

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

**Dated : 28<sup>th</sup> May, 2019**

**Present:**

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

**OP No.09/2018**

**BETWEEN:**

Koppal Green Power Limited,  
H.No.1-88/1/102,  
102, Shanti Vanam,  
Kavuri Hills Extension,  
Hyderabad – 500 081.

*[Represented by Metro Lawyers, Advocates]*

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**PETITIONER**

**AND:**

Gulbarga Electricity Supply Company Limited (GESCOM),  
Opp.: Hotel Parivar,  
Station Main Road,  
Kalaburagi – 585 101.

*[Respondents represented by Just Law, Advocates]*

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**RESPONDENT**

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**ORDERS**

- 1) This Petition is filed, praying for a direction to the Respondent - Gulbarga Electricity Supply Company Limited (GESCOM), to pay interest of

Rs42,03,475/- towards the delayed payments of the differential tariff for the energy supplied for the months, January, 2015 to October, 2016, and to pay cost.

- 2) The material averments, made in the Petition, may be stated as follows:
- (a) The Petitioner owns and operates a Biomass based Generating Company, with an installed capacity of 6 MW and exportable capacity of 5.4 MW. The Petitioner has entered into a Power Purchase Agreement (PPA) dated 30.03.2001 with the Karnataka Power Transmission Corporation Limited (KPTCL), for sale of energy to the State Grid. Subsequently, the said PPA was assigned to the Respondent (GESCOM). As per the Supplemental PPA dated 24.03.2011, entered into between the Petitioner and the Respondent (GESCOM), the tariff agreed to was Rs.4.3524 per unit of the energy delivered, from 30.03.2011, without escalation, for a period of ten years.
- (b) The Petitioner and another Biomass based Generating Company, by name, M/s. Poweronicks Limited, filed OP No.08/2013, praying for enhancement of the existing tariff of Rs.4.3524 per unit, stating that there was enormous increase in the Biomass fuel cost and other expenses. That Petition was disposed of on 22.01.2015, as per the following Order:

*"In the light of the above, the petition is disposed of with the following terms:*

- a) *The tariff applicable to the petitioners' unit with effect from 1.1.2015 shall be as shown below:*

Year	Tariff Rs./kWh)
2014-15	4.63
2015-16	4.79
2016-17	4.97
2017-18	5.15

*The fuel cost after 31.3.2018 will be as may be determined by the Commission after taking into account the relevant factors.*

- b) The terms of the PPA between the petitioners and the 4<sup>th</sup> Respondent shall be modified accordingly with effect from 1.1.2015.*
- c) Other reliefs sought are rejected."*

(c) Subsequently, the Petitioner and M/s. Poweronicks Limited filed OP No.20/2015 against the Respondent (GESCOM), praying for a direction against the Respondent (GESCOM) to comply with the Order dated 22.01.2015 and to direct the Respondent (GESCOM) to execute a Supplemental PPA, to reflect the revised tariff, instead of the existing tariff of Rs.4.3524 per unit, stated in the PPA, and to direct the Respondent (GESCOM) to pay the arrears of the differential tariff, for the energy supplied, and to pass such other Orders. After contest, on 16.06.2016, the Commission passed the following Order:

*"The Respondent is directed to execute the Supplemental Agreements with the Petitioners to implement the revised tariff ordered in OP No.8/2013 on 22.1.2015 and to make payment accordingly, within 2 (two) months from the date of this Order."*

- (d) Thereafter, the Petitioner filed Complaint No.6/2016 against the Respondent (GESCOM), under Section 142 of the Electricity Act, 2003, praying for punishment for non-compliance of the directions issued in the Order dated 16.06.2016, passed in OP No.20/2015, and also for a direction against the Respondent (GESCOM) to comply with the said Order. During the pendency of the proceedings in Complaint No.6/2016, the Respondent (GESCOM) and the Petitioner executed the Supplemental PPA on 28.10.2016, as directed in OP No.20/2015 and it was also reported that the Respondent (GESCOM) had paid the entire arrears of the differential tariff for the energy supplied, for the period from 01.01.2015 to October, 2016, by making payment of Rs.1,42,00,000/- on 07.07.2017 and Rs.1,00,29,661/- on 13.07.2017. Taking the above developments in consideration and after hearing the parties to the Complaint, the Commission dismissed the said Complaint No.6/2016 on 08.08.2017, with a direction to the Respondent (GESCOM) to make timely payments, in future.
- (e) After the dismissal of Complaint No.6/2016, the Petitioner, by its letter dated 11.08.2017, demanded for payment of interest on the delayed payments of the differential tariff for the energy supplied, for the months of January, 2015 to October, 2016. In the said letter, the Petitioner claimed that, as per Article 6.3 of the PPA dated 30.03.2001, the Respondent (GESCOM) was liable to pay interest on the delayed payments of the differential tariff. On subsequent occasions also, the Petitioner made the same demand, with no response

from the Respondent (GESCOM). Thereafter, the Petitioner has filed the present Petition, before this Commission, on 09.02.2018.

- (f) It is urged in the Petition that, since the payments of the arrears towards the differential tariff have been made, belatedly, the Petitioner is entitled for the late payment charges, as provided in Article 6.3 of the PPA, which reads thus:

*“6.3 **Late Payment:** If any payment from Corporation is not paid when due, there shall be due and payable to the Company penal interest at the rate of SBI Prime Lending Rate plus 2% per annum for such payment from the date such payment was due until such payment is made in full.”*

- 3) Upon Notice, the Respondent (GESCOM) has appeared through its counsel and filed the Statement of Objections, denying the claim made by the Petitioner for interest. The defence put forth by the Respondent (GESCOM) may be stated as follows :

- (a) That, a perusal of the Order dated 16.06.2016 of this Commission, passed in OP No.20/2015, would indicate that the direction given was to execute a Supplemental PPA and pay as per the revised tariff, determined in OP No.8/2013, within a period of two months. Therefore, the Respondent (GESCOM) had time upto October, 2016, to sign the Supplemental PPA. The payments, now categorized as having been delayed, are payments which would arise by virtue of the Order of this Commission to sign the Supplemental PPA with the revised rates.

- (b) That, Complaint No.6/2016 was dismissed by this Commission, after adverting to all the subsequent events and only thereafter the Respondent (GESCOM) was directed to make timely payments, in future.
  - (c) That, in response to the contention urged by the Petitioner that it was entitled to claim interest, as per Article 6.3 of the PPA, it was stated that the Petitioner was not entitled to payment of any interest, as per Article 6.3 of the PPA.
  - (d) That, the claim for interest made in the present Petition is barred on the principles stated in Order, II Rule 2(3) of the Code of Civil Procedure, 1908, as the Petitioner had failed to claim any interest in OP No.20/2015. Therefore, the Respondent has prayed for dismissal of the Petition.
- 4) We have heard the learned counsel for the parties.
- 5) The following issues would arise for our consideration:
- (1) Whether the Petitioner can raise the Monthly Tariff Invoices for the energy supplied, at the enhanced tariff, for the month of January, 2015 and for the subsequent months, without incorporating the enhanced tariff in Article 5 of the PPA dated 30.03.2001?
  - (2) Whether the claim of the Petitioner for interest is barred on the principles stated in Order II, Rule 2(3) of the Code of Civil Procedure, 1908?
  - (3) What Order?

- 6) After considering the oral submissions of the parties and the pleadings and material on record, our findings on the above Issues are as follows:
- 7) **ISSUE No.(1):** *Whether the Petitioner can raise the Monthly Tariff Invoices for the energy supplied, at the enhanced tariff, for the month of January, 2015 and for subsequent months, without incorporating the enhanced tariff in Article 5 of the PPA dated 30.03.2001?*

The main dispute involved in the present case, as per the pleadings and submissions of the parties, may be stated as follows:

- (a) According to the Petitioner, the enhanced tariff becomes due for payment, for the energy supplied, from 01.01.2015, even before the amendment of Article 5 of the PPA dated 30.03.2001. Therefore, the Petitioner contends that, it can raise Monthly Tariff Invoices, for the energy supplied, at the enhanced tariff, from the month of January, 2015, even without incorporating the enhanced tariff in the PPA. Accordingly, the Petitioner has raised the tariff invoices, for the energy supplied from January, 2015 and onwards, at the enhanced rate, as per the Order dated 22.01.2015 passed by this Commission in OP No.8/2013.
- (b) According to the Respondent (GЕССОМ), the enhanced tariff becomes due for payment, for the energy supplied from 01.01.2015, only after the amendment of Article 5 of the PPA, incorporating the enhanced tariff in place of the existing tariff of Rs.4.3524 per unit. Therefore, the Respondent

(GESCOM) has contended that, the Monthly Tariff Invoices for the energy supplied, at the enhanced tariff, from the month of January, 2015, cannot be raised, without incorporating the enhanced tariff in the Article concerned of the PPA. Accordingly, the Respondent (GESCOM) did not honour the amounts stated in the Monthly Tariff Invoices, from January, 2015, at the enhanced tariff, but has paid for the energy supplied, in the Monthly Tariff Invoices, from January, 2015, at the existing rate of Rs.4.3524 per unit.

- (c) It is not in dispute that, the Supplemental PPA was executed on 28.10.2016 between the parties, incorporating the enhanced tariff, as per the Order dated 22.01.2015 of this Commission in OP No.8/2013 and thereafter, the Respondent (GESCOM) had been making payments, for the energy supplied, at the enhanced rate. It is also not in dispute that, the differential tariff amounts towards the energy supplied for the period from January, 2015 to October, 2016, the Respondent (GESCOM) has paid an amount of Rs,1,42,00,000/- on 07.07.2017 and an amount of Rs.1,00,29,661/- on 13.07.2017.
- (d) The present Petition is filed, claiming interest (late payment charges) for the delay in making payment of the differential amounts between the enhanced tariff and the existing tariff, for the energy supplied during the period from January, 2015 to October, 2016. The Calculation Sheet, pertaining to the interest on the delayed payments of the differential tariff, is enclosed to ANNEXURE – D, viz., Notice dated 11.08.2017, and also in the subsequent

Notices issued to the Respondent (GESCOM), claiming such interest. The Petitioner has relied upon Article 6.3 of the PPA, relating to 'Late Payment Charges', which reads thus:

*“6.3 **Late Payment:** If any payment from Corporation is not paid when due, there shall be due and payable to the Company penal interest at the rate of SBI Prime Lending Rate plus 2% per annum for such payment from the date such payment was due until such payment is made in full.”*

- (e) The Commission notes that, for the application of Article 6.3 of the PPA, the Respondent (GESCOM) should commit default in making payment of the Tariff Invoice, when it becomes due. Article 6.1 of the PPA provides for issuance of a Monthly Tariff Invoice, for each Billing Period, to the Respondent (GESCOM), setting forth the amount payable by the Respondent (GESCOM) for the Delivered Energy. Article 6.2 provides that, the Respondent (GESCOM) shall make payment within fifteen (15) days from the date of receipt of the Monthly Tariff Invoice. Article 6.3, which provides for Late Payment charges, states that, “if any payment from Corporation [Respondent (GESCOM)] is not paid when due, there shall be due and payable to Company (Petitioner) penal interest at the rate of SBI Prime Lending Rate plus 2% per annum for such payment, from the date such payment was due until such payment is made in full.” A conjoint reading of Articles 6.1, 6.2 and 6.3 of the PPA would show that, the opening phrase in Article 6.3, “if any payment from Corporation is not paid when due” would clearly refer to the amount claimed

in the Monthly Tariff Invoice. The further phrase, 'such payment' in Article 6.3 would also clearly refer to the amount mentioned in the Monthly Tariff Invoice. Therefore, we are of the considered opinion that, the interest cannot be claimed, until and unless the Tariff Invoice is raised and the payment thereof is not made within fifteen (15) days from the date of delivery of the Tariff Invoice to the Respondent (GESCOM).

(f) Article 6.1 of the PPA, relating to the Tariff Invoice, reads thus:

**“6.1 Tariff Invoices :** *The Company shall submit to the Chief Engineer Elecy, Corporation's Load Despatch Centre, Bangalore or any other officer of Corporation, a Tariff Invoice for each Billing Period in the format prescribed by Corporation from time to time setting forth those amounts payable by Corporation for the Delivered Energy in accordance with Article 5.1.”*

Article 5.1 of the PPA specifies the tariff per unit payable by the Respondent (GESCOM) to the Petitioner, for the Delivered Energy in a month. In view of these terms contained in the PPA, we are of the considered view that, the incorporation of the revised tariff in the relevant Article of the PPA is essential, before raising the Monthly Tariff Invoice under Article 6.1 of the PPA, at the revised rate.

(g) The operative portion of the Order dated 22.01.2015 in OP No.8/2013 merely states that, the tariff applicable to the Petitioner's Unit, with effect from 01.01.2015, shall be as stated in the said Order. Further, it is specifically directed that, the terms of the PPA should be modified, accordingly, with

effect from 01.01.2015. The said Order is in the nature of a declaration, stating to which tariff the Petitioner is entitled, for the period from 01.01.2015 and onwards. The Order does not say that, the newly determined tariff should be deemed to be incorporated in the appropriate Article in the PPA. If the Order directed deemed incorporation of the revised tariff, from 01.01.2015, the Monthly Tariff Invoice could have been raised, at the revised tariff, for the energy supplied from the month of January, 2015.

- (h) The operative portion of the Order dated 16.06.2016 in OP No.20/2015 further fortifies the view that, incorporation of the revised tariff in the PPA is essential, before raising the Monthly Tariff Invoice at the revised rate, for the energy supplied. This Order directs that, the Respondent (GESCOM) shall execute a Supplemental PPA with the Petitioner, to implement the revised tariff, ordered in OP No.8/2013 and to make payment, accordingly, within two months from the date of the said Order. The operative portion of the Order clearly implies that, for implementing the revised tariff, the execution of a Supplemental PPA is essential. This Order has attained finality and is binding on the parties.
- (i) If there was an intentional delay on the part of the Respondent (GESCOM) in executing the Supplemental PPA, for incorporating the revised tariff, the Petitioner could have requested for compensation, but it cannot claim interest under Article 6.3 of the PPA. The Petitioner has not sought for any relief, on this ground. Therefore, it cannot be considered.

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- (j) For the above reasons, we hold that, in the present case, incorporation of the revised tariff in Article 5 of the PPA was essential, before raising the Monthly Tariff Invoice, at the revised tariff. It is not the case of the Petitioner that, after the execution of the Supplemental PPA dated 28.10.2016, it had raised the supplemental Tariff Invoice, claiming the differential tariff amount and there was any delay in making payment of the invoice. Therefore, there is no question of payment of interest under Article 6.3 of the PPA. Therefore, we answer Issue No.(1), in the negative.
- 8) **ISSUE No.(2)** : *Whether the claim of the Petitioner for interest is barred on the principles stated in Order II, Rule 2(3) of the Code of Civil Procedure, 1908?*
- (a) The learned counsel for the Respondent (GESCOM) submitted that, the claim for interest is barred by Order II, Rule 2(3) of the Code of Civil Procedure, which precludes a party from seeking such prayers that were not sought for earlier, but which could have been sought for. The learned counsel for the Respondent (GESCOM) submitted that, the Petitioner should have claimed interest in OP No.20/2015 and as the Petitioner omitted to claim interest in that Petition, it is precluded from claiming interest in the present Petition. The learned counsel for the Petitioner submitted that, Order II, Rule 2 of the Code of Civil Procedure is not applicable to the Quasi-Judicial Bodies, like the State Regulatory Commissions, under the Electricity Act, 2003. Further, he submitted that, the cause of action for claiming interest has arisen, only after

receiving the differential tariff amount from the Respondent (GESCOM), in two instalments.

- (b) The learned counsel for the Respondent relied upon the Full Bench decision dated 23.12.2005 of the Hon'ble High Court of Allahabad, in the case of *Surya Deo Mishra –Vs- State of U.P., and others*, reported in 2005 SCC Online ALL 1382, in which, it is held that, the cardinal rule of public policy to discourage multiplicity of proceedings, also incorporated in Order II, Rule 2 of the Code of Civil Procedure, the principles whereof are also applicable to writ proceedings. The learned counsel further submitted that, though Order II, Rule 2 of the Code of Civil Procedure is not made applicable to the proceedings before this Commission, but the principles under Order II, Rule 2 of the Code of Civil Procedure are applicable, while deciding the rights and liabilities of the parties.
- (c) We also note that, the Hon'ble Appellate Tribunal for Electricity (ATE) in Appeal No.185/2015, decided on 25.10.2018, in the case of *Kalani Industries Pvt. Ltd., -Vs- Rajasthan Electricity Regulatory Commission and others*, has answered the same question, in the affirmative. In the opening part of Paragraph-68 of the said Order, it is held thus:

*“After careful preposition of law envisaged in the aforementioned paragraphs, we are persuaded to hold that in the nature of judicial power conferred on the State Regulatory Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally*

*not recoverable in a regular suit or any other regular proceeding. ..."*

Further, we also note that, in the same Appeal, at Paragraph-62 of the Order, it is held thus:

*"In view of the relevant provisions of the Order II, Rule 2 of CPC, the State Regulatory Commission has rightly justified in denying the interest prior to Commission's Order dated 10.12.2012 which is just and reasonable. We do not find any error, infirmity or perversity in the impugned Order. The impugned Order has been passed by the first Respondent/ State Regulatory Commission by assigning valid and cogent reasons. Therefore, interference by this Tribunal does not arise."*

Therefore, we hold that the principles under Order II, Rule 2 of the Code of Civil Procedure is applicable to the proceedings before this Commission.

- (d) As already noted, for the reasons stated above, in the present case, the Petitioner cannot claim interest under Article 6.3 of the PPA. Hence, the contention of the Petitioner that, the cause of action for claiming interest has arisen subsequent to payment of the differential amount, does not survive. Therefore, we answer Issue No.(2), accordingly.

- 9) **ISSUE No.(3)** : *What Order?*

For the foregoing reasons, we pass the following:

**ORDER**

The Petitioner is not entitled to any of the reliefs, sought for, in the Petition.

Therefore, the Petition stands dismissed.

Sd/-  
(SHAMBHU DAYAL MEENA)  
CHAIRMAN

Sd/-  
(H.M. MANJUNATHA)  
MEMBER

Sd/-  
(M.D. RAVI)  
MEMBER