

No.: N/85/14

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

Dated : 11th February, 2016

Present:

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

OP No. 33 / 2014

BETWEEN:

Ravikiran Power Projects Private Limited,
Plot No.1071,
Road No.44, Jubilee Hills,
Hyderabad – 500 033

..

PETITIONER

[Represented by Navayana Law Offices, Advocates]

AND:

- 1) Gulbarga Electricity Supply Company,
Station Main Road,
Kalaburagi – 585 101.
- 2) State Load Despatch Centre,
28, Race Course Cross Road,
Bengaluru-560 009.
- 3) The Karnataka Power Transmission Corporation Limited,
Cauvery Bhavan,
K.G. Road,
Bengaluru – 560 009.

- 4) Bangalore Electricity Supply Company Limited,
K.R. Circle,
Bengaluru – 560 001.

.. **RESPONDENTS**

[Represented by Just Law, Advocates]

ORDERS

- 1) The Petitioner, which is a generating company, has filed this Petition under Section 86(1)(f) of the Electricity Act, 2003 (Act), praying for the following reliefs :

- (a) To direct the 2nd and 3rd Respondents, to grant Wheeling and Banking approval to the Petitioner;
- (b) To direct the Respondents to sign the Wheeling and Banking Agreement with the Petitioner;
- (c) To pass such other order(s).

- 2) The material facts made out in the Petition in support of the above prayers may be stated as follows :

- (a) The Petitioner is a Company registered under the Companies Act, 1956 and it has set up a 7.5 Mega Watts (MW) Biomass Power Project (Project) in the State of Karnataka and had entered into a Power Purchase Agreement (PPA) dated 10.6.2002 with the 3rd Respondent – Karnataka

- Power Transmission Corporation Limited (KPTCL). The said PPA was assigned to the 1st Respondent - Gulbarga Electricity Supply Company Limited (GESCOM), upon unbundling of the 3rd Respondent (KTCL). A Supplemental PPA dated 14.1.2006 was entered into between the Petitioner and the 1st Respondent (GESCOM). The Petitioner commenced supply of power from July, 2005 onwards to the 1st Respondent (GESCOM).
- (b) The Petitioner has contended that the 1st Respondent (GESCOM) committed breach of the material financial obligations stated in the PPA, thereby a Default Notice dated 28.10.2011 (ANNEXURE – P1) was issued to the 1st Respondent (GESCOM), and inspite of it, the 1st Respondent (GESCOM) did not cure the defects. Further, that on 27.2.2012, the Petitioner issued a Termination Notice to the 1st Respondent (GESCOM) and terminated the PPA.
- (c) The Petitioner then entered into a PPA dated 1.6.2012 with the PTC India Limited (PTC), a Trader, for sale of electricity through Exchange. As the transaction involved inter-State transmission of electricity, it required a 'No Objection Certificate' (NOC) of the 2nd Respondent – State Load Despatch Centre (SLDC), as per the Central Electricity Regulatory Commission (CERC) Regulations. However, the 2nd Respondent (SLDC), by its communication dated 3.7.2012 (ANNEXURE – P3), declined to issue the NOC for open access. Thereafter, the Petitioner filed a Petition

(ANNEXURE – P4) before the CERC, praying for a direction against the 2nd Respondent (SLDC) to issue the NOC and for other consequential reliefs. The CERC dismissed the said Petition, by Order dated 20.5.2013 (ANNEXURE – P6). The Petitioner preferred an Appeal before the Hon'ble Appellate Tribunal for Electricity (APTEL) in Appeal No.171/2013 against the Order of the CERC. This Appeal was also dismissed by the Hon'ble APTEL, as per Order dated 5.9.2014 (ANNEXURE – P7). It is stated by the Petitioner that the CERC and the Hon'ble APTEL have held that this Commission has to adjudicate upon the validity of the termination or otherwise of the PPA in question, before it could consider directing the 2nd Respondent (SLDC) to issue NOC.

- (d) In the meanwhile, the 1st Respondent (GESCOM) had filed OP No.7/2013 (ANNEXURE – P5) before this Commission in the last week of February, 2013, against the 1st Respondent (GESCOM), praying for a declaration that the PPA dated 10.6.2002 and the Supplemental PPA dated 14.11.2006 are valid and binding and for quashing the Termination Notice dated 27.2.2012. The Petitioner herein, who was the Respondent in OP No.7/2013, had filed objections opposing the prayers made in the said Petition. The said Petition was dismissed by this Commission on 17.10.2013 as "withdrawn", on the Memo filed by the 1st Respondent (GESCOM) herein, who was the Petitioner in the said Petition.

- (e) The Petitioner has contended that the dismissal of OP No7/2013 by this Commission amounted to upholding of the termination of the PPA by this Commission.
- (f) The Petitioner, under the impression that the termination of the PPA had attained finality, filed an application before the 2nd Respondent (SLDC) on 17.9.2014, requesting for grant for approval for entering into a Wheeling & Banking agreement (W&BA) for supply of power from its Generating Station to third parties in Bengaluru. However, the Respondents did not take any action on the open access application. Therefore, the Petitioner has filed the present Petition, praying for the reliefs, as mentioned at Paragraph-1 above. Here itself, we may note that the open access application dated 17.9.2014 was filed after dismissal of Appeal No.171/2013 by the Hon'ble APTEL by Order dated 5.9.2014.
- 3) The Respondents appeared through their counsel and filed their common Statement of Objections. The Respondents have denied the claim of the Petitioner that the PPA stood terminated by issuance of the Termination Notice dated 7.2.2012 (ANNEURE – P2). They have denied the validity of the Default Notice and the Termination Notice. The 1st Respondent (GESCOM) has admitted filing of OP No.7/2013 by it and its withdrawal on 7.10.2013. The 1st Respondent (GESCOM) has denied

the averments made by the Petitioner that, it had withdrawn OP No.7/2013 accepting that a valid Letter of Credit (LC) was never in existence. The contentions of the Respondents, as made out in Paragraphs 6 to 9 of their Statement of Objections praying for dismissal of the Petition, are as follows :

- “6. *The 2nd Respondent by communication dated 03rd July, 2012 declined ‘No Objection’ to PTC on the ground that as per the order of the State Government dated 01st September, 2009 all the private generators having valid PPAs with State utilities are bound to supply power to the respective power utilities in the State and the Petitioner had a valid PPA with 1st Respondent as reported by 1st Respondent. A copy of the said communication is produced herein as **ANNEXURE P-3.***
7. *Being aggrieved by the non-granting of ‘No Objection’ by the 2nd Respondent for inter-State open access, the Petitioner filed a Petition before the Central Commission to set aside the order / communication issued by 2nd Respondent. The 1st Respondent and 2nd Respondent filed objections before the Central Commission contending that the PPA is valid and subsisting. A copy of the said Petition is produced herein as **ANNEXURE P-4.***
8. *Then, the 1st Respondent filed OP No.7 of 2013 before Hon’ble Karnataka Electricity Regulatory Commission challenging the PPA termination seeking declaration that the PA is valid and subsisting. A copy of the said Petition is produced herein as **ANNEXRE P-5.***
9. *Based on the submissions of the Respondents and noting the case filed by the 1st Respondent before the Hon’ble Commission, the Central Commission, by the impugned order dated 20th May, 2013, dismissed the*

*Petition of the Petitioner. The Central Commission held that the question of denial of 'No Objection' by 2nd Respondent for inter-State open access would be gone into by the Commission only after the case before the Hon'ble Commission has been disposed of. A copy of the said order is produced herein as **ASNEXURE P-6.**"*

- 4) We have heard the oral submissions made by the learned counsel for the parties and perused the pleadings and records of the case.
- 5) The learned counsel for the Petitioner submitted that, by withdrawing OP No.7/2013, the 1st Respondent (GESCOM) has accepted, or it amounted to acceptance of, the termination of the PPA, as the 1st Respondent (GESCOM) had sought for quashing of the Termination Notice dated 27.2.2012 in OP No.7/2013. The learned counsel for the Petitioner further submitted that the withdrawal of OP No.7/2013 had the effect of the Termination Notice dated 27.2.2012 having attained finality. The learned counsel for the Petitioner further submitted that, under such circumstances, the 2nd Respondent (SLDC) should have allowed open access for sale of electricity to third parties and the Respondents should have executed the W&BA, as requested in the application dated 17.9.2014 (ANNEXURE – P8). The learned counsel for the Petitioner relied upon the decision of the Hon'ble Supreme Court, reported in **AIR 1999 SC 509**, in SLP(C) Nos.19359-60 of 1998, decided on 1.12.1998, in the case of *M/s.Upadhyay & Co. -Vs- State of U.P. & others.*

- 6) The learned counsel for the Respondents refuted the submissions made by the learned counsel for the Petitioner and contended that the PPA in question is still in existence and hence the Termination Notice is bad in law. Therefore, the learned counsel for the Respondents submitted that the 2nd Respondent (SLDC) has not rightly allowed open access to the Petitioner.
- 7) The following issues would arise for our consideration :
- (1) Whether the dismissal of OP No.7/2013 as having been withdrawn, would bar the 1st Respondent (GESCOM) from denying the validity of the termination of the PPA dated 10.6.2002?
- (2) What Order?
- 8) After considering the respective contentions of the parties and the pleadings and documents on record, our findings on the above issues are as follows :
- 9) **ISSUE No.(1) :**
- (a) There is no dispute that the Petitioner entered into the PPA dated 10.6.2002 with the 3rd Respondent (KPTCL) and subsequently the said PPA

was assigned to the 1st Respondent (GESCOM) and that the Petitioner issued the Default Notice dated 28.10.2011 (ANNEXURE – P1) and the Termination Notice dated 27.2.2012 (ANNEXURE – P2). It is also not in dispute that thereafter, the Petitioner entered into an agreement for sale of electricity with the PTC and applied for grant of NOC for open access, and that the 2nd Respondent (SLDC) rejected the request for issuance of NOC for sale of electricity under open access to the PTC, on the ground that, as reported by the 1st Respondent (GESCOM), there was a valid PPA subsisting between the Petitioner and the 1st Respondent (GESCOM). Therefore, it is clear that, after issuance of the Termination Notice, the 1st Respondent (GESCOM) has denied the validity of the termination of the PPA.

- (b) Thereafter, the Petitioner filing a Petition before the CERC, challenging the rejection of issuance of NOC by the 2nd Respondent (SLDC) and again the Petitioner approaching the Hon'ble APTEL against the Order of the CERC, are not in dispute. In the said proceedings, it is held that the State Commission has the exclusive jurisdiction to decide regarding the validity of the termination of the PPA, and until the State Commission decides that dispute, the CERC cannot insist on issuance of NOC to the Petitioner.
- (c) The 1st Respondent (GESCOM) filing OP No.7/2013 against the Petitioner for a declaration that the PPA in question was valid and subsisting and

for quashing the Termination Notice dated 27.2.2012, are also not in dispute. The said Petition was dismissed by this Commission on 17.10.2013, as 'withdrawn', on the Memo filed by the Petitioner therein (GESCOM).

- (d) We have given our careful consideration in respect of the Petitioner's contention, that the withdrawal of OP No.7/2013 amounted to the 1st Respondent (GESCOM) accepting the validity of the Termination Notice, thereby accepting the termination of the PPA in question. In other words, the contention is that, the 1st Respondent (GESCOM) was barred from taking the defense in the present case that the termination of the PPA is invalid, etc. We have also gone through the Judgment of the Hon'ble Supreme Court, cited by the learned counsel for the Petitioner. In the said Judgment, the Hon'ble Supreme Court has stated that, the principle stated in Sub-rule (4) of Rule 1 of Order 23 of the Code of Civil Procedure (CPC), which is based on a public policy, is applicable to the Special Leave Petition (SLP) proceedings before it. In that case, the SLP was filed against an Order passed in a Writ Petition and subsequently, that SLP was dismissed 'withdrawn' by the person who filed it. In the guise of challenging some other Order, another SLP was filed by the same person before the Hon'ble Supreme Court, for challenging the Order impugned in the earlier SLP proceedings. In such circumstances, the Hon'ble Supreme Court has held that, *"It is not permissible to challenge the same Order over again, after withdrawing the SLP, without*

obtaining permission of the Court for withdrawing it, with liberty to move for Special Leave again subsequently." The Hon'ble Supreme Court, in Paragraph-12 of the said Judgment, has stated thus:

"The above principle has been incorporated as a rule in the realm of suits. Order 23 Rule 1 of the CPC deals with withdrawal of suit or abandonment of part of the claim. Sub-rule (3) says that the court may in certain contingencies grant permission to withdraw from suit with liberty to institute a fresh suit in respect of the subject matter of such suit. Sub-rule (4) reads thus :

(4) Where the plaintiff - (a) abandons any suit or part of claim under Sub-rule (1), or (b) withdraws from a suit or part of a claim without the permission referred to in Sub-rule (3), he shall be liable for such costs as the court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim."

- (e) The above principle stated in Order 23 Rule 1(4) of the CPC does not bar a person withdrawing a Suit, without the permission of the Court for filing a fresh Suit in respect of the same subject-matter, from denying the contentions, which he had already raised in his earlier Suit that was withdrawn by him. The said Sub-rule (4) of Rule 1 of Order 23 of the CPC bars from obtaining the remedy by way of filing a Suit and does not take away the right of a party to a particular claim or property. The effect of withdrawal of the Suit or proceedings is that, the parties are left in the same position which they had occupied, if no such Suit or proceedings had been instituted. The party withdrawing the Suit or proceedings is not

entitled to file a fresh Suit in respect of the same subject-matter, if he had not obtained permission to file a fresh Suit. Such withdrawal of proceedings does not amount to *res judicata*. The principle stated in Sub-rule (4) of Rule 1 of Order 23 of the CPC, which as held by the Hon'ble Supreme Court is based on a public policy, is applicable to the proceedings arising out of a Petition filed before this Commission. Therefore, the 1st Respondent (GESCOM) is at liberty to deny the termination of the PPA in question.

- (f) Therefore, the Commission is of the considered view that the withdrawal of OP No.7/2013 by the 1st Respondent (GESCOM) does not preclude it from taking the defense that there existed a valid PPA and that termination of the PPA alleged by the Petitioner was invalid. In other words, the contention of the Petitioner that the withdrawal of OP No.7/2013 has the effect of the termination of the PPA, is incorrect. In the light of the said position of law, the 2nd Respondent (SLDC) has not committed any illegality in not allowing the application of the Petition for grant of NOC for open access.
- (g) In the present case, the Petitioner has not prayed for any declaration that the PPA in question stood terminated, as a consequence of the 1st Respondent (GESCOM) having failed to cure the defects pointed out in the Default Notice. The disputed fact of termination of the PPA is not put in issue in the present proceedings. In Paragraph-21 of the Petition, the

Petitioner has stated that, the scope of the present Petition is limited to the scope of denial of NOC for open access. The Petitioner has assumed that the withdrawal of OP No.7/2013 amounted to the termination of the PPA attaining finality and that the 2nd Respondent (SLDC) should have acted on such assumption and should have granted open access, and the Respondents should have executed the W&BA. It appears, with this wrong impression, the Petitioner did not request or make a prayer for declaration that the PPA in question has been validly terminated, and that the Petitioner did not argue the case on merits, on this issue. In such circumstances, the Commission is of the view that it need not consider the validity of the termination of the PPA, which is not in issue in the present proceedings.

- (h) The Default Notice pointed out payment defaults of monthly Invoice amounts and also default in payment towards interest due and also regarding non-opening of LC, as per Article 6.6 of the PPA. The Termination Notice states that, even after expiry of thirty days from the date of service of the Default Notice, the defects regarding payment of interest on delayed payments and non-opening of LC were not cured. However, the Termination Notice does not indicate that the payment of monthly invoices are not made. In the Default Notice, the quantum of interest due was not shown. The 1st Respondent (GESCOM) contended that payment of monthly invoice amounts along with interest due was made, apart from opening of a LC. The 1st Respondent (GESCOM) has

given the circumstances in which the LC had been reversed by its Banker without its knowledge and has further contended that, as soon as it came to know about the reversal of the LC, it had offered a fresh LC, which was rejected by the Petitioner. During the arguments, it was submitted by the learned counsel for the Petitioner that the Petitioner's Generating Plant was currently not functioning, as there was no subsisting PPA or grant of open access, without waiting for an adjudication on those issues by the competent authority. The PPA was entered into between the parties on 10.6.2002 and till the date of issuing the Default Notice on 28.10.2011, the Petitioner has not insisted on the concerned Respondent for opening of the LC. This delay and laches should also be considered, while deciding the effect of non-opening of the LC being taken as a ground for termination of the PPA.

- (g) We have noted the above facts, in order to show that the termination of the PPA is a debatable question and that the plea of the Respondents cannot be rejected, outright. In such circumstances, we consider that the said disputed fact, when it is not in issue, need not be gone into in these proceedings. For the above reasons, we answer Issue No.(1) in the negative.

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

For the foregoing reasons, we pass the following:

ORDER

The Petition stands dismissed.

Sd/-

(M.K. SHANKARALINGE GOWDA)
CHAIRMAN

Sd/-

(H.D. ARUN KUMAR)
MEMBER

Sd/-

(D.B. MANIVAL RAJU)
MEMBER