

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION
BANGALORE**

Dated this 24th March 2011

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

In OP No.16/2010

Between

1. The South Indian Sugar Mills Association (Karnataka)
'Farah Winsford', 1st Floor, No.133/6, Infantry Road
B A N G A L O R E – 560 001
2. Karnataka State Federation of Cooperative Sugar Factories Ltd.
No.58, 1st Main, Temple Street, Malleswaram
BANGALORE
3. M/s Nandi Sahakara Sakkare Karkhane
Krishnanagar, Hosur – 587 117
Bijapur Taluk and District
(Represented by its Advocate Sri Prabhuling Navadgi) ... Petitioners

Vs.

1. The Additional Chief Secretary, Department of Energy,
Govt. of Karnataka, Vikasa Soudha,
Dr.Ambedkar Veedhi, Bangalore – 560 001
2. KPTCL, Kaveri Bhawan, Kempegowda Road, Bangalore-560 009
3. BESCO, Corporate Office, K.R. Circle, BANGALORE – 560 001
4. MESCOM, Paradigm Plaza, A.B. Shetty Circle, Mangalore – 575 001
5. CESC, No.927, LJ Avenue Commr. Complex, New Kantharaja
Urs Road, Saraswathipuram, Mysore-570 009
6. HESCO, Navanagar, P.B.Road, Hubli-580 029
7. GESCOM, Main Road, GULBARGA – 585 101
(Represented by Just Law Advocates) ... Respondents

In OP No.45/2010**Between**

Bangalore Electricity Supply Company Limited
 Corporate Office, K.R. Circle
 Bangalore – 560 001
 (Represented by its Assistant Law Officer)

... Petitioner

Vs.

1. M/s. J.K. Cement Works
 Muddapur – 587 122
 Bagalkot District

2. M/s. Falcon Tyres Limited
 K.R.S. Road, Metagalli
 Mysore – 570 016

3. M/s. Himatsingka Seide Ltd.
 10/24, Kumara Krupa Road
 High Grounds
 Bangalore – 560 001

4. M/s. Sathavahana Ispat Limited
 No.169/11, Grand Trunk Road
 Near RTO Office, Cantonment
 Bellary – 583 104

5. M/s. Hare Krishna Metalics
 No.20, Kasan Kandi Road
 Hirebaganal Vil. & Post
 Koppal District – 583 228

(Represented by Advocates Sri Shridhar Prabhu &
 Khaitan & Co.)

... Respondents

In OP No.17/2010**Between**

M/s. Sunvik Steels Private Limited
 C-1304, 13th Floor, Platinum City, Yeshwantpur
 BANGALORE – 560 022
 (Represented by its Advocate Sri Shridhar Prabhu)

... Petitioner

Vs.

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

2. Karnataka Power Transmission Corporation Limited
 Cauvery Bhawan, Kempegowda Road
 Bangalore – 560 009

3. State Load Dispatch Centre - Karnataka
Ananda Rao Circle, Bangalore - 560 001

4. Government of Karnataka
Department of Energy, Vikasa Soudha
Dr. Ambedkar Veedhi
Bangalore - 560 001
(Represented by Just Law Advocates)

... Respondents

In OP No.19/2010

Between

M/s. Sathavahana Ispat Limited
No.314, Ramakrishna Towers, Nagarjuna Nagar
HYDERABAD - 500 073
(Represented by its Advocate Sri Shridhar Prabhu)

... Petitioner

Vs.

1. Government of Karnataka
Department of Energy, Vikasa Soudha
BANGALORE - 560 001

2. Gulbarga Electricity Supply Company Limited
Station Road
GULBARGA - 585 102

3. State Load Dispatch Centre Karnataka
No.28, Ananda Rao Circle, Race Course Road
BANGALORE - 560 001
(Represented by Just Law Advocates)

... Respondents

In OP No.23/2010

Between

M/s MPPL Renewable Energy Private Limited
No.29, Maliks Building, 1st Floor, Hospital Road
BANGALORE - 560 001
(Represented by its Advocates M/s. Nayak & Srikumar)

... Petitioner

Vs.

1. Mangalore Electricity Supply Company Limited
Paradigm Plaza, 4th Floor, A.B. Shetty Circle
MANGALORE - 575 001

2. Karnataka Power Transmission Corporation Limited
Kaveri Bhawan, Kempegowda Road
BANGALORE - 560 009
(Represented by Just Law Advocates)

... Respondents

In OP No.40/2010**Between**

M/s. Himatsingka Seide Ltd.
 10/24, Kumara Krupa Road
 High Grounds
 Near Sindhi High School
 Bangalore – 560 001
 (Represented by M/s.Khaitan & Co., Advocates)

... Petitioner

Vs.

1. Government of Karnataka
 Energy Department, Vikasa Soudha
 Bangalore – 560 001
2. Karnataka Power Transmission Corporation Limited
 Kaveri Bhavan, Kempegowda Road
 Bangalore – 560 009
3. State Load Despatch Centre – Karnataka
 Ananda Rao Circle
 Bangalore – 560 009
4. Chamundeshwari Electricity Supply Corporation Limited
 No.927, LJ Avenue
 New Kantharaja Urs Road, Saraswathipuram
 Mysore – 570 009
 (Represented by Just Law Advocates &
 Sri N.S. Sanjay Gowda, Advocate)

... Respondents

In OP No.41/2010**Between**

M/s. J.K. Cement Works
 MUDDAPUR – 587 122
 Bagalkot District
 (Represented by its Advocate Sri Shridhar Prabhu)

... Petitioner

Vs.

1. Government of Karnataka
 Department of Energy, Vikasa Soudha
 Dr. Ambedkar Veedhi
 Bangalore – 560 001
2. State Load Despatch Centre – Karnataka
 Ananda Rao Circle
 Bangalore – 560 009
3. Power Company of Karnataka Limited
 KPTCL Building, Kaveri Bhavan
 Bangalore – 560 009

4. Hubli Electricity Supply Company Limited
Navanagar
Hubli – 587 117
5. Bangalore Electricity Supply Company Limited
K.R. Circle
Bangalore – 560 001
6. Mangalore Electricity Supply Company Limited
Paradigm Plaza, A.B. Shetty Circle
Mangalore – 575 001
7. Gulbarga Electricity Supply Company Limited
Station Road
Gulbarga – 585 101
8. Chamundeshwari Electricity Supply Corporation Limited
927, LJ Avenue, New Kantharaja Urs Road
Saraswathipuram
Mysore – 575 009
.... Respondents
(Represented by Just Law Advocates)

In No.49/2010

Between

M/s. Falcon Tyres Limited
K.R.S. Road, Metagalli
Mysore – 570 016
(Represented by its Advocates Sri Shridhar Prabhu)
.... Petitioner

Vs.

1. Government of Karnataka
Department of Energy, Vikasa Soudha
Dr. Ambedkar Veedhi
Bangalore – 560 001
2. State Load Despatch Centre – Karnataka
Ananda Rao Circle
Bangalore – 560 009
3. Power Company of Karnataka Limited
KPTCL Building, Kaveri Bhavan
Bangalore – 560 009
4. Hubli Electricity Supply Company Limited
Navanagar
Hubli – 587 117
5. Bangalore Electricity Supply Company Limited
K.R. Circle
Bangalore – 560 001

6. Mangalore Electricity Supply Company Limited
Paradigm Plaza, A.B. Shetty Circle
Mangalore – 575 001
7. Gulbarga Electricity Supply Company Limited
Station Road
Gulbarga – 585 101
8. Chamundeshwari Electricity Supply Corporation Limited
927, LJ Avenue, New Kantharaja Urs Road
Saraswathipuram
Mysore – 575 009
(Represented by Just Law Advocates)
- Respondents

COMMON ORDER

1. All these petitions involve payments made or to be made by ESCOMs in the State for short term procurement of power from various generators during the months of April, May and June 2010. In petitions bearing No.16/2010 and 45/2010, the petitioners have sought the Commission's approval for the rates fixed in the Government Orders of 1.4.2010 and 6.4.2010. In the other petitions, the petitioners have sought determination of rates by the Commission for the supply of electricity made by various generators in compliance of the Government's Orders dated 3.4.2010 under Section 11(1) of the Electricity Act 2003.

2. Since all the petitions involve the question of approval of payments made and to be made under same orders of the Government, we have considered it convenient to hear them together and decide. Accordingly we have, with the consent of the parties, heard these petitions together and considered the contentions raised, the documents produced, and the judgments cited by them.

3. Before dealing with the issues involved in these cases, we would like to take note of the highlights of the various Government Orders relating to the short term procurement of power referred to above. In Government Order No. EN 29 EEB 2010, dated 1.4.2010, short term procurement of 250 MW of power from cogeneration sugar factories was approved for the period of April – June 2010 at Rs.5.50 per unit in April and May and Rs.5.00 per unit in June. Subject to the approval of this Commission, these rates were to apply to both the generators who had existing PPAs with ESCOMs as also those who did not have any such agreements. The Government Order noted that as reported by the Cane Development Commissioner, there was scarcity of bagasse in the State which necessitated the sugar factories using imported coal to generate power during the relevant period. The cost of generation with imported coal being higher, power had to be paid for at rates higher than those specified in the PPAs. The Government Order also directed ESCOMs to seek the Commission's approval for suspending the PPAs with sugar factories on force majeure ground to enable payment at such higher rates from sugar factories with PPAs.

4. Government issued a similar order on 6.4.2010 in respect of procurement of power from biomass based generating companies fixing the rate at Rs.5.00 per unit for the entire period from April to June 2010.

5. Both the Government Orders of 1.4.2010 and 6.4.2010 were issued after holding negotiations/discussions with the generators or their representative organizations.

6. In another order issued on 3.4.2010 the State Government, in exercise of powers under Section 11(1) of the Act, directed all generating companies in the State to operate and maintain their units at maximum exportable capacity and supply all exportable electricity to the State Grid until further orders. For the power so supplied, the rates to be paid by the ESCOMs were to be notified separately. The operation of this order was limited to the period up to 30.6.2010 by another Government Order issued on 30.6.2010.

7. In a subsequent Government Order issued on 1.8.2010, Government fixed a provisional rate of Rs.4/- per unit for the power supplied by a number of cogeneration units (other than sugar factories) and independent power producers who supplied power in compliance of the orders issued under Section 11(1) of the Act mentioned above.

8. The rates fixed by Government in all the orders mentioned above being subject to the approval of the Commission, the parties concerned are before this Commission seeking approval or enhancement of the said rates.

9. Under Section 62 of the Electricity Act, 2003, the Commission is empowered to fix the minimum and maximum tariff for supply of electricity on a short term basis up to one year in case of shortage of supply. This Commission had also fixed a ceiling or price cap of Rs.6.00 per unit for such short term supplies in its Order dated 7th September 2009. However, the Commission's order required that such short term procurements should be based on rates arrived at through a bidding process. Admittedly, the rates fixed by Government in its orders of 1.4.2010 and 6.4.2010 were the result of negotiations/discussions with

the generators and not arrived at through a bidding process. Further, even though these rates were approved by Government before or independent of the orders issued under Section 11(1) of the Act, the supplies made by the generators in question after 3.4.2010 were necessarily covered by those orders which were applicable to all generators in the State. Therefore, irrespective of the background to the fixing of rates for different categories of generators, we should consider the supplies made by the generators in question as supplies made in compliance of the order under Section 11(1) of the Act from 3.4.2010 to 30.6.2010. It is therefore appropriate for this Commission to consider the issues involved in these petitions in the light of Section 11(2) of the Act. In this background, we now proceed to consider the contentions of different parties in these petitions.

10. It is submitted by the counsel appearing for ESCOMs and the Law Officer of BESCO that this Commission may approve the rates provided in the respective Government Orders for payment as the Government has taken into consideration the relevant factors such as the cost of generation including the fuel prices at the relevant time and the rates prevailing in the open market. According to them, the rates fixed by the Government adequately compensate the generators for the electricity generated and supplied to the State Grid. They further submitted that the demand made by some of the generators for payment at the market rate prevailing in the electricity exchange cannot be considered as the rates prevailing in the exchange vary from day to day and do not provide a firm basis for determining the price of electricity in large quantities and over a sustained period of several weeks. According to them if the rates

prevailing in the open market have to be paid there was no reason for the Government to invoke and exercise its sovereign power under Section 11 of the Electricity Act, 2003. The counsel for ESCOMs has also contended that while fixing the rates under Section 11(2) of the Electricity Act, 2003 one has to consider the interest of the consumers of electricity and not the generators' interest alone.

11. Sri Prabhuling Navadgi, counsel appearing for South India Sugar Mills Association supports the rate fixed by the Government. According to him under Section 11(2) of the Electricity Act, 2003, the generators could have asked for a rate higher than the one fixed by the Government but considering the discussions that were held and in State's overall interest, they would accept the rates fixed. He further submitted that fixation of rates under Section 11(2) of the Electricity Act, 2003 is different from the tariff fixation process under Sections 62 and 64 of the Electricity Act, 2003. Section 62 read with Section 64 of the Electricity Act, 2003 applies only in case the rates have to be determined for supply of electricity under the PPAs not in a situation in which Section 11 of the Electricity Act, 2003 is invoked.

12. The learned counsel further referred to the observations in the orders of the Hon'ble High Court in W.P.Nos.590 & 591 of 2009 that "adverse financial impact means the electricity generated by virtue of the directions issued by the Government is not fetching the generating company the price what it would have fetched in the event of their supply to the licensee or customer, i.e., less than the same". He therefore argued that the Commission, while approving the rates payable to the generators for offsetting adverse financial impact, has to

keep in mind the revenues that could be realized by the generators but for the imposition of the directions under Section 11(1) of the Act.

13. Sri Shridhar Prabhu, counsel appearing for some of the cogeneration plants of captive steel mills supported the prayer that the rate should be fixed at Rs.6.50 per unit as was approved by the Commission in some cases in respect of power supplied in 2009. Further, he has contended that the word 'compensation' under Section 11(2) of the Electricity Act, 2003 has to be just compensation or full compensation based on the market value as supply of electricity was compulsory under the Government Orders. In support of this proposition, he cited cases decided under the Land Acquisition Act. He further contended that when the utilities are buying power from M/s. Jindal Steel Works Limited, which is a large power plant, at Rs.6.50 per unit, his clients who have smaller generating plants need to be paid at a higher rate than the one paid to Jindal because the cost of generation will be higher in smaller plants. He also submitted that while fixing the rates this Commission may have to take into account the market rates as his clients would have sold the power in the open market but for the compulsion imposed by the Government Orders.

14. Sri Pradeep Naik appearing in petition OP No.23/2010 has also submitted that the Commission, while determining the rates to be paid for the power supplied under Section 11 may fix the price which each generating company would have got but for the operation of the Order under Section 11. Further he submitted that in the case of his client who uses biomass for generation of electricity, the rate fixed by the Government was inadequate and will not meet

the cost of generation as the price of biomass had increased substantially due to the fact that sugar factories which normally use bagasse were procuring other biomass during the period in question. As a result of this the output of petitioner's unit was lower than usual due to scarcity of raw material arising from the above situation.

15. The counsel appearing for M/s.Himatsingka Seide Ltd., has argued that the price the generating companies could have got during the period, but for the order under Section 11, should be the basis for determination of rates payable for the power supplied in the present case.

16. During the course of the hearing the Commission asked the counsel for both parties to make submissions on the questions, whether the cost of generation of power by different categories of generating companies or the rates prevailing in the market should be the basis for fixing the rate for the power supplied. Also, what should be the basis for fixing different rates for power supplied by different categories of generating companies, and whether there are grounds for fixing rates different from PPA rates for generating companies which had existing Power Purchase Agreements with the utilities?

17. In response, Sri Sri Ranga, appearing for ESCOMS, in his written arguments has submitted that the cost of generation of different categories of generating companies would be a valid basis for determining tariff and for this purpose the Commission is free to adopt the approach generally followed in the determination of tariff under Section 62. He has also contended that the prices prevailing in the power exchange are not a dependable criteria for determining

tariff in the present case as the prices in the exchange are subject to frequent variations. He has also justified fixing different rates for electricity procured from different categories of generating companies in view of the difference in their costs of generation.

As regards observations made by the Hon'ble High Court of Karnataka in WP Nos.590 & 591/2009 etc., he has submitted that the Hon'ble High Court in the said Writ Petitions was not actually dealing with the issue of the manner in which adverse financial impact should be offset by the Commission. According to him, Para 84 of the Hon'ble High Court's Order, if read in its entirety, implies only that the Commission should fix appropriate compensation for any adverse impact suffered by the generating companies as a consequence of non commercial supply in compliance of orders issued under Section 11 of the Electricity Act and does not specifically stipulate that the price prevailing in the open market should be adopted for the purpose.

18. We have considered the rival contentions as summarized above. In our view, while interpreting the phrase of 'adverse financial impact' used under Section 11(2) of the Electricity Act, 2003, we have to keep in mind that the entire economics of a generating company depends upon the revenues received by it over a long period of time and not for a few months only. Unless a generating company has a long term power purchase agreement, its revenues do fluctuate depending upon the price for power prevailing in the market for short term transactions. The Hon'ble Division Bench of the Karnataka High Court at Para 84 of its judgment in Writ Petition No.590 & 591 of 2009 has observed that "Adverse

Financial Impact means the electricity generated by virtue of direction issued by the Government is not fetching the generating company the price what it would have fetched in the event of their supplying to the licensee or customer, i.e., less than the same".

19. In the light of the observations of the Hon'ble High Court cited above, as also the decision of this Commission in OP No. 24/2008, we have come to the conclusion that offsetting adverse financial impact of a generator would mean fixing a rate keeping in view both the revenue that a generator could have realized by selling the power in the short term market, subject to the said rate covering the costs of generation, so that the generating company does not incur a loss. In these cases, we have found that the estimates of the cost of generation were vary from one company to another as also one category of generators to another. We have therefore come to the conclusion that for the present purpose, it would be adequate if the rates determined are generally what generating companies could realize from the market when they are generating power without being compelled by Orders under Section 11 of the Act. The rates prevailing in the market during the relevant period therefore become relevant for our consideration.

20. The short term power market mainly consists of power traded through licensed traders, and that supplied on the basis of day ahead bids in two power exchanges. We do not think that the prices prevailing in the power exchanges can be the appropriate basis to fix the rates as the quantum of power traded through the exchange is hardly about 5 % of the total power consumed in the

country and the rates in the exchange keep fluctuating very frequently. In our view, the price of power supplied through bilateral contracts and traders offers a better indication of the price that a generating company could have realised for its power for short term sales of a few weeks or months. Even these prices vary from month to month. Further, there are costs associated with marketing of power through traders and transmission costs which need to be suitably discounted to arrive at the revenues realized by the generating companies.

21. We have looked at the statistics published by CERC relating to short term power transacted through traders during the period between April and June 2010. The average prices during these months were Rs.5.68 in April, Rs.6.26 in May and Rs.5.57 in June 2010 for energy supplied on round the clock basis. After discounting the marketing expenses and transmission charges involved, it would be reasonable in our opinion to assume that short term sales of power would have resulted in net revenues of about Rs.5.00 per kwh during the above period. We have also seen that the offers received from the traders included a guaranteed price of only Rs.5/- to some of the petitioners in these cases.

22. In the light of the foregoing discussion, we direct that the power supplied in compliance of the orders issued by the Government under Section 11(1) of the Act, 2003 in April 2010 by cogen power suppliers including sugarcane cogen generators and biomass based generators and also others who do not have PPA governing supplies during the said period shall be paid for at Rs.5.00 per kwh.

23. In the case of generators who have an existing PPA, even though the Government Orders mention the question of suspending the PPAs for the period

from 29.3.2010 to 30.6.2010, no such prayer for suspension of PPAs has been made by the ESCOMs in their petitions and therefore, it is not necessary for the Commission deal with that aspect of the matter. In fact, one of the Respondents in OP 16/2010, GESCO, has fairly submitted in reply to the Commission's queries that ...“for generators having valid and subsisting PPAs with this Respondent, legal permissibility of payment of higher rates than the rates as contained in the PPA for the very quantities of power / energy covered by the PPA, as the Government Order directs so, needs to be decided by the Commission after considering the merits of the case.” The generators with existing PPAs are therefore obliged to supply power at rates specified in the agreement to the extent of the supplies committed in the PPAs and the higher rate of Rs.5.00/- per kwh shall be applicable only if the supplies are made over and above the normal PPA obligations. For determining the normal supply obligation of such generators, we direct that the utilities shall take into account the quantum of power supplied by them during the months of April, May and June during the previous three years and any supplies made in excess of the average supply of the last three years shall be eligible for payment at Rs.5.00 per kwh determined under this order.

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

Sd/-
(VISHVANATH HIREMATH)
MEMBER

Sd/-
(K. SRINIVASA RAO)
MEMBER