

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

Dated : 10th July, 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 |

OP No.20/2009

BETWEEN :

- 1) Mangalore Electricity Supply Company Limited
Paradigm Plaza, 4th Floor
A.B. Shetty Circle
MANGALORE – 575 101
- 2) Power Company of Karnataka Limited
KPTCL Building
Cauvery Bhavan
BANGALORE – 560 009 ..
[Petitioners represented by M/s. Justlaw, Advocates]

PETITIONERS

AND:

M/s. Pune Power Development Private Ltd.
(Formerly known as Kalyani Power Development Pvt.Ltd.)
No.25, Unmol
Yeshwanth Ghatge Nagar
Range Hill Corner
PUNE – 411 007 ..
*[Respondent represented by M/s. Anandarama, Prashanth & Vikram,
Advocates & Solicitors]*

RESPONDENT

- 1) This Petition has been filed praying for recovery of the price of electricity not returned by the Respondent as per the agreement, with interest, cost, etc.

The following reliefs have been sought by the Petitioners in the Petition:

- (a) To declare that the Respondent is in breach of terms of 'Letter of Intent' and the subsequent assurance, and failed to return the energy;
- (b) To direct the Respondent to pay a sum of Rs.39.32 Crores being the maximum UI charges fixed by CERC at Rs.10.29 per Unit for the energy of 38.209143 Million Units (MUs);
- (c) To direct the Respondent to pay interest @ 18% from 01.03.2009 on the amount due till date of payment;
- (d) To grant cost of the proceedings;
- (e) To pass such orders as this Commission may deem fit on the facts and in the circumstances of the case.

2) The 1st Petitioner is a Government Company and a Distribution Licensee engaged in the business of supply and distribution of electricity in the specified area. The 2nd Petitioner is also a Government Company who is, *inter alia*, engaged in the business of procuring power on behalf of the Electricity Supply Companies (ESCOMs) for optimum supply of the same throughout the State of Karnataka, and it also co-ordinates with other States and Central Government agencies on power related issues. The Respondent is a company incorporated in the year 2007 under the name, "M/s. Kalyani Power Development Private Ltd.", and in the year 2009 the said name stood changed as "M/s. Pune Power Development Ltd." The Respondent has been granted a Trading License in the year 2007 by the Central Electricity Regulatory Commission (CERC) for inter-State trading in electricity as Category-F Licensee.

- 3) The material facts of the case may be stated as follows :
- (a) On 7.1.2008, the Respondent, as per ANNEXURE-A, enquired with the 2nd Petitioner, whether it could arrange banking of surplus power available with the ESCOMs, for the months of July, August and September, 2008, with some utility in Northern Region, on the condition that the said utility would return the power in February, March and April, 2009, and requested the 2nd Petitioner to indicate the terms and conditions for banking of this power. (ANNEXURES - A, B, C. etc., are produced by the Petitioners along with the Petition.)
- (b) In response to ANNEXURE-A, the 2nd Petitioner offered its terms and conditions on 14.2.2008, as per ANNEXURE-R2, to the Respondent, expressing its willingness for banking the surplus power if any, available with ESCOMs, during the ensuing monsoon months, i.e., from July, 2008 to September, 2008, with some utility in the Northern Region. (ANNEXURES - R1, R2, R3, etc., are produced by the Respondent along with the Statement of Objections and Counter-Claim).
- (c) Thereafter, the Respondent entered into an Energy Banking Agreement (EBA) dated 19.3.2008 with BSES Rajdhani Power Ltd., New Delhi (hereinafter referred to as BRPL), a utility in the Northern Region, with the terms and conditions stated therein, as per ANNEXURE-C / ANNEXURE-R4.

- (d) On 24.3.2008, the Respondent intimated the 2nd Petitioner, as per ANNEXURE-B, that BRPL had agreed to go for banking from 1.7.2008 till 15.9.2008 and they would return 105% of the power banked, starting from 1.2.2009 to 15.4.2009, and that the Respondent had already entered into an Agreement with the BRPL on 19.3.2008 and that the Respondent would visit the Office of the 2nd Petitioner for completing the balance requirement of this banking arrangement.
- (e) After some subsequent communications between the 2nd Petitioner and the Respondent, on 23.4.2008, the 2nd Petitioner intimated, as per ANNEXURE-D / ANNEXURE-R3, the terms almost finalized to the Respondent, and stated that a Letter of Intent (Lol) in this regard would be issued by the 1st Petitioner.
- (f) Pursuant to the above developments, the 1st Petitioner issued a Lol dated 4.7.2008, as per ANNEXURE-E / ANNEXURE-R5, to the Respondent, containing the final terms and conditions of the banking transaction. The terms of the Lol are as follows :

"1. MESCOM and/or ESCOMs shall supply up to 200 MW power on firm basis to NR Utility (BSES Rajdhani Power Limited) through M/s. Kalyani Power Development Private Limited from 1st July, 2008 to 15th September, 2008 between 00:00 to 24:00 hrs at the Delivery Point.

2.
 - a. *NR Utility (BSES Rajdhani Power Limited) through M/s. Kalyani Power Development Private Limited shall return 105% of quantum of energy supplied by MESCOM and/or ESCOMs in the months from 1st February, 2009 to 15th April, 2009 based on the schedule to be confirmed by MESCOM / PCKL during the month of October, 2008 on firm basis at their Delivery Point.*
 - b. *In the event of shortfall in supply of scheduled energy on firm basis, such shortfall has to be made good preferably in the respective month on day ahead basis. If not, carried forward to subsequent months.*
 - c. *The transaction for such shortfall, if any, still persists on 15th April, 2009, has to be completed before 15th May, 2009 failing which, the unsettled quantum of energy shall be settled at the maximum ceiling UI rate as notified by CERC from time to time.*
3. *The mechanism quoted above is to ensure exchange of energy with energy.*
4. *Delivery point shall be KPTCL periphery (Delivery Point) for supply of power by MESCOM and/or ESCOMs to NR Utility (BSES Rajdhani Power Limited) and Delhi State Transmission Utility periphery for return of power by NR Utility (BSES Rajdhani Power Limited) to MESCOM and/or ESCOMs.*

5. *On either side, all open access charges, transmission charges and transmission losses up to respective delivery points shall be to exporting utility and similarly all open access charges, transmission charges and transmission losses beyond delivery point shall be to the account of importing utility.*
6. *In case NR Utility (BSES Rajdhani Power Limited), through M/s. Kalyani Power Development Private Limited returns the energy supplied as detailed above, i.e., desired quantum of energy, there will be no monetary transaction.*
7. *NR Utility (BSES Rajdhani Power Limited), M/s. Kalyani Power Development Private Limited shall provide Bank Guarantee in the month of June, 2008 in favour of MESCOM and/or ESCOMs equivalent to approximate quantity of energy to be drawn during July, 2008 at the rate of Rs.5.0 / unit or 50% of maximum UI rate prevailing during the transaction (i.e., 50% of Rs.10.0 / unit present maximum UI rate). Similar methodology shall be followed for providing Bank Guarantee for the energy to be drawn during subsequent months. The Bank Guarantee shall be valid till May, 2009.*
8. *M/s. Kalyani Power Development Private Limited is entitled to claim the trading margin of Rs.0.03 / unit by the importing utility."*

(g) Meanwhile, on the request of the Respondent, the 1st Petitioner started supplying energy to BRPL from 1.7.2008 itself. Subsequently, on 19.7.2008,

the 2nd Petitioner, as per ANNEXURE-R6, intimated the Respondent that the availability of power from hydel sources was depleting day-by-day consequent to reduction in inflow to reservoirs, thereby pushing the State to precarious power condition. In view of shortage of power, the arrangement of banking of power stood withdrawn with immediate effect. The 1st Petitioner also wrote a letter on 29.7.2008, as per ANNEXURE-R9, to the Respondent, stating that the Lol stood withdrawn. The supply of power, which started on 1.7.2008, was continued up to 26.7.2008. During this period, the 1st Petitioner supplied 36.389660 MUs of energy to BRPL, as per the Agreement between the Petitioners and the Respondent.

- (h) The 1st Petitioner addressed a letter dated 31.1.2009, as per ANNEXURE-F, to the Respondent, calling upon it to return the banked energy during March, 2009, in the same schedule by which energy was drawn during July, 2008.
- (j) By letter dated 3.2.2009, as per ANNEXURE-G, the Respondent informed that 105% of energy supplied had to be returned by the BRPL and a Statement of Schedule had been forwarded to the BRPL for its concurrence, and that upon receipt of the concurrence from the BRPL, an application for open access would be filed for scheduling of the power. Subsequently, by letter dated 18.3.2009, as per ANNEXURE-H, the Respondent forwarded to the 2nd Petitioner, a copy of the communication received from BRPL, claiming compensation for non-supply of energy for the whole period, i.e., from 1.7.2008 to 15.9.2008, and for taking necessary action. As the Respondent

failed to return the banked energy, as agreed, the Petitioners have filed this Petition on 22.7.2009 seeking the reliefs stated above.

- 4) The Respondent filed preliminary objections on 1.10.2009, contending that:
 - (a) The subject matter of the dispute related to inter-State transaction for supply and return of electricity and that the CERC had granted a Trading Licence to the Respondent, therefore this Commission had no jurisdiction to adjudicate the dispute; and,
 - (b) The BRPL was a party to the transaction in question, which was required to return the power to the Petitioners, thus the Petition was liable to be dismissed for non-joinder of the necessary party.
- 5) The Respondent also filed an Interlocutory Application (IA) intimating the change of name of the Respondent-Company from "Kalyani Power Development Pvt.Ltd." to "Pune Power Development Private Ltd." with effect from 23.9.2009, as per the Certificate of Incorporation issued by the Registrar of Companies, Pune, Maharashtra.
- 6) The Petitioners have opposed the preliminary objections raised by the Respondent. The Petitioners, however, have not opposed the IA filed by the Respondent.

7) After hearing both the parties, this Commission, by Order dated 21.10.2009, overruled the preliminary objections of the Respondent and allowed the IA filed by the Respondent. Aggrieved by the said Order of this Commission insofar as it relates to overruling the preliminary objections, the Respondent filed Appeal No.200 of 2009 before the Hon'ble Appellate Tribunal for Electricity (ATE). After hearing both the parties, the Hon'ble ATE, by Order dated 23.2.2011, dismissed the Appeal, confirming the findings of this Commission.

8) During the pendency of Appeal No.200 of 2009 before the Hon'ble ATE, on persuasion by the Respondent, the BRPL has returned to the 1st Petitioner 38.209143 MUs of energy, which is 105% of the energy received by it.

9) On 29.9.2011, the Respondent filed its Statement of Objections and made a Counter-Claim, praying for:

(a) a direction against the Petitioners to pay a sum of Rs.1,07,67,187.85 (Rupees One Crore Seven Lakhs Sixty Seven Thousand One Hundred & Eighty Seven and Paise Eighty Five only) towards open access and trade margin charges, with future interest till the date of payment; and,

(b) a direction against the Petitioners to pay the damages caused to the Respondent and the BRPL for non-supply of electricity for the whole period agreed to by the parties.

10) The material submissions and the contentions raised by the Respondent in the Statement of Objections and the Counter-Claim may be stated as follows :

- (a) The Respondent has stated that it organized a power banking arrangement (power swapping arrangement – which is a cashless transaction in the power industry / sector) between the Petitioners and BRPL. The Respondent has not disputed the several communications that have taken place between the parties in regard to the power banking / barter arrangement, and also the Agreement dated 19.3.2008 between the Respondent and the BRPL, as per ANNEXURE-C / ANNEXURE-R4.
- (b) On the basis of the Agreement dated 19.3.2008 - ANNEXURE-R4, between the Respondent and the BRPL, and the Lol dated 4.7.2008 (ANNEXURE-E) and several other correspondences between the parties, the Respondent has contended (in paragraph-10 at page-7 of its Statement of Objections) that :

“Thus it can be seen that the responsibility of both MESCOM and BRPL to supply and return power is clearly defined and there is no scope for ambiguity or for a case to allege that it was the responsibility of the Respondent to supply or return the supplied power as per the agreements entered into in this agreement in respect of the impugned transaction. It is submitted that the ultimate responsibility to perform as per the agreements entered into pursuant to the impugned transaction

is upon the Petitioner No.1 or BRPL, and as a natural corollary of that, it can be submitted that in case of any breach of obligation as is contemplated in the said impugned transaction both the 1st Petitioner and BRPL are directly responsible to each other. This fact appears to be even clearer from the language of clause 2(c) of the said agreement which states that:

'BRPL shall provide Bank Guarantee in the month of June 2008 in favour of MESCOM and/or ESCOMs equivalent to approximate quantity of energy to be drawn during July 2008 at the rate of Rs.5.0/Unit. Similar methodology shall be followed for providing Bank Guarantee for the energy to be drawn during subsequent months. The Bank Guarantee shall be valid till May 2009.'

That as per the said agreement BRPL had agreed to receive 100% power from the 1st Petitioner during the period 01.07.2008 to 15.09.2008 and return 105% of the banked power to the 1st Petitioner in the months of February, March and April 2009."

For the above reasons, the Respondent has contended that under the Agreement, the responsibility to supply energy was on the 1st Petitioner and the responsibility to return the said energy was on the BRPL, and if there was any breach, it was a matter between those two parties and the Respondent was not concerned with it.

- (c) The Respondent (in paragraph-14 at page-9 of its Statement of Objections) has stated that discontinuance of power supply by the 1st Petitioner as per the terms of the Lol amounted to breach / violation of Clause-1 of the Lol regarding the quantum and duration of supply of power agreed to

between the parties. Further, the Respondent has contended that the BRPL has raised a demand of Rs.1,17,75,12,000/-, as per ANNEXURE-R11 dated 6.2.2009, towards damages for non-supply of electricity as per the Agreement. The said claim of BRPL should be paid by the Petitioners.

(d) By way of counter-Claim, the Respondent has claimed a sum of Rs.1,07,67,187.85 towards trading margin and open access charges from the Petitioners. In this regard the Respondent wrote letter dated 10.6.2010, as per ANNEXURE-R15, to the Petitioners, annexing a detailed statement of claim. Therefore, the Respondent has requested to dismiss the Petition and to allow its Counter-Claim.

11) The Petitioners have filed their Statement of Objections to the Counter-Claim made by the Respondent. They have contended therein that the whole purpose of the barter arrangement was to supply the power generated during monsoon, which was surplus power for the 1st Petitioner during the said season, and to receive back the said power during summer, when there would be shortage of power, and that this arrangement was clearly understood by the parties concerned. Further, they have contended that there was justification for the withdrawal of the arrangement for supply of power and the subsequent termination of the Lol. Further, they have contended that since the energy was returned after an inordinate delay, the Petitioners have suffered irreparable loss, damage and injury, and that the Respondent was therefore not entitled to claim open access charges and trading margin charges. They have also contended

that the Counter-Claim of the Respondent is not maintainable in the present proceedings. Therefore, the Petitioners have prayed for dismissal of the Respondent's Counter-Claim and for allowing their claim.

12) There is no dispute that the Respondent through the BRPL returned 105% of the electricity received by it during the period between 17.2.2010 and 5.6.2010. In view of this development, the Petitioners have not pressed their claim for payment of compensation with regard to the value of the quantum of electricity that was not returned as on the date of filing of the Petition. However, the Petitioners have claimed interest for the delay in returning the quantum of electricity received by the Respondent.

13) We have heard the oral submissions made by the learned counsel for both the parties.

14) The learned counsel for the Petitioners submitted that there was justification for withdrawal of the arrangement stated in the Lol subsequent to 26.7.2008. Further, the learned counsel for the Petitioners submitted that the Respondent was under an obligation to return 105% of the electricity received by it as per the schedule furnished by the 1st Petitioner in terms of the Lol, but the Respondent returned the same belatedly, and therefore the Respondent was liable to pay the interest and damages. Regarding the Counter-Claim of the Respondent, the learned counsel for the Petitioners submitted that the Respondent should have filed a separate Petition for claiming the reliefs stated in

the Counter-Claim, and that in the present proceedings, the Counter-Claim was not permissible, since the provisions governing Counter-Claims stated in the Code of Civil Procedure were not applicable to the present proceedings before this Commission. The learned counsel also submitted that as there was breach of contract on the part of the Respondent, the claim of damages and for recovery of the open access charges and trading margin was not tenable.

15) The learned counsel for the Respondent submitted that the 1st Petitioner was required to supply a certain quantity of power over the agreed period as per the Lol, but committed breach of the agreement by not supplying the same. Further, the learned counsel submitted that the return of electricity was subject to supply of the electricity agreed to between the parties, and hence the Respondent was not under any obligation to perform its part of the contract to return the electricity. Further, he submitted that as per the terms of the Lol, the Respondent was entitled to payment of open access charges and trading margin.

16) From the rival contentions, the facts of the case on record and the relevant applicable provision of law, the following Issues arise for our consideration :

- (1) Whether the performance of the contract in question for supply of electricity became impossible subsequent to 26.7.2008 for the reasons stated by the Petitioners?

- (2) If Issue No.(1) above is held in affirmative, to what relief(s) the parties are entitled to?
- (3) If Issue No.(1) above is held in negative, to what relief(s) the parties are entitled to?
- (4) What Order?

17) After considering the pleadings and the submissions of the parties in the case, our findings on the above Issues are as follows :

18) **ISSUE No.(1)** :

- (a) The justification stated by the Petitioners for the non-performance of the contract is the subsequent impossibility after entering into the contract. This subject is covered under paragraph-2 of Section 56 of the Indian Contract Act, 1872 (hereinafter referred to as the Contract Act). The said second paragraph of Section 56 of the Contract Act, which covers cases of subsequent impossibility of contract, reads thus :

“...Contract to do act afterwards becoming impossible or unlawful.- A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.”

(b) In this regard, for a better understanding of the principles of law, the following extracts from the 'Commentary on The Indian Contract and Specific Relief Acts' [by the learned Author, Pollock & Mulla, 14th Edition, Volume I, Pages-895 and 896) may be noted :

*“ ‘**Becomes Impossible**’: The word ‘impossible’ has been used in the section not only in the sense of physical or literal impossibility of performance, but also covers cases where the performance may be impracticable and useless from the point of view of the object and purpose, which the parties had in view. ...”*

*“**Non-existence of State of Things and Non-occurrence of an Expected Event** : The principle is applied because the performance of the contract depended on the existence of occurrence of a particular state of things which formed the basis of the contract. In such cases, the performance of the contract is not prevented, and is actually possible; but the common object is frustrated. The contract would be frustrated in such cases where ‘the common object ... has frustrated, not merely the individual advantage that one party or the other might have gained from the contract,’ or because one party has been prevented from putting the subject matter to the use intended by him because of such an event. A contract is also frustrated because contractual obligation has become incapable of being performed, because the circumstances in which performance is called for, would render it a thing radically different from that which was undertaken by the contract.*

“Where an expected event is the foundation of the contract, the cancellation of that event will, as a general rule, frustrate the contract. ...”

(c) In connection with the frustration of contract, the following judicial observations are worth noting :

1. *“This is much clear that the word ‘impossible’ has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested in their bargain, it can very well be said that the promisor finds it impossible to do the act which he promised to do.” [Satyabrata v. Magneeram, AIR 1954 SC 44].*

2. *“The view that section 56 applies only to cases of physical impossibility and that where this section is not applicable recourse can be had to principles of English law on the subject, is not correct. Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties. The impossibility contemplated is not confined to something not humanly possible. If the performance of contract becomes impracticable or useless having regard to the object and purpose, the parties had in view, then it must be held that performance of the contract had become*

impossible. But the supervening events should take away the basis of the contract and it should be of such a character that it strikes at the root of the contract."
[*Sushila Devi v. Hari Singh (1971) 2 SCC 288*].

- (d) In the present case, the Respondent made the initial proposal to the Petitioners to the effect, whether they were willing for banking of surplus power that might be available with them during the months of July, August and September, 2008, and to intimate the terms and conditions for banking of the said surplus power (ANNEXURE-A). In reply to the above proposal, the Petitioners stated that ESCOMs of Karnataka State were willing to offer round-the-clock power to an extent of 200 MW on day-ahead basis during the ensuing monsoon season, from July, 2008 to September, 2008, under the terms and conditions mentioned therein (ANNEXURE-R2).
- (e) Subsequent to the offer of the Petitioners to bank the surplus power during the ensuing monsoon from July, 2008 to September, 2008, the Respondent identified BRPL as the customer who could receive the surplus power from the Petitioners and return the said banked power during the period from February, 2009 to April, 2009. Thereafter, the Respondent accepted the offer of the Petitioners for banking the surplus power.
- (f) The 1st Petitioner supplied power from 1.7.2008 to 26.7.2008. Meanwhile, on 19.7.2008, as per ANNEXURE-R6, the 2nd Petitioner intimated the

- Respondent that the Karnataka State was undergoing severe power crisis due to delayed onset of the monsoon, causing low inflow to major hydel reservoirs and that the availability of power from hydel sources was depleting day-by-day consequent to the reduced inflow of water to reservoirs, thereby pushing the State under precarious power condition. In view of the acute shortage of power, the approval communicated vide letter dated 3.6.2008 stood withdrawn with immediate effect. Thereafter, from 27.7.2008, the power supply was discontinued by the Petitioners.
- (g) The Respondent did not raise any objection for the discontinuance of supply of power by the Petitioners, and much less, on the reasons stated for the discontinuance of supply of power in their letter dated 19.7.2008 (ANNEXURE-R6). On the other hand, the Respondent, as per letter dated 21.7.2008 (ANNEXURE-R8), informed the BRPL about the inability expressed by the Petitioners for banking the power due to severe power crisis in the State of Karnataka and that the Respondent would take steps for surrendering the reservation of transmission corridor, with immediate effect, for the months of July and August, 2008. If the Respondent had any grievance regarding the reasons stated by the Petitioners for the discontinuance of supply of power, it would have objected immediately after receiving the letter dated 19.7.2008 of the Petitioners.
- (h) The finalized terms, as per the Lol dated 4.7.2008 (ANNEXURE-E / ANNEXURE-R5), did not prescribe for supply of any particular quantity of

power by the Petitioners to the BRPL. On the other hand, the BRPL was required to return 105% of the quantum of energy supplied by the Petitioners, and in default, the Respondent was required to pay to the Petitioners for the shortfall of energy at the maximum UI rate as notified by the CERC. This fact also indicates that the Petitioners intended to supply only the surplus power available with them.

- (j) The Respondent has not categorically denied in its Statement of Objections, the averments by the Petitioners in their Petition for withdrawing the supply of power. The Petitioners have stated that there was delay in the onset of monsoon in July, 2008, which resulted in inadequate inflow of water into major hydel reservoirs. Consequently, the State of Karnataka became power-starved and the crisis became acute due to non-availability of coal for thermal power plants and there was an increase in consumption. In response to the above contention of the Petitioners, the Respondent has stated that, citing delayed rainfall and shortage of coal, the 1st Petitioner rescinded its Lol, which formed the basis of transaction, and unilaterally stopped the supply of surplus power flow from 27.7.2008, vide its letter dated 19.7.2008, and that in view of the said arbitrary action, the Petitioners have committed breach of the Lol dated 4.7.2008. It may be noted that these facts stated by Respondent do not amount specific denial of the reasons stated by the Petitioner for the discontinuance of supply of electricity.

(k) From the above facts and circumstances of the case, we are of the view that the basic purpose or object of the contract was to supply surplus electricity during the rainy season and that the said basic purpose or object of the contract has failed due to scarcity of rain and other circumstances stated by the Petitioners. It cannot be denied that the Respondent was fully aware of the basic purpose or object of the contract in question. Hence, we hold that the performance of the contract in question for supply of electricity became impossible subsequent to 26.7.2008. Issue No.1 is therefore answered in the affirmative.

19) **ISSUE No.(2)** :

(a) The effect of subsequent impossibility to perform a contract is that the contract becomes void and the contract is discharged. In such cases, if any party has received some benefit under the contract, he must restore it to the other party. A considerable portion of the Statement of Objections of the Respondent is devoted to contending that the agreement was actually between the Petitioners and the BRPL, and therefore, the Respondent was not liable for non-return of the electricity received from the Petitioners. This Commission has already held that the agreement has been entered into between the Petitioners and the Respondent and that it is only a bilateral agreement. This finding has

been upheld by Hon'ble Appellate Tribunal for Electricity (ATE). Therefore, ultimately, the Respondent itself is liable for the consequences of non-returning of the electricity to the Petitioners. In the present case, the Petitioners have supplied 36.389660 MUs of electricity to the BRPL, through the Respondent. The Respondent was liable to return the said quantity of electricity to the Petitioners immediately after the contract became void, i.e., on 26.7.2008. However, the Respondent, through the BRPL, during the period between 17.2.2010 and 5.6.2010, had returned 38.209143 MUs of electricity, representing 105% of the electricity received by it, as mentioned earlier. As per the Lol, the Respondent was required to return, between February, 2009 to April, 2009, 105% of the electricity received by it from the Petitioners, and the Respondent even asked the BRPL to return the electricity during 2009. Therefore, had the Respondent returned the 105% of the electricity received between February, 2009 and April, 2009, the Respondent could not have been blamed for any delay in returning the electricity. However, the Respondent has returned 105% of the electricity between the period 17.2.2010 and 5.6.2010. The above facts establish that there was almost one year delay in returning 38.209143 MUs of electricity by the Respondent. The Petitioners are therefore entitled to compensation for the said delay on the part of the Respondent in returning the electricity.

- (b) On the basis of the general principles stated in Section 34 of the Code of Civil Procedure, regarding award of interest in lieu of compensation or

damages in appropriate cases, the Hon'ble Supreme Court has held as follows :

“The general provision under this Section, being based upon justice, equity and conscience, would authorise the Redressal Forums and Commissions to also grant interest appropriately under the circumstances of each case. Interest may also be awarded in lieu of compensation or damages in appropriate cases and also on equitable grounds [Sovintorg (India) Ltd. v. State Bank of India, New Delhi, AIR 1999 SC 2963].”

- (c) In view of the above conclusion, it now becomes necessary for us to go into the question of determining the quantum of compensation for the delay in returning the electricity to the Petitioners. This would necessarily involve the question of determining the value of electricity to be returned by the Respondent. In the matter of determining the value of electricity supplied in the absence of a pre-determined price, this Commission, in OP No.40/2010 and OP No.41/2010, had relied upon the average price of electricity transacted through traders on short-term bilateral basis, published by the CERC. Going by the transactions relating to the relevant period, we find that the short-term bilateral transactions of electricity during the period from February, 2009 to April, 2009 were in the range of Rs.6.89 per Unit, Rs.6.83 per Unit and Rs.7.35 per Unit, respectively, averaging to Rs.7.02 per Unit. Thus, the value of electricity to be returned by the Respondent during the period between February, 2009 and April,

2009 at the rate of Rs.7.02 per Unit would amount to Rs.26.82 Crores for 38.209143 MUs, being 105% of 36.389660 MUs of electricity supplied by the Petitioners in the year 2008. Further, we also find that in the Lol issued by the Petitioners, the security demanded from the Respondent and the BRPL for the electricity to be supplied to the Respondent was at the rate of Rs.5/- per Unit. Between the two rates, viz., the average price prevailing in the short-term bilateral market during the relevant period and the value based upon the electricity supplied by the Petitioners in terms of the Bank Guarantee, we see that it is more reasonable to adopt the latter for the purpose of determining the monetary value of the electricity which was to be returned by the Respondent in the year 2009. At that rate, viz., Rs.5/- per Unit, the total value of the electricity in question amounts to Rs.19,10,45,715/- (Rupees Nineteen Crores Ten Lakhs Forty Five Thousand Seven Hundred and Fifteen only). For the delay of about one year in returning the said quantity of electricity, we deem it proper to award interest to the Petitioners to compensate for the said delay.

- (d) While determining the rate of interest in this case, the Commission has borne in mind the fact that the transaction between the Petitioners and the BRPL through the Respondent was not meant to be sale of electricity for commercial purpose. It was an arrangement for mutual convenience of power supply utilities for the benefit of their consumers. We would therefore consider it appropriate not to adopt a commercial rate of interest in determining the compensation for the delayed supply of

- electricity in this case. In our view, the ends of justice will be met, if a moderate rate of interest of 6% (six percent) per annum is charged on the assessed value of the quantum of electricity which ought to have been returned to the Petitioners during the period between February, 2009 and April, 2009, as per the understanding between the parties. At the interest rate of 6% per annum on Rs.19,10,45,715/- (Rupees Nineteen Crores Ten Lakhs Forty Five Thousand Seven Hundred and Fifteen only), the total amount of interest to be paid works out to Rs.1,14,62,742.90 (Rupees One Crore Fourteen Lakhs Sixty Two Thousand Seven Hundred & Forty Two and Paise Ninety only), which we feel is reasonable compensation for the inconvenience caused to the Petitioners and their consumers by the delayed return of electricity by the Respondent and the BRPL.
- (e) Now, we have to find out for what reliefs the Respondent is entitled to. The Respondent has claimed damages for breach of Clause-1 of the Lol committed by the Petitioners and it has also claimed open access charges and trade margin charges in terms of the Lol, along with interest.
- (f) We have already found that the contract has become void due to subsequent impossibility for performance of the same. Hence, the question of breach of contract by the Petitioners does not arise, and consequently there cannot be any claim for damages by the Respondent for breach of contract on the part of the Petitioners. Had the contract not become void, then only the question of breach of contract on the part of

the Petitioners would have arisen. Further, it can be seen that the Respondent and the BRPL have not complied with Clause-7 of the Lol in regard to furnishing of Bank Guarantee in the month of June, 2008, in favour of the Petitioners, as security for returning of the electricity received by them. For this reason also, the Respondent cannot claim specific performance of the contract by the Petitioners. Therefore, the Respondent is not entitled to any damages for the supposed breach of contract on the part of the Petitioners.

- (g) The Respondent has, in its counter-claim, claimed Rs.1,07,67,187.85 towards open access and trade margin charges payable to it under the terms of the Lol. It is not disputed by the Petitioners that the Respondent has incurred the open access charges and other miscellaneous charges on behalf of the Petitioners for import of electricity from Northern Region. It is also not disputed by the Petitioners that as per Clauses-4 and 5 of the Lol, these expenses shall be borne by them. The Petitioners have also not disputed that the Respondent was entitled to trade margin as stated in Clause-8 of the Lol. The Petitioners have contended that as the Respondent has not returned the electricity within the stipulated period, the Respondent was not entitled to claim the open access charges and the trade margin charges. The said contention of the Petitioners is not tenable and it is not based on any acceptable reasons. The Petitioners are entitled to claim compensation if there is delay in returning of

electricity. For that reason, the Petitioners cannot deny their liability to bear the open access charges and payment of trade margin charges.

- (h) The claim for open access charges and the trade margin has been made on the basis of the terms of the Lol. The amount claimed by way of set-off or counter-claim is an ascertained amount. Therefore, we are of the view that, in order to avoid multiplicity of proceedings, the claims of the Respondent can be entertained in this Petition itself, by way of set-off or counter-claim, against collection of the prescribed fee from the Respondent. The learned counsel for the Respondent has also submitted that the Respondent is ready to pay the fee prescribed on the amount of the counter-claim made by it.
- (j) The Respondent has claimed in ANNEXURE-R15, dated 10.6.2010, a sum of Rs.1,07,67,187.85 and another sum of Rs.2,96,907/- as the amounts outstanding from the Petitioners. In ANNEXURE-R13, dated 26.7.2010, the Respondent has claimed the very same amount, as claimed by it in ANNEXURE-R15. The Petitioners have admitted their liability to repay open access chargers and trading margin, as per ANNEXURE-R14, dated 1.4.2010. In the Statement of Objections filed by them to the counter-claim, the Petitioners have not disputed the quantum of amount claimed by the Respondent towards open access charges and trading margin. As already noted, the Respondent, in its counter-claim, has claimed Rs.1,07,67,187.85 towards open access and trading margin charges with

future interest. Therefore, we hold that the Petitioners are liable to pay a sum of Rs.1,07,67,187.85 to the Respondent. This amount should have been paid soon after the return of electricity by the Respondent, viz., soon after 5.6.2010. We are of the view that the Petitioners are also liable to pay interest to the Respondent at the rate of 6% per annum on the sum of Rs.1,07,67,187.85, till the actual date of payment.

(k) For the above reasons, Issue No.(2) is answered accordingly.

20) **ISSUE No.(3)** :

This Issue does not arise for consideration, as Issue No.(1) is held in the affirmative.

21) **ISSUE No.(4)** :

For the foregoing reasons, we pass the following :

ORDER

(a) The Respondent shall pay a sum of Rs.1,14,62,742.90 (Rupees One Crore Fourteen Lakhs Sixty Two Thousand Seven Hundred & Forty Two and Paise Ninety only) to the 1st Petitioner (MESCOM) within 60 (sixty) days from the date of this Order;

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- (b) The 1st Petitioner (MESCOM) shall pay a sum of Rs.1,07,67,187.85 (Rupees One Crore Seven Lakhs Sixty Seven Thousand One Hundred & Eighty Seven and Paise Eighty Five only) to the Respondent, along with interest at 6% (six percent) per annum on the said amount, from 5.6.2010 till the date of actual payment, within 60 (sixty) days from the date of this Order;
- (c) The Respondent shall pay the fee prescribed by the Commission towards its counter-claim of Rs.1,07,67,187.85 (Rupees One Crore Seven Lakhs Sixty Seven Thousand One Hundred & Eighty Seven and Paise Eighty Five only), within 30 (thirty) days from the date of this Order. In case the Respondent fails to pay the said fee to the Commission with the above-said period, the counter-claim of the Respondent stands rejected.

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

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

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