

No.N/366/2017

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,
No.16, C-1, Millers Tank Bed Area, Vasanth Nagar, Bengaluru-560 052.**

Dated: 23.03.2021

Present

Shri Shambhu Dayal Meena : Chairman
Shri H.M. Manjunatha : Member
Shri M.D. Ravi : Member

OP No.192/2017

BETWEEN:

AMR Power Private Limited,
Regd. Office: Suit No.701-702,
Prestige Meridian-2,
No.30, M.G. Road,
Bangalore-560 001.
(Represented by its Authorised Signatory
Sri Arun Chandrashekar)

... PETITIONER.

[Represented by Sri M.S. Raghavendra Prasad, Advocate
through Senior Advocate Sri Ananth Mandagi]

AND:

Mangalore Electricity Supply Company Limited,
1st Floor, Paradigm Plaza,
A.B. Shetty Circle,
Mangalore-575 001.
(Represented by its Managing Director)

... RESPONDENT.

[Respondent represented by Sri Shahbaaz Husain,
Advocate]

ORDERS

1. This petition is filed under Section 86 (1) (f) read with Section 129 of the

Electricity Act, 2003 by the Petitioner praying for the following reliefs:

- a) To determine and fix the market price which the Respondent (MESCOM) is liable to pay to the Petitioner in respect of electricity wrongly received and appropriated by the Respondent (MESCOM) from 22.07.2011 to 16.10.2014;

- b) To direct the Respondent (MESCOM) to pay the amounts so determined and quantified to the Petitioner with interest @ 14.5% p.a., after deducting the provisional payments already made to the Petitioner;
- c) To pass such other and further orders as this Hon'ble Commission may deem fit and proper in the circumstances of the case; and
- d) To Award costs of this petition to the Petitioner.

2. The undisputed/undisputable material facts of the case as can be made out from the record, may be stated as follows:

- a) That the Petitioner is a Mini Hydel Generating Company and has developed a 24.75 MW capacity Mini Hydel Power Project across the river Netravathi at Perla village, Bantwal taluk, Dakshina Kannada district (the Project). The Petitioner and the Respondent entered into a Power Purchase Agreement (PPA) dated 02.08.2006 (Annexure-P1) for sale and purchase of the energy from the Project @ tariff of Rs.2.80 per unit as per the Generic Tariff Order dated 18.01.2005. Almost at the fag end of the construction of the Project, the Petitioner filed OP No.28 of 2009 for declaration that the PPA dated 02.08.2006 has become void, in view of the non-fulfilment of Conditions Precedent and for a direction to SLDC for granting Open Access or for a direction to the Respondent to pay @ Rs.5.00 per unit, during the pendency of the case for the energy supplied. During the pendency of the said petition on the request of the Petitioner, an interim order was passed by this Commission on 27.08.2009 directing the Respondent to synchronize the Project and pay Rs.2.80 per unit for

the energy supplied. Subsequently, the Project was commissioned on 12.09.2009 and the power was being injected into the grid. Ultimately, OP No.28 of 2009 was dismissed by order dated 23.12.2010 holding that the Petitioner cannot take advantage of its own lapses in non-fulfilling the Conditions Precedent by it. The Petitioner preferred Review Petition No.2 of 2011 against the dismissal of the order. The said Review Petition was also dismissed on 23.12.2011. During the pendency of Review Petition, the Petitioner issued default notice dated 26.05.2011 alleging that the Respondent committed default in complying with the payment obligations under the PPA. The Respondent sent reply dated 04.07.2011 denying any default on its part. Thereafter, the Petitioner issued the termination notice dated 22.07.2011 (Annexure-P2), terminating the PPA.

b) Subsequent to the termination of the PPA, the Petitioner requested the Respondent by letter dated 16.09.2011 (Annexure-P3) to convey its consent for entering into the Wheeling and Banking Agreement (WBA). The Respondent by its reply dated 22.09.2011 (Annexure-P4) expressed its inability to give consent for wheeling of power as the PPA dated 02.08.2006 (Annexure-P1) was subsisting and not validly terminated.

c) The Petitioner filed OP No.48 of 2011 for declaration that the PPA dated 02.08.2006 stood terminated and for a direction to grant Open Access. The Petitioner in the said OP No.48 of 2011 filed Interim Application (IA) seeking direction to the Respondent to pay for the energy supplied @ Rs.2.80 per unit. That IA was allowed and the interim order dated

22.02.2012 was passed for payment of tariff @ Rs.2.80 per unit pending disposal of the said petition. However, the Petitioner sought withdrawal of the said petition. The petition was withdrawn on 22.03.2012. Thereafter, the Petitioner filed a petition before Hon'ble CERC for grant of Inter-State Open Access vide Petition No.141/MP/2012. The Respondent opposed the grant of Inter-State Open Access as the termination of the PPA was under dispute. The Hon'ble CERC has dismissed Petition No.141/MP/2012 due to the pendency of OP No.37 of 2012.

d) The Respondent filed OP No.37/2012 before this Commission challenging the notice of termination dated 22.07.2011 (Annexure-P2) and to declare that the PPA was valid and subsisting. The copy of Memorandum of OP No.37/2012 is as per Annexure-P5. In OP No.37/2012, this Commission passed interim order dated 23.08.2012 (Annexure-P6) directing both the parties to maintain the status-quo as existing pending final disposal of the main petition. The Respondent herein who was the Petitioner in OP No.37/2012 had sought for interim order of stay of the operation of the termination notice dated 22.07.2011 pending disposal of the petition. Against the said interim order dated 23.08.2012, the Petitioner herein who was the Respondent in OP No.37/2012, preferred Appeal No.223/2012 before the Hon'ble ATE and filed IA No.398/2012 dated 15.11.2012 (Annexure-P7) praying to determine an appropriate price for the energy generated from the Project and supplied to the Grid and to direct the

Respondent herein to make payment at appropriate price as might be determined by the Hon'ble ATE, till the final disposal of the original petition pending before the Commission or till the grant of Open Access to the petitioner herein by the Hon'ble CERC whichever is earlier in the interest of justice and equity. The Hon'ble ATE by order dated 22.11.2012 (Annexure-P8) disposed of IA No.398/2012 directing the Respondent herein to pay @ Rs.2.80 per unit as per PPA to the Petitioner herein without prejudice to the rights of the respective parties. Subsequently on the main Appeal No.223/2012, the Hon'ble ATE by its order dated 04.01.2013 (Annexure-P9), modified the status-quo order dated 23.08.2012 (Annexure-P6) passed by this Commission observing that the interim arrangement made by it vide order dated 22.11.2012, should continue till the disposal of the OP No.37/2012 and further observing that the said interim arrangement could not have the effect of stay of the termination of the PPA.

e) On conclusion of the proceedings in OP No.37/2012, this Commission dismissed the said OP No.37/2012 by order dated 14.08.2013 (Annexure-P10) holding that the termination of the PPA dated 02.08.2016 with effect from 22.07.2011 was legal and valid. The Respondent (MESCOM) filed Appeal No.275/2013 before the Hon'ble ATE against the order dated 14.08.2013. In this appeal, the Petitioner M/s AMR Power Private Limited filed IA No.49/2014 praying for a direction to MESCOM to accord consent to enter into Wheeling & Banking Agreement to wheel the energy

pumped into the grid from June 2013 or to pay at Rs.5.50 per unit for the energy injected from June 2013. By Order dated 27.03.2014 (Annexure-P11), the Hon'ble ATE, passed the interim order on IA No.49/2014 in Appeal No.275/2013, directing MESCOM to execute the WBA on or before 31.03.2014 and clarifying that this WBA should not be given effect to till the final decision in the main appeal. Thereafter, the WBA dated 06.05.2014 (Annexure-P12) executed by MESCOM, and other relevant parties namely; BESCO & KPTCL together with the Petitioner as per the direction issued in the order dated 27.03.2014 and subsequently the Appeal No.275/2013 was dismissed by the Hon'ble ATE vide order dated 17.10.2014 (Annexure-P13), upholding the termination of the PPA dated 02.08.2006. The Respondent (MESCOM) allowed Wheeling & Banking of the energy injected into the Grid from the Project with effect from 17.10.2014.

- f) The Petitioner demanded to treat the power injected from 01.07.2014 (from the start of Water Year) to 16.10.2014 as energy banked and to allow to wheel the said quantum to Open Access customers. This request was made vide letters dated 20.10.2014, 29.12.2014, 21.01.2015 and 23.01.2015 (Annexure-P14 collectively).
- g) The Respondent (MESCOM) preferred Civil Appeal No.1665 of 2015 before the Hon'ble Supreme Court of India against the order dated 17.10.2014 passed in Appeal No.275 of 2013. The said Civil Appeal was dismissed vide judgment dated 15.09.2016 (Annexure-P15).

h) The Petitioner has produced the details of power purchase costs incurred by the Respondent (MESCOM) for the Financial Years 2012 and 2013, obtained under the RTI Act at Annexure-P16. The Petitioner has also produced the Government Order dated 26.03.2014 (Annexure-P17) issued by GoK under Section 11 of the Electricity Act, 2003 directing all the Generators in the State for supply of energy to the State Grid. The Petitioner has also produced the copy of the order dated 24.01.2013 passed by this Commission in OP No.16 of 2011 (Annexure-P18) between M/s BESCOM Vs. Davangere Sugar Company Limited.

3. In para 18 of the petition, the Petitioner has stated that: With the dismissal of the Civil Appeal No.1665/2015 before the Hon'ble Supreme Court of India vide judgment dated 15.09.2016 (Annexure-P15), the termination of PPA with effect from 22.07.2011 became final; Consequently, the right and entitlement of the Petitioner to have supplied the electricity to third parties and to have realised the market prices of the same stood finally established; That on account of the wrong action of the Respondent, the Petitioner has been deprived of its right to sell the energy to the third parties; The Respondent without valid ground has compelled the Petitioner to supply energy to the Grid controlled by the Respondent and it appropriated the same to unjustly enrich itself. Therefore, it has claimed that the Respondent is liable to account for and make good the unjust enrichment made by it.

4. In support of the claim for compensation/damages for the energy supplied to the Respondent (MESCOM) for the months from 22.07.2011 to 16.10.2014, with the interest at 14.50% per annum, the Petitioner pleaded the following facts in para 18 to 25 of the petition.

“Para-18 – Against the dismissal of Appeal No.275/2014 MESCOM filed Civil Appeal No.1665/2015 before the Hon’ble Supreme Court. By final judgment dated 15/9/2016 Supreme Court was pleased to dismiss C.A. No.1665/2015 and confirm the order of the APTEL and this Hon’ble Commission. Copy of the judgment dated 15/9/2016 in C.A. No.1665/2015 is produced as “Annexure-P15”. With this, it stands finally determined that the termination of PPA by Petitioner with effect from 22/7/2011 is valid. Consequently, the right and entitlement of the petitioner to have supplied the electricity to third parties and to have realized the market price of the same also stands established. Only on account of wrongful actions of MESCOM, the petitioner has been deprived to exercise such right. On the other hand, MESCOM without any right has compelled the petitioner to supply energies to the grid controlled by MESCOM and it has appropriated the same to unjustly enrich itself. MESCOM is liable to account for and make good the unjust enrichment made by it.

Para-19 – It is submitted that MESCOM has procured power from various other sources at a price as high as in excess of Rs.16.00 per kWh. The details of price paid by MESCOM as obtained under Right to Information Act, is produced as “Annexure-P16”. In addition, since the power it procured from other sources was only conventional power, the Respondent was under an obligation to buy Renewable Energy Certificates (REC) to meet its RPO obligations under the KERC RPO Order dated 16.03.2011. The purchase price of RECs during the same period was in the range of Rs.1.50 to Rs.3.07. The REC prices during that period are:

(in Rupees)

Year	High	Low
2014-15	1.50	1.50
2013-14	1.50	1.50
2012-13	2.40	1.50
2011-12	3.07	1.50

The total value/amount wrongfully gained by the Respondent is nearly Rs.20/- per kWh and thus the Respondent has enriched itself by an amount of Rs.17.20 per kWh as it paid Rs.2.80 per kWh only.

Para-20 – It is further submitted that after termination of PPA, the petitioner could have sold the renewable/green power generated from its project in open market with a premium and realized more than Rs.7.00 per kWh on an average. The tariff applicable to BESCOM commercial category HT-2B (i) consumers during 2011-12 to 2014-15 is as below:

Year	Tariff per kWh in Rs.
2014-15	7.65
2013-14	7.25
2012-13	7.00
2011-12	6.80

The consumers in Karnataka to discharge their corporate social responsibility and to meet statutory obligations opt for green power and consequently green power is in demand.

Para-21 - The Government of Karnataka in exercise of power under Section 11 of Electricity Act, 2003, fixed the tariff @ Rs.5.50 per kWh in respect of electricity procured from Generators between 30.03.2014 to 30.06.2014 by G.O. No.EN 26 PPC 2015 dated 26.03.2014. Copy of G.O. dated 26.03.2014 is produced as Annexure-P17.

Para-22 – In O.P.No.16/2011 decided on 24.01.2013 also this Hon'ble Commission held that the rate of electricity for the period April to June 2010 was Rs.5.00 per kWh, considering the prevailing average of the market price at Rs.5.00 per kWh. Copy of the order dated 24.01.2013 in O.P. No.16/2011 is produced as Annexure-P18.

Para-23 - Petitioner has been unjustly deprived from utilizing monies to which it was rightfully entitled and which petitioner could have used to obtain reasonable return. The deprivation is to business/commercial entity. The PPA itself acknowledged the reasonable rate of interest payable to MESCOM at the Bank short term lending rate. The petitioner is entitled for interest on

the sums to be awarded @ 14.5% p.a. from the date of accrual till the date of payment.

Para-24 – It is submitted that with effect from the date of termination i.e., 22.07.2011 in respect of electricity which the Petitioner was compelled to deliver to MESCOM, MESCOM has paid Rs.2.80 per kWh up to the period 30.06.2014, provisionally. In respect of electricity received by MESCOM from 01.07.2014 till 16.10.2014, MESCOM has not paid any amounts to the petitioner.

Para-25 – Though the Petitioner, by selling power to third parties of its choice with effect from the termination of PPA, could have realized much higher price, even conservatively by treating Rs.5.30 per kWh as the realizable rate during 22.07.2011 to 31.03.2012 and Rs.5.50 per kWh from 01.04.2012 to June 2014 and Rs.5.85 per kWh for the period 01.07.2014 to 16.10.2014, the Petitioner could have recovered the amounts as pre the table below:

	Sl. No.	Year	Energy Pumped (kWh)	Energy Price (A)	REC Market Rate (B)	Realisable Rate (A)+(B)	Amount in Rs.	Total Amount in Rs.
A	1	2011-12	3,78,82,000	5.50	2.31	7.81	29,58,58,420	1,51,42,04,592
	2	2012-13	4,88,42,000	5.50	1.75	7.25	35,41,04,500	
	3	2013-14	6,82,48,000	5.50	1.50	7.00	47,77,36,000	
	4	2014-15 (Up to June 2014)	53,74,967	5.50	1.50	7.00	3,76,24,769	
	5	2014-15 (July to 16 th Oct. 2014)	4,98,40,129	5.50	7.00	7.00	34,88,80,903	
Add: Interest (detailed calculations annexed to the invoices)								
B	1	2011-12					23,30,86,260	83,44,85,494
	2	2012-13					21,19,44,817	
	3	2013-14					22,29,81,870	
	4	2014-15					16,64,72,546	
C	Amount received from MESCOM							44,16,48,992
Total amount payable (including Interest calculated till 30 th April 2017.								1,90,70,41,093

5. Subsequent to the judgment dated 15.09.2016 of the Hon'ble Supreme Court of India, the Petitioner wrote letter dated 28.09.2016 (Annexure-P19) to the Respondent claiming the compensation/damages for the amount stated therein. The Respondent sent reply dated 22.03.2017 (Annexure-P20) in response to Annexure-P19 dated 28.09.2016. In this reply, the Respondent stated that there was no case for the Petitioner to claim any higher tariff than the tariff already being paid. The Petitioner wrote letter dated 08.05.2017 (Annexure-P21) to the Respondent again making the request for payment of compensation/damages as claimed by it for the energy supplied during the period from 22.07.2011 to 16.10.2014 together with interest. The Respondent again repudiated the claim made in Annexure-21 dated 08.05.2017, through its letter dated 19.05.2017 (Annexure-P22). It appears the officials of the Petitioner met the Managing Director of the Respondent in person to resolve the issue and with reference to it, the Petitioner confirmed its consent by letter dated 05.06.2017 to discuss and to settle the matter through mutual negotiations to avoid any litigation. In response to Annexure-P23 dated 05.06.2017, the Corporate office of the Respondent intimated vide letter dated 30.06.2017 (Annexure-P24) that it had moved the proposal of the Petitioner for mutual negotiations of the dispute before the Board of Directors meeting scheduled in the month of July 2017. Thereafter, the Petitioner filed the present petition on 11.10.2017 before this Commission as there was no convincing reply from the Respondent.

6. The petition was presented with Filing fee of Rs.25,000. Office has raised the objection that the Filing fee payable should be on the monetary claims made in the petition. The Advocate for the Petitioner filed a Memo dated 12.10.2017 stating that Commission has to determine the market price of the energy to which the Petitioner would be entitled to and till that time, the monetary claim could not be quantified and, therefore, the office objection be over-ruled. On 23.11.2017, the case was called and the learned Advocate submitted that he would pay the required Filing fee as and when the tariff was fixed. Thereafter, the notice was issued to the Respondent. During the hearing, the learned counsel for the Petitioner addressed his arguments on the issue of payment of Filing fee.

7. The Respondent appeared through its counsel and filed Statement of Objections. The gist of the Statement of Objections opposing the claim of the Petitioner may be stated as follows:

a) That the petition is liable to be dismissed in limine as much as the petition is not maintainable either in law or of facts. The claim of the Petitioner suffers grossly from delay and latches and, therefore, deserves to be rejected on that ground at the very threshold. The Respondent denied all the allegations made in the petition except to the extent specifically adverted to and admitted in the Statement of Objections.

b) In response to Demand Notice dated 08.05.2017 (Annexure-P21) claiming a sum of Rs.190,70,41,094, the Respondent has released Rs.13,70,40,421 to the Petitioner towards pending claims for the period between

01.07.2014 to 16.10.2014. The Respondent has paid for the energy supplied @ Rs.2.80 per unit as agreed in the PPA for the energy supplied up to 16.10.2014. The Respondent is not liable to pay any other amount to the Petitioner.

c) The allegation in the petition that the Respondent wrongfully declined the consent to the Petitioner for wheeling energy to third parties is wholly denied as false. That in the light of the disputes arising out of the default notice and termination notice between the parties to the PPA, it was not appropriate for the Petitioner to give full effect to the termination of the PPA especially when the alleged default was not decided by the Competent Authority. The Respondent has denied the allegations made by the Petitioner that the Respondent unjustly enriched itself by denying the consent to the Petitioner to enter into the WBA for sale of energy to the third parties.

d) The Respondent in its statement of objections in para 36 to 39 has replied the averments made in para 18 to 25 of the petition which are as follows:

"Para-36 – Re-Para 18 to 21: The allegations that only on account of the wrongful actions of the Respondent that the Petitioner has been deprived to exercise its rights in so far as the supply of electricity to 3rd parties is concerned, and that the Respondent has appropriated the supply of energy in order to unjustly enrich itself, and that the Respondent is liable to account for and make good the unjust enrichment made by it, are baseless, frivolous, and wholly and categorically denied as false. The Petitioner has further alleged that the Respondent has gained wrongfully by procuring conventional power from other sources and that the Respondent has unjustly enriched itself by an amount of Rs.17.20 kWh are wholly baseless and denied in toto. All the contents

made in the referenced paragraphs have no basis and are therefore entirely denied as false.

Para-37 – Re-Para 22: The averment pertaining to O.P.16/2011 that was decided on 24/01/2013 by this Hon'ble Commission is irrelevant to the present dispute and has no bearing on the instant case.

Para-38 – Re-Para 23 & 24: The allegations that the Petitioner has been unjustly deprived from utilizing monies to which it is rightfully entitled to, is baseless and therefore denied. The averment that the Petitioner is entitled to interest on the sums to be awarded at the rate of 14.5% p.a. is denied, in as much as the Respondent herein is not liable to pay any sums to the Petitioner, much less these inflated figures at exorbitant interest rates. The allegation that the Respondent has not paid any amounts to the Petitioner from 01.07.2014 till 16.10.2014 is wholly denied as false, as the Respondent has made several attempts to make payments, and has even released Rs.13,70,40,421/- to the Petitioner herein toward pending claims for the said period. By making this payment, the Respondent has discharged its liability for making any payments for power supplied, at the rate specified in the PPA, from the date of commencement of power supply till 16.10.2014.

Para-39 – Re-Para 25: The averments made by the Petitioner in the referenced paragraph, and the table of computation allegedly suggesting the amounts that the Petitioner could have realized, is denied. The Petitioner has arrived at such computations on the basis of hypothetical circumstances that cannot be construed as realistic or plausible. Additionally, neither the Hon'ble Supreme Court, nor the Hon'ble APTEL, has determined the rate and tariff payable for the intervening period. Therefore, all computations and averments made in the referenced table and supporting paragraph are denied in to."

- e) For the above reasons, the Respondent has prayed for the dismissal of the petition.
8. The Petitioner filed the Rejoinder to the Statement of Objections by the Respondent. In the Rejoinder, the Petitioner has stated that it never wanted to continue the supply after termination of the PPA, but it was the

Respondent which wanted to use the energy from the Petitioner's Project under force and, thereafter got the interim arrangements through this Hon'ble Commission and Hon'ble ATE on payment of Rs.2.80 per unit, subject to the result of the litigation. When the energy was consumed under interim arrangement until conclusion of the litigation, the tariff payable for the same shall be either agreed between the parties subject to the approval of the Commission or to be fixed by the Commission.

9. The Respondent filed written submissions along with three Annexures (A, B & C) on 12.11.2019. The Petitioner filed one Excel Sheet on 28.01.2020 with Memo claiming that Rs.5.50 per unit would be the generating cost of the project. The Petitioner also filed written submissions on 14.05.2020. We have also heard the oral arguments addressed by the learned counsel for the parties. They also relied upon several decisions.

10. From the pleadings and the documents and from the submissions made by the parties, the following Issues arise for our consideration:

Issue No.1: What is the true nature of the legal principle on which the claim of the Petitioner is based upon?

Issue No.2: Whether the Petitioner is entitled to compensation/damages for the energy supplied to the grid subsequent to 22.07.2011, the date of termination of the PPA?

Issue No.3: If Issue No.2 is held in affirmative, the compensation/damages to be awarded should be at what rate and for which duration?

Issue No.4: Whether the Petitioner is entitled to interest, if so at what rate and for which duration?

Issue No.5: What should be the Filing fee payable on the petition?

Issue No.6: To which reliefs, the Petitioner is entitled to and what order?

11. On consideration of the entire pleadings and the documents produced by the parties and the submissions made by them, our findings on the above Issues are as follows:

12. Issue No.1: What is the true nature of the legal principle on which the claim of the Petitioner is based upon?

a) The gist of the averments made in the petition is that on conclusion of the proceedings challenging the termination of the PPA in favour of the Petitioner, upholding the termination of the PPA with effect from 22.07.2011, the right and entitlement of the Petitioner to have supplied the electricity to third parties and to have realised the market price of the same also stood established. The main relief claimed by the Petitioner is to determine the market price of the energy supplied to the Grid of Respondent (MESCOM). The Petitioner has stated that the refusal of the Respondent to give consent for 'Open Access' for the sale of energy to the third parties on the ground that the termination of the PPA was not valid, was not accepted by this Commission and the Hon'ble ATE and also the Hon'ble Supreme Court of India. Electricity is held to be the moveable property. Therefore, we are of the considered view that the appropriation of energy by the Respondent during the period when the Petitioner was entitled to Open Access for the sale of energy to third parties, amounts to 'Conversion' as understood in the Law of Tort. A 'Conversion' is said to be an act of wilful interference, without lawful justification with any chattel,

in a manner inconsistent with the right of another, where that other is deprived of the use and possession of it. The measure of damages to be awarded is in general, the market value of the goods at the time of 'Conversion'.

- b) The Petitioner has also stated incidentally that the Respondent is liable to account for and make good the 'Unjust enrichment' gained by it. We are of the opinion that the principle of 'Unjust enrichment' as understood in Section 70 of The Indian Contract Act, 1872 may not be applicable in the present facts, to fasten the liability on the Respondent. Therefore, the claim of the Petitioner cannot be said to be based on 'Unjust enrichment'.
- c) In the Rejoinder filed by the Petitioner, it is stated that when the energy was consumed under interim arrangement until conclusion of the litigation, the tariff payable for the same shall be either agreed between the parties subject to the approval of the Commission or to be fixed by the Commission. We think in the present facts of the case, the question of determination of tariff by the Commission does not arise. In the same way, the parties agreeing a tariff and the Commission approving it does not arise. Therefore, the claim of the Petitioner cannot be based on determination of tariff, for the energy supplied to grid.
- d) In the written arguments, the Petitioner specifically contended that its claim is based on the principle of 'Restitution' as envisaged in Section 144 of the CPC. In support of this contention, it is pointed out that because of the interim orders passed by this Commission as well as the Hon'ble ATE,

the energy was being supplied, ultimately the proceeding instituted by the Respondent were dismissed holding that the termination of the PPA was valid. Therefore, it is contended that the ingredients required under Section 144 of the CPC are fulfilled for claiming the relief of the 'Restitution'. The learned counsel for the Respondent did not submit his views as regarding the applicability of Section 144 of the CPC for claiming 'Restitution' by the Petitioner. On the analysis of the facts of the case and the principles stated in Section 144 of CPC, in the light of the ratio stated in (2003) 8 SCC 648 between South Eastern Coalfields Vs. State of Madhya Pradesh & Others and (2004) 2 SCC 783 between Karnataka Rare Earth Vs. Senior Geologist, Department of Mines & Geology, we are of the considered view that Section 144 of the CPC, is not be applicable in the facts of the present case for the following reasons:

- i) In none of the proceedings before this Commission or before the Hon'ble ATE, the Respondent had filed interim application praying for a direction to Respondent for supply of energy during the pendency of the disputes between them. The earliest proceeding was OP No.28 of 2009 filed by the petitioner for declaration that the PPA dated 02.08.2006 has become void, in view of non-fulfilment of the Conditions Precedent by it. In that case, the interim order was passed by the Commission on 27.08.2009 directing the Respondent (MESCOM) to synchronize the Project and to pay Rs.2.80 per unit for the energy supplied, on the interim application filed by the Petitioner

itself. Subsequently, that petition was dismissed holding that the Petitioner could not take advantage of its own lapses.

ii)Subsequently, the Petitioner issued termination notice dated 22.07.2011 and the Respondent disputed the validity of the termination and the Petitioner itself filed OP No.48 of 2011 on 18.10.2011, for declaration that PPA is validly terminated and for a direction to grant Open Access for the sale of energy to the third parties. In this case, the Petitioner filed an Interim Application (IA) seeking direction to the Respondent to pay for the energy supplied @ Rs.2.80 per unit. That IA was allowed on 22.02.2012 and the Respondent had made the payment. This OP No.48 of 2011 was withdrawn by the Petitioner on 22.03.2012.

iii)The Respondent filed OP No.37 of 2012 before the Commission for declaration that termination was invalid. In this proceedings, the Respondent filed the IA praying for stay of termination of the PPA. On that application, this Commission passed order dated 23.08.2012 directing the parties to maintain status-quo pending disposal of the dispute.

iv)The Petitioner also filed the petition No.141 of 2012 before the Hon'ble CERC requesting for grant of Inter-State Open Access. The Hon'ble CERC rejected that petition as OP No.37 of 2012 disputing the validity of termination was pending.

- v) Even before the Hon'ble ATE in Appeal No.223 of 2012 challenging the interim order dated 23.08.2012, the Petitioner filed IA requesting to fix an appropriate price for energy being supplied. However, on 22.11.2012, the Hon'ble ATE passed the interim order directing the Respondent to pay PPA rate as interim arrangement without prejudice to the rights of the parties subject to the final decision.
- vi) From the above facts, it can be said that the interim directions were issued for payment for the energy injected into the grid @ Rs.2.80 per unit, the rate as agreed in the PPA, at the instances of the Petitioner. It may be noted that at no stage of the proceedings, the Petitioner had requested by filing an IA for a direction against the Respondent to give consent for Open Access. Therefore, it is clear that the Petitioner had not made an attempt to go for Open Access during the pendency of the proceedings, by making appropriate IA.
- vii) The principles stated in South Eastern Coalfields Limited are reiterated in para 10 of the judgment in Karnataka Rare Earth and Others which is as follows:

Para 10 – "In South Eastern Coalfields Limited (2003) 8 SCC 648, this Court dealt with the effect on the rights of the parties who have acted bona fide, protected by interim orders of the Court and incurred rights and obligations while the interim orders stood vacated or reversed at the end. The Court referred to the doctrine of actus curiae neminem gravabit and held that the doctrine was not confined in its application only to such acts of the Court which were

erroneous; the doctrine is applicable to all such acts as to which it can be held that the Court would not have so acted had it been correctly apprised of the facts and the law. It is the principle of restitution which is attracted. When on account of an act of the party, persuading the Court to pass an order, which at the end is held as not sustainable, has resulted in one party gaining advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the Court and the act of such party, then the successful party finally held entitled to a relief, assessable in terms of money at the end of the litigation, is entitled to be compensated in the same manner in which the parties would have been if the interim order of the Court would not have been passed. The successful party can demand (a) the delivery of benefit earned by the opposite party under the interim order of the Court, or (b) to make restitution for what it has lost."

- viii) The close reading of the principles stated in the above decision and the analysis of the facts of this case shows that the Respondent had not persuaded this Commission or the Hon'ble ATE to pass any interim order in its favour. On the other hand, the Petitioner who was intending to continue the generation from the Project injected the energy to the Grid and has requested for interim order for payment of price at the tariff agreed in the PPA. As already noted, the Petitioner had not claimed for Open Access in any of the proceedings before this Commission or the Hon'ble ATE.

- ix) A Generator having a PPA for sale of power with distribution licensee, is not entitled to apply for Open Access for the capacity covered under the PPA. Even in the case of existence of a dispute regarding the termination of the PPA, the concerned officer empowered to grant Open Access would insist for production of an order from a Competent Authority having jurisdiction to decide the dispute regarding termination of the PPA. Therefore, the Petitioner was not entitled to grant of Open Access for sale of energy to third parties until, it obtained a decision in its favour from Competent Authority. In a properly instituted proceeding, the Petitioner could have requested the interim order allowing Open Access. The Petitioner has instead of taking that step, continued to inject power to grid and claimed PPA rate for the energy supplied as an interim arrangement or claimed fixation of higher rate which was not allowed.
- x) The facts of the present case disclose that the Respondent has not persuaded the Commission or the Hon'ble ATE to pass an order against the Petitioner directing to inject energy. There was no such occasion for the Respondent as the Petitioner was not unwilling to inject energy into the grid at any time. The interim orders enabled the Petitioner to get the price for energy injected at PPA rate. Otherwise, the Petitioner was required to file a separate proceeding for the recovery of that amount. Even in the absence of passing interim orders at various stages of the present dispute, the Petitioner

would have injected power into the grid which was beneficial to it irrespective of the final decision coming in its favour or not. Therefore, it cannot be said that the Respondent gained advantage because of the passing of interim orders, which it would not have gained otherwise, or the Petitioner was put to an impoverishment, which it would not have suffered otherwise.

xi) Therefore, we are of the considered opinion that the principles stated in Section 144 of CPC are not applicable to grant reliefs to the Petitioner.

e) For the above reasons, we hold on Issue No.1 that the claim of the Petitioner is based upon the tortious liability of 'Conversion' of the energy by the Respondent.

13. Issue No.2: Whether the Petitioner is entitled to compensation/damages for the energy supplied to the grid subsequent to 22.07.2011, the date of termination of the PPA?

a) It is found that the claim of the Petitioner is based on the tortious liability of 'Conversion' of the energy by the Respondent. The measure of damages is in general the market value of the goods at the time of Conversion. It cannot be concluded that the challenge by the Respondent regarding the termination of the PPA is malicious. Therefore, the question of awarding any exemplary damages does not arise.

b) The Respondent contended that the petition is liable to be dismissed in limine and the same is not maintainable either in law or on facts and the

claim of the Petitioner grossly suffers from delay and latches, therefore, deserves to be rejected. We are of the opinion that these bald grounds urged by the Respondent without any particulars are not legally maintainable. The remaining part of the Statement of Objections contains the defence that the Petitioner was paid at Rs.2.80 per unit as agreed in the PPA for the entire energy supplied and there was no reliable evidence for claiming higher rate than the PPA rate. Therefore, one can say that the entitlement of the Petitioner to damages is not disputed. Whether there is appropriate evidence to grant damages at the higher rate would be considered in subsequent Issues. Therefore, Issue No.2 is held in affirmative.

14. Issue No.3: If Issue No.2 is held in affirmative the compensation/damages to be awarded should be at what rate and for which duration?

a) There is no dispute that the Petitioner has received the amount @ Rs.2.80 per unit for the energy supplied from 22.07.2011 to 30.06.2014. The Petitioner stated that it has not received any amount for the energy supplied for the period from 01.07.2014 to 16.10.2014 as the amount offered at Rs.2.80 per unit for the energy supplied during this period vide cheque No.295640 dated 22.03.2017 drawn on Syndicate Bank, Mangalore for an amount of Rs.13,70,40,421 was unacceptable and thereby the cheque was returned to the Respondent along with letter dated 08.05.2017 (Annexure-P21). The Respondent in its letter dated 19.05.2017 (Annexure-P22) stated that the said cheque stated to have been returned was not found enclosed with letter dated 08.05.2017

(Annexure-P21). It is not clearly forthcoming whether the amount under the said cheque has been realised or not. Either of the parties could have produced better evidence as to whether this cheque was realised or not.

b) The Respondent has produced the statement showing the net energy injected from the project of the Petitioner in different months from 22.07.2011 to 16.10.2014. The said statement is enclosed along with Annexure-B produced by the Respondent on 12.11.2019 while filing the written arguments. It appears the quantum of net energy injected for the said period as shown in the statement is not disputed by the Petitioner. The extract of the energy supplied from 22.07.2011 to 16.10.2014 is mentioned below:

Net energy injected from the Project of the Petitioner to the Grid of MESCOM for the period from 22.07.2011 to 16.10.2014

Sl. No.	Month/Year	Monthly Units Injected
1	2	3
1	22 nd to 31 st July, 2011	41,21,290
2	August	1,34,12,000
3	September	1,20,02,000
4	October	56,30,000
5	November	44,88,000
6	December	17,15,600
7	January 2012	5,34,400
8	February	87,400
9	March	(80,800)
10	April	(71,300)
11	May	(1,03,500)
12	June	24,06,900
13	July	1,20,70,000
14	August	1,33,67,700
15	September	1,22,92,000
16	October	49,04,000
17	November	35,13,100
18	December	2,11,200
19	January 2013	35,800
20	February	18,800

1	2	3
21	March	(1,40,300)
22	April	(1,05,800)
23	May	(1,31,100)
24	June	93,62,400
25	July	1,49,75,700
26	August	1,56,08,000
27	September	1,16,84,000
28	October	92,98,000
29	November	36,54,000
30	December	28,59,700
31	January 2014	6,42,100
32	February	1,48,500
33	March	(1,66,200)
34	April	(1,08,100)
35	May	(1,40,300)
36	June	53,69,246
37	July	1,32,44,000
38	August	1,59,40,000
39	September	1,49,24,000
40	1 st to 16 th October 2014	57,32,129
	Total	21,32,04,565

Note: The figures shown in brackets are the quantum of energy drawn from the grid of the Respondent to the Project of the Petitioner.

c) As already noted the damages to be awarded to the Petitioner depends on the market value that could have been realised by the Petitioner, in the event the Petitioner was allowed to sell the energy to its Open Access consumers. The burden of proving such market value is on the Petitioner. Comparable sale of energy under Open Access in other instances during the relevant period, would have been the best evidence to arrive at a finding on the market value that could have been realised by the Petitioner. The Petitioner has not made an attempt to produce such evidence. It is not the case of the Petitioner that there were no such Open Access transactions during the said period. The Petitioner was allowed Open Access from 17.10.2014 onwards. The price realised by the Petitioner subsequent to 17.10.2014 under Open Access transactions

would have a bearing on the question to be determined. The Respondent in its written submission dated 12.11.2019 has stated that after withdrawal of the OP No.48 of 2011 on 22.03.2012, the Petitioner entered into an agreement with PTC India Limited on 30.04.2012 for sale of energy but the SLDC did not grant NOC and thereafter, the Petitioner approached CERC by filing Petition No.141/MP/2012. Therefore, it appears the Petitioner had an agreement for sale of power with PTC India Limited for Inter-State Open Access. There was no difficulty for the Petitioner to produce such evidence. It has not produced even such evidence.

d) In the petition, the Petitioner has stated the following facts to estimate the price that it could have been realised in case it was allowed Open Access:

(i) The consumers in Karnataka to discharge their corporate social responsibility to meet the statutory obligations opt for purchase of green power and consequently the green power was in demand. The retail tariff applicable to commercial category HT-2b(i) consumers in the BESCOM area, during 2011-12 to 2014-15 was Rs.6.80 per unit, Rs.7.00 per unit, Rs.7.25 per unit and Rs.7.45 per unit respectively. Therefore, it is stated that the Petitioner could have realized more than Rs.7.00 per unit on an average.

(ii) The tariff allowed for the period from 30.03.2014 to 30.06.2014 for the energy procured under Section 11 of the Electricity Act, 2003

to the State grid was fixed at Rs.5.50 per unit. In this regard, the Petitioner has relied upon the order dated 24.01.2013 passed in OP No.16 of 2011 by this Commission (Annexure-P18).

(iii) In para 25 of the petition, the Petitioner has stated that even conservatively by treating Rs.5.30 per unit during 22.07.2011 to 31.03.2012 and Rs.5.50 per unit from 01.04.2012 to 30.06.2014 and Rs.5.85 per unit for the period from 01.07.2014 to 16.10.2014 as realisable rates, the Petitioner could have recovered an amount of Rs.151,42,04,592. The detailed calculation is shown in the tabular columns statement in para 25 of the petition. The Petitioner has considered average energy price at Rs.5.50 per unit and added the benefit that could have been derived under REC market rate and has come to the final figure as shown in the said table which is extracted in para 4 of this judgment. Here itself, we may note that the Petitioner could avail the Renewable Energy Certificate (REC) provided it sold the energy to ESCOMs of the State at the pooled cost of power purchase of the State as notified by the Commission from time to time. Regulation 7 of the KERC (Power Procurement from Renewable Sources by Distribution Licensee and REC Framework) Regulation, 2011 provides for Conditions for Accreditation for obtaining RECs by the Renewable Generators. The relevant portion in this Regulation is as follows:

“7. Conditions for Accreditation: Renewable Energy Generators in the State applying for accreditation to the State Agency for securing REC shall satisfy the following conditions:

- a)
- b)
- c) *A Generating Company opting for REC Scheme shall sell the electricity generated by it to ESCOMs of the State at the pooled cost of power purchase of the State, [as notified by the Commission from time to time]*

Explanation: For the purpose of these regulations, ‘Pooled Cost of Power Purchase’ means the weighted average pooled price at which the State distribution licensees put together have purchased the electricity including cost of self-generation if any, in the previous year from all the energy suppliers long-term and short-term, but excluding those based on renewable energy sources, as the case may be.

- d)
- e)

Therefore, the Petitioner opting Open Access could not have claimed any benefit towards RECs by sale of energy to third party consumers.

- e) The Respondent has denied the relevancy of the grounds urged by the Petitioner for estimating the market value and contended that the said computation of the Petitioner is based on hypothetical circumstances and cannot be treated as realistic and plausible. In the written submission, the Respondent has stated that the Generator seeking any tariff higher than the PPA has to substantiate the same by production of accurate and adequate data depicting the income and expenditure

by the Generator warranting the higher tariff and relied upon the decision in OP No.23 of 2011 decided by this Commission.

f) The Respondent has produced month-wise statement of Average Cost of Power Purchase from Section 11/Short-term/Medium term, incurred by it for the period from 22.07.2011 to 16.10.2014 at Annexure-B along with its written submissions filed on 12.11.2019. The Respondent has produced the Report on Short Term Power Market in India for the Financial years 2011-12 to 2014-15 prepared by Economics Division of CERC. This Report discloses the price of short term transactions of electricity per unit. The Commission had orally instructed the Respondent to produce such Report. In response to it, the Respondent vide letter dated 27.12.2019 addressed to this Commission produced the Statement of Units of energy supplied by AMR Power Private Limited subsequent to termination of PPA vide Annexure-R1 and the Report on Short-term Power Market vide Annexure-2. We think for our purpose, the price of short term bilateral transaction of electricity carried through traders relating to supply of RTC (Round The Clock) power and the price discovered through Power Exchange, may also be relevant to some extent for ascertaining the market value that could have been realised by the Petitioner, in the absence of any material regarding comparable sales in Open Access transactions. In the below table, we have extracted the average monthly power purchase costs of RTC power through bilateral

transactions and of the power purchases through Power Exchange prepared by CERC for the Financial Years 2011-12 to 2014-15.

2011-12				2012-13			
Months	Price of RTC power per unit	Power Exchange Price per unit		Months	Price of RTC power per unit	Power Exchange Price per unit	
		IEX	PXIL			IEX	PXIL
1	2	3	4	1	2	3	4
April	4.76	3.49	4.00	April	4.35	3.19	4.71
May	4.52	2.96	3.03	May	4.26	3.60	3.89
June	3.81	2.80	2.99	June	4.11	4.11	4.10
July	3.90	2.97	3.22	July	4.02	4.51	4.54
August	3.88	2.89	3.01	August	4.22	3.89	3.53
September	3.95	3.00	3.08	September	4.37	2.98	2.34
October	4.19	5.40	5.42	October	4.43	4.03	3.76
November	4.25	4.08	4.09	November	4.39	3.62	2.89
December	4.12	4.05	4.02	December	4.35	3.90	3.08
January	4.38	3.29	3.36	January	4.38	3.65	3.66
February	4.41	3.34	3.50	February	4.42	2.90	2.42
March	4.37	3.32	3.94	March	4.46	3.68	2.76

2013-14				2014-15			
Months	Price of RTC power per unit	Power Exchange Price per unit		Months	Price of RTC power per unit	Power Exchange Price per unit	
		IEX	PXIL			IEX	PXIL
1	2	3	4	1	2	3	4
April	4.60	3.74	2.71	April	4.21	3.42	3.05
May	4.53	3.26	2.44	May	4.50	3.26	3.15
June	4.37	2.52	2.15	June	3.93	3.71	3.63
July	4.27	2.54	2.11	July	4.06	3.50	3.53
August	4.16	2.07	1.89	August	4.15	4.33	3.68
September	4.45	2.98	2.82	September	4.31	4.14	3.48
October	4.14	2.65	2.41	October	4.61	4.33	3.45
November	3.48	2.69	2.59	November			
December	4.35	3.16	3.05	December			
January	4.15	3.05	3.02	January			
February	4.50	3.17	2.94	February			
March	4.47	2.86	2.76	March			

Note: 1) The Price of RTC power per unit stated above is the price of short term Transactions of electricity for RTC power discovered in bilateral transactions through traders shown in the above Report.

2) Power Exchange Price per unit stated above is the price of short term transactions of electricity discovered in Power Exchange shown in the above Report.

g) There was Section 11 Order issued under the Electricity Act, 2003 by GoK for the period from 26.03.2014 to 30.06.2014 directing all the Generators in the State to inject power to the State grid fixing the provisional tariff at Rs.5.50 per unit. Subsequently, the GoK vide its Order No.EN 26 PPC 2014 dated 28.04.2014 has withdrawn the directions issued u/s 11 of the Act with immediate effect. Therefore, the duration of the Section 11 Order was between 26.03.2014 to 28.04.2014. It is found that as per the orders in OP No.15/2014 dated 25.09.2014 passed by this Commission, the rate of Rs.5.50 per unit as provisionally fixed by the GoK, has been affirmed for the energy supplied from 26.03.2014 to 28.04.2014. However, it is found that no energy was injected to the grid for the period from 26.03.2014 to 28.04.2014 from the project of the Petitioner to the grid, as could be seen from the table at sub-para (b) of para 14 of this order. Therefore, there is no question of awarding compensation/damages for this period.

h) The plus point to be noted in favour of the Petitioner for sale of Renewable Energy is based on the requirement of certain consumers of electricity to meet their Renewable Purchase Obligation. The Regulation 4 (ii) & (iii) of the KERC (Power Procurement from Renewable Sources by Distribution Licensee and Renewable Energy Certificate Framework) Regulations, 2011, provides that the captive consumer consuming energy from his captive plant using other than the renewable sources and having a total capacity of exceeding 5 MW; and any person consuming electricity with a Contract Demand exceeding 5 MW procured by Open Access from

sources other than renewable sources of energy are liable for Renewable Purchase Obligation (RPO) of a minimum quantity of 5% of its consumption from sources other than renewable sources of energy. The Petitioner's project being a Mini-Hydel Project of 24.75 MW could have sold the renewable energy to such obligated entities. This would depend upon the number of obligated entities and the quantum of their requirement of renewable energy to meet the RPO. Such statistics is not provided in the present case.

- i) When similar questions of fixing market price for the energy consumed by ESCOMs subsequent to the termination of the PPA had arisen, in number of cases this Commission had taken the view that in the absence of the Generator producing reliable evidence for proving the market price of the energy that could be obtained under Open Access transaction, the Generators are not awarded any amount exceeding the Generic Tariff applicable to the Projects. It may be noted that on appeal against the orders either the Hon'ble ATE or the Hon'ble Supreme Court of India had remanded the matters for fresh disposal giving an opportunity to Generators for producing the relevant evidence in support of their claims. In OP No.23 of 2011 between Nandi Sahakari Sakkare Karkhane Niyamita Vs. HESCOM relied upon by the Respondent, the Petitioner therein (Generator) could produce any further evidence after remand of the case for fresh disposal by the Hon'ble Supreme Court, thereby this Commission had not enhanced the compensation/damages.

- j) It may also be noted that in OP No.16 of 2011 between BESCO and Davangere Sugar Company Limited decided on 24.01.2013, where a question had arisen for determination of market value for the energy injected to the grid of the BESCO after the termination of the PPA this Commission had taken the view that the weighted average of short-term power market rates for bilateral transactions as published by CERC during the relevant period, could be a guiding factor.
- k) It may be noted that the Generators having smaller capacity of generation could enter into short-term bilateral transactions through traders for sale of energy to Distribution Licensees. The trading margin fixed by the CERC under Fixation of Trading Margin Regulations, 2010 was one of the expenses to be incurred by the Generator. For the relevant period for such trading margin was 7 Paise per unit in case the sale price is exceeding Rs.3 per unit and was 4 Paise per unit where the sale price is equal to or less than Rs.3 per unit. In this case, we may assume that the trade margin to be taken into consideration would be 7 Paise per unit. In the above OP No.16 of 2011, the trading margin along with some other expenses if any, to be incurred by the Generator is not taken into consideration. The short-term transactions are for a period less than one year. Usually the Distribution Licensees purchase power from short-term transactions, to meet their power shortage which usually occur during summer season from December to June so far our State is concerned. The generation from Mini-Hydel Project would be considerably less or even nil

during the months between December to June, as noted in the statement showing energy injected from the Project of the Petitioner.

l) In OP No.16 of 2011 noted above, the generation was from co-gen unit.

The Hon'ble High Court of Karnataka had fixed the interim tariff of Rs.5.00 per unit. The Distribution Licensee had paid that amount. At the end of the litigation, the Distribution Licensee was allowed by the Hon'ble High Court to recover the excess price paid if any, from the Generator. In case of co-gen unit, the fuel cost would be a considerable part of generation cost. Therefore, in OP No.16 of 2011 filed by the Distribution Licensee for the recovery of the difference between the interim price of Rs.5.00 per unit and the Generic Tariff applicable to that Generator, this Commission concluded that the price discovered in short-term bilateral transactions could be taken as a yardstick for estimating the market price. In the absence of production of any better evidence to fix the market price of energy that could have been fetched, had the Petitioner was allowed Open Access, the methodology stated in OP No.16 of 2011 is the only option left for us.

m) The sale of power through Power Exchange is usually for a short period.

Therefore, the sale of power by the Petitioner through Power Exchange was not an expected action.

n) Therefore, we are of the considered view that the better way of ascertaining the market price of the energy for the relevant period would be to find out the price that could have been obtained by the Petitioner,

in the event the energy was sold to the Distribution Licensees as per the price discovered through bilateral short-term transactions of electricity as published by CERC.

- o) Now, we will consider for which duration, the Petitioner should be allowed compensation/damages. The termination of the PPA was effected on 22.07.2011. The Petitioner cannot claim Open Access from the date on which the termination had taken place. Subsequent to termination of the PPA, the Petitioner has to search for the Distribution Licensees intending to purchase the short-term power or the Open Access consumers and thereafter, it has to file application before the Nodal Agency for Open Access as per the relevant provisions of Open Access Regulations. Thereafter, the Nodal Agency has to verify the application and conduct system studies and is required to grant Open Access within a fixed time from the date of receipt of application, in case the Open Access could be accommodated. After granting Open Access the applicant is entitled to inject the energy related to short-term bilateral transactions or Open Access transactions. In the present case, the Petitioner has in para 7 of the petition has stated that after termination of the PPA, by letter dated 16.09.2011 the Petitioner has requested the Respondent for according its consent to enter into WBA to enable the Petitioner to supply electricity to third parties as per request letter dated 16.09.2011 (Annexure-P3). Further the Petitioner stated that the Respondent by reply letter dated 22.09.2011 declined the consent and asserted that the PPA was subsisting. The

Petitioner has not stated anywhere in the petition that it has applied before the Nodal Agency as required under the relevant Regulations for allowing Open Access. One can assume that the Petitioner might have first intended to ascertain as to whether the Respondent would give consent or not, before filing the application for Open Access. It may be noted that the Respondent was not a person competent to allow Open Access, but it was SLDC/KPTCL in case of Intra-State Open Access, and RLDC in case of Inter-State Open Access. Assuming that, had the Petitioner filed the Open Access application on 16.09.2011, he was expected to receive the communication allowing Open Access by 16.10.2011, in the event the Respondent admitting the termination of PPA and consenting for the execution of WBA with other parties. Therefore, we hold that at best, the cause of action could have arisen on 16.10.2011 at the earliest for claiming compensation/damages. Therefore, we are of the considered view that the compensation/damages to be awarded should be for the duration between 16.10.2011 to 16.10.2014.

- p) The Petitioner has also injected power into the grid from 22.07.2011 to 15.10.2011. For this period, the Respondent has admittedly paid the energy charges @ Rs.2.80 per unit as per the tariff agreed in the PPA. The Petitioner could not have claimed the market value for the energy injected during this period, as the cause of action for getting Open Access would arise only from 16.10.2011 as noted above. Therefore, we

are of the considered view that the Petitioner is not entitled to any higher amount for the energy injected during this period.

q) From the above discussions, the Commission is of the view that the Petitioner may be awarded compensation/damages at the price of RTC power per unit noted in the above relevant table deducting the applicable trading margin (i.e., 7 paise per unit) for the energy supplied for the period from 16.10.2011 to 16.10.2014.

r) The Respondent has not specifically stated in the statement of objection or in its written argument, as to how it dealt with the energy drawn by the project of the Petitioner from the grid. However, the table relating to energy details for the period from 22.07.2011 to 16.10.2014 would show that the Petitioner has deducted the import energy out of the total export energy and has arrived the net energy injected in a month. In case the export energy is nil or less than the import energy in any month, the net energy for that month is shown in the bracket.

s) For the above reasons, Issue No.3 is held accordingly.

15. Issue No.4: Whether the Petitioner is entitled to any interest, if so at what rate and for which duration?

a) It is settled law that interest prior to suit cannot be awarded on the claim for un-ascertained sum in the nature of damages.

b) In this regard, the following decisions may be noted:

i) In *Clariant International Limited v. Securities Exchange Board of India*, reported in 2004 (8) SCC Page 524, the Supreme Court has held as follows: (para 30)

"Interest can be awarded in terms of an agreement or statutory provisions. It can also be awarded by reason on usage or trade having the force of law or on equitable considerations. Interest cannot be awarded by way of damages except in cases where money due is wrongfully withheld and there are equitable grounds therefor, for which a written demand is mandatory."

(ii) In *Union of India and Another Vs. A. Venkataiah* reported in AIR 1975 Madras 119, at the middle of the para 7 it is held as follows:

"A suit instituted by a litigant claiming damages either in tort or on breach of contract or for payment of damages by a carrier for non-performance of a statutory and other obligations as bailee, resulting in a decree for damages, which damages are obviously and necessarily computed in terms of money, can also be characterised as a decree for payment of money. Therefore, a decree for damages computed by the trial Court after hearing parties, which sum is reckoned by it on the evidence noticed by it, is to be treated and considered as a decree for payment of money. Thus understood, the second heading under which additional interest could be granted under Section 34 in cases of a decree for payment of money would not generally be invocable in cases where the suit is purely for damages. The second head relates to payment of additional interest on the principal sum adjudged for any period prior to the institution of the suit. In a case for damages, it would be speculative to award such interest for

*a period prior to the institution of the suit, because a person claiming such damages cannot be said to have been injured unless and until he quantifies the same in his own way and seeks for relief in a manner known to law. Such awarding of damages for a period prior to the institution of the suit would militate against the well accepted principle of *damnum sine injuria* without injury there cannot be a damage. In the case of damages, the party must suffer an injury and then ask for it. In a case similar to the one under consideration, if such interest is awarded prior to suit it would be damages over damages, which is not postulated in law. Therefore, in cases like the one before us, any interest as additional interest for a period prior to the institution of the suit ought to be automatically excluded."*

The decision relied upon by the learned counsel for the Petitioner in AIR 1975 Supreme Court 32 – The Godhra Electricity Company Limited and Others Vs. the State of Gujarat and Others is not applicable in the facts and circumstances of the present case. In the said case, it is held that acquiring property by the State without payment of purchase money and the interest for the delayed payment if any, is violation of Article 19 (1) (g) and 19 (1) (f) of the Constitution. The other decisions relied upon by the learned counsel in the written submissions of the Petitioner are also not relevant as the claim of Petitioner is not based on the principle of Restitution under Section 144 of the Civil Procedure Code, 1908 (CPC). It may be noted that the award of interest even in the cases of Restitution is within the discretion of the Commission. As

noted supra in sub-para (f) of this para, this is not a fit case for awarding interest prior to the filing of the petition.

- c) The Petitioner claims that the generating cost of the energy comes to Rs.5.50 per unit and in support of it has produced an Excel Sheet on 28.01.2020. Had the Petitioner incurred generating cost of Rs.5.50 per unit, it would have filed the petition for revision of tariff at or before the commissioning of the project. The Generic Tariff of Rs.2.80 per unit for mini hydel project determined by order dated 18.01.2005 was based on the capital cost required during that control period. The Petitioner started construction of the Project subsequent to the order dated 18.01.2005 fixing the tariff of Rs.2.80 per unit. Any Developer would prepare DPR before commencing the project work. If there was any unexpected extra cost incurred by the Developer, proper course was to file a petition for determining the project specific tariff. Therefore, the say of the Petitioner that generating cost comes to Rs.5.50 per unit cannot be believed and it should be rejected as a self-serving contention.
- d) The award of interest from the date of suit till the date of realisation of the amount ordered to be paid, is governed by the principles stated in Section 34 of the CPC. The Court has the discretion to award interest subsequent to the date of suit taking into consideration the relevant facts of the case in this regard.

- e) The above principles are also applicable for awarding interest by this Commission.
- f) In the present case, the Petitioner had executed PPA at the tariff of Rs.2.80 per unit for the energy supplied as per the Generic Tariff Order dated 18.01.2005. The project being a Mini-Hydel Project, the Petitioner does not incur any cost towards fuel charges. It appears that there is no provision in the Government Order allowing the Petitioner to establish the Project or in the PPA that in the event of termination of the PPA, the Petitioner is required to pay any royalty to the GoK for the use of water which is the Government property. The said project is also governed by concessional Wheeling & Banking charges, which in fact even does not cover the transmission and wheeling line-losses. Even before the commissioning of the project, the Petitioner made an attempt to wriggle out of the PPA. In the above facts and circumstances, we are of the opinion that interest may be awarded at the rate of 6% per annum from the date of petition to the date of realisation of the amount payable to the Petitioner by the Respondent as per this order.
- g) Issue No.4 is held accordingly.

16. Issue No.5: What should be the Filing fee payable on the petition?

- a) The Petitioner is liable for payment of Filing fee on the basis of the amount claimed in the petition as provided in Serial No.13 of Regulation 4 of the KERC (Fee) Regulations, 2016. It provides that disputes involving

monetary claims is liable for payment of Filing fee at 0.5% of the monetary claim subject to a minimum of Rs.25,000. The present case involves a monetary claim for damages. The Petitioner has to estimate the damages for which it is entitled to and has to pay Filing fee on the claim of such damages. The contention of the Petitioner that it has to pay the Filing fee on the quantum of damages to be awarded after its ascertainment by the Commission is not correct. Such a provision is not made in the said Regulations. The question of payment of Filing fee on the amount ascertained to be awarded would arise only, if the Fee Regulations provide for such a provision. The Petitioner has not claimed any specific amount towards damages and interest, in the prayer columns of the petition. However, in the body of the petition at para 25, the total amount claimed by the Petitioner towards damages and interest comes to Rs.190,70,41,093. Therefore, this total amount should be considered as the monetary claim made by the Petitioner in the petition.

- b) The learned counsel for the Petitioner submitted during the argument that the Filing fee is payable on the amount to be awarded. In view of the present clause contained in the Regulation 4 of the Fee Regulations, 2016 regarding liability to pay the Filing fee, the submission of the learned counsel for the Petitioner cannot be accepted. Non-inclusion of this claim amount in the prayer columns is not material. The quantum of the monetary claim made in the petition is to be ascertained on reading the

petition as a whole. As already noted in para 6 of our order when this case was first taken up on 23.11.2017, the learned Advocate for the Petitioner submitted that he would pay the required Filing fee as and when the tariff was fixed and thereafter, the notice to the Respondent was issued. On conclusion of the hearing, the learned counsel for the Petitioner filed a Memo dated 21.01.2021 undertaking to pay the Filing fee as per Regulations 3 & 4 of the Fee Regulations, 2016 on the amount determined/awarded by this Commission.

c) For the above reasons, we hold that the Petitioner is liable to pay Filing fee at 0.5% on the monetary claim of Rs.190,70,41,093. Out of this Filing fee payable, Rs.25,000 is already paid and the balance is to be paid.

d) Issue No.5 is held accordingly.

17. Issue No.6: To which reliefs, the Petitioner is entitled to and what order?

a) As noted on Issue No.3, the compensation/damages to be awarded is at different rates for different periods for the net-energy supplied by the project of the Petitioner from 16.10.2011 to 16.10.2014.

b) The interest to be awarded is as noted on Issue No.4.

c) The Petitioner is required to pay the deficit Filing fee as noted on Issue No.5 which comes to Rs.95,10,205.00.

d) It appears for the month of October 2011, the total energy injected comes to 56,30,000 units. Whereas the Petitioner was allowed compensation/damages for the energy injected from 16.10.2011 to

31.10.2011 for the month of October 2011. It appears the bifurcation of the energy injected for the period from 16.10.2011 to 31.10.2011 may not be available. Therefore, we think for ascertaining the energy injected for the period from 16.10.2011 to 31.10.2011, only 50% of the total energy injected for that whole month is to be considered.

e) Issue No.6 is held accordingly.

18. For the above reasons, we proceed to pass the following:

ORDER

- a) The petition is partly allowed awarding compensation/damages to the Petitioner for the quantum of energy supplied month-wise as shown in the table at sub-para (b) of para 14 of this Order from its project to the grid of the Respondent from 16.10.2011 to 16.10.2014 at the corresponding month-wise price of short term transactions of electricity for RTC power per unit discovered in bilateral transactions through traders shown in the table at sub-para (f) of para 14 of this Order, less 7 (seven) paise per unit towards trading margin. For ascertaining the energy injected for the period from 16.10.2011 to 31.10.2011, only 50% of the total energy injected for that whole month shall be taken into consideration.
- b) The Respondent shall calculate the actual amount that becomes due and payable to the Petitioner as per para (a) of this order, within a period of two months from the date of this order. Thereafter, deducting the amount already paid @ Rs.2.80 per unit shall arrive at the net amount payable to the Petitioner.

- c) The amount found due as per para (b) of this order shall be paid with interest at 6% per annum from the date of the petition i.e., 11.10.2017 till the date of payment of the said amount by the Respondent to the Petitioner.
- d) In the event the amount of Rs.13,70,40,421 shown in cheque No.295640 dated 22.03.2017 drawn on Syndicate Bank, Mangaluru, was not really realised or in some other way the said amount was not paid by the Respondent to the Petitioner the same shall be paid immediately from the date of this Order.
- e) The Petitioner shall pay the deficit Filing fee of Rs.95,10,205.00 within three weeks from the date of this order, failing which the petition shall stand rejected, as if no relief had been granted in this Order.

sd/-
(SHAMBHU DAYAL MEENA)
Chairman

sd/-
(H.M. MANJUNATHA)
Member

sd/-
(M.D. RAVI)
Member

