

No.: N/43/16

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

Dated : 9th March, 2017

Present:

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

OP No. 37 / 2016

BETWEEN:

Rugby Renergy Private Limited,
A-38, 1st Floor,
Mohan Co-operative Industrial Estate,
Main Mathura Road,
New Delhi – 110 044

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PETITIONER

[Represented Navayana Law Offices, Advocates]

AND:

- 1) Hubli Electricity Supply Company Limited,
P.B. Road, Navanagar,
Hubballi – 580 025.
- 2) Karnataka Power Transmission Corporation Limited,
Cauvery Bhavan,
K.G. Road,
Bengaluru – 560 009.

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RESPONDENTS

[Respondents 1 & 2 represented by Shri Shahbaaz Hussain Advocate]

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ORDERS

- 1) In the present Petition, the Petitioner has prayed for the following reliefs:

- “(a) Declare that the PPA dated 11th September 2008 as it stand amended by the supplementary agreement dated 28th January 2001 is validly terminated by the Petitioner vide Termination Notice dated 26th December 2015;
- (b) Direct the 2nd Respondent to provide the wheeling and banking facility by executing the wheeling and banking agreement in the format approved by this Hon’ble Commission;
- (c) Direct the 1st Respondent to make payment of Rs.1,27,96,761/- (Rupees One Crore Twenty Seven Lakh Ninety Six Thousand Seven Hundred Sixty One only) due including interest as more fully detailed in the Termination Notice at **Annexure P-1**;
- (d) Pass such other and incidental order as may deem fit appropriate in the facts and circumstances of the case.”
- 2) The material facts required for the disposal of this Petition may be stated as follows :
- (a) That as per the business transaction agreement dated 30.9.2013 between the DLF Limited and the Petitioner transferring 11.2 MW capacity of Wind Power Project, the Petitioner became the owner of the said Project. The DLF Limited had executed a Power Purchase Agreement (PPA) dated 11.9.2008, in favour of the 1st Respondent – Hubli Electricity Supply Company Limited (HESCOM) for sale of the electricity generated from the said Project, as per the terms and conditions mentioned in the said PPA. The DLF Limited had also

executed a Supplemental PPA dated 28.1.2011, after reduction of the capacity of the Wind Power Project, from the originally approved 25.6 MW to 11.2 MW, as per the Government Order dated 26.8.2010.

- (b) The said Project of 11.2 MW capacity was commissioned on 30.3.2008 and the Petitioner started delivering the energy to the 1st Respondent (HESCOM).
- (c) The Petitioner has contended that, the 1st Respondent (HESCOM) was highly irregular in making payments of the Monthly Tariff Invoices as and when they became due. The Petitioner was constrained to issue a number of letters and reminders. Finally, the Petitioner had sent the Default Notice dated 21.11.2015 (ANNEXURE-P9) calling upon the 1st Respondent (HESCOM) to pay the outstanding amount towards the Monthly Tariff Invoice dated 4.8.2015 for ₹1,27,96,761/- and the interest due on it, at the rate of 14.15% per annum, from 19.8.2015 to 31.10.2015 amounting to ₹3,62,148/-, within thirty days from the date of receipt of the Default Notice, further stating that, in case of failure to cure the default, the Petitioner would be constrained to issue a Termination Notice under Article 9.3.2 of the PPA. The Default Notice dated 21.11.2015 was served on the 1st Respondent (HESCOM) on 26.11.2015.
- (d) Thereafter, the Petitioner had issued the Termination Notice dated 26.12.2015 (ANNEXUE-P1) stating that, the payment due under the

Monthly Tariff invoice dated 4.8.2015 was still pending for payment even after service of the Default Notice. The Petitioner was constrained to terminate the PPA, entered into between the parties, by issuing the said Termination Notice. The Termination Notice was served on the 1st Respondent (HESCOM) on 2.1.2016. Therefore, the Petitioner has filed the above Petition before this Commission on 23.5.2016, seeking the reliefs mentioned above, as its request for open access for sale of electricity to third parties was not accepted.

- (e) The 1st Respondent (HESCOM) appeared through its counsel and contested the claim of the Petitioner. It is contended that, the 1st Respondent had paid a sum of ₹1,27,96,761/- to the Petitioner vide Cheque No.615816 dated 1.1.2016 by clearing the dues under the Monthly Tariff Invoice dated 4.8.2015. The 1st Respondent (HESCOM) had filed the Statement of Accounts, maintained by it, in respect of the Petitioner's account at ANNEXURE-R1, for the energy bills relating to the period from April, 2015 to July, 2016. The 1st Respondent (HESCOM) has contended that, the averments made in the Petition that the Monthly Tariff Invoice dated 4.8.2015 for ₹1,27,96,761/- was still due, is not correct.
- (f) The 1st Respondent (HESCOM) has contended that, there were certain delays in the payment of the Monthly Tariff Invoices due to the cash flow problems, as the Government was not releasing the subsidy in time.

- (g) The Petitioner has filed an Application dated 1.12.2016 proposing to delete the words and figures stated under Prayer (c) in the Petition and to insert the words and figures, “*₹21,20,508/- (Rupees Twenty One Lakh Twenty Thousand Five Hundred and Eight) only being interest on delayed payments calculated upto 30.11.2015 as per the Termination Notice dated 26.12.2015 annexed as P1 in the Petition*”. This Application for amendment of the Petition has been opposed by the 1st Respondent (HESCOM).
- 3) We have heard the learned counsel for the parties and perused the material placed on the record.
- 4) The following issues would arise for our consideration in the above case:
- (1) Whether the Petitioner has validly terminated the PPA dated 11.9.2008?
- (2) What is the amount due to the Petitioner by the 1st Respondent (HESCOM) as on the date of filing of the Petition?
- (3) What Order?
- 5) After considering the submissions of the parties and the material on the record, our findings on the above issues are as follows :

6) **ISSUE No.(1)** : *Whether the Petitioner has validly terminated the PPA dated 11.9.2008?*

(a) Before considering the validity of the Default Notice and the Termination Notice, we may notice the relevant provisions in the PPA dated 11.9.2008 on the above issue.

(b) Article 9.2.2 of the PPA provides for '*HESCOM's Default*', 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 the 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 the HESCOM for which it shall pay transmission and any other charges to the HESCOM at the rates applicable from time to time as approved by the Commission."*

(c) Article 9.3.2 of the PPA provides for termination of the PPA for '*HESCOM's Default*', which reads thus :

“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 the 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.

Where a Default Notice has been issued with respect to an Event of Default, which requires the co-operation of both Company and HESCOM, to remedy, Company shall render all reasonable co-operations to enable the Event of Default to be remedied.”

- (d) The Default Notice is dated 21.11.2015 and it was served on the 1st Respondent (HESCOM) on 26.11.2015. As per the Default Notice, the 1st Respondent (HESCOM) was due a sum of ₹1,27,96,761/- towards the Monthly Tariff Invoice dated 4.8.2015, and a sum of ₹3,62,148/- being the interest on it till 31.10.2015.

- (e) The Termination Notice dated 26.12.2015 was sent to the 1st Respondent (HESCOM) on 26.12.2015 itself, by Registered Post and the same has been served on the 1st Respondent (HESCOM) on 2.1.2016.
- (f) Article 9.3.2 of the PPA provides for the procedure for termination of the PPA on account of the 1st Respondent (HESCOM)'s default. As per this Article, there should have been an Event of Default by the 1st Respondent (HESCOM) as stated in Article 9.2.2 of the PPA, which would have entitled the Petitioner to deliver the Default Notice. If the default had not been cured at the expiry of thirty days' period from the date of delivery of the Default Notice, unless the parties have agreed otherwise, the Petitioner would have been entitled to deliver a Termination Notice to the 1st Respondent (HESCOM). Upon service of such Termination Notice on the 1st Respondent (HESCOM), the PPA would stand terminated.
- (g) In the present case, the Default Notice dated 21.11.2015 was served on the 1st Respondent (HESCOM) on 26.11.2015. The date of expiry of thirty days from the date of delivery of the Default Notice would be 26.12.2015, because the date of service of the Default Notice is to be excluded for counting the clear period of thirty days for this purpose. Therefore, the right to issue a Termination Notice would accrue to the Petitioner only on 27.12.2015, at the earliest. In the present case, the Petitioner issued the Termination Notice by Registered Post to the

1st Respondent (HESCOM) on 26.12.2015. Therefore, in our considered view, without there being a cause of action for issuance of the Termination Notice, the Petitioner has issued the Termination Notice to the 1st Respondent (HESCOM) on 26.12.2015 itself.

- (h) The learned counsel for the 1st Respondent (HESCOM) submitted that, the termination of the PPA took place only upon service of the Termination Notice. Further, he contended that, before the service of the Termination Notice, the amount claimed in the Default Notice was paid. Therefore, according to him, there is no valid termination of the PPA. The 1st Respondent (HESCOM) has produced the Accounts Extract, pertaining to the energy transactions of the Petitioner, at ANNEXURE-R1. The learned counsel for the 1st Respondent (HESCOM) submitted that, the Invoice amount of ₹1,27,96,761/- was paid on 1.1.2016. On the other hand, the learned counsel for the Petitioner submitted that, the said amount was credited to the Bank account of the Petitioner only on 2.1.2016, after receipt of the Termination Notice by the 1st Respondent (HESCOM). Therefore, he submitted that, the said amount was received from the 1st Respondent (HESCOM) after the termination of the PPA and hence, the receipt of the said amount on 2.1.2016 has no effect on the validity of the termination of the PPA, which had already taken place.
- (j) There is no dispute that, the Termination Notice was served on the 1st Respondent (HESCOM) on 2.1.2016. According to the

1st Respondent (HESCOM), it had paid the Monthly Tariff Invoice amount of ₹1,27,96,761/- by Cheque dated 1.1.2016. However, the Petitioner has contended that, the said amount was received into its Bank account from the 1st Respondent (HESCOM) through NEFT (Electronic Fund Transfer) on 2.1.2016 at 15:44:53 hours. In support of this contention, the learned counsel for the Petitioner has produced a copy of Statement of the Petitioner's Bank Account. On the other hand, the 1st Respondent (HESCOM) has not produced any reliable evidence to show that the said amount was paid to the Petitioner on 1.1.2016 itself. Only in the Statement of Accounts maintained by it, the 1st Respondent (HESCOM) has shown that the said amount was paid to the Petitioner by Cheque dated 1.1.2016. It appears, the said Cheque dated 1.1.2016 might have been issued by the 1st Respondent (HESCOM) to its Bank concerned, with a request to send the said amount through NEFT to the Petitioner's Bank account. Therefore, the 1st Respondent (HESCOM) has not established that, it had paid the said amount to the Petitioner on 1.1.2016 itself as contended by it.

- (k) There is no reliable evidence on the record to show that, after the service of the Termination Notice on 2.1.2016, the payment of the said amount was made to the Petitioner. It is true that, the payment of the said amount was made on 2.1.2016 at 15:44:53 hours. But, the Petitioner has failed to produce evidence to show that, the Termination Notice was served on the 1st Respondent (HESCOM)

before crediting of the said amount to its Bank Account by the 1st Respondent (HESCOM).

(l) The Petitioner has come before this Commission for a declaration that, the PPA dated 11.9.2008 was validly terminated. Therefore, it was for the Petitioner to produce a reliable evidence to show that, the payment was made to it, by the 1st Respondent (HESCOM), only after the service of the Termination Notice. Therefore, on this count also, we hold that the termination of the PPA is not valid.

(m) For the above reasons, we answer Issue No.(1) in the negative.

7) **ISSUE No.(2)** : *What is the amount due to the Petitioner by the 1st Respondent (HESCOM) as on the date of filing of the Petition?*

There can be no difficulty in allowing the Application for amendment of the Petition filed by the Petitioner. However, that does not end the difficulty in ascertaining the balance amount payable by the 1st Respondent (HESCOM) to the Petitioner as on 30.11.2015 or as on the date of filing of the Petition. The Statement of Accounts produced by the 1st Respondent (HESCOM) shows that, the balance amount due to the Petitioner was much more than the amount claimed by the Petitioner in its Application for amendment of the Petition or in the Default Notice or in the Termination Notice. A perusal of the Statement of Accounts (ANNEXURE-R1) would indicate that, the total

of the balance amount due to the Petitioner by the 1st Respondent (HESCOM) was quite different from any of the amounts claimed in the Default Notice or the Termination Notice. Therefore, we are of the considered view that, the parties should be directed to file the Statement of Accounts maintained by them, for the period prior to 31.1.2017, in order to ascertain the balance amount due to the Petitioner towards the supply of energy to the 1st Respondent (HESCOM). Therefore, we answer Issue No.(2), accordingly.

8) **ISSUE No.(3)** : *What Order?*

For the foregoing reasons, we pass the following :

ORDER

- (1) The PPA dated 11.9.2008, entered into between the Petitioner and the 1st Respondent (HESCOM) is not validly terminated, thereby, the Petitioner is not entitled to seek open access for sale of electricity generated from the Project in question to third parties;
- (2) The parties shall file the Statement of Accounts maintained by them, for the period prior to 31.1.2017, in respect of the supply of electricity made by the Petitioner to the 1st Respondent (HESCOM), within 30 (thirty) days from the date of this Order, for ascertaining the balance amount due, if any, as on that date, from the 1st Respondent (HESCOM) to the Petitioner.

Sd/-
(M.K. SHANKARALINGE GOWDA)
CHAIRMAN

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

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