

No.N/40/11

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

Dated : 24th January, 2013

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

OP No.16/2011

BETWEEN

M/s. Bangalore Electricity Supply Company Limited
K.R. Circle
BANGALORE-560 001
(Represented by M/s. Justlaw, Advocates)

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Petitioner

AND

Davanagere Sugar Company Limited
No.73/1, P.B.No.312, Shamanur Road
DAVANAGERE-577 304
(Represented by Shri Prabhuling K. Navadgi, Advocate)

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Respondent

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1) This Petition has been filed by Bangalore Electricity Supply Company Limited (hereinafter referred to as 'BESCOM'), seeking determination of tariff payable by it to the Respondent for the energy supplied by the latter from 8.7.2009 to 11.1.2011, and to refund the amount paid in excess from August, 2009 to December, 2010.

2) The facts of the case are that the Petitioner had a Power Purchase Agreement (PPA) dated 17.1.2002 with the Respondent. This PPA came to be terminated by the Respondent on 8.7.2009 on the ground of breach of the terms

of the PPA. The validity of this termination was challenged by the Petitioner in OP No.17/2009 before this Commission.

3) During the pendency of the above proceedings, a buyer for the Respondent's power applied for 'NOC' for Open Access under the CERC Open Access Regulations. This was rejected by the Chief Engineer, State Load Despatch Centre (SLDC), on the ground that there was a subsisting PPA and the termination of the same was in dispute. Against the non-granting of 'NOC', the Respondent approached the Central Electricity Regulatory Commission (CERC) in Petition No.114/2009. The CERC, by its Order dated 17.8.2009 (at Paragraph-15), observed that the existence of a PPA was not a valid ground for denial of Open Access, as held by it in the earlier proceedings, and directed to consider the applications for 'NOC' on that basis. This Order was challenged by the State of Karnataka in W.P.No,25431/2009 (GM-RES). The Petitioner was one of the Respondents to this Petition. The Hon'ble High Court, on 2.9.2009, stayed the operation of the CERC's Order dated 17.8.2009 and directed the Commission to decide OP No.17/2009 expeditiously. The Respondent-Generator (Respondent in the present Petition) filed an Application for vacating the Interim Stay Order. The Hon'ble High Court modified the Interim Order and directed the Respondent to continue to supply electricity to the Petitioner at the rate of Rs.5/- per Unit, during the pendency of the Petition. This modified Interim Order was unsuccessfully challenged by the present Petitioner in Writ Appeal No.4527/2009.

4) As per the interim direction of the Hon'ble High Court in the above Writ Petition, this Commission heard OP No.17/2009 on merits and dismissed the same on 8.10.2009, upholding the termination of the PPA dated 17.1.2002, effected on 8.7.2009 by the Respondent. This Order of the Commission was challenged by the Petitioner in Appeal No.176/2009 before the Hon'ble Appellate Tribunal for Electricity (ATE). The Hon'ble ATE, vide its Order dated 18.5.2010, dismissed the Appeal. The Civil Appeal No.25623/2010 filed against the above Order of the Hon'ble ATE was also dismissed by the Hon'ble Supreme Court.

5) Thus, the termination of the PPA became final with effect from 8.7.2009. The Writ Petition No.25431/2009 (GM-RES), referred to at paragraph-3 above, also came to be dismissed by the Hon'ble High Court, by its Order dated 16.12.2010, which is as follows :

"The learned Advocate General submits that the prayer in the Writ Petition do not survive for consideration.

2. Accordingly, the writ petition is hereby dismissed, as same do not survive consideration. Further the legal issues raised in this writ petition are kept open.

3. Respondent No.3 is at liberty to work out his remedy in so far as it relates to their claim for refund, pursuant to the interim order granted by this Court if they are so entitled in accordance with law."

6) The Petitioner, based on the observations made at paragraph (3) above by the Hon'ble High Court in its Order in the above Writ Petition, has come up with the present Petition, for fixation of tariff for the electricity supplied during the pendency of the proceedings before this Commission and the Hon'ble High Court, i.e., from 8.7.2009 to 16.12.2010, under Section 62 of the Electricity Act, 2003, and has prayed for issuance of a direction to refund the excess amount received by the Respondent.

7) It is submitted by the Petitioner that the rate of Rs.5/- per Unit fixed by the Hon'ble High Court was only an interim rate and not a final rate, and therefore this Commission may fix an appropriate rate, considering the material and calculations submitted by it in the Petition.

8) The Respondent has put in appearance through its Counsel, Shri Prabhuling K. Navadgi. It is submitted by the Respondent's Counsel that in view of the Order dated 21.4.2011 of this Commission passed in OP No.5/2011, the Petitioner cannot seek fixation of the rate and the rate fixed by the Hon'ble High Court has become final. Further, according to him, Section 62 of the Act has no application to the present case, as the said provision can be invoked by the Petitioner only if purchase of electricity is being made under an Agreement. It is submitted by him that in the instant case, electricity has been supplied not under an Agreement, but under an Order of the Hon'ble High Court in the Writ Petition filed by the Government against the Stay Order of the Central Electricity Regulatory Commission (CERC) allowing the Open Access to the Respondent.

9) We have heard the Counsel appearing for both the parties. We have also considered the averments made by both the parties and the documents and the Calculations placed.

10) The Issues that arise for consideration and decision in this case are:

(i) Whether the Petitioner, based on the observations made by the Hon'ble High Court of Karnataka in W.P.No.25431/2009 (GM-RES), can seek fixation of tariff for the electricity supplied by the Respondent to it under the Interim Order of the Hon'ble High Court, invoking Section 62 of the Electricity Act, 2003 ?

(ii) Whether the Petitioner is entitled to refund of any amount, which is already paid to the Respondent ?

11) The Hon'ble High Court of Karnataka, in the Writ Petition referred to by the Petitioner, had made the following observations :

“3. Respondent No.3 is at liberty to work out his remedy in so far as it relates to their claim for refund, pursuant to the interim order granted by this Court if they are so entitled in accordance with law.”

12) A careful reading of the above observations of the Hon'ble High Court makes it clear that the Hon'ble High Court has only reserved the liberty to claim refund, if the Petitioner is entitled for the same in accordance with law.

Therefore, the Petitioner has to establish that in law, it is entitled to the refund sought by it.

13) The Petitioner, in the present Petition, has invoked Section 62 of the Electricity Act, 2003, for fixing the tariff for the electricity supplied by the Respondent under the Order of the Hon'ble High Court and has sought refund of the excess amount allegedly paid by it. The Respondent's Counsel has vehemently argued that the Petitioner cannot maintain a Petition for fixation of tariff for the electricity supplied under the Interim Order of the Hon'ble High Court, invoking Section 62 of the Electricity Act, 2003. According to him, invoking Section 62 of the Electricity Act, 2003, for fixation of tariff arises only in case the power supply is to a buyer under an Agreement of Sale. This, according to us, is the correct view in the present case.

14) There is no dispute that the supply of electricity in the present case was not by way of an Agreement between the Buyer and the Seller. Supply of electricity is made on account of the Interim Order granted by the Hon'ble High Court in the Writ Petition and not under an Agreement of Sale. But for the Interim Order of the Hon'ble High Court in the Writ Petition No.25431/2009 filed by the Government of Karnataka, the Respondent would have sold the electricity in the market, as the CERC had already directed the Karnataka Power Transmission Corporation Ltd. (KPTCL) to grant Open Access to the Respondent for selling the electricity to third parties by its Order dated 17.8.2009.

15) Under Section 86(1)(f) of the Electricity Act, 2003, this Commission has to adjudicate the dispute that arise between a Generating Company and a Distribution Licensee. In this case, a dispute has arisen on the question of payment of payment for the electricity supplied during the period in which the Interim Order of the Hon'ble High Court of Karnataka was in force and this, in our view, falls within the powers of the Commission under Section 86(1)(f) of the Act and this Commission has to adjudicate the same.

16) It is forcefully submitted by the Petitioner that the Respondent is not entitled for Rs.5/- per Unit for the electricity supplied, as the rate of Rs.5/- per Unit fixed by the Hon'ble High Court was only an interim rate and the rate needs to be determined in the subsequent proceedings, like the one presented now. In this regard, we may usefully refer to the Orders of the Hon'ble High Court dated 7.12.2009 at Pages 84 and 85 :

"It is to be noticed that the 1st 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 and they have to shut down their unit as it is the power process in the State got escalated.

Having regard to the facts, I am of the view that the Tariff, as interim arrangement is fixed at Rs.5/- per unit and the said amount shall be calculated from the date the amount becomes due and shall be paid to the 1st Respondent deducting the amount already paid. Indeed the said amount 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."

17) From a reading of the above Order of the Hon'ble High Court, there cannot be any doubt that the rate fixed by the Hon'ble High Court was only an interim rate and the actual rate has to be determined by this Commission. According to the Petitioner, the rate for the electricity supplied has to be fixed by this Commission based on this Commission's Tariff Order dated 11.12.2009, i.e., Rs.3.59 per Unit. If the rate is considered at Rs.3.59 per Unit, then the Respondent has to refund a sum of Rs.21,17,22,583/-, and if the weighted average rate at which the Petitioner has procured power during the period from various sources is considered, the Respondent has to refund a sum of Rs.21,30,12,253/-.

18) In our view, the rate determined by this Commission on 11.12.2009 cannot be considered for fixation of the Tariff, as the rate determined by the Commission is for the new Projects coming after the date of its Order. Further, the said rate is applicable to power supplied under PPAs signed thereafter. Undisputedly, the Plant of the Petitioner has come up much prior to the Order of this Commission.

19) Similarly, we cannot go by the weighted average rate at which the Petitioner has bought power during the relevant period, as the same depends on various factors, including mostly power procured under several PPAs. In our view, the rate has to be fixed considering what rate the Respondent could have realized, if it were to sell the power in the market. We have therefore looked into

the weighted average of short-term power market rates for bilateral transactions, as published by CERC, prevailing between September, 2009 and December, 2010 (during the period in which electricity was supplied). The weighted average rate during the relevant months for short-term power procured from traders was Rs.5.07 per Unit. The Respondent could therefore be reasonably expected to realize Rs. 5.07 per Unit during the period.

20) This Commission, in OP No.16/2010 (relating to Section 11 Order of the Government of Karnataka), while determining the rate of electricity for the period from April, 2010 to June, 2010, has fixed Rs.5/- per KWh as an appropriate price, considering the prevailing average of the market price at Rs.5.50 per Unit on a similar basis.

21) Therefore, considering the general market rates referred to above prevailing during the relevant period and this Commission's Order dated 24.3.2011 in OP 16/2010, we cannot hold that the Respondent has been paid at rates in excess of the average rate then prevailing in the market.

22) In view of the above finding that the Respondent has not been paid at excess rates, the Petitioner is not entitled to any refund of the amount which it has already paid to the Respondent for the electricity supplied from the date of termination of the PPA to the date when NOC for Open Access was granted. Consequently, the Petition is rejected.

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

Sd/-
(VISHVANATH HIREMATH)
MEMBER

Sd/-
(K.SRINIVASA RAO)
MEMBER