

No.: N/109/16

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

Dated : 1st September, 2016

Present:

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

OP No.74 / 2016

BETWEEN:

Global Energy Pvt. Ltd.,
207, Gera Imperium II, SF,
Patto Plaza,
Panjim,
North Goa,
Goa – 403 001

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PETITIONER

[Represented by Adlaw Partners, Advocates]

AND:

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

2) Power Company of Karnataka Limited,
Cauvery Bhavan,
Bengaluru – 560 009

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RESPONDENTS

*[Respondent-1 represented by Just Law, Advocates,
Respondent-2 represented by Shri D.L. Chidananda, Advocate]*

OP No.74/2016

- 1) The present Petition is filed pursuant to the directions dated 17.8.2016 of the Hon'ble Appellate Tribunal for Electricity (ATE) in DFR # 2368/2016.
- 2) The Petitioner has prayed for the following reliefs in the Petition:
 - (a) To pass appropriate directions for implementation of the decision of this Commission, approving purchase of power by PCKL/ BESCO from GEPL in terms of the BESCO's Tariff Order dated 30.3.2016;
 - (b) To quash the notice inviting tender dated 05.08.2016 (as amended on 11.08.2016), and further quash any steps taken towards procurement of 200 MW power on the existing radial lines where the present transaction between BESCO and GEPL is subsisting; and,
 - (c) To pass any other order, in the interest of justice, equity and good conscience.
- 3) The material facts leading to filing of the present Petition may be stated as follows :
 - (a) The Petitioner is a Private Limited Company and is a Trader of electricity.

- (b) In a Tender floated on 12.11.2013 by the PCKL (Respondent-1) for supply of power on short-term basis to the BESCOM (Respondent-2), the Petitioner participated, and was declared as successful bidder, as it quoted the lowest tariff of ₹4.85 per unit. Initially, there was difficulty in obtaining open access approval from the Maharashtra State Load Despatch Centre (MSLDC), and after a direction dated 2.6.2014 given by the Maharashtra Electricity Regulatory Commission (MERC) in case No.71/2014, open access was granted to the Petitioner, with certain terms and conditions. Accordingly, the Petitioner supplied power to the BESCOM from 3.7.2014 to 31.12.2014, and the same was extended for a period of another six months from 1.1.2015, and the same was again extended from 1.7.2015 for a period of eleven months. Finally, on 26.5.2016, it was again extended from 1.6.2016 to 31.8.2016 for a reduced quantum of 165-200 MW, though the request of the Petitioner and the PCKL was to procure supply of power for a period of eleven months from 1.6.2016 and for a quantum of 235-270 MW.
- (c) While approving the power procurement for only three months from 1.6.2016, this Commission has directed the PCKL to initiate tender proceedings for procuring short-term power through 220 kV Chikodi-Mudasangi and 20 kV Chikodi-Talangade inter-State line and complete the process within three months, in order to enable the State to utilize these inter-State lines, for the subsequent period from 1.7.2016, in order to ensure transparency and to obtain competitive rates.

- (d) Subsequently, on 7.7.2016, the Petitioner made a representation to the Additional Chief Secretary, Government of Karnataka, with a copy marked to the PCKL, seeking an extension of the period for power supply from 1.9.2016 to 30.4.2017 at a reduced rate of ₹4.36 per unit, as against the earlier rate of ₹4.85 per unit. It appears, this proposal was not pursued further by the PCKL.
- (e) On 5.8.2016, the PCKL published a Notice in newspapers inviting tender for supply of power through 220 kV Chikodi-Kolhapur inter-State line on radial mode from Western Region. On 12.8.2016, the PCKL modified its Notice inviting tender, published on 5.8.2016, stating that the power could be procured from any Region, instead of the Western Region alone, as published earlier.
- (f) Aggrieved by the decision of this Commission extending the request for procurement of power for only three months from 1.6.2016 to 31.8.2016, the Petitioner approached the Hon'ble ATE in the third week of August, 2016, when the approved period was about to expire, requesting for a direction to this Commission to consider the proposal of the Petitioner and the PCKL for procurement of power for eleven months from 1.6.2016. The Hon'ble ATE, by its Order dated 17.8.2016 in DFR No.2368/2016, directed the Petitioner to file the present Petition before this Commission, urging all the grounds available to the Petitioner as to why the

- procurement of power for the entire eleven months should have been accepted by this Commission, as proposed by the Petitioner and PCKL.
- 4) The following grounds have been urged in support of the prayers of the Petitioner for accepting the procurement of power for eleven months as proposed by the parties :
- (I) That in the facts and circumstances of the case, it is improper for this Commission to adopt Section 63 of the Electricity Act, 2003 (Act) to procure short-term power and this Commission should have proceeded only under Section 62 of the Act to approve the procurement of power in question for the whole period;
 - (II) The approval accorded by this Commission for short-term power procurement for the previous periods, as agreed between the Petitioner and the PCKL, and also the conduct of the PCKL, made the Petitioner to believe that, the proposal of the PCKL for procurement of power for eleven months, made before this Commission, would not be rejected at all. Therefore, on the principle of *legitimate expectation*, this Commission could not have refused the proposal of the PCKL;
 - (III) The risk involved in obtaining the open access through the 220 kV Mudasangji and 220 kV Talandage Inter-State lines (the Chikodi-Kolhapur

- Inter-State lines) from MSLDC is not revealed in the present Tender Notification, thereby the tender proceedings are void *ab initio*.
- 5) The PCKL has denied the correctness of the grounds urged by the Petitioner and has filed its written objections as well as the written arguments.
 - 6) The BESCO has opposed the claim of the Petitioner and has filed its written arguments.
 - 7) All the parties, through their learned counsel, have addressed the oral arguments. The Petitioner has also filed its written arguments.
 - 8) We have heard the arguments of the learned counsel for all the parties in the case.
 - 9) After considering the pleadings of the parties, the documents produced by them and also their oral submissions, our findings in respect of Petitioner's prayers are as follows :
 - 10) Ground No.(I) :
 - (a) The Petitioner has relied upon the Tariff Order dated 30.3.2016 issued by this Commission in respect of BESCO, to contend that:

- (i) In the said Tariff Order, this Commission has already held that the existing short term Contracts till May, 2016, would continue for FY-17, upto FY-19;
 - (ii) This Commission has fixed a maximum ceiling limit of ₹4.50 per unit for short-term procurement of power;
 - (iii) This Commission has already taken a view that bidding cannot be adopted for short-term power procurement, in the event the tariff being offered is within the approved ceiling and within the approved quantity for short-term power procurement.
- (b) Therefore, according to the Petitioner, when there is no challenge to the said Tariff Order, there is no question of discovering the tariff under Section 63 of the Act. Further that, the existing Power Purchase Agreement (PPA) between the parties stands extended for the period approved in the said Tariff Order. It is also contended by the Petitioner that, it has reduced its price to ₹4.36 per unit in its offer dated 7.7.2016, which would fall below the ceiling rate of ₹4.50 per unit. Therefore, according to the Petitioner, the extension of the PPA at the tariff of ₹4.36

per unit is only a ministerial act by this Commission and it cannot go behind its own Tariff Order.

- (c) The Petitioner has relied upon the following paragraph of the Tariff Order to contend that the existing short-term power procurement contracts subsisting upto May, 2016 would continue in FY17 upto FY19:

“Further, as Short-Term Power / Medium Term Power procurement to an extent of 1108.80 MU has already been contracted by ESCOMs till May, 2016, the same has been considered towards availability for FY17.”

The Petitioner has relied upon the last portion of the above paragraph, viz.: *“the same has been considered towards availability for FY17”*, in support of its contention. The interpretation placed by the Petitioner on the above paragraph is incorrect. The said paragraph shows that, the short-term / medium-term power procurement to an extent of 1108.80 MUs has already been contracted by the ESCOMs till May, 2016 and the said quantity is to be considered for availability of short-term power or medium-term power for FY17. The said quantity is in respect of all the ESCOMs in the State. The short-term power procurement of BESCO, as disclosed in the Tariff Order, would come to 529.87 MUs till May, 2016, but not 1108.80 MUs, as averred in the Petition. The said paragraph does not lead to the inference that the existing short-term power availability till May, 2016 (which includes the short-term power supply by the Petitioner till May, 2016) would also continue for FY17, upto

- FY19. The short-term power procurement as approved by this Commission lasts till May, 2016 only.
- (d) There is no dispute, that the Tariff Order has fixed the maximum ceiling of tariff at ₹4.50 per unit for procurement of short-term power for FY17.
- (e) The Petitioner has relied upon the following paragraph of the Tariff Order to contend that, bidding cannot be conducted for short-term power procurement, in the event such procurement of short-term power is below the approved quantity :

"The Commission reiterates its earlier directive that any short-term or medium-term power procurement to be made over and above the approved quantities, shall be made only through competitive bidding duly complying with the Gol guidelines issued in the matter from time to time."

It appears, the Petitioner intends to interpret the phrase, "over and above the approved quantities" mentioned in the above paragraph, to the effect that, if the short-term procurement of power is below the approved quantities, one need not proceed for competitive bidding.

This interpretation of the Petitioner is also incorrect. The phrase, "the approved quantities" in the present context of the Tariff Order, should relate only to the approved contracted quantities. Therefore, the meaning of the above paragraph is that, any short-term power

procurement over and above the approved contracted quantities should be only through competitive bidding. The Tariff Order dated 30.3.2016 indicates that the quantity of short-term power purchase approved in respect of the BESCOM till May, 2016, was 529.87 MU for FY17. The Tariff Order does not indicate that there would be shortage of supply of power from 1.6.2016. Therefore, there was no approval in the Tariff Order for procuring the short-term power subsequent to 1.6.2016. The Tariff Order indicates that the quantity of the approved sale of the BESCOM has been met with the available contracted quantity of power for FY17. Therefore, there would be no requirement of short-term power subsequent to 1.6.2016.

- (f) The need for short-term purchase of power may arise, when the expected availability of power cannot be procured for unforeseen events, like adverse monsoon affecting the Hydro generation or major break-down of Thermal Generating Units or acute shortage of Coal, etc. The shortage of power may also occur, if there is increased sales than the approved quantity of sale due to unforeseen reasons.
- (g) The Tariff Order indicates that, any short-term power procurement, over and above the approved / contracted capacity, shall be made only by following a transparent process of bidding. It means that, any subsequent contract for short-term power purchase should be only through a transparent bidding process.

- (h) The fixation of the minimum and maximum ceilings of tariff in the case of procurement of short-term power falling under proviso to Section 62(1)(a) of the Act does not amount to determination of tariff under Section 62(1)(a) of the Act. The determination of tariff under Section 62(1)(a) of the Act and the discovery of tariff by a bidding process, as provided under Section 63 of the Act, are the two alternative methods for determination of tariff for supply of electricity by a Generating Company to a Distribution Licensee. When once the tariff is determined under Section 62(1)(a) of the Act, there is no question of proceeding again under Section 63 of the Act, to discover the tariff through a bidding process. The determination of tariff under Section 62(1)(a) of the Act is an exercise done in accordance with the principles stated in Section 61 of the Act and following the procedure for passing Tariff Order as provided under Section 64 of the Act. In the case of fixation of minimum and maximum ceilings of tariff for the short-term procurement of power under proviso to Section 62(1)(a) of the Act, the principles stated in Section 61 of the Act and the procedure stated in Section 64 of the Act are not followed. Therefore, the fixation of the minimum and maximum ceilings of tariff for the short-term power procurement does not prohibit discovery of a reasonable tariff through a bidding process under Section 63 of the Act.

- (j) It cannot be disputed that, a Distribution Licensee shall, in all circumstances, purchase energy in an efficient and economical manner, under a transparent procurement process, as approved by this Commission. That is the duty prescribed on a Distribution Licensee under Regulation 21 of the KERC (Conditions of Licence for ESCOMs) Regulations, 2004 issued by this Commission. The purchase of electricity at the maximum ceiling of tariff fixed by this Commission does not necessarily amount to fulfilling the duty of a Distribution Licensee to procure power only in an economical manner, under a transparent procurement process. For achieving these objectives, this Commission, in its Tariff Orders, has been directing that the short-term procurement of power shall be made only by following a transparent process of bidding and that prior approval of the Commission should be obtained, before finalizing the short-term procurement process, if the price discovered is over and above the maximum ceiling of tariff fixed by this Commission. We are of the considered view that, the proper interpretation of the proviso to Section 62(1)(a), Section 63 and Section 86(1)(b) of the Act should lead to the conclusion that, the fixation of the minimum and maximum ceilings of tariff for sale or purchase of short-term power cannot bar the discovery of tariff by a transparent bidding process under Section 63 of the Act, in respect of short-term procurement of power.
- (k) The question of discovery of tariff by a bidding process under section 63 of the Act would arise, only when there are more than one eligible

suppliers of power. In the present case, the Petitioner has contended that, it is only the supplier, who could supply power through this line in the radial mode, in view of the Order dated 2.6.2014 in Case No.71/2014 of the MERC. It is contended that, in the said Order of the MERC, the supply of power through the radial mode was specifically permitted in respect of the present transaction of supply of power by the Petitioner , with certain terms and conditions. We have gone through the Order dated 2.6.2014 of the MERC passed in the above case. The MSLDC had refused open access to the Petitioner, on the ground that, transmission of electricity from the Maharashtra State to the Karnataka State amounted to an 'inter-State' transaction and thereby, the RLDC was the Competent Authority, and also on the ground that, there was difficulty in settlement of accounts between the parties, in view of the inadequacy of the existing provisions contained in the Final Balancing and Settlement Mechanism (FBSM). The MERC, on consideration of the peculiar facts of the instant case, where supply of power was through a radial mode, and the nature of the drawal of energy in the existing transmission facility from Maharashtra to Karnataka, held that, such transmission of power should be deemed to be an 'intra-State' transmission and not an 'inter-State' transmission. The MERC also issued a direction for effecting the required changes in the existing FBSM for commercial settlement of the transaction between the parties.

(l) The above-said Order of the MERC is interpreted by the Petitioner to contend that, the benefit of this Order should be made applicable only to the above specific and particular transaction of the Petitioner. We are of the considered view that, such a plea of the Petitioner cannot be accepted for the following reasons :

- (i) The material question decided in that case by the MERC is that, the transmission of electricity from one State to another State in the given circumstances, is deemed to be an 'intra-State' transmission and thereby, the MSLDC was required to grant open access;
 - (ii) The direction to effect the required changes in the FBSM is only a consequential direction, in view of the finding that the transaction amounted to an 'intra-State' transaction; and,
 - (iii) Therefore, any person, in similar circumstances, who is transmitting power from Maharashtra to Karnataka through this radial line, can avail of the benefit of this Order.
- (m) It is contended by the Petitioner that, the radial line is likely to lose its character, if power flow through this radial line is discontinued. In support of the said contention, the Petitioner has relied upon certain proceedings of the meetings, held by the Southern Regional Power Committee on 15.3.2014 and the minutes of the meetings of the

Operations and Coordinating Committee of WRPC, held on 13.6.2014, where it was recommended that the Chikodi-Kolhapur Radial Line should be used as inter-Regional Transmission Lines. The Respondents have contended that, because of the increase in the generation capacity additions in and around the North Karnataka in the recent past, synchronization of this Radial Line for converting it into inter-Regional Transmission Line is technically not feasible. Further, it is contended that, for the present, the concerned Power Committees have not taken up the issues of converting this Radial Line into an inter-Regional Transmission Line.

- (n) We are of the considered view that, the Petitioner has not placed any reliable material to establish that this Radial Line is likely to lose its character, if the power flow is discontinued. We think, the State Utilities and the State Government would take proper defense before the concerned authority to protect their interest. We think, without hearing these interested persons, an Order for converting the Radial Line into an inter-Regional Transmission Line cannot be passed. If there are compelling reasons to convert this Radial Line into an inter-Regional Transmission Line, we think, mere continuation of flow of energy through this line from Maharashtra to Karnataka may not be a ground to keep the Radial Line, as it is. Apart from all these things, this Commission has instructed the PCKL to finalize the tender proceedings already initiated, to ensure utilization of this radial line. This apprehension expressed by the

Petitioner need not compel the Commission to accept the request of the Petitioner.

- (p) For the above reasons, we hold that Ground No.(I) urged by the Petitioner is liable to be rejected.

11) Ground No.(II) :

- (a) Before analyzing the rival contentions of parties relating to this ground, we may consider the concept of *legitimate expectation* and the nature of relief that could be granted and the *locus standii* for invoking it, as explained in paragraph 15 of the decision reported in **(2006) 8 SCC 381** in the case of *Ran Pravesh Singh and Others –Vs- State of Bihar and others*, as follows:

“15. What is legitimate expectation? Obviously, it is not a legal right. It is an expectation of a benefit, relief or remedy, that may ordinarily flow from a promise or established practice. The term ‘established practice’ refers to a regular, consistent, predictable and certain conduct, process or activity of the decision-making authority. The expectation should be legitimate, that is, reasonable, logical and valid. Any expectation which is based on sporadic or casual or random acts, or which is unreasonable, illogical or invalid cannot be a legitimate expectation. Not being a right, it is not enforceable as such. It is a concept fashioned by the courts, for judicial review of administrative action. It is procedural in character based on the requirement of a higher degree of fairness in administrative action, as a consequence of the promise made, or practice established. In short, a person can be said to have a ‘legitimate

expectation' of a particular treatment, if any representation or promise is made by an authority, either expressly or impliedly, or if the regular and consistent past practice of the authority gives room for such expectation in the normal course. As a ground for relief, the efficacy of the doctrine is rather weak as its slot is just above 'fairness in action' but far below 'promissory estoppel'. It may only entitle an expectant: (a) to an opportunity to show cause before the expectation is dashed; or (b) to an explanation as to the cause for denial. In appropriate cases, the courts may grant a direction requiring the authority to follow the promised procedure or established practice. A legitimate expectation, even when made out, does not always entitle the expectant to a relief. Public interest, change in policy, conduct of the expectant or any other valid or bona fide reason given by the decision-maker, may be sufficient to negative the 'legitimate expectation'. ..."

- (b) The Petitioner has relied upon a decision of the Hon'ble Supreme Court, reported in **(2007) 5 SCC 447**, in the case of *Southern Petro Chemical Industries Co.-Vs-Electricity Inspector & ETIO*. In the said Judgment, the Hon'ble Supreme Court, at paragraph-135, has noted the principles of *legitimate expectation* as laid down by the Court of Appeal in the case of *R. v. London Borough of Newham (Bibi case)* thus :

"In all legitimate expectation cases, whether substantive or procedural, three practical questions arise. The first question is to what has the public authority, whether by practice or promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the Court should do."

(c) The Petitioner has contended that, on the principle of *legitimate expectation*, the proposal of the PCKL and the Petitioner for supply of power for a total period of eleven months could not have been refused by this Commission. The Petitioner has relied upon the fact that, previously this Commission had approved the procurement of power as proposed by the PCKL, therefore it was under the impression that the last proposal for supply of power for eleven months from 1.6.2016 would not be rejected. It has also contended that certain back-to-back Agreements for purchase of energy from Generators have been entered into, contemplating that the proposal for procurement of power would be approved for the whole period by this Commission. This fact of entering into Agreements with Generators is not supported by any reliable material. The Petitioner has contended that the Tariff Order dated 30.3.2016 passed by this Commission in respect of the BESCO has also led it to believe that the proposal for procurement of power for the entire period would certainly be accepted by this Commission. As already noted, the Petitioner has incorrectly interpreted the Tariff Order dated 30.3.2016. Therefore, the contents of the Tariff Order may not be a ground for urging *legitimate expectation*.

(d) The Petitioner has contended that the past practice of the PCKL in extending the transactions with the Petitioner, read with the Tariff Order dated 30.3.2016, wherein the procurement of power from the Petitioner has been approved till 31.3.2017 provided the tariff is below ₹4.50 per

unit, creates a *legitimate expectation* in favour of the Petitioner. It may be noted that, the PCKL has acted as per the decision of this Commission in extending the power procurement transaction with the Petitioner and the PCKL had only made the proposals before this Commission. It cannot be refuted that the Commission has the exclusive jurisdiction in approving the PPA entered into between the Distribution Licensee and the Supplier of energy. The Petitioner being a Trader, must be knowing that the PCKL has no independent right to enter into PPAs without the approval of this Commission. Therefore, any representation or conduct of the PCKL cannot lead the Petitioner to assume *legitimate expectation*. Therefore, whether the past practice or the commitment of this Commission in approving the PPAs with the Petitioner would amount to a *legitimate expectation* or not, is to be seen. We are of the considered view that, the Petitioner cannot claim any relief on the principle of *legitimate expectation*, for the following reasons :

- (i) The act of approving the PPAs is a *quasi-judicial* function and the plea of *legitimate expectation* is not attracted in such circumstances;
- (ii) While approving the proposal for purchase of power from the Petitioner for the period from 1.7.2015 to 31.5.2016 this Commission had instructed the PCKL to float tenders for purchase of short-term power. In the same way, while approving the power purchase for

the period from 1.6.2016 to 31.8.2016, the commission has again directed the PCKL to float tenders for purchase of short-term power through this radial line. The request for supply of power was for eleven months. But, the Commission restricted it to three months only, with a view to discovering the competitive tariff in accordance with the market condition under Section 63 of the Act.

- (iii) It may be noted that, initially, the Petitioner participated in the bidding process and was selected as the successful Bidder and thereby, it was allowed to supply power;
- (iv) The decision of this Commission to curtail the period to three monthly only, as against the request for supply of power for eleven months, and to issue a direction to float tender proceedings for procurement of short-term power, was taken in the interest of the consumers;
- (v) The claim of the Petitioner for supply of short-term power, as proposed by it, is contrary to the provisions of the Act and the directions issued in the Tariff Orders of this Commission;
- (vi) The Petitioner, on 7.7.2016, has made an offer before the PCKL to supply short-term power from 1.9.2016 at a reduced rate of ₹4.36 per unit. This conduct of the Petitioner would show that, the

earlier rate of ₹4.85 per unit quoted by it was not a reasonable competitive rate.

(e) Considering the principles of *legitimate expectation* as stated in the above decisions of the Hon'ble Supreme Court and applying the same to the facts and circumstances of the present case, we are of the considered view that Ground No.(II) urged by the Petitioner is not sustainable and no relief can be granted on the basis of it.

12) Ground No.(III) :

The risk, as assumed by the Petitioner in obtaining the open access through this radial line, has no basis and it is only an imagination of the Petitioner. As already noted earlier, any other person, similarly placed for supply of power, can also get the approval for open access from MSLDC for transmission of power through the line in question. Hence, Ground No.(III) urged by the Petitioner is to be rejected.

13) For the foregoing reasons, we pass the following :

ORDER

The Petition is dismissed, by rejecting both the prayers made in the Petition.

Sd/-

(M.K. SHANKARALINGE GOWDA)
CHAIRMAN

Sd/-

(D.B. MANIVAL RAJU)
MEMBER