

No.: N/14/16

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,
BENGALURU**

Dated : 2nd February, 2017

Present:

Shri M.K. Shankaralinge Gowda	..	Chairman
Shri H.D. Arun Kumar	..	Member
Shri D.B. Manival Raju	..	Member

OP No.11 / 2016

BETWEEN:

Greenergy Wind Corporation Pvt. Ltd.,
No.3, Queens Road Cross,
Bengaluru – 560 052 ..

PETITIONER

[Represented by Shri M.A. Delvi, Advocate]

AND:

Hubli Electricity Supply Company Limited,
P.B. Road, Navanagar,
Hubballi – 580 025. ..

RESPONDENT

[represented by Shri Shahbaz Hussain, Advocate]

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ORDERS

- 1) For the reasons stated in the Petition, the Petitioner has prayed for the following reliefs:

“(A) Terminating the Power Purchase Agreement dated 27.03.2007 between Hubli Electricity Supply Company Limited and M/s.Cauvery Coffee Traders and presently Supplemental Agreement dated 31.05.2013 and Company / Petitioner at Annexure – ‘A and A1’;

- (B) *Directing the respondent to make payments of all sums due from it to the Claimant in respect of the power supplied by the Claimant after taking final accounts in that behalf together with further late payment charges of Rs.2,27,321/- (Rupees Two Lakhs Twenty Seven Thousand and Three Hundred and Twenty One only);*
- (C) *Permitting the Claimant to supply electricity power to any other consumer under Wheeling and Banking Agreement."*

2) The material facts stated by the Petitioner are as follows :

- (a) That the Respondent and the Cauvery Coffee Traders had entered into a Power Purchase Agreement (PPA) dated 27.3.2007 (ANNEXURE-A) for sale of wind energy from its 0.8 Mega Watt (MW) Wind Mill Power Project at Majjur village in Gadag District, at the rate of ₹3.40 per unit for the energy delivered and the term of the PPA was twenty years from the Commercial Operation Date (COD). The Project was commissioned and energy was being supplied to the Respondent as per the terms of the PPA. The said Wind Mill Power Project was transferred to the Petitioner and the same was approved by the Government of Karnataka, vide Government Order No.EN 248 NCE 2012 dated 08.05.2013. Thereafter, the Petitioner executed the Supplemental PPA dated 31.5.2013.
- (b) That the Petitioner sent the Default Notice dated 13.8.2015 by Registered Post on 17.8.2015 to the Respondent stating that, the tariff

invoices for the months of April, May and June, 2015 remained unpaid for three consecutive months, apart from the non-payment of interest on the tariff invoices relating to the period from November, 2014 to June, 2015. In the said Default Notice, the Petitioner has shown that, the tariff invoices for the period from April, 2015 to June, 2015 have not been paid within the due dates, viz., within 21.5.2015, 20.6.2015 and 20.7.2015, respectively. The Petitioner has also shown that, towards the tariff invoices for July, 2015, which became payable on 19.8.2015, the amount claimed was ₹9,44,624/-. The Default Notice further shows that, the total amount due towards the tariff invoices for the months from April, 2015 to July, 2015 would work out to ₹23,12,027/- and the total interest on delayed payments towards the tariff invoices from November, 2014 to July, 2015 would work out to ₹23,763.05. The Default Notice clearly implies for payment of the amounts due and it is stated that, the Default Notice was being issued for termination of the PPA dated 27.3.2007, as per its terms.

- (c) That the Petitioner had issued the Termination Notice dated 21.9.2015 to the Respondent stating that, for non-payment of the amounts due, the PPA has been terminated after thirty days from the date of sending the Default Notice, as provided in Article 9 of the PPA. A copy of the said Termination Notice has been addressed to the Secretary of this Commission.

- (d) That the Respondent sent its reply dated 2.12.2015 by Registered Post to the Petitioner in respect of the Petitioner's Default Notice, as well as, the Termination Notice. The Respondent's reply states that, the interest on the delayed payments of the tariff invoices was released through a Cheque dated 30.9.2015 for the period from November, 2014 to June, 2015. The said reply of the Respondent does not specifically state that, the arrears towards the tariff invoices were also cleared by it. However, the Statement of Objections and the accounts extract enclosed therewith, would show that the arrears of the tariff invoice for the month of April, 2015 was paid by Cheque dated 4.9.2015 and for the months of May, June, July and August, 2015, the arrears were paid by Cheque dated 29.9.2015. The reply further states that, the delay in payment of the tariff invoices stated in the Default Notice was not intentional, but it was due to the non-receipt of the subsidy to be released from the Government of Karnataka towards the LT categories of consumers from time to time. Further, the reply states that, the Respondent has to achieve 7% RPO and the termination of the PPA is a bilateral and not a unilateral act, therefore, the Respondent would not concur for the termination of the PPA.
- (e) The Petitioner has alleged in the Petition that, the Respondent has committed a default as provided in Article 9.2.2 of the PPA and the same was not cured, thereby the Termination Notice was issued as required under Article 9.3.2 of the PPA for termination of the PPA and has prayed for the reliefs as noted above.

3) The Respondent has appeared through its counsel and filed its Statement of Objections, the gist of which may be stated as follows :

(a) It is contended that, the statement of the Petitioner in its Default Notice dated 13.8.2015 made it clear that the Default Notice was issued upon a purported Event of Default on the part of the Respondent in terms of Article 9.2.2 (b) of the PPA, which reads thus :

"9.2 Events of Default:

9.2.1 *Company's Default:* XXX XXX XXX

9.2.2 *HESCOM's Default :* *The occurrence of any of the following at any time during the Term of this Agreement shall constitute an Event of Default by HESCOM:*

a. *Failure or refusal by HESCOM to perform its financial and other material obligations under this Agreement.*

b. *In the event of any payment default by HESCOM for a continuous period of three months, the Company shall be permitted to sell Electricity to third parties by entering into a Wheeling and Banking agreement with HESCOM for which it shall pay transmission and any other charges to HESCOM at the rates applicable from time to time as approved by the Commission."*

(b) Further, it is contended that, it is an undisputed fact that a 'Payment Default' would occur upon the expiry of the due date of the payment and that, in the present case, admittedly, the periods of default are only 84 days, 54 days and 24 days, respectively for the tariff invoices

for the months of April, May and June, 2015. Therefore, it is contended by the Respondent that, the Default Notice is defective, and on such defective Default Notice, the Petitioner could not have issued the Termination Notice and therefore, there was no termination of the PPA in terms of Article 9.3.2 of the PPA.

- (c) It is contended that, the amount due under the tariff invoice for the month of April, 2015 was paid on 4.9.2015 and the amounts due under the tariff invoices for the months from May, 2015 to August, 2015 were paid on 29.9.2015. Further, it is stated that, the Petitioner has not submitted the tariff invoices from September, 2015 onwards. Therefore, the Respondent has contended that, the Petitioner is not entitled to any of the reliefs sought for.
- 4) We have heard the learned counsel for the parties and perused the material placed on the record.
- 5) The following issues would arise for our consideration :
- (1) Whether the PPA dated 27.3.2007 (read with the Supplemental PPA dated 31.5.2013) stands validly terminated?
 - (2) If Issue No.(1) above is answered in the affirmative, what shall be the directions to be issued against the Respondent?
 - (3) What Order?

- 6) After considering the submissions of the parties and the material on the record, our findings on the above issues are as follows :
- 7) **ISSUE No.(1)** : *Whether the PPA dated 27.3.2007 (read with the Supplemental PPA dated 31.5.2013) stands validly terminated?*
- (a) The relevant provisions in the PPA relating to the Events of Default and the Termination of the PPA read thus :

“9.2 Events of Default:

9.2.1 *Company's Default: XXX XXX XXX*

9.2.2 *HESCOM's Default : The occurrence of any of the following at any time during the Term of this Agreement shall constitute an Event of Default by HESCOM:*

a. *Failure or refusal by HESCOM to perform its financial and other material obligations under this Agreement.*

b. *In the event of any payment default by HESCOM for a continuous period of three months, the Company shall be permitted to sell Electricity to third parties by entering into a Wheeling and Banking agreement with HESCOM for which it shall pay transmission and any other charges to HESCOM at the rates applicable from time to time as approved by the Commission.”*

“9.3 Termination:

9.3.1 **Termination for Company's Default:** *XXX XXX XXX*

9.3.2 **Termination for HESCOM's Default :** *Upon the occurrence of an Event of Default as set out in sub-clause 9.2.2 above, the Company may deliver a Default Notice to HESCOM in writing which shall*

specify in reasonable detail the Event of Default giving rise to the Default Notice, and calling upon HESCOM to remedy the same.

At the expiry of 30 (thirty) days from the delivery of this Default Notice and unless the parties have agreed otherwise, or the Event of Default giving rise to the Default Notice has been remedied, Company may deliver a Termination Notice to HESCOM. Company may terminate this Agreement by delivering such a Termination Notice to HESCOM and intimate the same to the Commission. Upon delivery of the Termination Notice this Agreement shall stand terminated and Company shall stand discharged of all its obligations."

- (b) The Petitioner's Default Notice dated 13.8.2015 and the Respondent's reply dated 2.12.2015 have been produced by the Petitioner, itself. The Respondent does not dispute having sent the reply dated 2.12.2015. The said Default Notice and the reply to it would clearly establish that, the tariff invoices for the months of April, May and June, 2015, which fell due on 21.5.2015, 20.6.2015 and 20.7.2015, respectively were not paid within the said due dates. The Statement of Objections, filed by the Respondent shows that, the dues on the tariff invoices for the months of April, 2015 were paid by Cheque dated 4.9.2015 and the dues for the months of May and June, 2015 were paid by Cheque dated 29.9.2015. The arrears of interest towards the late payment of the tariff invoices amounting to ₹23,763.05 were paid by the Respondent by Cheque dated 30.9.2015.
- (c) The Petitioner has stated that, the default Notice dated 13.8.2015 was sent to the Respondent by Registered Post on 17.8.2015. The Petitioner

has not produced any specific evidence regarding the date of service of the Default Notice on the Respondent. The Petitioner has sent the Termination Notice dated 21.9.2015 to the Respondent terminating the PPA in question, stating that, the Termination Notice was being issued as per Article 9 of the PPA after thirty days from the date of sending the Default Notice. The reply dated 2.12.2015 of the Respondent does not dispute the receipt of the Default Notice or the Termination Notice. The Respondent also does not specifically say the dates of receipt of the Default Notice and the Termination Notice. The Termination Notice dated 21.9.2015 is sent to this Commission and it appears, the same was received by this Commission the next day itself. The Respondent has not contended that, it had paid the dues claimed under the Default Notice within thirty days from the date of receipt of the Default Notice. Therefore, it can be concluded that, the Default Notice dated 13.8.2015 sent by Registered Post on 17.8.2015, must have reached the Respondent on 20.8.2015. The Office of the Petitioner is in Bengaluru and the Default Notice was addressed to the Finance Advisor of the Respondent having its Office at Hubballi. In the same manner, we hold that the Termination Notice dated 21.9.2015 must have reached the Respondent on or before 24.9.2015.

- (d) The failure or refusal by the Respondent to perform its financial obligations amounts to a 'Respondent's Default' as provided in Article 9.2.2(a) of the PPA. Admittedly, in the present case, there is such failure or refusal by the Respondent to pay the tariff invoices and the

interest on the delayed payments within the due dates, which entitles the Petitioner to issue a Termination Notice, as per Article 9.3.2 of the PPA.

- (e) In the event of any payment default by the Respondent for a continuous period of three months as provided in Article 9.2.2(b) of the PPA, it would entitle the Petitioner to sell the electricity to third parties by entering into a Wheeling and Banking Agreement, by paying the wheeling and banking charges and other open access charges. On the interpretation of a provision similar to Article 9.2.2(b) of the present PPA, this Commission has taken the view that, any payment default by the purchaser would occur, the moment payment is not made on or before the due date and if once such default has occurred, it is not cured even by making subsequent payments of the said dues. Further, this Commission has taken the view that, for claiming the open access for any payment default by the purchaser, there should be three consecutive defaults in payment of the tariff invoices for a continuous period of three months. Such a view taken by this Commission in OP No.3/2009 in the case of *M/s.Sandur Power Company Limited -Vs- Karnataka Power Transmission Corporation Limited and others* decided on 13.8.2009, has been upheld by the Hon'ble Appellate Tribunal for Electricity in Appeal No.180/2009 decided on 11.4.2011. Therefore, the contention of the Respondent that payment default by it would occur only in the event when the payment default continues for a period of 90 days, cannot be

accepted. As already noted above, the failure or refusal by the Respondent to pay the tariff invoices of the Petitioner within the due dates, would amount to a 'payment default' entitling the Petitioner to issue a Default Notice, calling upon the Respondent to cure the defect within the stipulated period. Therefore, it is a clear case of failure or refusal by the Respondent to perform its financial obligations under the PPA, apart from there being a payment default by it for a continuous period of three months. The Petitioner has terminated the PPA by issuing the Termination Notice for the above default of the Respondent. The termination of the PPA would take effect from the date of service of the Termination Notice and admittedly, the failure to perform the financial obligations by the Respondent within the curing period of thirty days from the date of receipt of the Default Notice, entitles the Petitioner to issue the Termination Notice. Therefore, we hold that, the PPA dated 27.3.2007 stands validly terminated with effect from 24.9.2015.

- 8) **ISSUE No.(2)** : *If Issue No.(1) above is answered in the affirmative, what shall be the directions to be issued against the Respondent?*
- (a) The Respondent has stated that, the Petitioner has not submitted the tariff invoices from September, 2015 onwards for the energy supplied into the State Grid, therefore there was no question of paying any amounts to the Petitioner. As already noted above, the PPA dated 27.3.2007 stands terminated with effect from 24.9.2015. The Respondent has denied the termination of the PPA dated 27.3.2007.

Therefore, the energy injected into the State Grid by the Petitioner's Project even after the termination of the PPA shall be taken to the Respondent's account and the Respondent be made responsible for payment for such energy injected into the State Grid. The Petitioner is therefore entitled to the tariff for the energy supplied till the termination of the PPA at the rate agreed in the PPA, for which the Petitioner could raise proper invoices and the Respondent has to pay the said invoices within 15 (fifteen) days from the date of receipt of such invoices.

- (b) For the energy injected into the State Grid subsequent to the termination of the PPA, the Petitioner is entitled to compensation till the grant of open access to the Petitioner, permitting it to sell the energy to third parties. We are of the considered view that, the compensation may be allowed at the same rate, at which the tariff was being paid to the Petitioner for the energy injected into the State Grid during the subsistence of the PPA. The Petitioner could make a claim to the Respondent for any such energy supplied subsequent to the termination of the PPA and such a claim shall be honoured by the Respondent. Therefore, we answer Issue No.(2) accordingly.

- 9) **ISSUE No.(3)** : *What Order?*

For the foregoing reasons, we pass the following :

ORDER

- (1) The Power Purchase Agreement (PPA) dated 27.3.2007 (read with the Supplemental PPA dated 31.5.2013 stands validly terminated with effect from 24.9.2015;
- (2) The Petitioner shall be paid by the Respondent for the electricity supplied till 24.9.2015 at the rate of ₹3.40 (Rupees Three and Paise Forty) only, agreed in the PPA dated 27.3.2007, within 15 (fifteen) days from the date of receipt of the monthly tariff invoices from the Petitioner, less the amount paid, if any, towards the same. In default, the Respondent shall pay late payment charges as agreed under Article 6.3 of the PPA dated 27.3.2007; and
- (3) The Petitioner shall be paid compensation by the Respondent for the energy injected into the State Grid from 25.9.2015 onwards till the date of grant of open access for sale of energy to third parties, at the rate of ₹3.40 (Rupees Three and Paise Forty) only, within 15 (fifteen) days from the date of receipt of the Bill from the Petitioner towards such energy injected into the State Grid. In default, the Respondent shall pay interest to the Petitioner at the rate of 9% (nine percent) per annum from the date of default till the date of actual payment of interest.

Sd/-

(M.K. SHANKARALINGE GOWDA)
CHAIRMAN

Sd/-

(H.D. ARUN KUMAR)
MEMBER

Sd/-

(D.B. MANIVAL RAJU)
MEMBER