

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 196 of 2010

Dated: 25th July, 2011

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam,
Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member,

In The Matter Of

M/s. Bhagyanagar Solvent Extractions
Private Limited., Registered Office: 8-2-348/1,
Ground Floor, Flora Apartments, Road No.3,
Banjara Hills,
Hyderabad (AP)

... Appellant(s)

Versus

- 1. The Managing Director,**
Gulbarga Electricity Supply Co. Ltd (GESCOM),
Station Main Road,
Gulbarga, GESCOM,
Karnataka State-585 102

- 2. The Managing Director,**
Karnataka Power Transmission
Corporation Ltd (KPTCL),
Kaveri Bhavan, Bangalore,
Karnataka State-560 001

**3. The Registrar,
Karnataka Electricity Regulatory Commission at
Bangalore,
6th & 7th Floor, Mahalaxmi Chambers,
No.9/2, M.G. Road,
Bangalore-560 001**

....Respondent(s)

**Counsel for Appellant(s):Mr.B.P. Patil, Sr.Adv.
Mrs. N Shoba,
Mr. Sriram J. Thalapathy,
Mrs. S.P Parthasarathy,
Mr.V. Adhimoolam,
Mr. Adhi Venkataraman,
Mrs. Sudha Ramani(Rep)**

**Counsel for Respondent(s):Mr.S. Sriranga,
Mr. Venkat Subramaniam T.R
Mr.Raghavendra S. Srivatsa**

JUDGMENT

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON**

1. M/s. Bhagyanager Solvent Extractions Private Limited is the Appellant. M/s. Karnataka Power Transmission Corporation Limited is the second Respondent. Aggrieved by the order

dated 3.2.2010 passed by the State Commission approving the draft supplemental PPA filed by the Karnataka Power Transmission Corporation Limited (R-2), the Appellant has filed this Appeal. The short facts are as follows:

2. The Appellant is a Biomass based power generating Company. There was a Power Purchase Agreement entered into between the Appellant and the Karnataka Power Transmission Corporation Limited (R-2) on 18.10.2001 whereby the R-2 agreed to purchase power from the 6 MW Capacity Biomass based Power Project of the Appellant. The said Agreement was terminated by the Respondent on 5.7.2003. As against the said termination, the Appellant filed the petition in OP No.34/2006 before the State Commission (R-3) praying for setting aside the said termination and to restore the original PPA. During the pendency of the said proceedings, the Power Transmission Corporation (R-2) offered to settle the issue with the Appellant. The Appellant accepted the said offer. Accordingly, on 17.5.2007, both the Appellant and R-2 filed joint

memo before the State Commission mentioning the various terms agreed upon by both the parties.

3. On the basis of the joint memo, the State Commission passed the detailed order dated 31.5.2007 recording the terms and conditions of the joint memo, restoring the original PPA dated 18.10.2001, approving the tariff and directing the parties to file the supplemental PPA for the approval of the Commission according to the order.

4. In spite of this order dated 31.5.2007, approving the joint memo, the Karnataka Power Transmission Corporation Limited (R-2) failed to release the arrears to the Appellant in terms of the joint memo. In the meantime, the electrical power distribution business conducted by R-2 namely Transmission Corporation Limited was taken over by the Gulberga Electricity Supply Company Limited (GESCO) (Respondent-1). Therefore, the Appellant had approached the GESCO for implementation of the order dated 31.5.2007 passed by the State Commission. A lot of

deliberations were held between the parties regarding the terms of the joint memo. Finally, on 31.12.2009, a draft supplemental PPA was forwarded to the Appellant, who in turn, sent it back to the Respondent. Thereupon, the Respondent filed the said draft before the State Commission for approval.

5. On coming to know of the same, the Appellant sent a representation dated 7.1.2010 to the State Commission objecting to the said approval highlighting the fact that the clause 6 of the joint memo has not been given effect to by not increasing the tariff as agreed for other similar projects and requesting the State Commission to make a suitable modification in the draft supplemental PPA submitted by the Respondent for approval of the State Commission. However, the State Commission by the order dated 3.2.2010 had approved the draft supplemental PPA without giving opportunity of hearing to the Appellant with regard to the representation of the Appellant complaining about the non compliance of the terms of the joint memo. This order was not intimated to the

Appellant. Having no knowledge about the said approval dated 3.2.2010, the Appellant again on 14.2.2010 sent similar representation before the Commission raising the same objection in respect of non compliance of the terms of the joint memo dated 17.5.2007. Only at that time, the Appellant came to know that the approval order had been passed on 3.2.2010 itself without hearing him.

6. Thereupon, aggrieved by the said order dated 3.2.2010 approving the supplemental PPA dated 31.12.2009, the Appellant has filed the present appeal.

7. The Appellant has raised the following grounds challenging the order impugned:

- (i) The State Commission has not complied with the principles of natural justice while approving the supplemental PPA on 3.2.2010 by not giving opportunity of

hearing to the Appellant with regard to the objections raised by the Appellant through its representation dated 7.1.2010.

(ii) The State Commission has ignored its own orders dated 17.5.2007 and 31.5.2007 approving the joint memo filed by the Appellant and R-2 in OP No.34/2006, while passing the impugned order.

(iii) The State Commission has ignored to consider the Appellant's representation dated 7.1.2010 before the impugned order was passed on 3.2.2010.

8. In reply to the above, the Learned Counsel for the Respondent 1 and 2 have made the following submissions:

(i) The challenge in the present proceedings is to the communication of the approval by the State Commission to the supplemental PPA placed before it. The power utilities can enter into arrangements for the purchase of power in a

manner approved by the State Commission. Therefore, the process contemplated in the law is that the parties negotiating the terms of the power purchase agreement and the said agreed terms are adduced in writing. This document for supplemental PPA was initialled by both the parties. The said signed document was placed before the State Commission seeking for its approval. The State Commission after considering the terms of the agreement passed approval and communicated its approval. Seeking approval of the supplemental PPA is not in the nature of an adversarial in litigation between the two parties. The parties to the contract put their signatures in the documents and the said document was placed before the Commission for its approval. Therefore, the question of there being a violation of principle of natural justice does not arise.

(ii) Since in this case, the parties were well informed by way of direction of the Commission in its order dated 31.5.2007, the act of approving the supplemental PPA on

3.2.2010 in terms of the order dated 31.5.2007 was only a formal ministerial act. The said order of 31.5.2007 was passed by the State Commission only after hearing both the parties and the said order is fully binding on both the parties. In the absence of any deviation from the directions of the Commission in its order dated 31.5.2007, it is not open to the parties to complain about the lack of opportunity or breach of natural justice especially when the supplemental PPA is fully in line with the order of the State Commission dated 31.5.2007.

(iii) The issue regarding tariff payable to the Appellant was deliberated at great length before the State Commission in the presence of both the parties. The perusal of the orders of the State Commission both dated 17.5.2007 and 31.5.2007 show that the State Commission passed the detailed and reasoned order specifically adverting to the tariff payable to the Appellant and clarified that the 6 MW Power supplied upto March, 2007 and from 1.4.2007, the

Appellant would be entitled to Rs.3.85 per unit to be escalated at the rate of 2% per year non-cumulatively from the base year 2006-07. For the remaining 5 MW Power supply, the State Commission directed that the Appellant be entitled to Rs.2.85 per unit from the date of the commercial operation date (COD) with 2% non cumulative escalation. Only after recording the same, the State Commission went on to direct the parties to file the supplemental PPA on the above lines. Order dated 31.5.2007 has not been challenged. Having failed to do so, the order of the State Commission dated 31.5.2007 has attained finality. The Appellant cannot now indirectly challenge the said order by way of present proceedings as it is impermissible under the law.

9. In the light of the above rival contentions, the following questions may arise for consideration:

(i) Whether the State Commission is right in approving the draft supplemental PPA submitted by the Respondent by the order dated 3.2.2010 without considering the objections raised by the Appellant through its representation dated 7.1.2010 and without affording an opportunity of being heard to the Appellant in violation of the principles of natural justice?

(ii) Whether the Appellant would be discriminated by the Respondent Companies which are the instrumentalities of the State purchasing power on tariff rates lower than the rate on which the power is purchased from similar biomass energy generators?

(iii) Whether the State Commission discharged its statutory functions properly in approving the supplemental PPA through the order dated 3.2.2010 when the same is not in conformity with the conditions of the terms and

conditions of the joint memo dated 17.5.2007 and the consequent order dated 31.5.2007 ?

10. While dealing with the above questions, it would be proper to refer to the relevant factual details:

(i) On 18.10.2001, the Power Purchase Agreement was entered into between the Appellant and Power Corporation Limited (R-2) for purchase of power from the Appellant's 6MW Biomass based power plant. The rate agreed to between the parties was based upon the guidelines issued by the Ministry of Non-Conventional Energy i.e. at the rate of 2.25 with 5% escalation.

(ii) On 5.7.2003, the said PPA was terminated by the Respondent.

(iii) On the same date, in spite of the termination on 5.7.2003, the Power Transmission Corporation Limited (R-2) approved the synchronization of the 11MW power generator of the Appellant. Thereupon, on 5.7.2006, the Appellant filed a petition before the State Commission praying for setting aside of the termination and for restoration of the original PPA dated 18.10.2001.

(iv) At that stage, the Power Transmission Corporation (R-2) offered to settle the issue. The Appellant also accepted the offer because from the date of the termination i.e. 5.7.2003, the Appellant was being paid as an ad hoc tariff at the rates of Rs.2.70 per unit. Therefore, accordingly, on 17.5.2007, the Appellant and the Respondent-2 entered into a joint memo with the following terms:

“Both the parties have discussed and on such discussion both the parties have agreed on the following:

(1) The payment upto March, 2007 to the Petitioner Company will be as per PPA (now revived) i.e. at MNES rate and the difference if any shall be paid by the Respondent Company.

(2) *The Petitioner Company shall be paid for the electricity supplied from 01.04.2007 at Rs.3.85/unit to be escalated thereafter at 2% per year non-cumulatively from base year 2006-07 for 6 MW of power supplied and over and above 6 MW shall be billed at Rs.2.85 from the date of COD with 2% non-cumulative escalation.*

(3) *Term of the PPA shall be 10 years from COD.*

(4) *Out of the pending arrears payment of arrears @ 3.32/unit shall be made immediately as done in other cases.*

(5) *No LC is to be provided as payment is agreed to be made within 15 days from the date of the presentation of invoice.*

(6) *Increase will be considered only if similar Biomass project is given the increase”.*

11. The Appellant and the Respondent-2 further agreed in the joint memo that:-

“ With the above modification, the PPA shall stand revived from the date of termination and shall continue to be in force till 10 years from the COD. The parties will sign a supplementary agreement incorporating the above on approval of the Commission to the above terms.

The above may kindly be recorded and the petition may please be disposed off in terms of the same”.

12. On the same date, i.e. on 17.5.2007, the said joint memo was placed by both the parties before the State Commission which in turn, had passed the following order:

“Counsel and parties present. Joint memo is filed. Case is disposed of in terms of joint memo. A detailed order will be issued on 31.05.2007”.

13. Following this order, the detailed orders had been passed on 31.5.2007 referring the various terms and conditions contained in joint memo and deciding the tariff payable by the Respondent to the Appellant. Through this order, the State Commission directed the parties to file a supplemental PPA for approval of the Commission according to the said order. Thereupon, the distribution business conducted by the Power Transmission Corporation (R-2) was taken over by the Gulberga Electricity Supply Company Limited (R-1). Accordingly, the Appellant approached GESCOM for implementation of order dated 31.5.2007 passed by the State Commission.

14. On 11.9.2009, there was a meeting between the parties. In the meeting, the Appellant participated for enabling the resolution of the dispute. In the said meeting, the following factors have been high lighted. They are quoted as below:

“3. Chairperson, PCKL informed that Joint memo filed by the KPTCL/GESCOM and M/s. Bhagyanagar Solvent Extraction Private Limited was approved by the KERC and KERC ordered to arrange payment for 6 MW Power supplied at different rate and for energy supplied for 5 MW at different rate, in accordance with the KERC orders.

5. Director (Finance), KPTCL stated that payments arranged by KPTCL/GESCOM on prorata basis for 6 MW and 5 MW is not as per the Joint Memo and payments of arrears to be released for upto 6 MW as per 6 MW rate.

7. Chairperson, PCKL informed that KERC had fixed the tariff for energy supplied by the firm for 6 MW and 5 MW. Chairperson, PCKL stated that for supplementary PPA for 11 MW should be entered into and KERC approached for increased tariff.

8. The firm representative stated that the Joint Memo filed by KPTCCL/GESCOM had a clause that any increase rate considered for similar Bio-mass projects, the same shall be given to M/s. BASE also. Chairperson PCKL directed that orders of the KERC must be adhered to payments should be made as per the Joint Memo and supplementary PPA to be entered into.

15. Despite the decision taken in the said meeting, the GESCO, the first Respondent withheld the payment of arrears till 23.2.2010. In the meantime, supplemental PPA dated 31.12.2009 was drafted by the Respondent and the same was forwarded to the Appellant for its signatures. At this stage, the Appellant raised the issue of increase in the tariff in terms of clause 6 of the joint memo. The Appellant was directed by the Respondent in the meeting held on 9.11.2009 to approach the Commission for orders on the said issue. Under those circumstances, the Appellant initialled the supplemental PPA dated 31.12.2007 and forwarded it to the Respondent. Thereupon, the Respondent placed the same before the State Commission for approval. The relevant clause in the supplemental PPA is extracted hereunder:-

“(iii) The Power Purchase Agreement dated 18.10.2001 was terminated by KPTCL dtd: 5th July, 2003 for the reasons stated therein.

(iv) The Company disputed the validity of the termination of the Agreement by KPTCL filing the writ petition No.OP/34/06/1252 dated 01.08.2006 before Karnataka Electricity Regulatory Commission at Bangalore. Further,

on discussions both the parties have agreed and signed a joint memo dtd 17.05.2007.

(v) As per Electricity Act 2003, KPTCL is barred from trading electricity with effect from 10.6.2005. hence the PPA dated 18.10.2001 in respect of M/s. Bhagyanagar Solvent Extractions Pvt Ltd. was assigned to GESCOM by GOK vide its order dated 31.08.2005 and consequent orders.

(vi) Negotiations have been held between parties and they have arrived at a mutually acceptable settlement and signed a Joint Memo dated 17.05.2007 and the same was approved by KERC (Karnataka Electricity Regulatory Commission by order No. OPN/34/06/2778 dated 31.05.2007”.

16. At that stage, the Appellant sent a separate representation dated 7.1.2010 to the Commission requesting for the modification of the supplemental PPA by highlighting the fact that the clause 6 of the joint memo dated 17.5.2007 has not been given effect to. The relevant portion of the letter dated 7.1.2010 is given below:-

“As per the mutually agreed joint memo, the clause 6 mentions that increase in tariff will be considered only if similar Biomass project is given the increase”.

We request and seek your kind clarification on the above point No.6 of Joint Memo, wherein the same was disposed off favourably, in terms of Joint Memo by KERC on 17.5.2007”.

“As we have already explained above, we are eligible for the increase in tariff as applicable to the tariff of M/s. R K Powergen pvt. Ltd. and in this regard, we request the Hon’ble Commission to duly clarify our position (which was already agreed upon) arrived at mutually for due implementation”.

17. Though the same was received by the Commission, there was no intimation to the Appellant with regard to the consideration of the representation. Therefore, another similar representation was sent on 14.2.2010. In the meantime, the Appellant came to know that the Commission had already approved the supplemental PPA on 3.2.2010 without any reference to the Appellant’s representation dated 7.1.2010.

18. In the light of the above factual background, the questions that are framed in the present Appeal have to be gone into.

19. The main issue which revolves around all the questions that are framed in this present Appeal is as to whether the

supplemental PPA dated 31.12.2009 was fully in conformity with the order passed by the State Commission on 31.5.2007 on the basis of the joint memo filed by both parties on 17.5.2007. If the answer to this question is affirmative, then the question relating to the breach of principle of natural justice would not arise. Therefore, let us now deal with the question whether the terms of the joint memo dated 17.5.2007 as recorded in the order dated 31.5.2007 is in consonance with the supplemental PPA dated 31.12.2009 which has been approved by the State Commission by the order dated 3.2.2010.

20. According to the Appellant, the joint memo dated 17.5.2007 filed by both the parties approved by the Commission by the order dated 31.5.2007 has not been given effect to, by the State Commission through the impugned order dated 3.2.2010 as it has completely ignored the clause No.6 which is important, contained in the joint memo dated 17.5.2007. In short, the case of the Appellant is that the State Commission has ignored its

own order dated 17.5.2007 and 31.5.2007 while approving the supplemental PPA on 3.2.2010.

21. It is strenuously contended by the Appellant that the supplemental PPA dated 31.12.2009 was filed by the Respondent without the due signatures of the Appellant as the terms of the said supplemental PPA was not in line with the joint memo dated 17.5.2007 and also not in accordance with the order dated 31.5.2007 passed by the State Commission. It was also submitted that when the approval for supplemental memo filed before the Commission was pending, the Appellant sent the representation on 7.1.2010 raising his objections and praying for modification of the said supplemental PPA by suitably adding the term No.6 as contained in joint memo and despite the receipt of the same, the State Commission has not considered and blindly accepted the supplemental PPA even without hearing the Appellant.

22. Now let us quote the joint memo:

JOINT MEMO

Both the parties have discussed and on such discussion both the parties have agreed on the following:

(1) The payment upto March, 2007 to the Petitioner Company will be as per PPA (now revived) i.e. at MNES rate and the difference if any shall be paid by the Respondent Company.

(2) The Petitioner Company shall be paid for the electricity supplied from 01.04.2007 at Rs.3.85 /unit to be escalated thereafter at 2% per year non-cumulatively from base year 2006-07 for 6 MW of power supplied and over and above 6 MW shall be billed at Rs.2.85 from the date of COD with 2% non-cumulative escalation.

(3) Term of the PPA shall be 10 years from COD.

(4) Out of the pending arrears payment of arrears @ Rs.3.32/unit shall be made immediately as done in other cases.

(5) No LC is to be provide as payment is agreed to be made within 15 days from the date of the presentation of invoice.

(6) Increase will be considered only if similar Biomass project is given the increase.

With the above modification, the PPA shall stand revived from the date of termination and shall continue to be in force till 10 years from the COD. The parties will sign a supplementary agreement incorporating the

above on approval of the Commission to the above terms.

The above may kindly be recorded and the Petition may please be disposed off in terms of the same.

23. The reading of the above joint memo would indicate that both the parties have agreed to the terms 1 to 6 and requested the State Commission to dispose of the matter in terms of the same. Accordingly, the State Commission passed the order on the same day itself disposing the matter in terms of the joint memo and informed the parties that a detailed order will follow later.

24. Accordingly, the detailed order was passed on 31.5.2007. We will quote the entire order for the purpose of deciding the issue:

“The Petitioner Company is aggrieved by the impugned intimation date 05.07.2003 issued by the KPTCL terminating the Power Purchase Agreement (PPA) entered into between the Petitioner and the Respondent. Notices were issued to both the parties and their Counsels were heard. The facts of the case as stated by the Petitioner are briefly as under:

(1) *The Petitioner had entered into a PPA with the KPTCL in respect of a 6 MW capacity Bio-mass Power Project on 18.10.2001. The PPA had been approved by the Commission. The Petitioner Company had obtained necessary statutory clearances for setting up of the project and had also finished construction of the project by obtaining loan of Rs.1695 lakhs from IREDA. However, it received the impugned intimation dated 05.07.2003 from the KPTCL terminating the said PPA with immediate effect. Copy of the said intimation is filed. For the reasons stated in the said petition, the petitioner has argued that termination of the PPA which had been approved by the Commission is bad in law and there was no reason for terminating the PPA as the Petitioner had complied with all the terms of the contract stated in the PPA. Based on the above, it was pleaded that the PPA entered into on 18.10.2001 between the two parties be declared as valid and subsisting. It was also pleaded that appropriate directions be issued to the Respondent to continue with the purchase of power from approved additional capacity in accordance with the terms and conditions of the PPA.*

(2) *The Respondent had objected to all the contentions raised by the Petitioner Company and they have also filed written objections in this regard. While the appeal was being heard, the Counsels from the Petitioner and the Respondents submitted that they were trying to settle the matter and will file a joint Memo after the issue is settled between them. Accordingly, they have filed a joint memo on 17.5.2007 stating the following:*

JOINT MEMO

Both the parties have discussed and on such discussion both the parties have agreed on the following:

(1) The payment upto March, 2007 to the Petitioner Company will be as per PPA (now revived) i.e. at MNES rate and the difference if any shall be paid by the Respondent Company.

(2) The Petitioner Company shall be paid for the electricity supplied from 01.04.2007 at Rs.3.85 /unit to be escalated thereafter at 2% per year non-cumulatively from base year 2006-07 for 6 MW of power supplied and over and above 6 MW shall be billed at Rs.2.85 from the date of COD with 2% non-cumulative escalation.

(3) Term of the PPA shall be 10 years from COD.

(4) Out of the pending arrears payment of arrears @ Rs.3.32/unit shall be made immediately as done in other cases.

(5) No LC is to be provide as payment is agreed to be made within 15 days from the date of the presentation of invoice.

(6) Increase will be considered only if similar Biomass project is given the increase.

With the above modification, the PPA shall stand revived from the date of termination and shall continue to be in force till 10 years from the COD. The parties will sign a supplementary agreement incorporating the above on approval of the Commission to the above terms.

The above may kindly be recorded and the Petition may please be disposed off in terms of the same.

*ADVOCATE FOR PETITION For Bhagyanagar Solvent
Extraction Pvt. Ltd.*

*ADVOCATE FOR RESPONDENT For Karnataka Power
Transmission Corporation*

This Joint Memo has been signed by the representatives of the Petitioner as well as the Respondent.

(3) The Commission has considered the facts of the case and the Joint Memo carefully. It is from the record that the PPA for setting up of 6 MW Bio-Mass Projects was approved by the Commission. Subsequently, the capacity of the plant was enhanced to 11 MW after getting necessary clearance from the Government of Karnataka. The Respondent, KPTCL, had sought the approval of Commission for the draft PPA initialed with the Petitioner. The proposal was for the increased capacity of 11 MW for which there was no approval from the Commission. The Commission by its letter dated 18.11.2004 had returned the said PPA as the PPA had been received after 10.6.2004. It had been intimated earlier to the KPTCL that the draft PPAs in respect of NCE projects received in the Commission on or after 10.6.2004 will be considered only after the determination of the tariff for the NCE projects as per Electricity Act, 2003. Since the said PPA had been received after 10.6.2004, the same was returned for re-submission after the tariff in respect of NCE projects was determined by the Commission as per Order dated 18.01.2005 wherein the tariff for Bio-Mass projects was determined at Rs.2.85 per unit with 2% annual escalation. The revised PPA is yet to re-submitted for approval for the

Commission. In the facts of the case, and in view of the Joint Memo filed by the parties, the impugned intimation dated 05.07.2003 terminating the PPA is no longer effective and the said PPA dated 18.10.2001 will be valid and subsisting.

(4) Regarding the tariff payable, it is clarified that the Petitioner Company be paid for 6 MW power supplied upto March, 2007 at the MNES rates and from 01.04.2007 @ Rs.3.85/- per unit to be escalated thereafter at 2% per annum non-cumulatively from base year 2006-2007. For the remaining 5 MW power supplied, the Petitioner will be paid at Rs.2.85 per unit from the date of COD with 2% non-cumulative escalation. The parties will file a supplementary PPA for approval of the Commission on the above lines.

The Petition is accordingly disposed”.

25. Careful perusal of this order would indicate whatever the terms referred to in the joint memo agreed upon by the parties had been specifically mentioned in this order also. However, it is not very clear from the order if all the conditions of the Joint Memo have been approved and if some conditions have not been approved, then the reason for not accepting the same.
26. Thereafter, the supplemental agreement was prepared by the Respondent and sent for the signatures of the

Appellant. Since Appellant felt that the supplemental agreement had not been properly drafted, he raised an objection in the meeting held on 11.9.2009. The relevant portion of the minutes of the meeting held on 11.9.2009 is as follows:-

“(3). Chairperson, PCKL informed that Joined memo filed by the KPTCL/GESCOM and M/s. Bhagyanagar Solvent Extraction Private Limited was approved by the KERC and KERC ordered to arrange payment for 6 MW power supplied at different rate and for energy supplied for 5 MW at different rate, in accordance with the KERC orders.

(4). Managing Director, GESCOM informed that in spite of repeated request from GESCOM, firm has not come forward for signing of supplementary PPA for 11 MW.

(5) Director (Finance), KPTCL stated that payments arranged by KPTCL/GESCOM on prorata basis for 6 MW and 5 MW is not as per the Joint Memo and payments of arrears to be released for upto 6 MW as per 6 MW rate.

(6) Chairperson, PCKL informed that apportioning of the energy for 6 MW and 5 MW is not correct, since unit size is one number of 11 MW.

(7) Chairperson, PCKL informed that KERC had fixed the tariff for energy supplied by the firm for 6 MW and 5 MW. Chairperson, PCKL stated that for supplementary PPA for 11 MW should be entered into and KERC approached for increased tariff.

(8) The firm representative stated that the Joint Memo filed by KPTCL/GESCOM had a clause that any increase rate considered for similar Bio-mass Projects, the same shall be given to M/s. BASE also. Chairperson, PCKL directed that orders of the KERC must be adhered to payments should be made as per the Joint Memo and supplementary PPA to be entered into.

(9) Regarding signing of supplementary PPA, MD GESCOM informed that, supplementary PPA document for 11 MW shall be provided to the firm on 14th September, 2009”.

27. Since the supplemental agreement was not prepared in accordance with the joint memo, the Appellant insisted for the compliance of the clause 6 of the joint memo relating to the eligibility for the increase in tariff as applicable to the tariff of others.

28. The Respondent suggested that this could be urged before the Commission before deciding the approval of the supplemental agreement. In pursuance of the said suggestions, the Appellant had sent a representation to the State Commission on 7.1.2010 especially requesting for clarification with respect to the application of the applicability of

the tariff as agreed to in the joint memo. The said representation is as follows:-

*“Bhagynagar
Solvent Extractions Pvt. Ltd.*

*Chennai
07.01.2010*

*The Secretary,
Karnataka Electricity Regulatory Commission,
6 & 7 Floor, Mahalaxmi Chambers,
M.G. Road,
Bangalore-1.*

Respected Sir,

Sub: Request for clarifications with respect to the application of the eligible tariff as agreed to in the Joint Memo & KERC order dated 31.05.2007.

We profoundly thank you for your clarification dated 16.12.2006 on which basis the joint memo we had signed on 17.05.2007 had been given effect to.

As per the mutually agreed joint memo the clause 6 mentions that “increase in tariff will be considered only if similar Biomass project is given the increase”.

We request and seek your kind clarification on the above point No.6 of Joint Memo, wherein the same was disposed off favourably, in terms of Joint Memo by KERC on 17.05.2007.

In the light of the same, we put forward the following for kind consideration:

(1) Our case is similar and ditto to Biomass Power Project of M/s. R K Powergen Pvt Ltd., wherein ironically both the companies are identical almost like twin brothers with same date of birth i.e. the date of signing PPA being 18.10.2001. Incidentally, we qualify better since our Commercial Operation Date (COD) is September, 2003 whereas for R.K Powergen, it is February, 2004. Hence, ours is a better case to be considered with similar treatment and or parity for the increase in tariff as the present billing of M/S. R K Powergen is around Rs.4.66 per unit against a similar project of our is billed at Rs.4.08 per unit.

(2) In another similar situation for those companies (M/s. Indira Power, M/s. Poweronics and M/s. Koppal Green), who arrived settlement subsequent to our joint memo, were given increase in tariff of Rs.4.03 per unit from 01.04.2007 with base year 2006-07 against Rs. 3.92 per unit from 01.04.2007 with base year 2006-07 given to us.

As we have already explained above, we are eligible for the increase in tariff as applicable to the tariff of M/s. R K Powergen Pvt. Ltd. and in this regard, we request the Hon'ble Commission to duly clarify our position (which was already agreed upon) arrived at mutually for due implementation.

Yours faithfully,

*Sd/-
Authorised Signatory
(M/s. Bhagyanagar Solvent Extractions (P) Ltd)".*

29. Admittedly, this objection was never considered by the State Commission even though it was pointed out that there is a variation between the joint memo and the supplemental PPA. It can not be disputed that in the supplemental agreement clause 6 of the joint memo dated 17.5.2007 has not been given effect to. As per clause 6 of the joint memo dated 17.5.2007, increase of tariff will be considered when similar Biomass projects are given the increase. According to the Appellant as mentioned in the representation dated 7.1.2010, the other projects namely M/S. R K Powergen Private Limited is getting around Rs.4.66 per unit whereas the Appellant's projected is billed at Rs.4.08 per unit. Similarly, the Appellant has pointed out some other Companies like M/s. Indira Power, M/s. Poweronics and M/s. Koppal Green have been given the increase in the tariff but even then no such increase has been given to the Appellant.

30. Under those circumstances, it can not be said that the supplemental PPA filed on 31.12.2009 was in consonance with the joint memo dated 17.5.2007. So when it was pointed out by Appellant that this PPA was not in consonance with the Joint Memo and it was the bounden duty of the Commission to hear the Appellant with reference to failure to give effect to the clause No.6 of the joint memo in the PPA, more so when the Commission received the representation on 7.1.2010 raising an objection for non conclusion of clause 6 of the joint memo and its order dated 31.5.2007 did not clearly indicate acceptance of all the conditions of the joint memo or reason for non-acceptance of any of the conditions set out in the joint memo.

Summary of Our Findings

31. The orders passed by the State Commission on 17.05.07 and 31.5.07 would clearly indicate that the joint memo filed by both the parties, agreeing to all the six terms, was noted by the State Commission. Accordingly, the State Commission directed both the parties to file the

supplemental PPA. Admittedly, the supplemental PPA dated 31.5.07 filed by the Respondent does not refer to clause 6 of the joint memo. The Appellant, complaining about the non inclusion of said clause 6 of the joint memo thereby, the increase in tariff have to be considered if similar Biomass Project is given the increase, has sent a representation dated 7.1.2010 to the State Commission. Even then, the State Commission without proper verification as to whether the supplemental PPA dated 31.12.09 was in conformity with the joint memo dated 17.5.07 and without giving an opportunity of hearing to the Appellant with reference to its objections contained in its representation dated 7.1.2010, has simply approved the supplemental PPA. The State Commission should have heard the Appellant especially as its order dated 31.5.2007 did not clearly spell out whether it had approved all the terms and conditions of the joint memo and if not, reason for not approving some of the conditions.

32. Thus, the impugned order approving the supplemental Agreement has been passed without considering the objections raised by the Appellant regarding non-inclusion of Clause 6 of the Joint Memo dated 17.5.07 and so the same is liable to be set aside.

33. Accordingly, the same is set aside and the matter is remanded back to the State Commission to consider the objection raised by the Appellant and after hearing both the parties, the State Commission may pass a reasoned order.

The Appeal is allowed. No order as to cost.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 25th July, 2011

REPORTABLE/NON-REPORTABLE