2 had filed an Appeal before the Hon'ble Appellate Tribunal for Electricity (ATE) against the impugned Order of dated 29.3.2012 (passed in OP No.4/2011) and the Order dated 21.6.2012 (passed in RP No.5/2012). The said Appeal was dismissed by the Hon'ble ATE by its Order dated 12.7.2013.
- (e) The Petitioner had filed a Complaint bearing No.3/2013 before this Commission as Respondents 1 & 2 did not comply with the impugned Order dated 29.3.2012 (in OP No.4/2011). In the said proceedings also, the Respondents did not seek any rectification of the final Order dated 29.3.2012. On the other hand, the Respondents made payments to the Petitioner as directed in the said Order and filed a Memo dated 18.9.2013 reporting compliance of the Order, and thereafter the said Complaint was withdrawn.
- (f) After having made payments to the Petitioner, the Respondents are estopped from making any claims contrary to the Order of this Commission.

(g) The valuable rights accrued in favour of the Petitioner cannot be taken away at this stage. Therefore, the Petitioner has prayed for dismissal of I.A.No.1/2013 filed by the Applicants.

4) Learned counsel for both the parties submitted oral arguments, who have reiterated their respective contentions made in the pleadings.

5) The following points would arise for our consideration :

(1) Whether the present Application, I.A.No.1/2013, is maintainable?

(2) What Order?

6) After considering the records and submissions of the parties, our findings on the above points are as follows :

Point No.(1) :

7) It is true that Regulation No.8 of KERC (General and Conduct of Proceedings) Regulations, 2000 (hereinafter referred to as the 'G&C Regulations') is not the proper provision under which the present application could have been filed. Any petition or application under the 'G&C Regulations' needs to be filed within ninety days from the date of passing of Order or other

direction. There is no provision for condonation of delay in filing the application under Regulation No.8.

8) Regulation No.11 of the 'G&C Regulations' states that this Commission has inherent power in the matter of adjudication of cases before it. Even in the absence of this provision, this Commission is of the opinion that the powers under Section 152 of the Code of Civil Procedure could be entertained, if the facts of the case so warrant. The scope and application, and the principles, of Section 152 of the Code of Civil Procedure are stated thus (by the learned Author, Sarkar, on 'Code of Civil Procedure', 11th Edition, Reprint 2008, Volume 1, at Pages- 839, 840 and 841) :

"... The section is based on two important principles: (1) that an act of the court shall prejudice no man; and (2) that courts have a duty to see that their records are true and they represent the correct state of affairs. So, even in the absence of any move by the parties, the court can suo motu make the correction. ... "

"... As a matter of fact such inherent powers would generally be available to all courts and authorities irrespective of the fact whether provisions contained under section 152, CPC may or may not strictly apply to any particular proceeding. But before exercise of such power, a valid finding that the order or the decree contains or omits something which was intended to be otherwise that is to say while passing the decree the court must have been passed in particular manner but that intention is not translated into the decree or order due to clerical, arithmetical error or accidental slip. The power of rectification of clerical errors, arithmetical errors or

accidental slips does not empower the court to have a second thought over the matter and to find out that a better order or decree should be passed. The power under section 152 is confined to something initially intended but left out or added against such intentions. Modification of the order which amounts to reopening the entire matter afresh is impermissible under section 152. ..."

"... The cause for such a slip or omission may be the Judge's inadvertence or the advocate's mistake. ..."

9) Keeping in view the above principles, we have to find out whether the impugned Order requires any rectification or correction. In pages-6 and 7 of the impugned Order, this Commission has considered the decision of the Hon'ble ATE in the case of *Jocil Limited –Vs- Southern Power Distribution Company [(2008) LR APTEL 0829]* and the decisions of this Commission in OP No.19/2008 in the case of *Bhoruka Power Corporation Limited –Vs- the Managing Director, CESC*, disposed of on 12.3.2009, and in OP No.14/2010 in the case of *Orange County Resorts & Hotels Limited –Vs- HESCOM and others*, decided on 1.7.2010. In these cases, this Commission had allowed compensation at the rate of generic tariff prevailing at the relevant time when electricity was injected into the State Grid by the generator without any schedule.

10) In the present case, the electricity was injected into the Grid by the Petitioner on 11.11.2009 and 12.11.2009, and between 20.11.2009 and 26.11.2009. As already noted in paragraph-21 of the impugned Order, this Commission has stated that as per the principles laid down by the Hon'ble ATE and this

Commission, the ESCOMs were liable to pay for the electricity pumped into the system by the Petitioner and utilized by the ESCOMs during the period in which the Petitioner's application for open access was under consideration, at the rate of generic tariff fixed for Co-generation Plants at the time. Therefore, this part of the impugned Order makes it very clear that the Commission intended to award compensation at the rate of generic tariff prevailing at the relevant time.

11) This Commission, by its Order dated 18.1.2005, has determined the generic tariff for Co-generation Plants at Rs.2.80 per Unit for the base year of the Control Period. This Order is made applicable to all the PPAs filed before the Commission on or after 10.6.2004. The tariff period was ten years from the Commercial Operation Date (COD) and the tariff was subject to revision after the Control Period of five years.

12) Subsequently, this Commission, by its Order dated 11.12.2009, has determined the generic tariff of Co-generation Plants at Rs.3.59 per Unit for the base year of the Control Period. This Order is made applicable to all the PPAs filed before the Commission on or after 1.1.2010. The tariff period was ten years from the date of signing of PPAs and the tariff was subject to revision after the Control Period of five years.

13) In view of the above Orders of this Commission fixing the generic tariff for Co-generation Plants, it is clear that the generic tariff applicable for Co-generation Plants during November, 2009, when the Petitioner had injected

electricity into the State Grid, was Rs.2.80 per Unit, and not Rs.3.59 per Unit as mentioned at the end of paragraph-21 of the impugned Order. This Commission had made it clear in the impugned Order that the compensation to be awarded was at the generic tariff prevailing at the relevant time. However, while stating the applicable rate of generic tariff, it has been wrongly mentioned as 'Rs.3.59 per Unit' instead of 'Rs.2.80 per Unit' in the impugned Order. On the above facts and circumstances, we hold that the Commission intended to award the generic tariff prevailing at the relevant point of time, but that intention was not translated in the impugned Order while mentioning the rate of generic tariff applicable to the present case. This is clearly due to an accidental slip and therefore the said error can be rectified by this Commission under Section 152 of the Code of Civil Procedure.

14) The objections raised by the Petitioner for opposing I.A.No.1/2013 filed by the Applicants are not tenable. There is no limitation for applying the provisions of Section 152 of the Code of Civil Procedure and also no third party has acquired any right under the impugned Order. Therefore, the issue of any delay in filing the Application, I.A.No.1/2013, does not arise in the present case. If the impugned Order is not rectified by this Commission, the consumers would be the ultimate sufferers. The relief under Section 152 of the Code of Civil Procedure can be granted even in consent orders and also after the satisfaction of the decree or order. The Appeal filed against the impugned Order before the Hon'ble ATE by Respondents 1 and 2 was dismissed, not on its merits but on the question of delay in filing the Appeal before it. Hence, this Commission can

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entertain the Application, I.A.No.1/2013, for rectification of the said error, inspite of filing an Appeal before the Hon'ble ATE against the impugned Order.

15) The learned counsel for the Petitioner has relied upon the following decisions in support of his case :

- (a) AIR 1940 MADRAS 29, in the case of *Thirugnanavalli Ammal –Vs- P. Venugopal Pillai and others*;
- (b) (2004) 12 SCC 713, in the case of *Ran Chandra Singh –Vs- Savitri Devi and others*;
- (c) (1999) 3 SCC 500, in the case of *Dwaraka Das –Vs- State of M.P. and another*.

16) In the first case cited at paragraph-15(a) above, on the facts of that case, it was held that omission regarding payment of further interest in a money suit, even if accidental, cannot be rectified. This conclusion was arrived at in the face of the provisions of Section 34(2) of the Code of Civil Procedure, which states that where a decree is silent with respect to the payment of further interest from the date of decree to the date of payment or other earlier date, the court shall be deemed to have refused such interest and a separate suit therefor shall not lie.

17) In the second case cited at paragraph-15(b) above, it was held that in the garb of correction of mistakes arising out of accidental slips or typographical errors, the judgment cannot be altered or modified. In the case cited at paragraph-15(c) above, it was held that correction should be of the mistake or omission which is accidental and non-intentional and does not go to the merits of the case, and the provision under Section 152 cannot be invoked to modify, alter or add to the terms of the original judgment, order or decree so as to in effect pass an effective juridical order. These principles are not in dispute. The conclusion arrived at by this Commission in the present case does not go against the principles stated in the above decisions.

18) For the reasons stated above, we hold that I.A.No.1/2013 is maintainable and the same is to be allowed. Accordingly Point No.(1) is answered in the affirmative.

19) Point No.(2) :

As Point No.1 is held in the affirmative, we pass the following :

ORDER

- (i) In the Order dated 29.3.2012 passed by this Commission in OP No.4/2011, the letters and figures, 'Rs.3.59', appearing in the last line of paragraph-21 at page-8 shall be substituted with the letters, figures and words, 'Rs.2.80 (Rupees Two and paise Eighty only)';

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- (ii) Consequently, the Petitioner shall refund to the ESCOM(s) the excess amount(s), if any, received by it by virtue of the impugned Order dated 29.3.2012, within two months from the date of this Order.

Sd/-
(M.R. SREENIVASA MURTHY)
CHAIRMAN

Sd/-
(H.D. ARUN KUMAR)
MEMBER

Sd/-
(D.B. MANIVAL RAJU)
MEMBER