

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.320 of 2013
AND
APPEAL No.322 of 2013

Dated:28th April, 2014

Present:

HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

APPEAL No.320 of 2013

In the Matter of:

M/s. Indowind Energy Limited
Kothari Building, 4th Floor,
114, M G Road, Nungambakkam,
Chennai-600 034

...Appellant

Versus

- 1. Karnataka Electricity Regulatory Commission,**
6th & 7th Floor,
Mahalaxmi Chambers,
No.9/2, M.G. Road,
Bangalore-560 001
- 2. Bangalore Electricity Supply Company Limited**
K R Circle,
Bangalore-560 001

...Respondent(s)

Counsel for the Appellant(s) : Mr. Shridhar Prabhu

Counsel for the Respondent(s): Mr. Anand K Ganesan
Ms. Swapna Seshadri

APPEAL No.322 of 2013

In the Matter of:

**M/s. Indowind Energy Limited
Kothari Building, 4th Floor,
114, M G Road, Nungambakkam,
Chennai-600 034**

...Appellant

Versus

**1. Karnataka Electricity Regulatory Commission,
6th & 7th Floor,
Mahalaxmi Chambers,
No.9/2, M.G. Road,
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**2. Bangalore Electricity Supply Company Limited
K R Circle,
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...Respondent(s)

Counsel for the Appellant(s) : Mr. Shridhar Prabhu

Counsel for the Respondent(s): Mr. Anand K Ganesan
Ms. Swapna Seshadri

J U D G M E N T

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

1. Both these Appeals are disposed of by this Common Judgment since the parties as well as the issues are the same.
2. The Appellant is a Wind Generating Company having two projects one having a capacity of 7.5 MW and another 10.5 MW capacity Wind Power Project.
3. Karnataka State Commission is the First Respondent. Bangalore Electricity Supply Company Limited (BESCOM), the Distribution Licensee is the Second Respondent.
4. The Appellant and the Distribution Licensee (R-2) have entered into PPA in respect of these two projects on 2.4.2008. Thereupon, these two projects were commissioned on 28.3.2009.
5. Under Article 6.5 of the PPA, the BESCOM (R-2) was required to establish and maintain an irrevocable Letter of Credit and make it operational prior to the Commercial Operation Date.

6. In terms of the directions of Government of Karnataka all the Distribution Companies were required to put in place the mechanism of Letter of Credit in terms of the PPA. Accordingly, BESCO (R-2) established the Letter of Credit in favour of the Appellant in August, 2012 and sent the same to the Appellant.
7. On 5.9.2012, the Appellant issued invoices to the Distribution Licensee (BESCO) (R-2) towards the power supplied to the Distribution Licensee during the month of August, 2012.
8. Since the Letter of Credit was established by the Distribution Licensee, the monthly bill for the month of August, 2012 was paid on 21.9.2012 after deduction of rebate @ 1.8% of tariff invoice. Disputing the deduction, various correspondence were exchanged between the Appellant and the Distribution Licensee with regard to the manner of calculations of Letter of Credit amount as well as the right to avail rebate from the monthly tariff invoices of the Appellant.
9. Since, the correspondence between the parties did not fructify, the Appellant filed two Petitions in OP No.3 of 2013 on 5.2.2013 and in OP No.4 of 2013 on 12.02.2013 seeking for an appropriate interpretation of Article 6.5 and consequently praying for the direction for the refund of the rebate deducted by the Distribution Licensee (R-2).

10. The main prayer made in these Petitions was for declaration that the deduction effected by the Distribution Licensee, month on month basis towards the Letter of Credit Charges as per article 6.5 of the PPA are ultra-vires of the PPA and for consequent directions to refund the amount deducted along with interest of 2% per month from the date of illegal reduction to the date of repayment in full.
11. The Distribution Licensee (R-2) appeared before the State Commission and objected to the above prayer. Ultimately, on 19.9.2013, the State Commission passed the Common Impugned order rejecting both the Petitions filed by the Appellant.
12. As against these orders passed in OP NO.3 of 2013 and OP No.4 of 2013 the Appellant has filed these Appeals in Appeal No.322 of 2013 and 320 of 2013 respectively.
13. Challenging the Common Impugned Order, the learned Counsel for the Appellant has made the following submissions:
 - (a) The prime ground on which the State Commission has rejected the Petition is that the PPA is a statutory contract and the parties to the PPA cannot privately alter the terms therein. This ground is

untenable and opposed to law. The PPA is not a statutory contract. It is a commercial contract executed between the parties for supply of power. The PPA had not been executed by the State. As such, no sovereign duty is being discharged under the contract. Hence, by no stretch of imagination, Letter of Credit opening can be termed as statutory.

(b) If the PPA has to be termed as a statutory contract, then the Letter of Credit ought to have been opened 30 days prior to the Commercial Operation Date as per the PPA. Admittedly, in this case, the Distribution Licensee did not open the same within that period. The letter of Credit came to be opened only during the month of August, 2012 i.e. 3½ years beyond the time frame envisaged under the PPA. When the Letter of Credit was not in existence due to the failure to open the Letter of Credit, no deductions whatsoever were made. In fact, even after the Letter of Credit was returned, the deductions were being effected. This is not valid in law.

(c) Even according to the Distribution Licensee, a Letter of Credit was opened as per the directions issued by Government of Karnataka. Therefore, the Letter of Credit was not opened as per the terms of the PPA.

Hence, it does not qualify for a rebate. The very fact that the letter of Credit is opened after several years of commissioning date, it cannot be qualified as a Letter of Credit as per the terms of the PPA.

(d) A Letter of Credit is to be opened by the Distribution Licensee for the sole benefit of the Appellant. Once any instrument is made for the sole benefit of one contracting party and when such beneficiary rejects such benefit, the deductions cannot be thrust upon him. Where stipulation is exclusively for the benefit of one contracting party, such party can waive it unilaterally.

(e) The Letter of Credit Clause is not a rebate Clause. Any rebate envisages incentives to the prayer if the payments are made well before the payment deadlines. No rebate is offered when the payments are made on usual course. A rebate clause is structured as an independent Clause never linked to the opening of any payment security mechanism. As per Article 6.5 (V) of the PPA, the Letter of Credit has to be renewed before 60 days of its expiry. Admittedly, this was not complied with. Therefore, it cannot be said that it is a Letter of Credit under the PPA.

14. On these grounds, the learned Counsel for the Appellant prayed for setting aside the common Impugned Order.
15. In reply to the above submissions, the learned Counsel for the Respondent-2, the Distribution Licensee has elaborately argued and contended that the detailed reasons given in the Common Impugned Order passed by the State Commission are perfectly justified and as such Article 6.5 (V) of the PPA has been correctly interpreted by the State Commission and hence, it does not warrant interference in the Impugned Order.
16. In the light of the above submissions the following questions would arise for consideration:
 - (a) Whether the State Commission's interpretation of Article 6.5 of the PPA is valid or not?
 - (b) Whether the Appellant is entitled to waive off his right unilaterally?
17. Before dealing with the above questions, let us refer to the plea of the Appellant before the State Commission.
18. The Appellant filed these Petitions before the State Commission mainly on two grounds:

(a) Article 6.5 of the PPA contemplates the reimbursement of Letter of Credit charges by the Appellant to the Distribution Licensee (R-2) as a one time measure and the Distribution Licensee cannot claim any rebate at 1.8% per month and therefore, the rebate deducted by the Distribution Licensee from the monthly invoices of the Appellant ought to be refunded.

(b) Admittedly, the Opening of Letter of Credit by the Distribution Licensee is only for the benefit of the Petitioner, the Appellant. In this case, the Petitioner waived off the said benefit. Therefore, the Distribution Licensee cannot insist on deduction of rebate month on month from its bills.

19. The State Commission having considered the submissions made by the parties on these grounds interpreted the Article 6.5 (V) of the PPA and held that the rebate has to be allowed by the Appellant to the Distribution Licensee in the monthly invoices. Accordingly, both the grounds urged by the Petitioner/Appellant before the State Commission were rejected.

20. Let us refer to the reasonings and findings given by the State Commission in the Impugned Order for rejecting these prayers.

21. Let us first refer to the findings given by the State Commission in regard to the First Contention:

“5. We have considered the first contention in the light of the Order dated 17.1.2013 already passed by this Commission in OP No.28 of 2012 in the case of Tuppadahalli Energy India Private Limited against MESCOM. In our view, as submitted on behalf of the Respondent, the first contention is no longer res integra. A similar contention, as now raised in these Petitions in support of the interpretation of Clause 6.5 of the PPA, was raised in OP No.28 of 2012. In the said case, this Commission rejected the contention, after considering the wordings of Clause 6.5 of the PPA, by its Order dated 17.1.2013 by holding that:

“Considering the language adopted in Article 6.5(v) of the PPA, we are not inclined to accept the contention put forward on behalf of the Petitioner. The words of Article 6.5.(v) of the PPA are very clear and therefore this Commission cannot give any other meaning than what is provided in the PPA. In our view, Article 6.5.(v) of the PPA cannot be read to mean that it provides only for recovery of charges incurred for opening Letter of Credit, in view of its clear wordings. If it was intended by the parties to recover only the charges incurred to open Letter of Credit charges, Article 6.5(v) of the PPA would not have made any reference to the rebate and would not further have added that, the same shall be deducted from the Monthly Tariff Invoice payable to the Company. The term would have referred only to Letter of Credit charges and stopped at that. In our view, the interpretation placed by the Respondent-Company is in accordance with the wordings used in Article 6.5(v) of the PPA, and not the one the Petitioner is trying to

place upon after realizing that the rebate is recurring and quite substantial. Merely the term is onerous, it cannot be ignored. The contention that deduction of rebate every month will have an impact on the Petitioner's Tariff and hence the interpretation placed by the Respondent runs counter to the orders of this Commission dated 11.12.2009, is not tenable. We have looked into the Order referred to by the Petitioner. The said Order only deals with fixation of Tariff and factors considered while fixing tariff. At any rate, there is nothing in Article 6.5(v) of the PPA in view of the clear language used herein. The Order of the Hon'ble Appellate Tribunal for Electricity (ATE) referred to by the Petitioner has no application to the present case, as the issue in this case is the interpretation of a clause agreed to in the Contract.

An Appeal filed in Appeal No.66 of 2013 against the above Order of the Commission has been rejected by the Hon'ble Appellate Tribunal for Electricity (ATE) by its Order dated 10.7.2013. Therefore, the contention of the Petitioner that the Respondent cannot deduct the rebate month-on-month and the Respondent is entitled to recover only the cost of Opening the Letter of Credit, has to be rejected."

22. The discussions leading to above findings with regard to the 1st contention would reveal that the State Commission interpreted Article 6.5 (V) of the PPA and held that the Respondent is entitled to deduct the rebate month on month basis in the light of its earlier order dated 17.1.2013 confirmed by this Tribunal in the Judgment in Appeal No.66 of 2013 dated 10.7.2013. In this order, the State Commission quoted the wordings of Clause 6.5 (v) of the PPA and held that Article 6.5

of the PPA cannot be read to mean that it provides only for recovery of charges incurred for opening the Letter of Credit in view of its clear wordings in the light of the wordings contained in Article 6.5 that the rebate shall be deducted from monthly tariff invoice payable to the Company.

23. With regard to the Second Contention relating to the Waiver, the State Commission has given the following findings:

“6. As regards the second contention of the Petitioner that furnishing of Letter of Credit under Clause 6.5 of the PPA dated 2.4.2008, is for its sole benefit and it has a right to waive the same, and once it waives its right to get the Letter of Credit, the Respondent cannot continue to deduct rebate at 1.8% of the tariff invoice, we have again looked into the PPA dated 2.4.2008 and the wordings of Clause 6.5 of the PPA dated 2.4.2008 which is as follows:

“6.5 Letter of Credit: MESCOM shall establish and maintain transferable, assignable, irrevocable and unconditional non-revolving Letter of Credit in favour of, and for the sole benefit of the Company. The Letter of Credit shall be established in favour of, and issued to, the Company on the date hereof and made optional thirty(30) days prior to the Commercial Operation Date of the Project and shall be maintained consistent herewith by MESCOM at any and all times during the Term of the Agreement. Such Letter of Credit shall be in form and substance acceptable to both the Parties

and shall be issued by any Scheduled Bank and be provided on the basis that:

i) In the event of Tariff Invoice or any other amount due and payable by MESCOM pursuant to the terms of this Agreement is not paid in full by MESCOM as and when due, the Letter of Credit may be called by the Company for payment in full of the unpaid Monthly Invoice or any such other unpaid amount.

ii) The forgoing as determined pursuant hereto, upon representation of such Monthly Invoice or other invoice or claim for such other amount by the Company on the due date therefor or at any time thereafter, without any notification, certification or further action being required.

iii) The amount of the Letter of Credit shall be equal to one month's projected payments payable for MESCOM based on the average of annual generation.

iv) The MESCOM shall replenish the Letter of Credit to bring it to the original amount within 30 days in case of any valid drawdown.

v) The Company shall allow a rebate of 1.8% of the Tariff Invoice or actual expenditure/charges for the LC account incurred, whichever is higher, and the same shall be deducted from the monthly Tariff Invoice payable to the Company.

vi) The Letter of Credit shall be renewed and/or replaced by the MESCOM not less than 60 days prior to its expiration.”

7. In our view, the above contention of the Petitioner does not merit acceptance. The contract which is signed by the parties in this case is not a product of bilateral negotiations between two private parties. The Contract is the outcome of the regulatory exercise of the power of the Commission under Section 86 (1) (b) of the Electricity Act, 2003 wherein the Commission has power to regulate purchase of electricity and the price at which electricity can be procured from the generating companies or licensees or from other sources through agreements by the Distribution Licensees. The terms of the Contract which is signed have been prescribed by this Commission after hearing all the stakeholders. Further, the price payable for the electricity supplied under the PPA is determined by the Commission, and after signing the PPA, the same is approved by this Commission. From the order of the Commission, wherein the terms of the PPA have been prescribed and the price is determined, this Commission has taken into consideration the interest of the generators, distribution licensees, consumers and other factors that will have a bearing on the price of electricity, which includes the security mechanism for payments. Therefore, in our view, the Contract in question has attained the status of a Statutory Contract and the parties to the Contract are not at liberty to unilaterally alter the terms of the same without the prior approval of this Commission.

8. The Hon'ble Supreme Court in the case of India Thermal Power Ltd-Vs State of Madhya Pradesh reported in (2000) 3 SCC 379, while dealing with

Statutory Contract has held that if entering into a Contract containing the prescribed terms and conditions is a must under a statute, then the Contract to that Extent is statutory, and if the terms and conditions which are incorporated in the Contract are as a result of mutual agreement between the parties, it will not be statutory.

9. Once the Contract is held to be statutory, the parties to the said Contract cannot alter any of its provisions privately. No doubt, the Letter of Credit is provided for the benefit of the Petitioner. But, the same cannot be waived by the Petitioner, as this term of the Contract is not on account of mutual negotiation and agreement between the parties and may upset the balance maintained in the PPA, especially in the interest of consumers. We are of the firm view that the Petitioner cannot unilaterally waive the requirement of opening of the letter of credit as provided in the PPA dated 2.4.2008 just in order to avoid grant of rebate to the Respondent. Therefore, the second contention also has to be rejected.

10 It is contended on behalf of the Respondent that the waiver of the term of the Contract has not been accepted by the Respondent and therefore, the term relating to furnishing of Letter of Credit continues to exist and that as per the said condition, it has furnished the Letter of Credit to the Petitioner. Further, as held by the Hon'ble ATE, by its order dated 18.5.2010 in appeal No.176 of 2009 in the case of BESCO Vs Davanager Super Company Limited and another, the unilateral waiver will not come into force unless the same is accepted by the other party. We have already held that the Contract in question is a Statutory Contract and cannot be altered by a party without the prior approval of the Commission. Therefore, the

question of waiving of the requirement of one of the Terms of Contract by a party and acceptance or non-acceptance of the same by the other party, do not arise and need not consideration.

11. For the foregoing discussion both the Petitions are liable to be dismissed and accordingly they stand dismissed”.

24. The State Commission in the above discussion with regard to 2nd contention, after quoting the entire Article 6.5 of the PPA held that the Petitioner cannot unilaterally waive requirement of opening Letter of Credit as provided in the PPA dated 2.4.2008 in order to avoid grant of rebate especially the waiver has not been accepted by the Distribution Licensee.
25. In the light of the above findings we shall consider the issues raised in these Appeals.
26. The main argument of the Appellant before the State Commission was on the interpretation of Article 6.5 to the effect that month on month the deduction on rebate cannot be permissible even after establishing the Letter of Credit by the Distribution Licensee. It is also argued that the Appellant is entitled to waive its right of Letter of Credit which is a contractual right and therefore, the Distribution Licensee could not go on deducting the monthly rebate.

27. While dealing with this argument, the State Commission has dealt with the relevant Clauses of the PPA and held that the PPA has been signed by both the Appellant and the Distribution Licensee exactly in terms of the Regulatory approval given by the State Commission in its order dated 18.8.2005 and thus, it was a statutory contract and therefore, the Appellant cannot unilaterally waive the term of such contract.

28. We shall now refer to the relevant Articles. The Letter of Credit is a payment security mechanism under the PPA. This is dealt in Article 6. Article 6.1 deals with the billing and payment. Article 6.2 deals with the payment. Article 6.3 deals with the Late Payment. Article 6.4 deals with the disputes. Article 6.5 deals with the Letter of Credit and Article 6.6 deals with the payment under the Letter of Credit.

29. The relevant Article 6.5 (V) is reproduced below:

*“**Article 6.5.(v)** : The Company shall allow rebate of 1.8% of tariff invoice or the actual expenses for the establishment of letter of credit amount incurred, whichever is higher, and the said rebate shall be deducted by the distribution company from the monthly tariff invoice payable to the generating company”.*

30. The above provisions mandate that the Appellant shall allow a rebate of 1.8% of the tariff invoice or the actual expenses

incurred in establishing Letter of Credit whichever higher amount to be incurred is and the same shall be deducted from the monthly tariff invoice. This does not mean that there should be no month on month collection of rebate.

31. As pointed out by the learned Counsel for the Respondent, the Distribution Licensee, the State Commission had approved Article 6.5 (v) in the Order dated 18.8.2005 as part of approving the draft PPA submitted for the approval of the State Commission.
32. The relevant extract of the Order dated 18.8.2005 on the Letter of Credit are as under:

“(p) “In Clause 6.5 (iii), it is indicated that for payment by LC, the amount of Letter of Credit shall be equal to one month’s projected payments payable by the ESCOM based on the average of annual generation. Some of the developers have represented that the words average of annual generation” are to be replaced by the words “maximum projected monthly generation for the year”.

The Commission after examining the request of the developer finds no merit in the representation and hence decides that the Clause shall remain unaltered”.

33. So, the present PPA is in terms of the draft PPA approved by the State Commission through the Order dated 18.8.2005.

34. The reading of the above Article would not show that the rebate is a one time measure. It says that the rebate amount is to be deducted from the monthly tariff invoice and not as one time measure.
35. The very same issue has been raised before the State Commission in yet another Petition filed by the Generator namely M/s. Tuppadahalli Energy India Private Limited. In that case, the same clause in the PPA was called for interpretation.
36. The question arose in that case was whether the rebate was to be provided in the monthly bills or only as a one time measure. The State Commission interpreted the said Article and held in the Order dated 17.1.2013 that the wordings of the PPA would indicate the rebate was to be allowed in the monthly bills and not as a one time measure as claimed by the Generator.
37. This order dated 17.1.2013 passed by the State Commission was challenged in the Appeal filed by the said Generator in Appeal No.66 of 2013.
38. Dealing with this exact same issue, this Tribunal considered the findings of the State Commission and went into the meaning of the relevant Articles and confirmed the order

passed by the State Commission and consequently dismissed the Appeal filed by the Generator.

39. Thus, according to the Respondent, this issue has already been decided by this Tribunal and that decision would squarely apply to the present case as well.

40. We shall now refer to the relevant observations and findings rendered by this Tribunal on 10.7.2013 in Appeal No.66 of 2013 which reads as under:

“21. The reading of Article 6.5. as a whole would reveal that the purpose of letter of credit is to provide security of payment to the Appellant and to ensure that the payment is not delayed beyond 15 days.

.....

27. Now, we would see the meaning of Article 6.5(v). This Article is reproduced below:-

Article 6.5.(v) stipulates that the generator shall allow rebate of 1.8% of tariff invoice or the actual expenses for the establishment of letter of credit amount incurred, whichever is higher, and the said rebate shall be deducted by the distribution company from the monthly tariff invoice payable to the generating company.

28. The reading of the above Article would not show that the rebate is a one time measure. It says that the rebate amount is to be deducted from the “monthly tariff invoice” and not as “one time measure”.

29. *If the PPA contemplated, as claimed by the Appellant, that the rebate of 1.8% was only a one time measure there is no need to provide for the same in Article 6 which is for payment of monthly tariffs in securing payment thereafter. In this context, it is to be noted that the Article 6.5(v) uses the words “monthly tariff invoice” and not “first tariff invoice”. The language of Article 6.5(v) is clear that the rebate contemplated is in the nature of prompt payment rebate. Thus, the rebate is a incentive to the MESCOM(R-2) to promptly establish the letter of credit and put in place and continue a payment security mechanism to the generators. The charge for the letter of credit is concerned with the letter of credit which has to be maintained with the life of the PPA and not for one month. If a letter of credit is to be maintained only for one month, it will involve much lesser charges as against the letter of credit for a longer period.*

37. *We do not find force in the contention of the Appellant that the tariff agreed to in the PPA is the tariff determined by the State Commission by its order dated 11.12.2009 which does not provide for rebate for timely payment of monthly invoice. As correctly pointed out by the Respondent No.2, the tariff order did not contain the payment security mechanism and rebate for ensuring timely payment and the same was agreed to in the PPA. However, the tariff decided by the State Commission in its order dated 11.12.2009 included the interest on Working Capital equivalent to 2 months’ receivables. As against the provision of the PPA regarding payment of Monthly Invoice within 15 days from the date of receipt of the tariff invoice, and in case payment is not made within due date, interest on the delayed payments, the interest on Working Capital allowed to the Appellant in the Tariff is on Working*

Capital equivalent to 2 months' receivables. Thus, we reject the contention of the Appellant in this regard.

41. According to the Respondent, these observations and findings would apply to the present facts of the case as well.
42. It was strenuously contended by the Appellant that it is not a statutory contract and it is only a commercial contract and therefore, this PPA will not have any statutory force.
43. This contention is totally untenable.
44. As a matter of fact, this draft PPA containing the Article 6.5 (V) had been approved by the State Commission by the Order dated 18.8.2010. As mentioned earlier, there was no objection raised to Article 6.5 (V).
45. At the time of entering into the PPA, the Appellant admittedly did not raise any issue on the rebate as provided in Article 6.5 (V). The above said Clause exists in all the PPAs signed with all the developers. This clause cannot be ignored merely on the statement of the Appellant that the said Clause is unreasonable and affects the tariff of the Appellant. This ground is not enough to hold that the said Clause is not valid. The amount of Letter of Credit which needs to be furnished by the Distribution Licensee to the Appellant would vary from time to time. The monthly payments to be made to the

Appellant are protected by the Letter of credit. In case the Distribution Licensee does not make the payment within time frame, the Appellant is entitled to invoke the Letter of credit. On the basis of that, the monthly rebate at the rate of 1.8% has been contemplated for such a protection. Thus, the rebate contemplated, is in the nature of prompt payment rebate.

46. The Letter of Credit was opened for Rs.51 lacs. This was informed to the Appellant through the letter dated 31.8.2012. Through the very same letter, the Appellant has been informed that the rebate of 1.8% will be recovered in the monthly bill from August, 2012 onwards.
47. In fact, if the PPA contemplated that the rebate of 1.8% was only a one time measure, there is no need to provide for the same in Article 6 which deals with the payment of monthly tariffs and securing payment thereof. As a matter of fact, Article 6.5 (V) uses the words “monthly tariff invoice” and not “first month’s tariff invoice”.
48. According to the Appellant, the Letter of Credit was opened only for the benefit of the Appellant and as such, the Distribution Licensee cannot claim any rebate such as a rebate on the same. This submission is misconceived.

49. The language of Article 6.5 (V) is manifestly clear that the rebate contemplated is in the nature of prompt payment rebate. The Distribution Licensee is entitled to the rebate of 1.8% from the prompt payment. The fact remains that the entitlement of the rebate can be claimed by the Distribution Licensee only when the Letter of Credit is opened by the Distribution Licensee in favour of the Appellant.
50. As mentioned earlier, the rebate is an incentive to the Distribution Licensee to promptly establish the Letter of Credit and put in place and continue a payment security mechanism to the generators.
51. In other words, only in order to secure repayment to the Generating Companies, the rebate has been made subjected to the Opening of Letter of Credit. However, this would not change the nature of the monthly rebate which the Distribution Licensee is entitled to claim from the Generating Company. As against the payment being made to the Generating Company within 15 days of raising the Bill, the State Commission has in fact, factored in the interest for two months receivables in the tariff being allowed to the Appellant. Therefore, it has to be concluded that the Appellant is also deriving a substantial benefit out of the same.

52. The argument of waiver of the right to Letter of Credit on the part of the Appellant is also misconceived and without any merit. The Appellant claims that the Distribution Licensee is not entitled to the rebate. The Appellant cannot have the right to unilaterally leave an entitlement of Letter of Credit under the PPA which in fact gives the corresponding benefit to the Distribution Licensee by claiming the monthly rebate.
53. Thus, the relevant provisions of Opening of Letter of Credit and consequential rebate are a Clause that provides benefits to both the parties. The tariff to the consumers at large is reduced on account of the Opening of the Letter of Credit and the entitlement of the rebate by the Distribution Licensee. In fact, interest on two month's receivables is included in the generation tariff of the Appellant in the form of interest on working capital and, therefore, the Distribution Licensee and its consumer are entitled for rebate for early payment of dues of the Generating Company.
54. Under the above circumstances, it cannot be open for one party to claim the waiver of the Letter of Credit being opened and not providing the rebate consequently.
55. As mentioned earlier, it is the right of the Respondent-2 to open the Letter of Credit in order to entitle the rebate of 1.8%

in the tariff which goes to the benefit of the Distribution Licensee and public at large.

56. The Appellant further contends that the Letter of Credit should have been opened by the Distribution Licensee 30 days prior to the commercial operation of the wind generating units and in this case, the Letter of Credit had been opened long after the commencement of the units.
57. This contention also has no relevance at this stage. Only when the Distribution Licensee (R-2) put in place the Letter of credit in August, 2012, the monthly deduction of rebate was made. In other words, no deductions were made by the Distribution Licensee for the past period when the Letter of Credit was not opened. Therefore, the Appellant cannot have any grievance.
58. As indicated above, the Letter of Credit is a payment security mechanism. If the Appellant does not receive the payment from the Distribution Licensee within 15 days of the bill being raised, the Appellant is entitled to receive the same from the bank guarantee directly by way of Letter of Credit.
59. In view of the above, the decision quoted by the Appellant in AIR 1973 SC 559 Dr. Jeevan Lal and Others Vs Brij Mohan

Mehra relating to the waiver of the right, unilaterally would not apply to the present case.

60. On the other hand, the decision rendered by this Tribunal in Appeal No.66 of 2013 in Tuppadahalli case would squarely apply to the present case.

61. Hence, the grounds raised in the Appeal which have already been decided by this Tribunal cannot be said to be valid so as to interfere in the Impugned Order which has been passed by the State Commission after thorough analysis by giving detailed reasonings.

62. Summary of Our Findings

(a) The Distribution Licensee is entitled to claim rebate in the monthly bills according to Article 6.5 (V) of the PPA.

(b) Rebate is not a one time measure and is to be deducted from the monthly tariff invoice.

(c) It is not open to the Appellant to claim waiver of the condition of opening of Letter of Credit and not providing the rebate.

(d) Finding of this Tribunal in Appeal No.66 of 2013 in Tuppaadahalli case would squarely apply to the present case.

63. In view of our above finding, the Appeal is liable to be dismissed as devoid of merits.

64. Accordingly, the same is dismissed.

65. However, there is no order as to costs.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated:28th April, 2014

✓ ~~REPORTABLE/NON-REPORTABLE~~