

No.N/11/11

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION BANGALORE**

**Dated this 21<sup>st</sup> April 2011**

- |                               |          |
|-------------------------------|----------|
| 1. Sri M.R. Sreenivasa Murthy | Chairman |
| 2. Sri Vishvanath Hiremath    | Member   |
| 3. Sri K. Srinivasa Rao       | Member   |

**Case No. OP 05/2011**

**BETWEEN**

M/s. Davangere Sugar Company Limited  
No.73/1, P.B.No.312, Shamanur Road,  
Davangere – 577 004

(Represented by Prabhuling Navadgi Advocates) ...

**Petitioner**

**AND**

1. Bangalore Electricity Supply Company Limited  
K.R. Circle  
Bangalore – 560 001

2. The State Load Dispatch Centre  
28, Race Course Road  
Bangalore – 560 009

3. The Karnataka Power Transmission Corporation Limited  
Kaveri Bhavan, Kempegowda Road  
Bangalore – 560 009

4. Power Company of Karnataka Limited  
KPTCL Building, Kaveri Bhavan, Kempegowda Road  
Bangalore – 560 009

(Represented by Just Law Advocates) ...

**Respondents**

1. This petition has been filed seeking a direction to the 1<sup>st</sup> Respondent Bangalore Electricity Supply Company Limited (BESCOM) to pay a sum of Rs.18,91,90,200/- along with interest @ 18 % from the date of receipt of energy till the date of payment.

2. The respondents have put in appearance and have filed their objections statement dated 17.3.2011.

3. We have heard the advocates appearing for both the parties. We have also perused the orders of the Central Electricity Regulatory Commission (CERC), the Hon'ble High Court of Karnataka as well as the orders of this Commission passed in the earlier proceedings and the order of the Hon'ble Appellate Tribunal for Electricity (ATE) thereon.

4. The petitioner, which has a cogeneration facility along with a sugar plant, had entered into a Power Purchase Agreement (PPA) with the 3<sup>rd</sup> Respondent Karnataka Power Transmission Corporation Limited (KPTCL) on 17.1.2002. The said PPA was terminated by KPTCL on 5.7.2003. However, the PPA came to be reinstated by the parties by a Supplemental Agreement 9.6.2005 with modifications to the tariff clause. The PPA along with the Supplemental Agreement came to be assigned to the 1<sup>st</sup> Respondent BESCOM with effect from 1.6.2005.

5. The petitioner terminated the PPA vide its communication dated 8.7.2009 on the ground that BESCOM had committed breach of the terms of the PPA. This was challenged by BESCOM before this Commission in OP 17/2009. This Commission in its order dated 8.10.2009 dismissed the petition and upheld the termination effected by the petitioner. This Commission's Order came to be challenged by BESCOM before the Hon'ble ATE in Appeal No. 176/2009. The Hon'ble ATE vide its order dated 18.5.2010 also dismissed the appeal. The Civil Appeal filed by the 1<sup>st</sup> Respondent challenging the order of the Hon'ble Tribunal

and the Commission also came to be dismissed by the Hon'ble Supreme Court on 4.10.2010.

6. During the pendency of the proceedings before this Commission regarding the validity of the termination of the PPA, the petitioner had made an application for Open Access to sell the electricity to third parties. The 2<sup>nd</sup> Respondent, the State Load Dispatch Centre (SLDC) rejected the said application vide its letter dated 10.6.2009 on the ground that the dispute regarding the termination of the PPA was pending before the Commission and the Government Order issued under Section 11 of the Electricity Act, 2003 mandated all the generators to supply to the grid only. This was questioned by the petitioner before the CERC in Petition No. 114/2009. CERC, vide its Order dated 14.7.2009 held that the rejection of the application for Open Access was contrary to the Open Access Regulations and therefore the petitioner was at liberty to make a fresh application for grant of Open Access and the respondents were to consider the same in accordance with law in the light of the observations made by it.

7. The Government of Karnataka challenged the Order of the CERC before the Hon'ble High Court of Karnataka in WP No.25431/2009. The Hon'ble High Court initially granted absolute stay of the Order of CERC on 25.8.2009. However on an application moved for vacating the Interim Order by the petitioner the learned Single Judge of the Hon'ble High Court on 7.12.2009 modified the Interim Order and directed BESCO to pay to the petitioner Rs.5.00 per kwh for the electricity supplied during the pendency of the writ petition. While passing this

Order the Hon'ble High Court observed that "It is to be noticed that the 1<sup>st</sup> respondent has sought for an interim measure before the Karnataka Electricity Regulatory Commission seeking purchase price per unit at Rs.5.80 ps. Obviously, such a blanket request cannot be granted. But nevertheless, one cannot lose sight of the fact that it should be a policy of 'live and let live'. Indeed what Mr. Navadgi says is true that they have to shutdown their unit as it is the power process in the State got escalated.

Having regard to the facts and the view that the tariff as an interim arrangement is fixed at Rs.5.00 per unit and the said amount shall be calculated from the date the amount becomes due and shall be paid to the 1<sup>st</sup> respondent deducting the amount already paid. Indeed the said amount is payable is subject to final accounting. Indeed this is only an interim arrangement since the Appellate Authority as well as the Karnataka Electricity Regulatory Commission are required to consider the matters before them independent of this interim arrangement.

8. The order of the learned Single Judge fixing the rate of Rs.5/- was challenged by BESCO before the Division Bench of Hon'ble High Court in WP No. 4527/2009. The Division Bench, vide its Order dated 20.1.2010 confirmed the order of the learned Single Judge fixing Rs.5/- per kwh for the electricity supplied as per the interim order and dismissed the appeal.

9. The Hon'ble High Court on 16.12.2010 ultimately dismissed the writ petition not surviving for consideration as per the submission of the learned Advocate General. It further observed that the 3<sup>rd</sup> Respondent BESCO is at liberty to

workout its remedy in so far as reliefs to claims for refund pursuant to the interim order granted by the court if they are so entitled to in accordance with law.

10. It appears from the pleadings that after the dismissal of the civil appeal by the Hon'ble Supreme Court on 4.10.2010 and till the final disposal of the writ petition on 16.12.2010, the 1<sup>st</sup> Respondent did not make the payments as per the interim order. Therefore the petitioner has filed the present petition seeking payments for the power supplied during the above period as per the interim order of the Hon'ble High Court along with interest at 18 %.

11. It is contended by Sri Prabhuling Navadgi, counsel appearing for the petitioner that the 1<sup>st</sup> Respondent is liable to pay Rs.5.00 per unit for the electricity supplied during the period from October to December as per the interim order since as on that date the interim order was still in operation and the petitioner was bound to sell the electricity to the 1<sup>st</sup> Respondent and the 1<sup>st</sup> Respondent was liable to pay for the same.

12. Per contra Sri Sriranga, counsel appearing for the respondents has contended that the electricity charges claimed by the petitioner are not liable to be paid only by BESCO as PPA with BESCO was already terminated by the petitioner on 8.7.2009 and the supply was not under the PPA but to the State grid in general and therefore all ESCOMs together have to pay for the electricity supplied.

13. In the light of the rival contentions, one question that arises for consideration is whether BESCO alone is liable to pay for the electricity

supplied during the period from October to December or other ESCOMs are also liable to pay the amount due along with BESCO.

14. From the facts placed before us it is observed that the PPA of the petitioner was with BESCO and power was being supplied to it till termination of the same. It is also observed that the notice of termination of the PPA was served on BESCO and it is BESCO which contested the validity of the termination before this Commission seeking a direction to the petitioner to continue to supply power to it as per the terms of the PPA. Further BESCO carried the dispute of validity of termination to the Hon'ble Appellate Tribunal for Electricity and the Hon'ble Supreme Court and suffered adverse orders. It is also observed that among the distribution companies, it is BESCO alone which was a party before the CERC and the Hon'ble High Court of Karnataka in writ petition No.25431/2009 wherein the CERC order of permitting Open Access was challenged. It is also observed that BESCO which was one of the respondents, alone challenged the interim order of the learned Single Judge directing it to pay Rs.5/- before the Hon'ble Division Bench of the Hon'ble High Court of Karnataka which also dismissed the appeal.

15. In view of the above incontrovertible facts, BESCO cannot now dispute its liability to pay to the petitioner for the electricity supplied for the months of October to December as per the interim order of the Hon'ble High Court as during the said period also the interim order was in force and binding on BESCO. If BESCO had any reservation on purchase of power at the interim order rate, as observed by the Hon'ble Division Bench, BESCO could have

moved the learned Single Judge and made a submission that it does not want to buy the power at the rate fixed by the court and the petitioner could go for 3<sup>rd</sup> party sale. Admittedly BESCO did not do this and compelled the petitioner to supply power to it on account of the stay of CERC's Order allowing the petitioner the open access. It is also noticed that after the dismissal of SLP during October BESCO did not take any action to move the Hon'ble High Court where the writ petition was pending to seek modification of the interim order. This also has not been done by BESCO. In our opinion, at this length of time, BESCO cannot refuse payment as per the interim order of the Hon'ble High Court.

16. It is contended by Sri Sriranga that the interim order of the learned single judge specifically said that the payments made by BESCO pursuant to the interim order are subject to final accounting and therefore the rate fixed in the interim order was not a final one. As noticed already the learned Single Judge of the Hon'ble High Court while fixing the rate had taken into consideration the submission of both the parties. While confirming the order of the learned Single Judge, the Hon'ble Division Bench has considered the merit of fixing an interim rate of Rs.5/- per kwh. In the counter filed on behalf of BESCO, the only contention of BESCO is as regards the portion of its liability and not per se about the rate fixed by the Hon'ble High Court. It is further mentioned therein that BESCO has already written to Respondents 2 & 4 in the matter of sharing the payments of power supplied during the period subsequent to 4.10.2010. In our opinion BESCO therefore cannot dispute the amount payable as per the interim order of the learned Single Judge. However, BESCO shall be at liberty

to recover appropriate amounts from the other ESCOMs in proportion to the power utilized by the latter during the period subsequent to 4.10.2010. Further, as observed by the Hon'ble High Court while finally disposing the petition, the payments to be made by BESCOM are without prejudice to the rights of BESCOM to workout its remedy in so far as its claim relating to refund if they are so entitled in accordance with law.

17. As regards the claim for interest by the petitioner, we are of the view that the same is not admissible as the PPA was not in force and no provision was made by the Hon'ble High Court while passing either the interim order or the final order for payment of interest.

18. Consequently this petition is allowed. BESCOM is directed to pay to the petitioner at Rs.5.00 per kwh for the electricity supplied till 16.12.2010 within two (2) weeks from the date of this order subject to the observations made by the Hon'ble High Court in its order dated 16.12.2010.

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

Sd/-  
(VISHVANATH HIREMATH)  
MEMBER

Sd/-  
(K. SRINIVASA RAO)  
MEMBER