

KERALA STATE ELECTRICITY REGULATORY COMMISSION
THIRUVANANTHAPURAM

Present : Shri T K Jose, Chairman
Shri B Pradeep, Member

OP No 04/2023

In the matter of : Petition filed by M/s BSES Kerala Power Limited, under section 142 and 146 of the EA-2003, regarding noncompliance of the Order of the Commission dated 05.10.2018 in Petition OP No.34/2015.

Petitioner : BSES Kerala Power Limited (BKPL)

Petitioner represented by : Adv. Venkatesh, Counsel for the Petitioner
Shri. Jose Varkey, BKPL

Respondent : Kerala State Electricity Board Ltd (KSEB Ltd)

KSEB Ltd represented by : Adv. Raju Joseph, Counsel for the respondent
Shri, Jayaraj, Chief Engineer,
Shri. D.S.Rajesh, Dy. Chief Engineer

Date of hearing : 09.03.2023, 11:00 AM

Venue : e-hearing through video conferencing

Daily Order dated 22.03.2023

1. M/s BSES Kerala Power Limited (hereinafter referred as M/s BKPL or Petitioner) on 17.06.2022 has filed a petition before the Commission with the following prayers:

"In view of the facts and circumstances explained above, it is most humbly prayed that this Hon'ble Commission may be pleased to: -

(a) Direct the Respondent to pay an amount Rs. 19,81,42,512/- in compliance with directions as contained in Para 46(4) and 46 (6) of the Order dated 05.10.2018 passed by this Hon'ble Commission;

(b) Direct Respondent to pay interest which works out to Rs. 10,21,59,022/-on account of delay in making the payments due to the Petitioner;

(c) Initiate appropriate proceedings against the Respondent in terms of Section 142 and 146 of the Act, for non-compliance of the directions of this Hon'ble

Commission; Levy penalty/appropriate punishment upon the Respondent for not complying with the directions of this Hon'ble Commission; and

(e)Pass any such further order(s) as this Hon'ble Commission may deem fit and appropriate in light of the facts and circumstances of the present case.”

2. The admissibility hearing on the petition was held on 09.03.2023 at 11:00 AM through video conference. Adv. Venkatesh, Counsel for the petitioner appeared on behalf of the Petitioner and Adv. Raju Joseph appeared before the Commission on behalf of KSEB Ltd. The deliberations during the hearing are summarized below.

(1) The petitioner M/s BKPL submitted the following during the deliberations;

- (i) The Commission vide the Order dated 05.10.2018 in petition OP No. 34 of 2015 had issued orders on the disputes between the petitioner BKPL and the respondent KSEB Ltd. In the said Order, the Commission has decided on the fixed charge payable for November 2015 and also the electricity charges payable for the electricity generated and injected into the grid during the period from 25.05.2017 to 24.06.2017 using the balance stock of Naphtha available with the petitioner as per the directions of the Hon'ble High Court.
- (ii) The petitioner vide the letter dated 22.10.2018 had raised an invoice for Rs 19.81 crore based on the Order of the Commission, which includes fixed cost for Rs 2.6814 crore and energy charges for Rs 17.13 crore. However, the respondent has not paid the amount till date.
- (iii) In the meantime , aggrieved by the Order of the Commission, the petitioner had filed an appeal before the Hon'ble APTEL as per Section 111 of the EA-2003, and also filed an IA seeking directions from the Hon'ble APTEL to the respondent to pay an amount of Rs 78.67 crore which is the 50% of the disputed claim of the petitioner, or alternatively direct the respondent to remit the amount due to the petitioner as per the impugned Order.
- (iv) Subsequently, the respondent withdrew the IA application requesting liberty to approach the State Commission for appropriate relief and the Hon'ble APTEL vide the Order dated 13.05.2022 has disposed the same with the liberty as requested.
- (v) Section 142 of the EA-2003 provides for punishment for non compliance of the directions of the Appropriate Commission by the distribution licensees and other parties concerned. In the present case, the Commission has issued the impugned Order on 05.10.2018, however the respondent is yet to comply with the said Order of this Commission. Hence the petitioner filed the

present petition before this Hon'ble Commission dated 17.06.2022.

- (vi) The petitioner further submitted that, they could receive the counter affidavit dated 08.03.2023 filed by the respondent only on 08.03.2023. Hence the petitioner requested for two weeks time to file the rejoinder to the counter affidavit of the respondent. The petitioner further submitted that, the final hearing on the matter may be held subsequently at the convenience of the Commission.
- (2) The respondent KSEB Ltd submitted the following during the deliberations of the subject matter;

- (i) Aggrieved by the Order of the Commission dated 05.10.2018, the respondent has also filed an Appel petition No. 240/2019 before the Hon'ble APTEL on 05.02.2019. Accordingly, the appeal petition No. 352/2018 filed by the petitioner M/s BKPL and the appeal petition No. 240/2019 filed by the respondent KSEB Ltd against the Order of the Commission dated 05.10.2018 in Petition No. 34/2015 is still pending before the Hon'ble APTEL.

The finality of the Order of the Commission dated 05.10.2018 could reach only with the final judgement of the Hon'ble APTEL in these appeal petitions.

- (ii) KSEB Ltd did not release the payment as per the Order of the Commission, as the matter is subjudice before the Hon'ble APTEL.
- (iii) Since no PPA exist with the petitioner since November 2015, it will be difficult to recover the over payment, if any, made by the respondent KSEB Ltd to the petitioner M/s BKPL, if the final judgment of the Hon'ble APTEL is in favour of KSEB Ltd.
- (iv) Moreover, though the plant is in complete shut down and dismantling is in process, the following amounts are due from the petitioner M/s BKPL.

- The auxiliary power requirement of the plant is being availed from the KSEB Ltd. The amount due for the auxiliary consumption including interest is Rs 5.628 crore.
- The State Government vide the Orders dated 04.04.2017 and 14.08.2017 had transferred the 20 acres of land under lease to BKPL from the Travancore Cochin Chemicals Ltd (TCCL) to KSEB Ltd. Accordingly the land under lease to BKPL is fully owned by KSEB Ltd. Since, the BKPL is still under occupancy of the land, they are liable to pay lease rent as per the lease rent agreement signed between the BKPL and the earlier owner TCCL.

The lease amount payable for the period from 01.04.2017 to 31.03.2022 is Rs 35,45,44,500/- @Rs 7,09,08,900/- per year and Rs 9,74,99,737/- @Rs 10,63,63,500/- per year from 01.04.2022 to 31.03.2027.

- The total lease amount due from the petitioner is about Rs 45.20 crore, which is much higher than the amount claimed by the petitioner as per the Order of the Commission dated 05.10.2018.

(3) The Commission during the hearing clarified the following;

- (i) As of now, the Order of this Commission dated 05.10.2018 in OP No. 34/2015 has not attained legal finality, which depends on the outcome in appeal petitions, 352 of 2018 and 240 of 2019 filed by the petitioner and the respondent respectively.
- (ii) As per the Order dated 05.10.2018, the payment to the petitioner includes;
 - Fixed charge for the month of November 2015 at the rate agreed by the respondent KSEB Ltd.
 - Energy charge includes the electricity charges for the electricity generated and injected into the grid during the period from 25.05.2017 to 24.06.2017 at the average RTC clearing price of IEX.

The Commission cannot entertain other claims of the respondent KSEB Ltd, which had arisen after the issue of the Order dated 05.10.2018, such as amount payable by BKPL to KSEB Ltd, against auxiliary consumption, lease rent etc.

- (iii) Regarding the fixed charges of Rs 2.68 crores for the month of November 2015, Hon'ble APTEL vide the Order dated 24.02.2023 in IA No. 273/2023, filed by KSEB Ltd, observed as follows;

“
While several contentions have been urged, both for and against the grant of such relief, we are of the view that this part of the order of the Commission need not be stayed, and the only issue which would necessitate examination is the manner in which this amount, of around Rs.2.68 crores, should be secured so that the Appellant can be repaid the said amount, in case of their success in the main Appeal, later. Mr. Shri Venkatesh, learned Counsel for the 2nd Respondent, would fairly state that the Commission be directed to consider the appropriate interim arrangement to be made to secure the interests of the Appellant herein, in case they were to succeed in the main Appeal later. Mr. P. V. Dinesh, learned Counsel for the Appellant, agrees that the Commission can be called upon to consider the appropriate interim arrangement to

be made to secure the said amount, in case the Appellant were to succeed in the main Appeal later.

The other part of the order under appeal relates to payment of electricity charges, for the energy generated and injected in the grid, during the period from 25.05.2017 to 24.06.2017. Mr. P. V. Dinesh, learned Counsel for the Appellant, would submit that this and other contentions, raised by him during the course of hearing today, would instead be urged before the Commission in the petition, under Section 142 of the Act, pending before it; and it would suffice if this Tribunal were to make it clear that it has not expressed any opinion on this part of the order passed by the Commission.

Consideration of this IA is therefore confined to payment of dues for the month of November, 2015, which is of around Rs.2.68 crores. While the said amount shall be paid by the Appellant to the 2nd Respondent, and shall be subject to the result of the main Appeal, the manner in which the 2 nd Respondent should be asked to secure the interests of the Appellant, on payment of the said amount by them to the 2nd Respondent, shall be considered by the Commission in the Section 142 proceedings pending before it. We make it clear that we have not expressed any opinion, in so far as the other relief for payment of energy injected into the grid during the period 25.05.2017 to 24.06.2017 is concerned, in the light of the submission of Mr. P. V. Dinesh, learned Counsel for the Appellant, that they would make their submission on the various facets of this claim, in the proceedings pending before the Commission under Section 142 of the Electricity Act.”

As above, both the petitioner and respondent in the instant petition agreed before the Hon'ble APTEL to release the fixed charges for the month of November 2015, after making necessary security mechanism by the BKPL against KSEB Ltd, to secure the interest of KSEB Ltd in the event they succeed in the main Appeal No. 240 of 2019.

However, Hon'ble APTEL has not expressed any opinion, regarding the other relief, i.e., for payment of energy injected into the grid during the period 25.05.2017 to 24.06.2017.

- (v) The Commission is bound to comply with the Order of the Hon'ble APTEL regarding the release of the fixed cost for the month of November 2015 by KSEB Ltd to M/s BKPL, which is around Rs 2.68 crore. This has to be released to BKPL only after ensuring proper security arrangement from M/s BKPL. Hence the Commission has directed the petitioner M/s BKPL and the respondent KSEBL in the instant petition to clarify what form of security can be provided by the BKPL and whether it is agreeable to KSEB Ltd.
- (vi) The Commission also directed the parties to clarify the following legal aspects on the present petition filed before the Commission under Section 142 of the Electricity Act, 2003;

- (a) Section 142 of the EA-2003 is regarding the punishment for non-compliance of the directions of the Appropriate Commission. However, the instant petition is filed before the Commission to issue necessary directions to the respondent KSEB Ltd to pay an amount of Rs 19.8143 crore for the compliance of the Order of the Commission dated 05.10.2018.
- (b) The appeal petition filed by the petitioner M/s BKPL (Appeal No. 352 of 2018) and the respondent KSEB Ltd (Appeal No. 240 of 2019) against the Order of the Commission dated 05.10.2018 is pending before the Hon'ble APTEL. It is clarified by the Hon'ble APTEL in the Order dated 24.02.2023 in petitions IA No. 278 of 2023 in Appeal No. 240 of 2019 and IA No. 273 of 2023 that, the Appeal Petitions are included in the list of finals of Court-II of the Hon'ble APTEL.

Hence the parties may clarify whether it is legally correct on the part of the petitioner BKPL to file the present petition before the Commission at this stage.

- (c) The petitioner BKPL raised the invoice of about Rs 19.81 crore way back in the year 2018 subsequent to the Order of the Commission dated 05.10.2018. At the same time, the petitioner filed an IA also along with the main Appeal Petition No. 352 of 2018 seeking instant relief for payment of the amount as determined in the impugned Order of the Commission dated 05.10.2018. The IA was withdrawn from Hon'ble APTEL only on 13.05.2022 with the permission to seek relief before this Commission.

The petitioner BKPL may clarify the reason for the delay in seeking appropriate relief from the Commission for the implementation of the Order dated 05.10.2018 and whether the respondent can be faulted with not releasing the payment while the said matter was under consideration of Hon'ble APTEL through the IA filed by the petitioner.

- (4) On the clarifications sought by the Commission, the petitioner BKPL submitted the following;
 - (i) The counsel has to get the opinion of their client regarding the mode of security that can be provided by the petitioner.
 - (ii) The Section 142 of the Electricity Act, 2003, does not prohibit them from seeking action before the Commission against non-compliance of its Order dated 05.10.2018. There is no stay on the implementation of the Order of the Commission dated

05.10.2018. As per the Code of Civil Procedure, 1908, the Commission has to take action against the respondent KSEB Ltd for non compliance of its Order. The Commission cannot hold back the execution of the Order by stating the matter is sub judice and not attained legal finality.

- (iii) The petitioner also requested that, the issues of payment of energy charge may be deliberated in the final hearing.
- (5) Regarding the clarifications sought by the Commission, the respondent KSEB Ltd submitted the following;

- (i) Regarding the security for making payment of about Rs 2.68 crore as per the Order of the Hon'ble APTEL dated 24.02.2023, KSEB Ltd require the security, nothing less than 'Bank guarantee' from a scheduled bank.

Once the petitioner BKPL provide the bank guarantee from a scheduled bank, within one month from the date of receipt of the bank guarantee, KSEB Ltd shall make the payment to M/s BKPL.

- (ii) There is no time limit specified for implementation of the Order of the Commission dated 05.10.2018. Section 142 of the EA-2003 is applicable only when specific time limit is specified for the implementation of the Order of the Commission.
- (iii) The proceedings before the Commission are based on its own Regulations and hence the Code of Civil Procedure 1908 is not directly applicable.
- (iv) There is no valid agreement between KSEB Ltd and the petitioner M/s BKPL. Hence, there is no mechanism to get back, the excess payment made to the petitioner BKPL, in the event KSEB Ltd succeed its claim before the Hon'ble APTEL.
- (v) Huge amount is due from the petitioner BKPL in the form of charges for auxiliary consumption and lease rent as submitted earlier, after the issue of the Order dated 05.10.2018.

3. Based on the deliberations during the hearing, the Commission hereby issues the following directions to the petitioner M/s BKPL and respondent KSEB Ltd for immediate compliance.

- (1) In compliance of the Order of the Hon'ble APTEL dated 24.02.2023 in petition IA No. 273 of 2023, the petitioner M/s BKPL shall provide Bank Guarantee for an amount of Rs 2.68 crore from a Scheduled Bank in favour of KSEB Ltd for making fixed cost payment for the month of November 2015 based on Order of the Commission dated 05.10.2018 in petition OP No. 34/2015.

- (2) KSEB Ltd shall, within one month from the date of receipt of Bank Guarantee from BKPL, make payment of Rs 2.68 crore towards fixed cost for the month of November 2015 based on Order of the Commission dated 05.10.2018 in petition OP No. 34/2015.
- (3) The issue of payment of electricity charges for the energy injected into the grid from 25.05.2017 to 24.06.2027 along with other issues shall be deliberated in the next hearing. The date and mode of conduct of the hearing shall be communicated to the parties separately.
- (4) The petitioner BKPL and the respondent KSEB Ltd shall submit additional clarifications on the issues raised by the Commission latest by 29.03.2023 with a copy to either side.

Sd/-
B Pradeep
Member

Sd/-
T K Jose
Chairman

Approved for issue

Sd/-
Secretary