

Before the Karnataka Electricity Regulatory Commission, Bangalore

Dated this 29th day of May 2003

Present

- 1. Sri. Philipose Matthai - Chairman**
- 2. Smt. Nalini M.K. Menon - Member**

Case Nos: OP-01/2003 to OP-13/2003, OP-15/2003, OP-19 to 21/2003

Between

1. M/s Enercon India Ltd.,
#208, Prestige Center Point,
Cunningham Road,
BANGALORE - 560 052
2. M/s.Jindal Aluminum Ltd.,
Jindal Nagar,
Tumkur Road,
BANGALORE -560 073
3. M/s Shriram Investments Ltd.,
117/118, Dalmal Towers "B" Wing,
211, Nariman Point,
Mumbai 400 021.
4. M/s J.N.Investments and Trading Co. Pvt. Ltd.,
Kaysons No. 1, Mehra Estate,
LBS Marg, Vikhroli (West),
MUMBAI 400 079.
5. M/s. Dee Dee Enterprises,
Arora House,
16, Golf Link,
Union Park, Khar (West)
MUMBAI 400 052.
6. M/s Topaz Investments Pvt. Ltd.,
71/25, 59th B Cross, 4th Block'
Rajajonagar,
BANGALORE 560 010.
7. M/s Sanjay D Ghodavat (HUF),
Plot No.118, A.P.Chipri,
Kolhapur Dist. Maharashtra.
Pin 416 101

8. M/s Ghodavat Pan Masala Products (I) Pvt. Ltd.,
Plot No.118, A.P.Chipri,
Kolhapur Dist. Maharashtra.
Pin 416 101
9. M/s. Shriram Traansport Finance Co. Ltd.,
117/118, Dalmal Towers "B" Wing,
211, Nariman Point,
Mumbai 400 021.
10. M/s Sriram City Union Finance Ltd.,
117/118, Dalmal Towers "B" Wing,
211, Nariman Point,
Mumbai 400 021.
11. M/s Enercon Wind farms (Karnataka) Pvt. Ltd.,
87-B Silver Industrial Estate,
Bhimpore,
Daman - India
12. M/s Lovely Fragrances,
A-701, Baker's Field,
Shastrinagar,
Andheri West,
Mumbai - 400 058.
13. M/s.Mohite & Mohite Engineers & Contractors (P) Ltd,
Zilla Parishat Road,
Nagala Park'
Kolhapur 416 003
14. M/s. Texmo Industries,
P.O.Box No. 5303,
Mettupalayam Road,
Coimbatore 641 029.
15. M/s Prabhat Agri Bio-Tech Pvt. Ltd.,
3-6-168/7. Hyderguda,
Hyderabad.
16. M/s Savita Chemicals Ltd.,
66/67, Nirman Bhavan,
Nirman Point,
Mumbai - 400 021.
17. M/s Encon Service Limited,
Lanco House,
25 G N Chetty Road,
T. Nagar,
Chennai - 600 017.

Petitioners
(Sri. Uday Holla, Advocate)

and

1.M/s Karnataka Power Transmission Corpn. Ltd.,
Cauvery Bhavan,
Bangalore -560 009

2. The Director,
Karnataka Renewable Energy Dev. Ltd.,
Maj. Gen. A.D.Loganathan INA Cross,
Queen's Road,
Bangalore - 560 052.

3. Secretary to Government,
Energy Department,
M.S.Building,
Bangalore - 560 001.

Respondents

(Sri S.S.Nagananda, Adv. for Res.No.1
Sri. P.S.Rajgopal, Adv. for Res. No.2)

These petitions, filed by the 17 petitioners named above, seek direction to the respondent to enter and execute the Power Purchase Agreement (shortly 'PPA' hereinafter) in favour of the petitioners. In view of the common issues involved we have heard these cases together and a common order is hereby passed.

2. The Government of Karnataka through its various orders allocated/ sanctioned Wind Power Projects in Chitradurga, Belgaum, Davangere, Gadag and Dharwad districts in favour of the petitioners and the petitioners have entered into agreements with Government of Karnataka for setting up of wind energy plants in terms of the Government Orders. The petitioners claim that they have already completed the erection of the power plants and that, with the consent of the respondent; the power is being evacuated to the transmission-lines of the respondent. The petitioners state that the respondent has to enter into agreements regarding wheeling and banking charges and also regarding power purchases from the petitioners. It is contended that the petitioners have sent draft agreements to the respondent and the respondent is unnecessarily delaying the processing of these agreements. It is contended that the respondent has to formulate a draft PPA with the petitioners and

submit it to the Commission for approval. It is further contended that in case of some petitioners, the draft PPA has already been approved by the Commission and they are pending with the respondent for finalization.

3 The following grounds are urged in support of these petitions, which are found under Section 17, 18 & 25 of the Karnataka Electricity Reforms Act, 1999:

- i) The inaction on the part of the KPTCL in not providing the draft of the PPA to the petitioner and forwarding the same to the Commission is wholly illegal.
- ii) The KPTCL has entered into the PPAs with other persons who have set up Wind Farm projects. The KPTCL is however persistently refusing to execute the PPA in favour of the petitioners.
- iii) The inaction on the part of the KPTCL in not executing the PPA in favour of the petitioners is wholly arbitrary and discriminatory in nature and the same violates Article 14 of the Constitution of India. KPTCL has executed PPA in favour of several persons whose wind farms have been set up by the petitioner. The persistent refusal on the part of the KPTCL in not executing the PPA in favour of the petitioner is therefore illegal.
- iv) The inaction on the part of KPTCL in not getting PPA approved from the Commission as per the Karnataka Electricity Reforms Act, 1999, and the norms and procedures laid down by the Commission is wholly improper.
- v) KPTCL has failed and neglected to get the PPA approved from the Commission and PPA executed in favour of the petitioner even after other persons like BSES Limited approached the Commission and got the PPA executed in their favour. The action of the KPTCL is arbitrary and calls to be regulated by the Commission.
- vi) The aforementioned inaction on the part of KPTCL suffers from other legal infirmities.

2. The petitioners have prayed for the approval of the draft PPAs produced along with their petitions. They have also sought direction to the respondent to enter into and execute the PPAs approved by the Commission.

3. The Respondent No.1 has put in appearance and has opposed petitions. In the Statement of Objections filed by the respondent, the following points are briefly urged:
- i) There are no agreed drafts of PPAs between the parties as on date. The parties have not reached consensus regarding the terms of the PPA and therefore the draft PPA has not been initiated by the respondent so far.
 - ii) The petitions are premature and are liable to be dismissed since the Commission gets jurisdiction only after the parties negotiate the terms and an initial PPA is presented before the Commission for consideration.
 - iii) The parties have not been able to arrive at the agreed purchase price for the power to be generated by the petitioners and the clause pertaining to grant of escalation. These aspects are under consideration before the Government and the respondent will be able to indicate the purchase price only after the Government takes a decision in this regard.
 - iv) As regards the payment for the energy being fed into the grid, it was only on the request of the petitioners that the respondent agreed to synchronize the power plants with KPTCL grid, pending the signing of the PPAs. Therefore the petitioners cannot contend that they are entitled to PPAs, as a matter of right, since they are supplying the power to the respondent.
 - v) The petitioners have entered into agreements with the Government of Karnataka while establishing the power plants and as per Clause 12 of these agreements, the disputes or differences arising between the parties with regard to execution, implementation and commission of project or interpretation of agreement or provisions thereof or claim arising there under will have to approach the Government whose decisions will be final and binding. Therefore the petitioners have to approach the Government seeking redressal of the alleged claim made by them.
 - vi) In spite of best efforts of the respondent, it has not been possible to finalize the draft PPAs since many issues involved in the matter are pending consideration before the Government. The case of BSES was totally different from the facts of the cases of the petitioners and they cannot be compared.
 - vii) The concept of promissory estoppels is not applicable to the present cases as the present cases are contractual in nature. There is no agreed power price as on date. Therefore the question of payment for the energy consumed or interest thereon has not arisen.

- viii) There is no inaction on the part of respondent and, even if there is a delay, it cannot be agitated before this forum.
- ix) The petitioners are not entitled to any of the reliefs claimed.

4. The following is the brief status of these projects and their PPAs, according to the pleadings:

(a) The Projects of the following petitioners have been completed and their projects have been interconnected to the KPTCL grid and the power is being evacuated. The Respondent No. 1 has not paid the energy charges in respect of the energy utilized by him. The draft PPA has not been initialed by the KPTCL and it has not been sent to the Commission for approval

- i. M/s Sriram Investments Ltd.
- ii. M/s Jindal Aluminum Ltd.
- iii. M/s J.N.Investments & Trading Co.Ltd.
- iv. M/s Sanjay Ghodawat,
- v. M/s Ghodawat Pan Masala Products (India) Ltd.
- vi. M/s Sriram Transport Finance Co. Ltd.,
- vii. M/s Sriram City Union Finance Ltd.
- viii. M/s Lovely Fragrances
- ix. M/s Mohite & Mohite
- x. M/s Prabhat Agri. Bio-Tech.
- xi. M/s Savita Chemicals Ltd.
- xii. M/s Texmo Industries

(b) In case of the following petitioners, the projects are yet to be completed. KPTCL has not initialed the draft PPAs:

- i. M/s Enercon Wind Farms
- ii. M/s Enercon India Ltd.
- iii. M/s Enercon Services

(c) In case of the following project, it is stated that the draft PPA has been approved by the Commission but KPTCL has not given effect to it. The project is interconnected to the KPTCL grid and energy is being utilized by KPTCL.

i. M/s DEE DEE Enterprises.

5. We have heard, the Learned Counsel for the petitioners and also for the Respondent No.1. The Respondent Nos. 2 was represented by his counsel. Respondent No 3 has remained absent despite service of notice.

6. Sri Uday Holla, Learned Counsel for the petitioners, stated that the petitioners have invested huge sum for erection of these power plants on the implied and written assurances by the Government and KPTCL. He stated that nearly Rs.75 crores has been invested by borrowing money from the financial institutions. Most of the power projects have been completed on schedule and the power is being evacuated to transmission lines of the respondent. He contended that the respondent has been utilizing the energy produced by the petitioners but he is not in a hurry to sign the PPAs and to pay the bills of the energy evacuated. He further stated that there is no change in the policy of the Government so far as the wind power projects are concerned and there is no reason for delaying the draft PPAs. He contended that the reasons put forth by the respondent and his taking shelter behind the State Government is a bad practice and is unethical. The Respondent is bound to sign the PPAs since there was an implied assurance, at the time of erection of the power plants, by the respondent that such PPAs would be expeditiously entered into and executed. He requested the Commission to approve the draft PPAs enclosed to their petitions and direct the respondent to execute the PPAs approved by the Commission. He also stated that the petitioners are entitled to an interest of 24 % per annum on the outstanding amount since the respondent is charging the same rate to its consumers on the delayed payments.

7. Sri S.S. Nagananda, Learned Counsel for the respondent, reiterated the points urged in the Statement of Objections and contended that there is no deliberate delay on the part of the respondent nor there is any illegality in such delays since some of the issues in the PPAs are yet to be determined by the Government. He stated that PPAs would be entered into as soon as Government clearance is received regarding the escalation clause and also on the purchase price. He further stated that the respondent is not responsible for the delays and the matter has to be agitated before the Government, and that the petitioners have chosen wrong forum to agitate their grievances.

8. Prima facie, no legal issue is involved in these petitions. It appears that the Petitioners are driven to the wall, with the abnormal delay in executing the agreements relating to wheeling & banking charges and power purchases. The Respondent ought to have completed these procedures much before the power generated by the petitioners is evacuated. The reasons put forth by the Respondent that some of the issues involved are pending consideration of the State Government and that the drafts of these agreements are not yet ready for initialing. This, we are unable to appreciate. The establishment of these projects is a package deal between the Petitioners, the State Government and the Respondent. As pointed out by the Petitioners, there are implied and written assurances by the parties concerned and the projects are executed in good faith. The delay on the part of the Respondent to finalize the draft PPAs is not justifiable. It is strange that the respondent is using the power generated by the Petitioners and selling it to the consumers and generating revenue, but refusing to pay for such energy, on the grounds that the rates are not finalized. This is indeed an unethical business practice on the part of the Respondent Company.

9. The Respondent No.1 states that the disputes are required to be settled before the Government and the Commission has no jurisdiction. It should be remembered that the Karnataka Electricity Reforms Act, 1999, has been enacted *'to provide for avenues for participation of private sector entrepreneurs in the electrical industry in the State and generally for taking measures conducive to the*

development and management of the electrical industry in the State in an efficient, economic and competitive manner' through the constitution of the Commission. It is the solemn duty of the Commission to regulate the power sector of the State and it has inherent power to set right the issues affecting the smooth functioning of the sector. It is also clear to us that there are no disputes between the parties to the agreements on any issue which require to be resolved by resorting to the mechanism prescribed under the agreements. It is the question of delay in initiating the PPAs and getting approval for them from the Commission. There is hardly any role for the Government for sorting out this issue. This is precisely the mandate for the Commission. We, therefore, do not agree with the contention of the Respondent on jurisdiction.

10. Section 17(1) of the K.E.R.Act, 1999, read with Regulation 25 of the K.E.R.C. (Licensing) Regulations, 2000, prescribes that the licensee shall establish to the satisfaction of the Commission that the purchase of power by the licensee is through a transparent power purchase procurement process. It is now noticed that the Respondent Licensee has permitted many of the Petitioners to connect their generating plants to the grid of the Licensee and selling the power evacuated by the Petitioners to its consumers without any valid agreements approved by the Commission. This is no less a violation of the licensing conditions, and the Respondent No.1 should make amends to this without further loss of time.

11. Under these circumstances, we hold that the Respondent No.1 should expeditiously complete all formalities and finalize the draft PPAs and send them to the Commission for consideration and approval. In the case where the draft PPA has already been approved by the Commission, the Respondent shall give effect to it without further delay. We set a time limit of three months from the date of this order to finalize the PPAs relating to these Petitioners. It is so ordered.

sd/-

[Philipose Matthai]

CHAIRMAN

sd/-

[Nalini M.K Menon]

MEMBER

