

No.: N/35/16

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

Dated : 16th March, 2017

Present:

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

OP No.28 / 2016

BETWEEN:

SRM Power Private Limited,
No.105, 'R.R. Takt',
37, Bhoopasandra Main Road,
Sanjaynagar,
Bengaluru – 560 094.

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PETITIONER

[Represented by Shri M.S. Raghavendra Prasad, Advocate]

AND:

Mangalore Electricity Supply Company Limited,
MESCOM Bhavana,
Kavoor Cross Road,
Bejai,
Mangaluru – 575 004.

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RESPONDENT

[Represented by Just Law, Advocates]

ORDERS

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

“(i) Resolve the dispute in so far as it relates to the deletion of Article 6.5 of the Power Purchase Agreement dated 15.06.2006 as provided under Article 10.5 of the Power Purchase Agreement dated 15.06.2006;

- (ii) *Pass an Order directing the Respondent to refund the rebate in a sum of Rs.15,31,354/- (Rupees Fifteen Lakhs Thirty One Thousand Three Hundred and Fifty Four only) claimed by it from 07.09.2013 (date of first request to the Respondent not to renew the Letter of Credit) with interest at the rate of 18% per annum from the date of claiming each rebate till the date of actual refund;*
- (iii) *Award costs of this Petition to the Petitioner;*
- (iv) *Such other order / directions / guidelines in the circumstances of the case."*

2) The material facts required for the disposal of the above Petition may be stated as follows :

- (a) The Petitioner has established a 6 MW capacity Mini Hydrel Power Generating Station near Samshe Village, Mudigere Taluk and has entered into a Power Purchase Agreement (PPA) dated 15.6.2006 with the Respondent for sale of electricity. The said PPA provides for other terms and conditions.
- (b) Article 6.5 of the PPA provides that, the Respondent shall establish and maintain a Letter of Credit (LC) in favour of the Petitioner and further, the Petitioner shall allow a rebate of 1.8% of the Monthly Tariff Invoice amount or actual expenditure / charges for the LC, whichever is higher and the same shall be deducted from the Monthly Tariff Invoice amount payable to the Petitioner and the other terms relating to it.

- (c) The Petitioner has contended that, the establishment and maintenance of the LC is for the sole benefit of the Petitioner, as made out in Article 6.5 of the PPA itself, therefore the Petitioner can waive that right at its will and that the continuance of the same is a burden to the Petitioner, as a rebate of 1.8% of the Monthly Tariff Invoice amount or the actual expenditure / charges for the LC, whichever is higher, is being deducted.
- (d) The Petitioner has contended that, accordingly, by letter dated 7.9.2013, it had requested the Respondent not to renew the LC any further, but the Respondent, by letter dated 9.10.2013, had refused to accede to the said request of the Petitioner. There were further communications between the parties in this regard and ultimately the Petitioner requested the Respondent to delete Article 6.5 of the PPA through an amendment, for which the Respondent refused.
- (e) The Petitioner claims that, a sum of ₹15,31,354/- has been deducted towards rebate from 7.9.2013 (i.e., the date of first request to the Respondent not to renew the LC) till the date of filing of the present Petition and the same is liable to be refunded to the Petitioner.
- (f) The Respondent has appeared through its counsel and filed its Statement of Objections. Paragraph-6 of the said Statement of objections discloses the defense of the Respondent, which reads thus:

"The provisions regarding opening of Letters of Credit has been construed and held to be an essential and material clause of the PPA in earlier proceedings. The non-opening of Letters of Credit by ESCOMs has been held to be a breach of the terms of the PPA resulting in providing the generating company a cause of action to terminate the PPA. In the circumstances, the deletion of an essential clause of the PPA solely on the ground that there is a reciprocal obligation to provide rebate is wholly unsustainable. Under the garb or seeking an amendment, the Petitioner is seeking to take away the financial benefit conferred on the Respondent. The financial benefit conferred on the Respondent by virtue of the terms of the PPA cannot be taken away unilaterally."

- (g) The Respondent has contended that, a similar controversy has been decided by this Commission in OP No.28/2012 by its Order dated 17.1.2013 and the said Order has been upheld in Appeal No.66/2013 by the Hon'ble Appellate Tribunal for Electricity (ATE) by Order dated 10.7.2013. Therefore, the Respondent has contended that, the Petitioner is not entitled to any of the reliefs claimed in the Petition.
- 3) When the present Petition was pending before this Commission, the Order dated 10.7.2013 passed by the Hon'ble ATE in Appeal No.66/2013 was pending before the Hon'ble Supreme Court in Civil Appeal No.8736/2013 preferred by the aggrieved generating company. By the time the present Petition was taken up for arguments, the said Civil Appeal was disposed of by the Hon'ble Supreme Court by its Order dated 10.1.2017, upholding the findings of the Hon'ble ATE in this regard.

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- 4) We have found that the controversies involved in this case and in OP No.28/2012 are similar in nature. Therefore, we hold that that, the controversy in question has been finally resolved by the Hon'ble Supreme Court in Civil Appeal No.8736/2013 by its Order dated 10.1.2017, rejecting the contention of the generating company to delete Article 6.5 of the PPA in order to avoid payment of the rebate stated therein. Therefore, there is no question of refund of any amount deducted towards the rebate to the Petitioner.
- 5) For the foregoing reasons, we pass the following :

ORDER

The above Petition is dismissed.

Sd/-

(M.K. SHANKARALINGE GOWDA)
CHAIRMAN

Sd/-

(H.D. ARUN KUMAR)
MEMBER

Sd/-

(D.B. MANIVAL RAJU)
MEMBER