

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

Dated : 5th December, 2014

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| 1. Sri M.R. Sreenivasa Murthy | Chairman |
| 2. Sri H.D. Arun Kumar | Member |
| 3. Sri D.B. Manival Raju | Member |

OP No.48/2012

BETWEEN:

Soham Phalguni Renewable Energy Pvt. Ltd.,
HMG Ambassador Building (7th Floor),
137, Residency Road,
Bangalore – 560 025.

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PETITIONER

[Represented by M/s. Shetty and Hegde Associates, Advocates]

AND

1) Karnataka Power Transmission Corporation Limited,
Kaveri Bhavan (IV Floor),
Bangalore – 560 009.

2) Energy Department,
Government of Karnataka,
Vikas Soudha (III Floor),
Bangalore – 560 001.

3) Mangalore Electricity Supply Company Limited,
Paradigm Plaza,
A.B Shetty Circle,
Mangalore – 575 001

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RESPONDENTS

[Respondent No.3 represented by M/s. Justlaw, Advocates]

- 1) The Petitioner has filed this Petition under Section 62 of the Electricity Act, 2003, praying for revision of the tariff for its Mini Hydel Power Project (Project) from Rs.2.92 per unit [as agreed in the Power Purchase agreement (PPA) dated 26.11.2004 (ANNEXURE-A) between the Petitioner and the 1st Respondent-KPTCL] to Rs.3.97 per unit and to direct the consequential amendment to the said PPA. At the fag end of the proceedings, the Petitioner has filed an Interim Application on 29.5.2014, praying for revising the tariff to Rs.4.34 per unit, instead of Rs.3.97 per unit, as sought earlier in the Petition.

- 2) The material facts stated by the Petitioner are as follows:
 - (a) The Petitioner is a Company registered under the Companies Act, 1956, carrying on the business of developing, owning and operating Mini Hydel Projects in the State of Karnataka. Prior to 31.7.2010, the name of the Petitioner-Company was, "Mount Kailash Power Projects Pvt. Ltd.", instead of its present name as mentioned in Cause Title above. A copy of the fresh Certificate of Incorporation consequent upon change of name is at ANNEXURE-B. The present promoters of the Petitioner-Company purchased the entire equity shares, as per Share Purchase Agreement dated 28.2.2008 (ANNEXURE-C) from the earlier promoters, who had owned the entire Share Certificates. The procedure for share purchase

was completed and Closing Memorandum dated 28.10.2009 (ANNEXURE-D) was executed between the parties.

- (b) The Government of Karnataka (GOK), vide Order dated 10-10-2002 (ANNEXURE-E), accorded sanction to set up a Mini Hydel Plant of 6 Mega Watts (MW) capacity across Puchamoguru River at Mullibettu village in Mangalore, and vide Order dated 23-10-2003 (ANNEXURE-F), enhanced the capacity of the Project to 10.5 MW. The Petitioner entered into an Agreement dated 10-11-2003 (ANNEXURE-G) with the GOK, containing the terms and conditions agreed between the Government and the Petitioner regarding the development of the Project. The Petitioner entered into a PPA dated 26.11.2004 with KPTCL for sale of power (ANNEXURE-A). Under Article 5 of the PPA, the tariff for the sale of power was Rs.2.90 per unit, with an annual escalation of 2%.
- (c) As per Clause 12 of the Agreement dated 10.11.2003 (ANNEXURE-G), the completion period of the Project was 48 months from the date of the said Agreement. As it was envisaged that the Project cannot be completed within the said period, the then management of the Petitioner sought extension of time and the Government extended the time for three years from its Order dated 9.11.2006 (ANNEXURE-H) for completion of the Project. The then management of the Petitioner, except obtaining certain formal clearance Certificates from different authorities required for construction of the Project, virtually did not start the Project Construction

Work, till it handed over the management to the present promoters of the Petitioner. The GoK cancelled the allotment of the Project, vide its Order dated 19.6.2010, for non-completion of the Project within the time schedule.

(d) The present management of the Petitioner made a request to the GoK seeking revocation of the earlier cancellation of the allotment of the Project and for further extension of time. On consideration of the Petitioner's request and the report of the Karnataka Renewable Energy Development Limited (KREDL), the GoK extended the time for completion of the Project till August, 2012, by revoking the earlier cancellation Order, vide its Order dated 29.10.2010 (ANNEXURE-J). As the Petitioner showed progress in the construction of the Project, but could not complete it before the extended period of August, 2012, its request, vide letter dated 7.6.2012 (ANNEXURE-K), for further extension of time was allowed, vide Government Order dated 10.12.2012 (produced along with the Memo dated 29.8.2014), extending the time up to August, 2014. During the arguments on 18.7.2014, the learned counsel for the Petitioner submitted that 80% of the Project work was completed and it would be ready for commissioning by November, 2014.

(e) The Petitioner estimated the total cost of the Project as on 12.12.2012, i.e., the date of filing of the Petition, at Rs.56.58 Crores and claimed a tariff of Rs.3.97 per unit. On 29.5.2014, i.e., the date of filing of the amendment

application, the Petitioner projected the total expected cost for completion of the Project at Rs.65.34 Crores and claimed a tariff of Rs.4.34 per unit.

3) The Respondents have appeared through their counsel and the 3rd Respondent has filed the Statement of Objections, mainly contending as follows :

(a) The learned counsel for the Respondents has admitted that the PPA dated 26.11.2004 (ANNEXURE-A) was entered into between the 1st Respondent-KPTCL and M/s. Mount Kailash Power Projects Pvt. Ltd. (as the Petitioner was called then). He also submitted that the said PPA has been subsequently assigned by the 1st Respondent-KPTCL to the 3rd Respondent-MESCOM, as per the Government Order.

(b) That the delay in execution of the Project was attributable to the petitioner as it failed to adhere to the construction schedule, and having availed all the benefits given by the Government, the Petitioner cannot seek revision of tariff by taking advantage of its own wrong. The Project ought to have been completed in the year 2007 itself, but the Petitioner has delayed the same. The rate of Rs.2.90 per unit fixed in the PPA was based on the relevant consideration of the facts. Therefore, having voluntarily entered into the PPA at the rate of Rs.2.90 per unit, the Petitioner is not entitled to re-fixation of the tariff. The Petitioner cannot

seek re-fixation of tariff based on the generic Tariff Order dated 11.12.2009 for Renewable Sources of Energy, as the parameters considered are different. Altering the tariff is impermissible, as it would amount to altering the term of a concluded contract. In the generic Tariff Order dated 11.12.2009, it is specifically mentioned that the Order applies to PPAs submitted for approval on or after 1.1.2010 and cannot be made applicable to the Petitioner's Plant, as the PPA of the Petitioner's Plant was approved by the Commission on 7.9.2004. It is specified in this order that in respect of PPAs already approved, the tariff and other terms in those PPAs would hold good for the period specified therein. If re-determination of the tariff is allowed, it would lead to a situation in which every generator would approach the Commission for similar reliefs, rendering the exercise of fixing the generic tariff futile.

- (c) That the responsibility of establishing the Project within the stipulated time is on the Petitioner and the 3rd Respondent cannot be made liable to pay additional tariff for failure of the Petitioner to manage its finances or to adhere to the time schedule. By delaying the Project, the Petitioner has wasted the natural resources of the State for several years and deprived the State from availing the benefit of power that could have been supplied from its Plant. The terms of the PPA executed are binding on both the parties, and the question of revising the tariff agreed between the parties would amount to re-writing the terms of the Contract. That the averments in the Petition with regard to the increase in the input costs are

self-serving statements and that had the Project been implemented by the Petitioner as originally envisaged, these issues of escalated costs would not have arisen at all. The 3rd Respondent has denied the estimated costs for completion of the Project, as stated by the Petitioner, and contended that they are self-serving averments. The averments made in the Interim Application filed by the Petitioner are denied by the 3rd Respondent. Therefore, the Respondents have prayed for dismissal of the Petition.

- 4) We have heard the oral submissions made by the learned counsel for both the parties and have perused the pleadings and documents placed on record by the parties. During arguments, the learned counsel for the Respondents has not disputed the fact that the tariff agreed in the PPA can be revised by the Commission, if there are material changes in the circumstances, provided the party seeking revision of tariff is not at fault. He has submitted that such grounds for revision of tariff were not made out by the Petitioner. On the other hand, the learned counsel for the Petitioner has submitted that without there being any fault on the part of the Petitioner, the construction and completion of the Project was delayed due to reasons beyond its control, and therefore, the tariff agreed in the PPA needs to be revised.

5) From the rival contentions, the following issues would arise for our consideration :

(1) Whether the Petitioner has made out grounds justifying revision of the tariff agreed in the PPA?

(2) If the answer to Issue No.(1) above is in the affirmative, what should be the generation tariff that could be allowed to the Petitioner's Project?

(3) What Order?

6) After considering the records and the submissions made by the learned counsel for both the parties, our findings on the above issues are as follows:

7) **ISSUE No.(1) :**

(a) The learned counsel for the Respondents has contended that the term regarding 'Purchase Price' or 'Tariff' was agreed between the parties and that term was validly concluded. Further, the learned counsel submitted that the increase in the cost of the Project was due to the wrongful acts of the Petitioner and that the Petitioner cannot take advantage of its own wrongful acts. Therefore, he submitted that the increase in the

- construction cost of the Project cannot be a ground for revision of the tariff. It was pointed that the PPA was executed on 26.11.2004, and as per Article 4.1 (iii) of the PPA, the Petitioner should have completed the Project within 24 (twenty four) months from the date of the Financial Closure, and that as per Article 2.1(c), the Financial Closure should have taken place within 3 (three) months from the date of signing of the PPA. Therefore, according to the learned counsel for the Respondents, as per the terms of the PPA, the Project should have been completed within 27 (twenty seven) months from the date of the PPA. He further submitted that the PPA provides for its termination by the 3rd Respondent, in case the Petitioner does not achieve the Financial Closure within the stipulated time or it commits any Construction Default, as agreed.
- (b) The learned counsel for the Petitioner submitted that there were genuine grounds, which prevented it from commencing and completing the Project works, as agreed in the PPA and in the Agreement (ANNEXURE-G) executed with the Government. He pointed out that from time-to-time, the Government had extended the time for completion of the Project works, after considering the reports submitted by the KREDL and other circumstances explained by the Petitioner. Therefore, he submitted that this Commission has to revise the tariff.

- (c) The relevant provision regarding the period of completion of the Project is contained in Clause-12 of the Agreement with the Government (ANNEXURE-G), which reads thus :

"If the Company does not take effective steps such as obtaining necessary approvals for the Project from the appropriate authorities, land acquisition and arranging finances for the Project to the satisfaction of the Government of Karnataka within 18 months from the date of agreement and also if the Company does not run the Plant after commissioning at the acceptable Plant Load Factor as per the approved Detailed Project Report of the scheme, the Government reserves the right to terminate the agreement, subject to the force majeure condition and also to recover any loss caused to the Government on this account. The completion period for the Project including commissioning shall be 36 months for the Projects up to 10 MW and 48 months in other cases from the date of agreement."

- (d) As already noted above, the Government has extended the time for completion of the Project from time-to-time, till August, 2014, on the requests of the Petitioner and also upon consideration of the reports submitted by KREDL. Therefore it can be inferred that the Government was satisfied with the reasons given by the Petitioner for the delay in the commencement and completion of the Project. In the Government Order dated 10.12.2012, it is stated that, apart from payment of the prescribed fee for grant of extension of time for completion of the Project,

the Petitioner shall also give a Performance Guarantee of Rs.3,00,000/- per MW. It is not disputed that the earlier Management of the Petitioner had not even commenced the Project works, except obtaining certain necessary approvals. The transfer of the management of the Petitioner was completed only on 28.10.2009 (ANNEXURE-D). The actual progress of the Project started thereafter, and for the present, it is nearing completion. It may be noted here that the 3rd Respondent has not taken any action, calling upon the Petitioner to cure the Construction Defaults and to terminate the PPA.

- (e) From the above facts, it cannot be concluded that the Petitioner has failed to make out sufficient cause for the Construction Defaults. When the Government itself has extended the time, from time-to-time, for completion of the Petitioner's Project, it cannot be said that the Petitioner is seeking to benefit from its own wrong in claiming the higher tariff on the basis of the cost incurred on the Project. It is not the case of the Respondents that there was any oblique motive or dishonest intention on the part of the Petitioner in delaying the completion of the Project. A claim for damages by the Respondents for failure on the part of the Petitioner to meet with the scheduled date of completion of the Project may not be maintainable as the Government had extended the time on several occasions for completion of the Project. In such circumstances, it cannot be said that the Petitioner violated the Respondents' legal right. The Respondents cannot contend that the action of the Government in

extending the time, from time-to-time, for completion of the Project, is not binding on them.

- (f) The principles and methodologies for determination of tariff for supply of electricity by a generating company to a distribution licensee, enumerated in Section 61 of the Electricity Act, 2003, and the guidelines stated in this regard in Clause-5.0 and Clause-6.0 of the Tariff Policy, 2006, would show that the generation tariff determined should relate to the Project costs and other relevant facts. The determination of tariff is regulated by the Commission on the guidelines stated in the relevant provisions of the Electricity Act, 2003, and the Regulations framed thereunder. Considering the above facts and circumstances, we are of the view that in the present case, this Commission can revise the tariff, taking into account the material changes in the circumstances. As to when the term regarding 'tariff' or 'purchase price' agreed in the PPA could be revised is stated in the decision of the Hon'ble Supreme Court reported in **(2011) 11 SCC 34**, in the case of *Transmission Corporation of Andhra Pradesh Limited and another –Vs- Sai Renewable Power Private Limited and others*. In paragraph-63 of the said Judgment, it is held thus :

"...The term 'purchase price' indicted in the PPAs, as such, would be a matter within the realm of contract but this is subject to the changes which are contractually and/or even statutorily permissible. ..."

In the facts and circumstances of the present case, the revision of tariff agreed in the PPA is statutorily permitted. Accordingly, we answer issue No.(1) in the affirmative.

8) **ISSUE No.(2) :**

- (a) The Petitioner entered into the PPA dated 26.11.004 (ANNEXURE-A) with the 1st Respondent. Subsequently, it was assigned in favour of the 3rd Respondent. The tariff agreed under Article 5.1 of the said PPA was Rs.2.90 per KWhr for the energy delivered at the Metering Point, with an escalation at a rate of 2% per annum over 'the base tariff' every year. The term of the PPA was twenty years from the Commercial Operation Date (COD) and it could be renewed for a further period of ten years on such terms and conditions as might be mutually agreed between the parties. It appears, the tariff agreed was as per the then existing MNRE guidelines. These guidelines related to the determination of generic tariff in respect of Renewable Sources of Energy. The determination of Project-specific tariff was not envisaged in the said guidelines. The Government used to allot Mini Hydel Projects on the recommendation of the Allotment Committee for the said purpose. Those persons, who had experience and ability in the field of execution of Mini Hydel Projects, used to be preferred.

(b) The Petitioner could not have ventured to proceed with the Project, if it were not economically viable. The Petitioner had entered into the PPA with the 1st Respondent for sale of electricity at the rate of Rs.2.90 per KWhr, with an escalation of 2% per annum on the base tariff. The Petitioner claims that it is the sister-concern of Soham Group of Companies, which has already commissioned certain Mini Hydel Projects in the State of Karnataka. Before filing the present Petition, the Petitioner had made attempts to wriggle out of the PPA entered into with the 1st Respondent, by making requests to the Government and KREDL, vide letter dated 20.11.2010 (ANNEXURE – S) and letter dated 30.11.2010 (ANNEXURE – T), respectively, stating that the PPA had become void for non-completion of the Project within the period stated in the PPA. A similar request was made by the Petitioner to the 1st Respondent, vide letter dated 4.8.2011 (ANNEXURE – V). These requests were rejected by the Respondents, stating that this Commission had already decided, after contest, on 23.12.2010 in OP No.27/2009 between *M/s. Soham Mannapitlu Power Pvt. Ltd. –Vs- KPTCL and others*, that the Project Developer, which failed to fulfil the terms and conditions of the PPA, cannot be allowed to take advantage of its own wrong, to contend that the contract had become void. Apparently, after failing in its attempts to wriggle out of the PPA, the Petitioner has filed the present Petition on 12.12.2012. Immediately before filing this Petition, the Petitioner has also got extension of time to complete the Project up to August, 2014, vide Government

Order dated 10.12.2012, In this backdrop, the Petitioner has the onus of proving that the Project Cost has not been inflated, to support its prayer for revision of the tariff, as prayed for. While seeking revocation of the Government Order cancelling the allotment of the Project and also further extension of time for completion of the Project, it has to be taken that the Petitioner was very well aware of the Tariff Order obtaining then and the capital cost fixed in determining generic tariff for similar Projects in such orders. It would be justifiable to expect that due diligence required to be taken by any investor in similar Project, to ensure that his Project Cost remained within the cost adopted in the applicable generic Tariff Order, should have been taken by the Petitioner as well. Thus, it can be justifiably presumed that the Petitioner pursued with the Project implementation, being well aware of the consequences of any cost overrun.

- (c) The total Project cost estimated in the Petition is Rs.56.58 Crores. In the amendment application, filed nearly one and-a-half year thereafter, the Project cost indicated is Rs.65.30 Crores. The certificates of the Chartered Accountants, the Ledger extracts and the copies of the Agreements pertaining to the civil works of the Project, purchase and servicing of the machineries and other engineering services required for the Project, cannot be taken on their face value, in the absence of material justifying the absolute need for such expenditure.

- (d) The determination of the quantum of tariff is subject to the relevant Regulations framed under the Electricity Act, 2003. This Commission has determined tariff in respect of Renewable Sources of Energy by its Order dated 18th January, 2005. Under the said Order, for Mini Hydel Projects, the tariff determined was at Rs.2.80 per KWhr without any escalation for the first ten years from the year of Commercial Operation of the Plant. This tariff was also made applicable to the Mini Hydel Projects, for which PPAs had been submitted before the Commission on or after 10.6.2004. The Order further states that the tariff determined in this Order would be reviewed after five years, which shall be applicable to agreements to be entered into after that date between a distribution licensee and the generator.
- (e) This Commission subsequently, by its Order dated 11.12.2009, determined the tariff in respect of Renewable Sources of Energy. Under this Order, the tariff for Mini Hydel Projects was fixed at Rs.3.40 per KWhr without any escalation for the first ten years from the date of signing of the PPA. The Order further states that the tariff determined shall be applicable to all PPAs submitted to the Commission on or after 1.1.2010, for a period of ten years from the date of signing of the PPA between a distribution licensee and the generator. The Order further states that the tariff determined in this Order would be reviewed after five years, which shall be applicable to the agreements to be entered into after that date.

- (f) This Commission, in its generic Tariff Orders dated 18.1.2005 and 11.12.2009 for the Renewable sources of Energy, has fixed the costs for Mini Hydel Project at Rs.3.90 Crores per MW and Rs.4.75 Crores per MW, respectively. These Orders have been passed by the Commission after following the required procedures and conducting public hearings. Several Mini-Hydel Projects have been executed subsequent to these generic Tariff Orders.
- (g) In the present case, admittedly, the Petitioner has incurred the Project Cost during the five years period, i.e., from 1.1.2010 to 31.12.2014, when the generic Tariff Order dated 11.12.2009 was in force and the tariff of Rs.3.40 per KWhr was applicable for the Projects commenced and completed during the said period.
- (h) The Project Costs claimed by the Petitioner in the Petition, as well as in its Interlocutory Application, are not supported by any reliable evidence with regard to its correctness and need. Therefore, the Project Cost and the related tariff in respect of the Mini-Hydel Projects, as determined by this Commission in the generic Tariff Order dated 11.1.2009 need to be taken into account in this case.
- (j) For the foregoing reasons, we hold that the Petitioner is entitled to the tariff of Rs.3.40 (Rupees Three and Paise Forty only) per KWhr, without any escalation, for the energy delivered at the Metering Point, for the first ten years from the COD. Therefore, Issue No.(2) is answered accordingly.

9) **ISSUE No.(3) :**

For the foregoing reasons, we pass the following :

ORDER

- (1) The Petitioner shall be entitled to the tariff of Rs.3.40 (Rupees Three and Paise Forty only) per KWhr, without any escalation, for the energy delivered at the Metering Point, for the first ten years from the Commercial Operation Date, instead of the tariff indicated in Article 5.1 of the PPA dated 26.11.2004 (ANNEXURE-A); and
- (2) The parties shall effect the necessary amendment to the PPA dated 26.11.2004 (ANNEXURE-A), in the above terms.

Sd/-
(M.R. SREENIVASA MURTHY)
CHAIRMAN

Sd/-
(H.D. ARUN KUMAR)
MEMBER

Sd/-
(D.B. MANIVAL RAJU)
MEMBER