

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

**Dated : 19<sup>th</sup> September, 2013**

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

**OP No.3/2013**

**BETWEEN :**

Indowind Energy Limited  
'Kothari Building', 4<sup>th</sup> Floor, 114  
M.G. Road, Nungambakkam  
CHENNAI – 600 034

.. *[Represented by M/s. Shridhar Prabhu Associates, Advocates]*

**PETITIONER**

**AND**

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

.. *[Represented by M/s. Justlaw, Advocates]*

**RESPONDENT**

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**OP No.4/2013**

**BETWEEN :**

Indowind Energy Limited  
'Kothari Building', 4<sup>th</sup> Floor, 114  
M.G. Road, Nungambakkam  
CHENNAI – 600 034

.. *[Represented by M/s. Shridhar Prabhu Associates, Advocates]*

**PETITIONER**

**AND**

Bangalore Electricity Supply Company Limited  
K.R. Circle  
BANGALORE – 560 001  
[Represented by M/s. Justlaw, Advocates]

.. **RESPONDENT**

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**COMMON ORDER**

- 1) The Petitioner has filed OP No.3/2013 and OP No.4/2013 praying for :
  - (a) A declaration that Letter of Credit (LC) charges to the Respondent is contemplated as a one-time measure and no rebate much less month-on-month rebate at 1.8% on the Tariff Invoice is contemplated under the Power Purchase Agreement (PPA);
  - (b) A declaration that the deductions effected by the Respondent month-on-month basis towards alleged LC charges as per Article 6.5 of the PPA are *ultra vires* of the PPA.

ALTERNATE TO THE PRAYERS AT A AND B ABOVE :

A declaration that the deductions made by the Respondent towards the alleged LC charges even after the returning of purported LC are illegal and bad in law.

- (c) A direction to the Respondent to repay the amounts deducted in contravention of the PPA and the illegal deductions made, along with interest of two percent per month, from the date of illegal deduction to the date of repayment in full.

2) Upon Notice, the Respondent has put in appearance through its counsel, M/s.Justlaw, and has filed detailed Statement of Objections countering the contentions raised by the Petitioner.

3) As the Petitions referred to in the cause title above involve similar issue, we have heard both the matters together and have passed the common Order after considering the respective arguments and material produced.

4) The Petitioner has submitted two contentions for the Commission's consideration. Firstly, it is contended that under Clause 6.5 of the PPA dated 2.4.2008, the Respondent can claim only charges incurred for opening of the Letter of Credit, and not rebate at 1.8% per month. Secondly, it is contended that opening of the Letter of Credit by the Respondent is only for the benefit of the Petitioner, and once that benefit is waived by the Petitioner, the Respondent cannot insist upon deduction of rebate month-on-month from its bills.

5) We have considered the first contention in the light of the Order dated 17.1.2013 passed in already passed by this Commission in OP No.28/2012 in the case of *Tuppadahalli Energy India Private Limited against MESCOM*. In our view, as submitted on behalf of the Respondent, the first contention is no longer *res integra*. A similar contention, as now raised in these Petitions in support of the interpretation of Clause 6.5 of the PPA, was raised in OP No.28/2012. In the said case, this Commission rejected the contention, after considering the wordings of Clause 6.5 of the PPA, by its Order dated 17.1.2013, by holding that :

*“Considering the language adopted in Article 6.5(v) of the PPA, we are not inclined to accept the contention put forward on behalf of the Petitioner. The words of Article 6.5(v) of the PPA are very clear and therefore this Commission cannot give any other meaning than what is provided in the PPA. In our view, Article 6.5(v) of the PPA cannot be read to mean that it provides only for recovery of charges incurred for opening Letter of Credit, in view of its clear wordings. If it was intended by the parties to recover only the charges incurred to open Letter of Credit charges, Article 6.5(v) of the PPA would not have made any reference to the rebate and would not further have added that, “the same shall be deducted from the Monthly Tariff Invoice payable to the Company.” The term would have referred only to Letter of Credit charges and stopped at that. In our view, the interpretation placed by the Respondent-Company is in accordance with the wordings used in Article 6.5(v) of the PPA, and not the one the Petitioner is trying to place upon after realizing that the rebate is recurring and quite substantial. Merely the term is onerous, it cannot be ignored. The contention that deduction of rebate every month will have an impact on the Petitioner’s Tariff and hence the interpretation placed by the Respondent runs counter to the orders of this Commission dated 11.12.2009, is not tenable. We have looked into the Order referred to by the Petitioner. The said Order only deals with fixation of Tariff and factors considered while fixing tariff. At any rate, there is nothing in the said Order which will have any bearing on the interpretation of Article 6.5(v) of the PPA in view of the clear language used therein. The Order of the Hon’ble Appellate Tribunal for Electricity (ATE) referred to by the Petitioner has no application to the present case, as the issue in this case is the interpretation of a clause agreed to in the Contract.”*

An Appeal filed in Appeal No.66/2013 against the above Order of the Commission has been rejected by the Hon'ble Appellate Tribunal for Electricity (ATE) by its Order dated 10.7.2013. Therefore, the contention of the Petitioner that the Respondent cannot deduct the rebate month-on-month and the Respondent is entitled to recover only the cost of opening the Letter of Credit, has to be rejected.

6) As regards the second contention of the Petitioner that furnishing of Letter of Credit under Clause 6.5 of the PPA dated 2.4.2008 is for its sole benefit and it has a right to waive the same, and once it waives its right to get the Letter of Credit, the Respondent cannot continue to deduct rebate at 1.8% of the tariff invoice, we have again looked into the PPA dated 2.4.2008 and the wordings of Clause 6.5 of the PPA dated 2.4.2008, which is as follows :

**"6.5 Letter of Credit :** BESCOM shall establish and maintain transferable, assignable, irrevocable and unconditional non-revolving Letter of Credit in favour of, and for the benefit of, the Company. The Letter of Credit shall be established in favour of, and issued to, the Company of the date hereof and made operational thirty (30) days prior to the Commercial Operation Date of the Project and shall be maintained consistent herewith by BESCOM at any and all times during the Term of the Agreement. Such Letter of Credit shall be in form and substance acceptable to both the Parties and shall be issued by any Scheduled Bank and be provided on the basis that:

- (i) *In the event a Tariff Invoice or any other amount due and payable by BESCOM pursuant to the terms of this Agreement is not paid in full by BESCOM as and when due, the Letter of Credit may be called by the Company for payment of the unpaid Monthly Invoice or any such other unpaid amount.*
- (ii) *The foregoing as determined pursuant hereto, upon presentation of such Monthly Invoice or other invoice or claim for such other amount by the Company on the due date therefor or any time thereafter, without any notification, certification or further action being required.*
- (iii) *The amount of the Letter of Credit shall equal to one month's projected payments payable by BESCOM based on the average annual generation.*
- (iv) *The BESCOM shall replenish the Letter of Credit to bring it to the original amount within 30 days in case of any valid drawdown.*
- (v) *The Company shall allow a rebate of 1.8% of the Tariff Invoice or actual expenditure / charges for the LC amount incurred, whichever is higher, and the same shall be deducted from the monthly Tariff Invoice payable to the Company.*
- (vi) *The Letter of Credit shall be renewed and/or replaced by BESCOM not less than 60 days prior to its expiration."*

**[Emphasis supplied]**

7) In our view, the above contention of the Petitioner does not merit acceptance. The Contract which is signed by the parties in this case is not a

product of bilateral negotiations between two private parties. The Contract is the outcome of the regulatory exercise of the power of the Commission under Section 86(1)(b) of the Electricity Act, 2003, wherein the Commission has power to regulate purchase of electricity and the price at which electricity can be procured from the generating companies or licensees or from other sources through agreements by the Distribution Licensees. The terms of the Contract which is signed have been prescribed by this commission after hearing all the stakeholders. Further, the price payable for the electricity supplied under the PPA is determined by the Commission, and after signing the PPA, the same is approved by this Commission. From the Order of the Commission, wherein the terms of the PPA have been prescribed and the price is determined, this Commission has taken into consideration the interest of the generators, distribution licensees, consumers and other factors that will have a bearing on the price of electricity, which includes the security mechanism for payments. Therefore, in our view, the Contract in question has attained the status of a Statutory Contract and the parties to the Contract are not at liberty to unilaterally alter the terms of the same without the prior approval of this Commission.

8) The Hon'ble Supreme Court, in the case of *India Thermal Power Ltd. –Vs- State of Madhya Pradesh*, reported in **(2000) 3 SCC 379**, while dealing with Statutory Contracts, has held that if entering into a Contract containing the prescribed terms and conditions is a must under a statute, then the Contract to that extent is statutory, and if the terms and conditions which are incorporated in

the Contract are as a result of mutual agreement between the parties, it will not be statutory.

9) Once the Contract is held to be statutory, the parties to the said Contract cannot alter any of its provisions privately. No doubt, the Letter of Credit is provided for the benefit of the Petitioner. But, the same cannot be waived by the Petitioner, as this term of the Contract is not on account of mutual negotiation and agreement between the parties and may upset the balance maintained in the PPA, especially in the interest of consumers. We are of the firm view that the Petitioner cannot unilaterally waive the requirement of opening of the Letter of Credit as provided in the PPA dated 2.4.2008, just in order to avoid grant of rebate to the Respondent. Therefore, the second contention also has to be rejected.

10) It is contended on behalf of the Respondent that the waiver of the term of the Contract has not been accepted by the Respondent and therefore, the term relating to furnishing of Letter of Credit continues to exist and that as per the said condition, it has furnished the Letter of Credit to the Petitioner. Further, as held by the Hon'ble ATE, by its Order dated 18.5.2010 in Appeal No.176/2009 in the case of *BESCOM -VS-Davanagere Sugar Company Limited and another*, the unilateral waiver will not come into force unless the same is accepted by the other party. We have already held that the Contract in question is a Statutory Contract and cannot be altered by a party without the prior approval of the Commission. Therefore, the question of waiving of the requirement of one of the



terms of Contract by a party and acceptance or non-acceptance of the same by the other party, do not arise and need no consideration.

11) For the foregoing discussions, both the Petitions are liable to be dismissed and accordingly they stand dismissed.

Sd/-

(M.R. SREENIVASA MURTHY)  
CHAIRMAN

Sd/-

(VISHVANATH HIREMATH)  
MEMBER

Sd/-

(K.SRINIVASA RAO)  
MEMBER