BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION BANGALORE

Dated 13th January 2012

1. Sri M.R. Sreenivasa Murthy Chairman
   2. Sri Vishvanath Hiremath Member
   3. Sri K. Srinivasa Rao Member

OP 34/2006

BETWEEN

M/s. Bhagyanagar Solvent Extraction Pvt. Ltd.
No.202, Chitra Avenue, Manju Block
Choolamedu High Road
C H E N N A I – 600 094
(Represented by M/s. Diwakara & Associates, Advocates)

AND

1. The State of Karnataka
   Department of Energy
   Bangalore

2. M/s. The Karnataka Power Transmission Corporation Limited
   Cauvery Bhavan
   Bangalore

3. M/s. Gulbarga Electricity Supply Company Limited
   Station Road
   Gulbarga

4. The General Manager (Technical)
   KPTCL, Cauvery Bhavan
   Bangalore

5. The Superintending Engineer (Technical)
   KPTCL, Cauvery Bhavan
   Bangalore
   (Represented by M/s. Just Law, Advocates)

2. In this case, the Petitioner-Company had entered into a Power Purchase Agreement (PPA) dated 18.10.2001 for supply of electricity from its power Plant of 6 MW, at the rate of ` 2.25 with 5% escalation, with the then Transmission and Distribution Licensee, M/s. Karnataka Power Transmission Company Limited (KPTCL). This PPA came to terminated on 5.7.2003 by KPTCL. This termination was challenged initially before the Hon’ble High Court and thereafter before this Commission in OP 34/2006.

3. During the pendency of the original Petition, both the parties settled the dispute amicably and filed a Joint memo before this Commission on 17.5.2007. In the Joint Memo, it was stated as follows:

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

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

2. The Petitioner Company shall be paid for electricity supplied from 1.04.2007 at Rs.3.85/unit to be escalated thereafter at 2% per year non-cumulatively from the year 2006-07 for 6 MW 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."
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 CoD. The parties will sign a supplementary agreement incorporating the above on approval of the Commission to the above terms.

The above may be recorded and the Petition may please be disposed of in terms of the memo."

4. This Commission recorded the above settlement and disposed of the Petition, with a detailed Order on 31.5.2007.

5. As per the orders of this Commission, both the parties signed a Supplementary PPA on 31.12.2009. However, when this Supplementary PPA was submitted to the Commission for its approval by the 3rd Respondent-GESCOM, the Petitioner wrote a letter dated 7.1.2010 to the Commission on the eligible tariff applicable to its Company. As per Clause (6) of the Joint Memo, petitioner in this representation stated that it is entitled to the tariff given to M/s. R.K. Powergen Pvt. Ltd., on the ground that its 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. Further it stated that it qualify better since its Commercial Operation Date (COD) is September 2003 whereas for R.K. Powergen, it is February 2004. Therefore it is entitled to a 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 ours billed at Rs.4.08 per unit.
6. This Commission did not consider the points raised in the above letter as Supplementary PPA was already signed by both the parties and approved the Supplementary PPA.

7. Aggrieved by the non-consideration of its representation, the Petitioner approached the Hon'ble Appellate Tribunal for Electricity in Appeal No.196/2010, praying for a direction to: (a) Respondent No.1—GESCOM, to draft a fresh Supplementary PPA giving effect to Clause (6) of the Joint Memo dated 17.5.2007; (b) to Respondent No.3—this Commission, to consider the same for approval and pass appropriate orders.

8. The Hon'ble Appellate Tribunal for Electricity, vide its Order dated 25.7.2011, set aside the Order dated 3.2.2010 of this Commission approving the Supplementary Agreement dated 30.12.2009, and remanded the matter back to the Commission to consider the representation dated 7.1.2010 after hearing both the parties and to pass reasoned order.

9. Pursuant to the Order of the Hon'ble Appellate Tribunal for Electricity, this Commission issued notice to both the parties to appear and submit their case. Accordingly both the parties have appeared through their counsels Sri Sriranga and Sri Divakar and have made detailed submissions supported by material on record.

10. It is vehemently contended by the Petitioner that, in the light of Clause (6) of the Joint Memo dated 17.5.2007, it is entitled to seek an increase in tariff as applicable to M/s. R.K. Powergen Pvt. Ltd., as their Plant is similar to that of M/s.
R.K. Powergen Pvt. Ltd. Further, according to the Petitioner, their Company and M/s. R.K. Powergen Pvt. Ltd., are identical, as both the Companies have signed the PPA on 18.10.2001 and they have achieved the Commercial Operation Date (COD) in September 2003, which is earlier to M/s. R.K. Powergen Pvt. Ltd., which achieved the Commercial Operation Date (COD) in February 2004.

11. In reply, Sri Sriranga, learned Counsel for the Respondents, submitted that the Petitioner is not entitled to any increase in tariff based on the Joint Memo dated 17.5.2007, as this Commission, while passing its Order dated 31.5.2007, has not incorporated Clause (6) of the Joint Memo in the operative portion of the Order. Consequently, Clause (6) of the Joint Memo cannot be pressed into service by the Petitioner in support of its claim for increase in tariff. Further, he has contended that the Order of the Commission in M/s. R.K. Powergen Pvt. Ltd.'s case is earlier to the Order made in the Petitioner's case, and the same cannot be treated as similar by the Petitioner. He further submitted that even if it is assumed that the Petitioner is entitled for an increase in the rate as per Clause (6) of the Joint Memo, the same cannot be that of M/s. R.K. Powergen Pvt. Ltd., as the rate of M/s. R.K. Powergen Pvt. Ltd. was not granted by the Respondents and the same is as per the PPA (which came to be revived on account of this Commission's Order dated 23.3.2006 passed in OP 09/2006, in which the termination of the PPA by KPTCL was set aside). He further referred to the meaning of the word, 'similar' contained in Ramanath Iyer Law Lexicon (at Page 4374) to drive home his point that the case of the Petitioner is not similar to that of M/s. R.K. Powergen Pvt. Ltd.
12. The Commission has looked into the records pertaining to OP 34/2006, the Supplemental Agreement signed by the parties, the representation of the generator dated 7.1.2010 and the Orders of the Hon'ble Appellate Tribunal for Electricity, dated 25.7.2011. It has also considered the written as well as oral submissions made on behalf of both the parties.

13. Based on the rival pleadings, the Issues that arise for consideration and decision of this Commission are:

(1) Whether the Petitioner is entitled to seek an increase in tariff in view Clause (6) of the Joint Memo dated 17.5.2007 in the first instance;

(2) If the Petitioner is held to be entitled to an increase in tariff, as per Clause (6) of the Joint Memo dated 17.5.2007, then whether increase in rate will be that of M/s. R.K. Powergen Pvt. Ltd.; / OR

(3) Whether the petitioner is entitled to an increase in tariff as per the Clause (6) of the Joint Memo dated 17.5.2007 on par with any other companies if it is held that it is not entitled to the rate of M/s. R.K. Power Gen Ltd.

14. **Issue No.1**: Whether the Petitioner is entitled to seek an increase in tariff in view Clause (6) of the Joint Memo dated 17.5.2007.

We have looked into the records of OP 34/2006 and the Joint Memo dated 17.5.2007 filed by the parties. The Commission on the said Joint Memo passed the following order:

"Case called. Counsel for parties present. Joint Memo is filed. Case is disposed of in terms of the Joint Memo. A detailed order will be issued on 31.5.2007".
On 31.5.2007, this Commission issued a detailed order. The operative portion of the said order is as follows:

"The Commission has considered the facts of the case and the joint Memo carefully. It is seen from the records that the PPA for setting up of a 6 MW Bio-Mass project 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 the Commission for the draft PPA initialled 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. The revised tariff for NCE projects was determined by the Commission as per Order dated 18.1.2005 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 be re-submitted for approval of the Commission. In the facts of the case, and in view of the Joint Memo filed by both 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.

Regarding the tariff payable, it is clarified that the Petitioner Company will be paid for 6 MW power supplied upto March 2007 at the MNES rates and from 1.4.2007 @ Rs.3.85/- per unit to be escalated thereafter at 2% per annum non-cumulatively from base
year 2006-07. 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.

When the petitioner’s claim for increase in the rate is examined in the light of the terms of the Joint Memo and the above two orders of the Commission, it appears to us that the demand of the petitioner for an increase in the rate is well justified. In the detailed Order passed by this Commission on 31.5.2007, this Commission specifically refers to bar the Joint Memo. The operative portion of the order of the Commission begins as "The Commission has considered the facts of the case and the Joint Memo carefully...". The Commission may not have referred to Clause (6) in detail as the said Clause comes in operation only in future that too when a similar biomass project has been given an increase in rate. The contention of the Respondents’ Counsel, Sri Sriranga, that this Commission in the operative portion of the Order has not referred to Clause (6) of the Joint Memo and therefore the Petitioner cannot derive support from Clause (6) of the Joint Memo, is factually incorrect. Considering the orders of this Commission dated 17.5.2007 and 31.5.2007, we hold that the petitioner is entitled to seek an increase in tariff in terms of Clause (6) of the Joint Memo. Accordingly this issue is answered in favour of the petitioner.

15. **Issue No.2**: If the Petitioner is held to be entitled to an increase in tariff, as per Clause (6) of the Joint Memo dated 17.5.2007, then whether increase in rate will be that of M/s. R.K. Powergen Pvt. Ltd.

Since we have held Issue No.1 in favour of the Petitioner, now we may consider whether the Petitioner is entitled to an increase in the rate similar to that
of M/s. R.K. Powergen Pvt. Ltd., or any other Company. In this connection, we may usefully refer the wordings of Clause (6) of the Joint Memo dated 17.5.2007. Clause (6) of the Joint Memo reads as under:

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

According to us, the wordings of Clause (6) of the Joint Memo referred to above clearly contemplate grant of increase in rates in future only if higher rate is given to any other similar biomass project. Admittedly, the Order of this Commission dated 23.3.2006 in the case of M/s. R.K. Powergen Pvt. Ltd., is earlier to the signing of the Joint Memo and the orders of this Commission dated 17.5.2007 and 31.5.2007. Further, the case of the petitioner is fundamentally different from that of M/s. R.K. Power Gen Pvt. Ltd., as there was no compromise in the said case and no new rate was granted by the respondents to the said company, subsequent to the date of Joint Memo. The rate provided in the PPA of M/s. R.K. Power Gen Ltd. was already in existence and this only got revived due to setting aside of the termination of the PPA by this Commission. The contention of the Petitioner that both the PPAs were signed on the same day and it has achieved the Commercial Operation Date (COD) earlier to M/s. R.K. Powergen Pvt. Ltd., and therefore they are similar does not merit consideration in the context of the above. To consider similarity, we have to look into circumstances in which Clause (6) of the Joint Memo came to be incorporated and rates granted to other companies. As noticed above, Clause (6) of the Joint Memo came to be included subsequent to the Order of this Commission in M/s. R.K. Powergen Pvt. Ltd.'s case and no new / increased rate was granted to
M/s. R.K. Powergen Pvt. Ltd., by the Respondents after signing the Joint Memo with the petitioner. Therefore, we have to hold that the Petitioner is not entitled to the rate given to M/s. R.K. Powergen Pvt. Ltd. Accordingly we answer this issue against the Petitioner.

16. **Issue No.3**: Whether the petitioner is entitled to an increase in tariff as per the Clause (6) of the Joint Memo dated 17.5.2007 on par with any other companies if it is held that it is not entitled to the rate of M/s. R.K. Power Gen Ltd.

In the light of our finding on Issue Nos. (1) & (2), now we may consider whether the petitioner is entitled to an increased rate on par with other biomass based generators in which cases an increase in tariff has been allowed subsequent to 17.5.2007. In this respect, we have considered the cases of M/s. Indira Power and M/s. Koppal Green. Records available reveal that M/s. Indira Power and M/s. Koppal Green had 6 MW biomass power plants and generated electricity from the same fuel as being used by the petitioner, i.e., Rice Husk. Both these companies had PPAs with the KPTCL and the same were also terminated on 5.7.2003 as was done in the petitioner's case. Similar to the petitioner, both the companies settled the dispute amicably with KPTCL / GESCOM and filed Joint Memos on 4.8.2007 agreeing to the rate of Rs.4.03 per unit from 1.4.2007 with base year of 2006-07. This Commission accepted those Joint Memos and disposed of the petitions as was done in the petitioner's case and reinstated the PPAs with modified rates. Considering the facts of the petitioner's case as well as M/s. Indira Power and M/s. Koppal Green Power, we are of the view that the petitioner's case is similar to that of M/s. Indira Power and M/s. Koppal Green Power. As these two plants have been granted with a
higher rate subsequent to the Joint Memo filed in the petitioner's case and the petitioner is entitled to the same rate, these cases in our view also qualify as similar in terms of the expression of 'similar' given in the Law Lexicon of Ramanath lyer based on various court decisions. These cases have a general likeness with the case of the petitioner. The Petitioner has also referred to these cases in its representation dated 7.1.2010 to bring home the point that it is entitled increase in rates. Even respondents have not stated anything about these cases in their pleadings. Therefore, we hold that the Petitioner is entitled to increase in rate on par with that of M/s. Indira Power and M/s. Koppal Green Power. Accordingly, Issue No. (3) is answered in favour of the Petitioner.

17. In view of the foregoing, the prayer of the Petitioner made in its letter dated 7.1.2010 is allowed in part. Respondent No.3 GESCOM is directed to modify Supplementary PPA suitably to bring the rate specified therein for 6 MW capacity of the Petitioner on par with M/s. Indira Power and M/s. Koppal Green Power, i.e., Rs.4.03 per unit w.e.f. 1.04.2007 and work out the arrears on the said basis for the electricity supplied and pay the same to the Petitioner within a period of two (2) months from the date of this Order.

18. During the course of the arguments, the Petitioner made a fervent plea that the Respondent No.3 GESCOM has not paid the interest due and payable to it as per the PPA for the power already supplied, even though the same was agreed to be paid before the Hon'ble ATE and therefore a direction shall be issued to pay the same. We have seen from the papers placed before the Hon'ble ATE that the Respondents had agreed to settle and pay the interest due
to the petitioner as per PPA. Therefore Respondent No.3 GESCOM is directed to pay the interest which has become already due within thirty (30) days from the date of this Order.

Sd/-
(M.R. SREENIVASA MURTHY)  Sd/-
CHAIRMAN            Sd/-
(VISHVANATH HIREMATH)  Sd/-
MEMBER (K.SRINIVASA RAO)  MEMBER