

No.: N/75/14

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

**Dated : 24<sup>th</sup> November, 2016**

**Present:**

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

**OP No. 29 / 2014**

**BETWEEN:**

BEML Limited  
"BEML SOUDHA"  
No.23/1. 4<sup>th</sup> Main Road,  
S.R. Nagar,  
Bengaluru - 560 027

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**PETITIONER**

*[Represented by Shri Karthikeyan B.S. Iyer, Advocate]*

**AND:**

- 1) Hubli Electricity Supply Company Limited,  
P.B. Road, Navanagar,  
Hubballi – 580 025
- 2) State Load Despatch Centre - Karnataka,  
Ananda Rao Circle,  
Bengaluru – 560 009
- 3) Gulbarga Electricity Supply Company Limited,  
Station Road,  
Kalaburagi – 585 105.
- 4) Karnataka Power Transmission Corporation Limited,  
Cauvery Bhavan,  
K.G. Road,  
Bengaluru – 560 009.

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**RESPONDENTS**

*[Represented by Induslaw, Advocates]*

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**ORDERS**

- 1) In substance, the Petitioner in this Petition has prayed for the following reliefs :
  - (a) To declare that the Power Purchase Agreement (PPA) dated 27.2.2008, executed between the Petitioner and the 1<sup>st</sup> Respondent-Hubli Electricity supply Company Limited (HESCOM), stands terminated;
  - (b) Consequently, to direct the Respondents to execute the Wheeling & Banking Agreement (W&BA) to wheel the energy from the Wind Power Project of the Petitioner to its captive consumption points; and
  - (c) To direct the 1<sup>st</sup> Respondent (HESCOM) to pay a sum of ₹32,54,782/-, being the interest due for the delay in payment of the Monthly Tariff Invoices.
  
- 2) The material facts urged by the Petitioner in support of its prayers may be stated as follows :
  - (a) The Petitioner is a Public Sector Undertaking under the Ministry of Defence, Government of India and is a Government Company incorporated under the provisions of the Companies Act, 1956. The Petitioner-Company was established in the year 1964 and is a multi-technology heavy industry. It is having manufacturing units at Bengaluru, Kolar Gold Fields and Mysuru and is utilizing, approximately, 420 Lakh Units of electrical energy per annum, sourced through Bangalore Electricity Supply Company Limited (BESCOM) and Chamundeshwari Electricity Supply Corporation Limited (CESC).

- (b) The Petitioner filed an application dated 23.7.2007 before the Karnataka Renewable energy Development Limited (KREDL) for allotment of 5 MW capacity Wind Power Project at Kappataguda in Mundargi Taluk of Gadag District, for its captive use. In the said application, it was made clear that, the entire power generated from its Project would be consumed by the Petitioner at its various manufacturing units on a Wheeling and Banking arrangement, which was pending for approval by this Commission, and until the Wheeling and Banking arrangement was finalized, the power generated would be sold to the 4<sup>th</sup> Respondent-Karnataka Power Transmission Corporation Limited (KPTCL).
- (c) The Wind Power Project of the Petitioner was commissioned on 20.12.2007, after allotment of a 5 MW capacity Wind Power Project at Bidanhal Village, Mundargi Taluk, Gadag District. It is urged that, as on the date of commissioning of the Wind Power Project, the Wheeling and Banking arrangement was not finalized, therefore the Petitioner entered into the PPA dated 27.2.2008 with the 1<sup>st</sup> Respondent (HESCOM). It is further urged that, the PPA was executed with a pre-condition that, the Petitioner should be permitted to switch over to the Wheeling and Banking facility as and when the Wheeling and Banking Agreement (W&BA) comes into force in the State of Karnataka.

- (d) By Order dated 11.7.2008, this Commission has duly approved the Standard W&BA for Renewable Energy Projects with the terms and conditions stated therein. The Petitioner has urged that, since the date when the W&BA came into force in the State of Karnataka, the Petitioner had been meeting the officials of the 1<sup>st</sup> Respondent (HESCOM) seeking permission to switch over to the W&B facility, but without any positive outcome. Thereafter, the Petitioner made a written request on 9.11.2013 (ANNEXURE-P3) to the 1<sup>st</sup> Respondent (HESCOM) and also other higher officials. The 1<sup>st</sup> Respondent (HESCOM) refused to accede to the request made by the Petitioner.
- (e) The Office of the Comptroller and Auditor General of India has issued an audit objection observing that there is 'loss due to non-utilization of power generated for captive consumption' because of payment towards its power consumption at a higher tariff than what was received under the PPA.
- (f) The 1<sup>st</sup> Respondent committed series of payment defaults by not honouring the Monthly Tariff Invoices, ranging from 15 days to 183 days. The 1<sup>st</sup> Respondent (HESCOM) had not paid any interest for the delayed payments of the Monthly Tariff Invoices. Because of the payment defaults, the PPA stood terminated and the Petitioner became entitled to wheel the energy to its destination. A copy of the Statement, showing the details of the delays in making the payments and the interest accrued on the delayed payments, is produced at ANNEXURE-P9.

- (g) During the hearing of the Petition, the Petitioner filed an Application for amendment of the Petition to insert an additional ground to the effect that, Article 5.2 of the PPA is a 'Contract in Terrorem' as it allows only the 1<sup>st</sup> Respondent (HESCOM) to terminate the PPA after ten years and such an option has not been given to the Petitioner and that the 1<sup>st</sup> Respondent (HESCOM) being in a dominant position, the Petitioner had to execute the PPA.
- (h) For the above reasons, the Petitioner has prayed for the reliefs as noted above.
- 3) The Respondents have appeared through their counsel and filed their Statement of Objections to the main Petition as well as to the amendment Application of the Petitioner. The material grounds urged by the Respondents in support of their defence may be stated as follows:
- (a) The Respondents have denied that, the PPA was executed with a pre-condition that the Petitioner would be permitted to execute a W&BA as and when it came into force. It is contended that, the Petitioner has voluntarily chosen to enter into the PPA dated 27.2.2008 with the 1<sup>st</sup> Respondent (HESCOM) knowing fully well that the term of the PPA was for a period of 20 years from the Commercial Operation Date (COD) and the PPA was binding on it for the whole term. Further, it is contended that, the

Petitioner had not stated that it was entering into the PPA for a limited period as there was no approved W&BA.,

(b) The 1<sup>st</sup> Respondent (HESCOM) has contended that, it had made prompt payments towards the Monthly Tariff Invoices, as and when they were submitted by The Petitioner and that the Petitioner's claim for interest towards delayed payments was barred by limitation. Further, it is contended that the amendment Application filed by the Petitioner is not maintainable and the paragraph intended to be inserted in the main Petition does not improve the case of the Petitioner and that Article 5.2 of the PPA is valid and binding on the parties.

(c) The Respondents have therefore prayed for dismissal of the Petition.

4) We have heard the learned counsel for the parties and perused the material placed on record. The learned counsel for the Petitioner contended that, in the present case, as per Article 9.2.2(b) of the PPA, the Petitioner is entitled to wheel the power generated from its Wind Power Project, apart from urging other grounds. The learned counsel for the Respondents contended that, the Petitioner had failed to make out a case for wheeling of energy under Article 9.2.2(b) of the PPA.

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

- (1) Whether the PPA dated 27.2.2008 was executed subject to the condition that the Petitioner should be allowed to wheel the energy from its Wind Power Project to its captive consumption points, on approval by the Commission of the Standard Format of the Wheeling and Banking Agreement?
  - (2) Whether the PPA dated 27.2.2008 stands terminated for non-payment of interest?
  - (3) Whether the Petitioner is entitled to open access under Article 9.2.2(b) of the PPA dated 27.2.2008?
  - (4) Whether the 1<sup>st</sup> Respondent (HESCOM) is liable to pay interest accrued due to delayed payment of the Monthly Tariff Invoices? If so, to what extent?
  - (5) What Order?
- 6) After considering the oral submissions made by the learned counsel for the parties and perusing the material placed on record, our findings on the above issues are as follows :
- 7) **ISSUE No.(1)** : *Whether the PPA dated 27.2.2008 was executed subject to the condition that the Petitioner should be allowed to wheel the energy from its Wind Power Project to its captive consumption points, on approval by the Commission of the Standard Format of the Wheeling and Banking Agreement?*
- (a) Admittedly, there is nothing in writing to show that the PPA dated 27.2.2008 was executed subject to the condition as contended by the Petitioner.

Therefore, we have to examine, whether there was such an oral agreement between the parties in this regard. During the arguments, it is not contended by any of the parties that, proving such an oral agreement to contradict the terms of the PPA is barred under law or not. Therefore, for adjudicating on this issue, we assume that, the Petitioner is not debarred from proving such a condition, that he should be allowed to wheel the energy on approval of the terms regarding the W&BA.

- (b) On perusal of the records and consideration of the facts and circumstances urged by the Petitioner, it is difficult to believe that the PPA was executed subject to an oral condition as pleaded by the Petitioner. The only fact in favour of the Petitioner is that, in its application dated 23.7.2007 (ANNEXURE-P1), filed before the KREDL, it stated that the 5 MW capacity Wind Power Project was intended to be developed to meet the self-consumption of power to the various manufacturing units of the Petitioner and that, until the standardization of the Wheeling and Banking arrangement was finally approved, the power generated would be sold to the Licensees. However, it appears that, the allotment of a 5 MW capacity Wind Power Project by the Government in favour of the Petitioner was not with liberty to use the power generated for its captive consumption, but for selling the same to the Licensee. It can be so inferred from the recitals stated in paragraph-1 of the PPA, which reads thus:

*“...GoK by it's order No.EN 271 NCE 2007 dated 18.8.2007 has approved cancellation of 5.00 MW Wind Power Capacity from*



*M/s. VRL Logistics Limited Phase 7 & 8 and transfer the same capacity of 5.00 MW to the Company at Bidanhal Village, Mundargi Taluk, Gadag District, Karnataka State from out of the 21.25 MW capacity allotted to M/s. Suzlon Energy Limited and permitted Corporation to enter into an agreement with the Company for purchase of Electricity."*

The above recitals would show that, the allotment was made by the Government with a direction that, the power generated should be sold to the Licensee. The further recital in the PPA shows that, the Power Company of Karnataka Limited (PCKL), by its Order dated 25.9.2007, has allocated this Project to the 1<sup>st</sup> Respondent (HESCOM) and thus, the present PPA was entered into between the 1<sup>st</sup> Respondent (HESCOM) and the Petitioner. Both the parties have not produced the Government Order dated 18.8.2007 referred to above. However, the recital in the PPA referring to the Government Order dated 18.8.2007 clearly contradicts the contention of the Petitioner.

- (c) If really there was such an oral agreement between the parties prior to the execution of the PPA, the Petitioner would have insisted the 1<sup>st</sup> Respondent (HESCOM) to execute the W&BA, soon after the Order of this Commission dated 11.7.2008, approving the standard terms of the W&BA, was issued. The Petitioner has stated at Paragraph-4 of the Petition that, since the date of approval of the W&BA, it had been approaching the 1<sup>st</sup> Respondent for permission to switch over to the Wheeling and Banking arrangement and finally, it made a written request on 9.11.2013 (ANNXURE-P3). It is difficult to

believe the said version of the Petitioner that, for more than five years, it was approaching the 1<sup>st</sup> Respondent (HESCOM), without even making a written request, and that only on 9.11.2013, made its representation in writing. It can also be noted that, in the representation dated 9.11.2013 or in any other representation, it is not stated that, the Petitioner had been approaching the 1<sup>st</sup> Respondent (HESCOM) subsequent to the approval of the W&BA. The reason as to why the Petitioner was requesting to permit it to come out of the PPA and to enter into a W&BA, is clear from the relevant portion of the Petitioner's representation dated 9.11.2013 which reads thus:

*"It should be noted that, during December, 2007 when the 5 MW Wind Project was commissioned, the BESCO energy tariff was Rs.430 per unit, which is at present enhanced to Rs.5.75 per unit. This is causing enormous burden on our energy bills. Hence, we request you to permit us to withdraw from PPA arrangement and to permit for self-use of Wind Power generated through Wheeling and Banking facility."*

Therefore, the only inference one could arrive at is that, the Petitioner, for the first time, made up its mind to make a representation on 9.11.2013, requesting to allow the Wheeling and Banking in respect of the power generated from its Wind Power Project, instead of selling the power generated to the 1<sup>st</sup> Respondent (HESCOM) under the PPA. It appears, entering into the PPA was a commercial decision that was favourable to the Petitioner during that period, for one or the other reason. The Petitioner cannot resile from the terms of the PPA due to subsequent disadvantageous market conditions, arising out of subsequent periodic revision of retail tariffs. An audit observation made

without appreciating the rights and responsibilities flowing from a statutorily binding contract cannot aid the Petitioner to wriggle out of the PPA.

- (d) The Petitioner has contended that, the PPA was executed in the Standard Format approved by this Commission, thereby the Petitioner had no other option but to accept the clauses contained in the said PPA. The Petitioner has further contended that, the 1<sup>st</sup> Respondent (HESCOM) was in a dominant position and therefore the Petitioner had to execute the PPA, though the 1<sup>st</sup> Respondent (HESCOM) alone had the right to terminate the PPA from the eleventh year onwards from the COD. Therefore, the Petitioner has contended that, non-inclusion of a clause in the PPA to the effect that the Petitioner should be allowed to consume the power by itself on approval of the W&BA cannot lead to an adverse inference. Further that, the Petitioner should at least be allowed to terminate the PPA from the eleventh year onwards from the COD, as allowed to the 1<sup>st</sup> Respondent (HESCOM). Both the above grounds urged by the Petitioner are not sustainable. If there was really such an understanding as pleaded by the Petitioner, there was no difficulty in entering into a separate Agreement or to include the said term in the PPA itself. There is a valid reason as to why a Distribution Licensee alone is given an option to continue a PPA after the tenth year from the COD. It is so because, after completion of ten years, the debt servicing of the Project Cost would have been fully met with. Having played a prominent supporting role in the first 10 years of the PPA, the Distribution Licensee can thereafter be relieved of the responsibility of both the guaranteed off-take of power, as well as

payment of a fixed price, determined in advance. Therefore, the option given to the 1<sup>st</sup> Respondent (HESCOM) to continue the PPA from the eleventh year onwards from the COD, cannot be considered as a "Contract in Terrorem", as pleaded by the Petitioner.

- (e) Therefore, we are of the considered view that, the Petitioner made up its mind to enter into the PPA, instead of going in for consumption of power generated from its Wind Power Project, without there being any condition that the Petitioner should be allowed to wheel the energy from its Wind Power Project to its captive consumption points on approval of the W&BA. Therefore, we answer Issue No.(1) in the negative.

- 8) **ISSUE No.(2)** : *Whether the PPA dated 27.2.2008 stands terminated for non-payment of interest?*

Assuming that, non-payment of interest would amount to failure or refusal to perform the 1<sup>st</sup> Respondent's (HESCOM's) financial obligations under the PPA, the Petitioner is required to deliver a Default Notice to the 1<sup>st</sup> Respondent (HESCOM), specifying therein reasonable details, the Event of Default giving rise to the issuance of the Default Notice and calling upon the 1<sup>st</sup> Respondent (HESCOM) to remedy the default, and in the event the 1<sup>st</sup> Respondent (HESCOM) fails to cure the defect, the Petitioner is required to deliver a Termination Notice, and upon service of the Termination Notice, the PPA stands terminated. Therefore, the issuance of a Default Notice, calling upon

the Licensee to cure the default, is a pre-condition for issuance of a Termination Notice. Admittedly, in the present case, such Default Notice is not issued. Therefore, we answer Issue No.(2) in the negative.

- 9) **ISSUE No.(3)** : *Whether the Petitioner is entitled to open access under Article 9.2.2(b) of the PPA dated 27.2.2008?*

- (a) Article 9.2.2(b) of the PPA dated 27.2.2008 reads thus :

*"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 off three months, the Company shall be permitted to sell Electricity to third parties by entering into Wheeling & Banking agreement with the HESCOM for which it shall pay transmission and any other charges to HESCOM at the rates applicable from time to time as approved by the Commission."*

- (b) The non-payment of interest may amount to failure or refusal by the 1<sup>st</sup> Respondent (HESCOM) to perform its financial and other obligations under the PPA, leading to issuance of a Default Notice, calling upon the 1<sup>st</sup> Respondent (HESCOM) to remedy the said default. However, the

non-payment of interest accrued due on account of late payment of the Monthly Tariff Invoice does not amount to any Payment Default, as contemplated under article 9.2.2(b) of the PPA. Article 6.2 of the PPA states that, the 1<sup>st</sup> Respondent (HESCOM) shall make payment of the amount due within fifteen days from the date of receipt of the Monthly Tariff Invoice. Article 6.3.2 of the PPA states that, if any payment which becomes due is not paid, the 1<sup>st</sup> Respondent (HESCOM) shall pay interest at the State Bank's Medium Term lending rate per annum for such late payment, from the date it became due until the payment is made in full. Therefore, we hold that, non-payment of interest by the 1<sup>st</sup> Respondent (HESCOM) for late payment of the monthly Tariff Invoices cannot be treated as a 'Payment Default', as contemplated under Article 9.2.2(b) of the PPA. Further, Article 9.2.2(b) of the PPA is interpreted to the effect that, if the payment is not made within fifteen days, as stipulated in Article 6.2 of the PPA, the default in payment occurs and whenever similar default occurs for the three consecutive Monthly Tariff invoices, the Generator (Seller) shall be permitted to sell the electricity to a third party by entering into a W&BA, etc. In the present case, the Petitioner has not pleaded these necessary ingredients to claim a right to sell electricity to third parties under Article 9.2.2(b) of the PPA. Therefore, we answer Issue No.(3) in the negative.

- 10) **ISSUE No.(4)** : *Whether the 1<sup>st</sup> Respondent (HESCOM) is liable to pay interest accrued due to delayed payment of the Monthly Tariff Invoices? If so, to what extent?*

Now, it is settled law that, the claim of the Petitioner should be within the period of limitation. If the payment due under the Monthly Tariff Invoices is not made within fifteen days from the date of the receipt of the said Invoices, the claim for interest would start after the expiry of that period. In the present case, the Petitioner has claimed interest for the monthly Tariff Invoices submitted from 17.7.2008 onwards till 19.3.2014. The Petition was filed before this Commission on 13.11.2014. Therefore, the interest that became due three years prior to 13.11.2014 is barred by limitation. We therefore hold that the 1<sup>st</sup> Respondent (HESCOM) is liable to pay interest accrued due to the Petitioner from 14.11.2011 to 13.11.2014. We answer Issue No.(4), accordingly.

- 11) **ISSUE No.(5)** : *What Order?*

For the foregoing reasons, we pass the following Order:

### **ORDER**

- (a) The request of the Petitioner to declare that, the Power Purchase Agreement dated 27.2.2008 stands terminated and to direct the Respondents to execute a Wheeling and Banking agreement, is rejected; and

- (b) The 1<sup>st</sup> Respondent (HESCOM) shall calculate and pay the interest accrued due on delayed payments of the Monthly Tariff Invoices, for the period from 14.11.2011 to 13.11.2014, as per Article 6.3 of the PPA dated 27.2.2008, if not already paid, within 2 (two) months from the date of this Order,

Sd/-

(M.K. SHANKARALINGE GOWDA)  
CHAIRMAN

Sd/-

(H.D. ARUN KUMAR)  
MEMBER

Sd/-

(D.B. MANIVAL RAJU)  
MEMBER