

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

Dated : 13th November, 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.9/2013

BETWEEN:

Jindal Aluminium Ltd.,
Jindalnagar,
Tumkur Road,
Bangalore – 560 073.
(Represented Shri S.V. Bhat, Advocate)

.. **PETITIONER**

AND:

1) Bangalore Electricity Supply Company Limited,
Corporate Office, II Floor,
K.R.Circle,
Bangalore – 560 001.

2) The General Manager – Electrical,
Power Purchase,
Bangalore Electricity Supply Company Limited,
Corporate Office, II ..Floor,
K.R.Circle,
Bangalore – 560 001 ..

RESPONDENTS

[Respondents represented by M/s. Justlaw, Advocates]

1) The petitioner has filed this Petition for a declaration that the action of the Respondents in deducting 1.8% of the monthly tariff invoice from August to December, 2012 under Article 5.6(v) of the Power Purchase Agreement (PPA), is

illegal and for a direction to the Respondents to pay Rs.1,03,373/- so deducted, with interest at Bank rate, viz., 11% per annum from the date of invoice and other consequential reliefs.

- 2) The brief facts of the case, as mentioned in the Petition, are as follows:
- (a) The Government of Karnataka accorded sanction in the year 2000 for installation of Wind Energy Plant of 4.47 Meg Watts (MW) capacity at Chitradurga Dist. Out of the total capacity, 1.9 MW was transferred to the Petitioner. The Plant started Commercial operation on 21-5-2003. The Petitioner entered into a PPA with Karnataka Power Transmission Corporation Limited (KPTCL) on 15-7-2003 for sale of power generated. The PPA was later assigned to Respondent No.1. As per Article 5.6 of the PPA, a Letter of Credit (LC) was required to be established and made operational within thirty days prior to the date of commercial operation of the Project and had to be maintained by the Respondent during the term of the PPA. However, the LC was opened on 18-8-2012 for Rs.12,00,000/-. The Petitioner returned the LC to the Respondent on 13-9-2012, pointing out that the same should have been issued prior to the Commercial Operation Date (COD) and that the Respondent was estopped from issuing the LC after ten years. The Petitioner also informed the Respondent that it was satisfied with the payment pattern and requested to continue the same.

(b) The Petitioner made several correspondences with the Respondents in the matter and suggested that the parties may mutually negotiate and resolve the issue or approach the Commission to seek amendment of Article 5.6(v) of the PPA. The Respondents, without responding to the letters, deducted a total sum of Rs.1,03,373/- from the monthly invoices for the months from August to December, 2012, towards 1.8% rebate as per Article 5.6(v) of the PPA. Being aggrieved by the act of the Respondents, the Petitioner has filed this Petition.

3) The Commission heard the preliminary submissions of the counsel for the Petitioner and directed issuance of Notice to the Respondents. Upon service of Notice, the Respondents entered appearance through their counsel and filed Statement of Objections on 29-8-2013. In the Objections, the Respondents have submitted that Article 5.6 of the PPA has been interpreted by the Commission in its Order dated 17-1-2013 in OP No. 28/2012, which has been upheld by the judgment dated 10-7-2013 of the Hon'ble Appellate Tribunal for Electricity (ATE) in Appeal No.66/2013. The Respondents have also contended that the Petitioner had not produced any record to show that it had intimated the proposed COD to the respondent, to enable it to open the LC. The Respondents have also relied on the judgment dated 18-5-2010 of the Hon'ble Appellate Tribunal for Electricity (ATE) in Appeal No. 176/2009 (BESCOM -Vs- Davanagere Sugar Company Limited) wherein it is held that opening of LC is a vital and integral part of the PPA and a fundamental financial continuous obligation cast upon the purchaser under the PPA and failure to honour such obligation constitutes an

event of default. In the light of the above judgment, the Respondents have submitted that LCs have been opened in all subsisting PPAs, to avoid termination of the PPAs.

4) We have heard the counsel for the parties. During arguments, the counsel for the Petitioner reiterated the averments made in the petition and submitted that the petitioner is satisfied with the payment pattern and waives the right to receive the LC. He also submitted that the LC should be in a form and content to the satisfaction of both parties and cannot be forced upon the petitioner. The counsel for Respondents submitted that establishing and maintaining the LC is a continuous obligation and as per the judgments of the Hon'ble ATE, the Respondents are left with no option but to open and maintain the LC.

5) We have perused the records. The issue in this case revolves around Article 5.6 of the PPA which reads as follows:

"5.6 Letter of Credit: Corporation shall establish and maintain transferable, assignable, irrevocable and unconditional non-revolving Letter of Credit in favour of, and for the sole benefit of, the Company. The letter of Credit shall be established in favour of, and issued to, the Company on the date hereof and made operational thirty (30) days prior to the Commercial Operation Date of the project and shall be maintained consistent herewith by Corporation at any and all times during the Term of Agreement. Such Letter of Credit shall be in form and substance acceptable to

both the parties and shall be issued by any Scheduled Bank and be provided on the basis that:

(i) In the event of Tariff Invoice or any other amount due and payable by Corporation pursuant to the terms of this Agreement is not paid in full by Corporation as and when due, the Letter of Credit may be called by the Company for payment in full of the unpaid Tariff Invoice or any such other unpaid amount.

(ii) The foregoing as determined pursuant hereto, upon representation of such Tariff Invoice or other invoice or claim for such other amount by the Company on the due date therefor or at any time thereafter, without any notification, certification or further action being required.

(iii) The amount of the Letter of Credit shall be equal to one month's projected payments.

(iv) The Corporation shall replenish the Letter of Credit to bring it to the original amount within 30 days in case of any valid drawdown.

(v) The Company shall allow a rebate of 1.8% of the Tariff Invoice or actual expenditure /charges for the LC account incurred, whichever is higher, and the same shall be deducted from the monthly Tariff Invoice payable to the Company.

(vi) The Letter of Credit shall be renewed and/or replaced by the Corporation not less than 60 days prior to its expiration."

6) The Commission had an occasion to interpret this Article in the PPA in OP No. 28/2012 (Tuppadahalli Energy India Pvt Ltd vs MESCOM). In the Order dated 17-1-2013 in OP No. 28/2012, the Commission had held that the deduction

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of the rebate of 1.8% from the monthly tariff invoice of the Company is proper. This Order was upheld by the Hon'ble ATE in its judgment dated 10.7.2013 in Appeal No.66/2013.

7) In Appeal No: 176/2009 (BESCOM –Vs- Davanagere Sugar Company Ltd), the Hon'ble ATE has held that opening of LC is a fundamental financial obligation and an integral part of the Contract and failure to fulfil the obligation amounts to an event of default and entitles the generating Company to terminate the PPA. Further, while dealing with the Article in the PPA relating to waiver, the Hon'ble ATE held as follows in Para No.40:

“...where there is a continuous obligation cast upon one party by the Agreement, the waiver of right would not absolve the other party to discharge its obligation subsequently. ... opening of a LOC is a continuous obligation to be discharged by the appellant after the expiry of 30 days during all times of period of Agreement.....”.

8) Besides the aforesaid decisions, we deem it proper and necessary to refer to the common Order of the Commission in OP Nos. 3 & 4/2013 (Indowind Energy Ltd –Vs- BESCOM), although the parties have not relied on the same. In OP Nos.3 & 4/2013, this Commission had an occasion to deal with the Article in the PPA relating to LC and the question of right of waiver. In this decision, it is held as follows:

“... the Contract in question is a Statutory Contract and cannot be altered by a party without the prior approval of the Commission. Therefore, the question of waiving of the requirement

of one of the terms of Contract by a party and acceptance or non-acceptance of the same by the other party, do not arise and need no consideration."

9) This Order of the Commission in OP Nos.3 & 4 / 2013 was challenged in Appeal Nos. 320 of 2013 and 322 of 2013 before the Hon'ble ATE. It is relevant to refer to the judgment in Appeal Nos. 320 of 2013 & 322 of 2013 dated 28th April, 2014 (Indowind Energy Pvt Ltd.-Vs- KERC & another), wherein the Hon'ble ATE has held as follows:

"52. The argument of waiver of the right to Letter of Credit on the part of the Appellant is also misconceived and without any merit. The Appellant claims that the Distribution Licensee is not entitled to the rebate. The Appellant cannot have the right to unilaterally leave an entitlement of Letter of Credit under the PPA which in fact gives the corresponding benefit to the Distribution Licensee by claiming the monthly rebate.

53. Thus, the relevant provisions of Opening of Letter of Credit and consequential rebate are a Clause that provides benefits to both the parties. The tariff to the consumers at large is reduced on account of the Opening of the Letter of Credit and the entitlement of the rebate by the Distribution Licensee. In fact, interest on two month's receivables is included in the generation tariff of the Appellant in the form of interest on working capital and, therefore, the Distribution Licensee and its consumer are entitled for rebate for early payment of dues of the Generating Company.

54. Under the above circumstances, it cannot be open for one party to claim the waiver of the Letter of Credit being opened and not providing the rebate consequently.

55. As mentioned earlier, it is the right of the Respondent-2 to open the Letter of Credit in order to entitle the rebate of 1.8% in the tariff which goes to the benefit of the Distribution Licensee and public at large.

56. The Appellant further contends that the Letter of Credit should have been opened by the Distribution Licensee 30 days prior to the commercial operation of the wind generating units and in this case, the Letter of Credit had been opened long after the commencement of the units.

57. This contention also has no relevance at this stage. Only when the Distribution Licensee (R-2) put in place the Letter of credit in August, 2012, the monthly deduction of rebate was made. In other words, no deductions were made by the Distribution Licensee for the past period when the Letter of Credit was not opened. Therefore, the Appellant cannot have any grievance.

58. As indicated above, the Letter of Credit is a payment security mechanism. If the Appellant does not receive the payment from the Distribution Licensee within 15 days of the bill being raised, the Appellant is entitled to receive the same from the bank guarantee directly by way of Letter of Credit.

59. In view of the above, the decision quoted by the Appellant in AIR 1973 SC 559 Dr. Jeevan Lal and Others Vs Brij Mohan Mehra relating to the waiver of the right, unilaterally would not apply to the present case.

60. On the other hand, the decision rendered by this Tribunal in Appeal No.66 of 2013 in Tuppadahalli case would squarely apply to the present case."

10) In the light of the settled law stated above, we are unable to accept the contention of the petitioner that it has waived the right to receive the LC and that the deduction of rebate of 1.8% is improper. The parties have consciously signed the PPA, which is a statutory contract. The contract provides for establishing the LC, as a payment security mechanism. The Respondents, are required under the PPA to open and maintain the LC during the term of the agreement. As this is a continuous obligation, the opening of LC cannot be held to be contrary to the terms of the PPA. The question of non- opening of LC prior to 30 days from COD and waiver have been dealt with by this Commission and the Hon'ble ATE in the above mentioned cases, and their findings go against the Petitioner. There is no other fresh issue to be decided in this case. Therefore, we hold that the Petitioner is not entitled to the reliefs sought for.

11) For the foregoing, we pass the following:

ORDER

The Petition is dismissed.

Sd/-

(M.R. SREENIVASA MURTHY)
CHAIRMAN

Sd/-

(H.D. ARUN KUMAR)
MEMBER

Sd/-

(D.B. MANIVAL RAJU)
MEMBER