Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No. 5 of 2011

Dated : 11th January,2012

Coram; HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER
HON'BLE MR. JUSTICE P.S. DATTA, JUDICIAL MEMBER

IN THE MATTER OF :

M/s Orange Country Resorts
And Hotels Limited,
St Patrick's Business Complex,
2nd Floor, Museum Road,
Bangalore- 560 025
(Represented by its General Manager …. Appellant

Versus

1. Karnataka Electricity Regulatory Commission
   6th & 7th Floor, Mahalaxmi Chambers,
   No. 9/2, M.G. Road,
   Bangalore- 560 001
   (Represented by its Chairman)

2. Hubli Electricity Supply Company Limited
   Navanagar B.P. Road,
   Hubli- 580 029
   (Represented by its Managing Director)

3. Karnataka Power Transmission
   Corporation Limited
   Kaveri Bhavan, Kempegowda Road,
   Bangalore-560 -009
   (Represented by its Managing Director)

4. State Load Dispatch Centre For Karnataka

Anand Rao Circle,
Bangalore -560 009
(Represented by its Chief Engineer)

5. Chamundeshwari Electricity Supply
Corporation Limited,
L.J. Avenue, New Kantharaj Urs Road,
Saraswathipuram Mysore-570 009
(Represented by its Managing Director) … Respondents

JUDGMENT

HON'BLE MR. JUSTICE P.S. DATTA, JUDICIAL MEMBER

The appellant M/s. Orange County Resorts & Hotels Ltd. which is a Company under the Companies Act, 1956 established a 0.6 MW wind energy captive power plant for its installations at two places in the State of Karnataka. Apart from consent having been given by the Government of Karnataka the appellant has also obtained in -principle approval from the respondent No.4, State Load Dispatch Centre for Karnataka for wheeling and banking agreement (WBA) in respect of the above two installations. The respondent No. 1 is the Karnataka State Electricity Regulatory Commission, the respondent No. 2 Hubli Electricity Supply Co. Ltd. and respondent No. 3 Karnataka Power Transmission Co. Ltd. and the two State Government Authorities responsible for giving consent for wheeling and

banking agreement. Respondent No. 2 is the Company with whom the appellant has banked the energy that it produced in its plant. Chamundeshwari Electricity Supply Corporation Ltd. Is a government company engaged in distribution and transmission of electricity from whom the appellant is said to have been taking supplies for its installations during the period when the matter of execution of WBA was pending for consideration with the concerned respondents. Appellant entered into an agreement with the Government of Karnataka on 22.9.2007 for the purpose of establishing a 0.6 MW captive power plant.

2. On 3.12.2007 the respondent No. 3, according to the appellant, accorded its consent for wheeling and banking agreement through a letter the contents of which were later modified by the respondent No. 3 itself through a subsequent letter dated 10.12.2007. It goes without dispute that the captive power plant of the appellant was commissioned on 31.3.2009 and the appellant contends that the power was injected/transferred to respondent No. 2 for banking with them. The appellant obtained a certificate on 4.4.2009 regarding

commissioning of the project on 31.3.2009 but the appellant was not in a position to utilize the power because the respondents nos. 2 and 3 were yet to sign the WBA. It is the case of the appellant that to expedite the process of executing of WBA the appellant made several representations including one on 9.6.2009 to the respondent No. 2 who along with the other respondents allegedly delayed the execution of the WBA. On 15.10.2009 the respondent No. 4, the State Load Dispatch Centre for Karnataka accorded its approval for execution of WBA subject to incorporation of two fresh clauses namely clause 5.1 (b) and clause 5.1 (c) and asked the appellant to approach the respondent No.2 and 3 for further action. Accordingly, the appellant by letter dated 15.10.2009 approached the respondent No.2 who by letter dated 4.11.2009 compelled the appellant to accept the above two clauses suggested to be incorporated by the respondent No.4 in the WBA. Immediately the appellant vide its latter dated 5.11.2009 accepted the incorporation of the two clauses and finally the appellant and the respondent No. 3 signed the WBA on 7.11.2009. On 17.11.2009 respondent No. 3 forwarded the

WBA after it has signed to the respondent No. 2 for its signature. The respondent No.2 signed the WBA on 30.12.2009 and meanwhile respondent No. 3 also having signed the WBA submitted the same to the Commission for its approval on 18.1.2010. According to the appellant, the State Commission declined to give its approval to the WBA on the ground that inclusion of the new clauses were under challenge before the Commission. At this stage the appellant made further representation on 25.1.2010 to the respondent No.3. In this way a year rolled by and because of non approval of the WBA the electrical energy generated by the appellant in its CPP during the period from 31.3.2009 to 31.3.2010 was deposited with the respondents. The total energy so deposited was 1040940 units the value of which, if calculated on the basis of High Tension -2 (b) tariff came to be Rs.52,29,425/- as on 31.3.2010. The appellant demanded against the respondents for payment of a sum of Rs. 52,29,425/- at the HT-2(b) tariff rate but the respondents did not pay. According to the appellant, even after March, 2010 the appellant produced more electrical energy than what was required for its

installations and as against total production of 1050000 unit per annum the appellant's consumption was about 8.75000 units. Appellant filed a petition being OP No. 14 of 2010 before the Commission on 17.3.2009 seeking directions to the respondents to sign the WBA and to make payment towards the energy generated by the appellant and deposited with the respondent No.1. During the pendency of this petition the respondent No. 2 forwarded the WBA to the Commission for approval.

3. After approval of WBA by the Commission the appellant issued "C form" to the respondent No. 2 for wheeling the energy generated in the month of April for captive use to the appellant's installations in the month of May, 2010, similar form C was further issued for the months from May to November, 2010 after approval of the WBA and issuance of form C for the month of April, 2010. The Commission disposed of the petition No . 14 of 2010 on 1.7.2010 holding that the said petition had become in fructuous but while deciding the prayer of the appellant regarding payment of electricity generated by it in its CPP and

deposited with the respondent No.2 the Commission made the following order

"11. Then next question that arises for consideration is that what shall happen to the energy pumped by the petitioner to the grid till signing of wheeling and banking agreement.

12. Admittedly the petitioner is a generating company and producing electricity after making substantial investment. It was also not the intention of either of the parties to treat the electricity generated be supplied free. In the circumstances of this case we deem it proper to order the respondents to pay the petitioner for the energy pumped to the grid at the rate of FRs.3.40 (which is the rate fixed by this Commission to the wind energy). The respondents may pay this in cash or adjust against the charges payable by the petitioner in future either towards wheeling and banking charges or electricity charges to respondents."

4. It is this order dated 1.7.2010 which is under challenge in this appeal on variety of grounds as narrated hereunder:

(i) The amount to which the appellant was found and held to be entitled should have been paid to the appellant without leaving the amount to be adjusted by the respondents.

(ii) The impugned order is vague and superfluous because as the appellant is producing 10,50,000 units per annum, whereas total consumption from both the installations is about 8,75,000 units the question of adjustment is misnomer.

(iii) There was delay and latches on the part of the respondents in execution of the agreement.

(iv) The rate determined by the Commission for payment of the electricity generated by the appellant and deposited with the respondent no.2 is not reasonable and justified.

(v) The power supply to the appellant's installations in Kabini under the fourth respondent being R.R.No.HTS-9 is restricted to about four hours, while for remaining 20 hours of supply the appellant is depending on diesel which causes loss to the appellant. Thus the banked

energy, even it is carried forward cannot be adjusted for future consumption. The energy surplus, therefore, will remain.

(vi) The Commission overlooked the fact that the appellant spent huge amount of money, say Rs. 3.45 crores for setting up the project and suffered loss on its capital investment as also on the working of the project and also towards purchasing power from the respondent no.5 under HT – 2(b) tariff.

(vii) The Commission overlooked the fact that because of want of WBA it was the respondent no.2 who utilized the electrical energy to satisfy its consumers.

(viii) The Commission failed to note that the respondent no.2 utilized 1040940 units of power and it collected charges at HT-2(b) tariff from its consumers, therefore, the respondents are liable to pay to the appellant the same amount for the energy deposited with it.

(ix) The appellant purchased power by paying Rs.4.85 per unit till November, 2009 and then from onwards at Rs. 5.60

per unit. Therefore, the respondents are liable to the appellant at the same rate for the power it has obtained from them.

(x) The Commission overlooked the fact that the appellant was entitled to interest against the respondent.

5. Respondents no. 3 and 5 filed a joint counter affidavit while the other respondents including the Commission did not file any counter. The points contended by the respondents no. 3 and 5 are summarized hereunder:

i) Though the State Load Dispatch Centre granted in principle approval for wheeling and banking of electrical energy subject to concurrence from the respondents no.2,3,4,and respondent no.5, for the reasons best known to the appellants its plant was only commissioned on 04.04.2009 i.e. nearly 16 months after grant of wheeling and banking. On 17.07.2009 the appellant approached the respondent for execution of WBA but the particulars were insufficient and the appellant was directed to file additional information on

07.08.2009 and it was on 07.11.2009 that WBA was executed.

ii) It was the appellant who was responsible in commissioning of the project and the respondent no.2 was not liable to reimburse the appellant for the energy charges at HT-2(b) tariff rate.

iii) Subsequent to the execution of WBA, the appellant failed to follow the procedure enumerated in draft of the WBA approved by the Commission on 11.07.2008 and it was pointed out that as per Article 6 of the said agreement, the onus was on the appellant to furnish to the respondent Form C in order to enable the respondent to facilitate wheeling of energy, which the appellant failed to do so. As late as 26.05.2010 the appellant did not furnish to the respondent Form C for processing wheeling facility. Had the C form been submitted earlier after signing of the agreement then the request for wheeling facility would have been granted immediately.

iv) Till the date of signing of the WBA on 07.11.2009 the appellant was not entitled to wheeling and banking facilities. There is nothing to show that the respondents deliberately attempted to delay the execution of the agreement, as such the Commission rightly concluded that the appellant would not be entitled to the refund of charges paid by it as a consumer to the fourth respondent. However, with regard to the power pumped into the grid until the date of signing of the WBA the Commission directed the respondent to pay to the appellant @ Rs. 3.40 paisa which was rate fixed by the Commission in its tariff order for Wind Energy either in cash or adjust the charges towards future wheeling and banking charges or electricity charges payable to the respondents.

v) The Commission rightly held that until the date of signing of the agreement on 07.11.2009, the appellant was not entitled to WBA facility, as such it cannot be

said that during the period of correspondence between the parties, wheeling and banking agreement was denied to them.

vi) The rationale behind the option to the respondents to adjust the payable amount towards future charges was that there were two distribution companies and the operation with regard to payment for adjustment would have to be made by them and either way the appellant would be paid for the energy so supplied by it.

vii) The appellant was not entitled to interest because there was no agreement subsisting between the parties to that effect. The State Commission after considering the cost incurred by the appellant in generating electricity awarded Rs. 3.40 paise per unit. The basis on which the State Commission has awarded Rs. 3.40 per unit to be payable to the appellant for the electricity supplied by them before executing a wheeling and banking agreement is reasonable and proper.

viii) The contention of the appellant that it generated and deposited with the respondents 1040940 units of energy from 31st March, 2009 to 31st March, 2010 is false and it is equally baseless and untenable that the respondents are liable to pay to the appellant a sum of Rs. 52,29, 425/- for the electricity generated by the appellant till 31st March, 2010 at HT -2(b) tariff rate.

6. The pleadings raised the following issues:

i) Was the Commission justified in circumstances of the case in giving option to the respondents to the adjustment of the payable amount instead of payment in cash without giving any option or opportunity of hearing on that score to the appellant?

ii) Was the Commission justified in directing adjustment when there was always surplus production?

iii) Whether the Commission was legally justified in determining the correct and reasonable tariff rate for electricity produced in captive generation plant of the appellant for want of WBA deposited with the

respondent no.2 who in turn utilized the same for supply to the consumers.

iv) Whether there was delay and latches on the part of the respondents in execution of WBA with the appellant?

v) Whether the appellant was entitled to interest?

vi) Whether the appellant was entitled against the respondents the amount at the tariff rate which the respondent no.2 charged against its own consumer.

vii) whether the Appellant was responsible for the delay in the matter of execution of wheeling and banking agreement with the Respondents as alleged by.

7. We have heard the learned counsel for all the parties and having perused the order of the Commission which is a brief one it appears to us that the matter lies in small compass. The main grievance of the Appellant is that the Respondents caused delay in having the WBA finalised as result of which the Appellant had to put in a total 1040940 units of energy into the grid of the Respondents which utilised the supply for distribution to the

consumers for commercial purpose and thereby put the Appellant to loss. The second grievance is that the Commission was not justified it directing for adjustment for price of electricity generated by the Appellants and utilised by the Respondents. Third grievance is that since there was inordinate delay in directing for payment of the money the Appellant is entitled to interest against the Respondents. The fourth grievance is that the Appellant was entitled against the Respondents the amount at the tariff rate which the Respondent No. 2 charged against its own consumption.

8. It was small wind energy captive power plant of the Appellants with capacity of 0.6 MW. It cannot be gainsaid that the law, with the abolition of the state monopoly, encourages co-generation and generation of renewable sources of energy. Again, the law encourages open access so that a generator is free to make supply to consumer of his choice through open access subject to payment of surcharge. It is not in dispute that the project was commissioned commercially on 31st March 2009, and a certificate to that effect was issued on 4th of April

of 2009. It is also not in dispute that the power generated by the Appellant was put to the grid of the Respondent No. 3 and it is the Respondent NO. 4, the State Load Dispatch Centre that was responsible for grant of wheeling facilities in order for the Appellant to supply through open access. It is also not in dispute that between the period from 31.03 2009 to 31.03 2010, the Appellant generated and deposited with the Respondents 1040940 units of energy and the value of such energy if calculated on the basis of H T-2(b) is a sum of Rs. 5229425/-. The contention of the Respondent No. 3 and 5 that is was the appellant who was responsible for the delay if finalising the WBA cannot be accepted because the chronology of events beginning with 22.09.2007 when the Appellant executed agreement with the Government for establishing 0.6MW captive generating plant would reveal that at each step, as was required of the appellant to take, the appellant has been prompt because it had to ensure that with utmost expedience the power is sold to its desired customers through the execution of WBA . The argument of the Respondent No. 3 and 5 as to why the Appellant caused delay in commissioning

the project only on 31st March 2009 when it executed an agreement with Government as far back as 22nd September 2007, is totally meaningless because it was on 31st March 2009, when the cause of action arose and the appellant does not seek for any commercial benefit against any of the Respondents prior to 31st March 2009 . Secondly, the argument of the Respondent of 3 and 5 that subsequent to the execution of WBA the appellant failed to follow the provider enumerated in the draft of WBA since approved by the Commission at later point of time is difficult to accept because the correspondences do not reveal that at any point of time the Respondent No 3 and 5 consistently made out any case that because of non submission of Form C the WBA could not be finalised. It appears from the correspondences that on 9.06.2009 the appellant requested the Respondent 2 for approval for signing of WBA . Two months later the Respondent No. 2 asked the appellant for government order within a few days that is 12.08.2009 the Appellant forwarded to the Respondent No. 2 a copy of the government order and at the same time it wrote to the Respondent No. 3 to issue a fresh consent latter or have the

latter 10.09. 2007 revalidated. The Respondent No. 3 by letter dt. 14.09.2009, asked the Respondent No. 2 if, the Appellant had executed any power purchase agreement with the Respondent No. 2. On 22.09.2009 the Respondent No. 2 wrote to Respondent No. 3 that no agreement was entered into between the Appellant and Respondent No. 2. In fact, this was not necessary. On 15.10.2009, the "State Load Dispatch Centre wrote to the Appellant that it should approach the Respondent No. 2 and 3 for the purpose of finalisation of WBA provided incorporation was made of the two clauses in the agreement. On 4.11.2009, the Respondent No. 2 wrote to the Appellant that the agreement would be signed by it on 17.11.2009, the Appellant then wrote to the Respondent No. 2 on 5.11.2009, that is very next date to do the needful in the matter of signing of agreement on 17.11.2009 the Respondent No. 2 asked the Respondent NO. 3 to sign the agreement as per the standard draft approved by the KERC vide Commission's order dated 11.07.2008 on 30.12.2009 the Respondent No. 3 informed to Respondent No. 2 that it signed the agreement on 25.01.2010, the Appellant wrote to the Respondents No3 requesting it

instruct Respondent No. 2 so that, it could draw power for its own captive consumption. It does not appear that the Appellant was responsible for such inordinate delay in the matter of execution of the WBA It was Respondent No. 2 and 3 who were instrumental in exchanging correspondence in whole matter.

9. In such circumstance the Appellant was without any alternative but to supply power to Respondents No. 2 and 3. The Commission was of course right in observing that the Respondents are liable to pay on account of the energy consumed often upon supply by the Appellant but having regard to the totality of the circumstance it ought to have left the matter of payment having rested there instead of giving scope to the Respondent to detriment of interest of the Appellant for adjustment of the amount. This is more so when the power plant was very small one with commissioning only a year ago and that the Appellant had invested a considerable amount for installation of the project. This answers issue No. 1 and 2.

10. On the question whether the Commission was legally justified in not fixing the price of the energy at par with price at which the Appellant purchased from Respondent No. 5 it has to be stated that the date 7th November 2009, is the date when the Appellant signed the WBA along with the Respondent No. 3. The delay in the matter of finalisation of the WBA has two parts. The first part ranges between 22.09.2007 and 7.11.2009, while second part ranges between 8.11.2009 and 24.02.2010. It is very difficult to determine as to which of the two Respondents namely the Respondent No. 2 and 3 is more responsible than the other in causing delay but both are responsible but to argue that the Respondents were not serious enough in bringing the WBA into a reality is not to argue that that should be a contributing factor in fixing the price of energy supplied to the Respondents at the price at which the Appellant purchased energy from the Respondent No. 5. The matter of the fact is that a sum of Rs. 3.40 was the rate fixed by the Commission for the Wind Energy. The Appellant's is also a Wind Energy Project. Accordingly, the Commission can not

be faulted with in fixing the price of the energy at Rs. 3.40 per unit. This answers the issue no. 3,4, and 6.

11. The last point is whether the Appellant is entitled to interest. The matter of the fact is that till now the appellant has not been paid the value of the energy produced by it and utilised by the Respondent. It is true that there was no contractual agreement between the concerned parties for payment of interest in favour of the appellant in the event of any eventuality but the fundamental principle is that when the decree is for the payment of money the decree holder is normally entitled to interest for any period including the period from the date of institution of suit till the date of payment. For the appellant the cause of action originated with the supply of energy. It is open for the court to award interest either from the date of the suit to date of decree, or from the date of the suit till payment post decree or from the date of the decree till payment according to the circumstance as would be warranted in given situation. Withholding of payment for long period is a circumstance conducive to the appellant's case that it is entitled to interest. Since, there is no contractual rate of interest, according to us,

justice would be met if the Respondent are asked to pay interest at 6% per annum from the date of the application made before the Commission and the date of the order of the Commission. This answers issue No. 5.

12. Accordingly, we allow the appeal to the extent indicated above. That is, we direct the Respondents 2 to pay to the appellant at the rate fixed by the Commission in the impugned order for the total quantum of energy utilised by them within a period of three months from the date of this order along with interest at the rate of 6% per annum from the date of the application made before the Commission and the date of the impugned order of the Commission. No cost.

(Justice P.S.Datta)
Judicial Member

(Rakesh Nath)
Technical Member

KS