

No.N/09/7

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION
BANGALORE**

Dated this 10th July 2008

1. Sri K.P.Pandey	..	Chairman
2. Sri S.D.Ukkali	..	Member

Case No.OP.09/2007

Between

M/s.Enercon Wind Farms (Karnataka) Limited
Kolsite House, Plot No.31
Shah Industrial Estate, Veera Desai Road
Andheri ((West,
Mumbai-400053

No.10, "Casa Birgitta"
III Floor, Brunton Road,
BANGALORE-560025

And

Bangalore Electricity Supply Company Limited
Corporate Office,
K.R.Circle,
BANGALORE-1

The Petitioner is a Company registered under the provisions of Companies Act 1956 and is an Independent Power Producer and a Generating Company within the meaning of Section 2(28) of Electricity Act 2003.

The Respondent is a Distribution Licensee in the State of Karnataka operating under the Distribution License issued by the Commission and the purchaser of the power generated by Petitioner's 21 MW Wind Power project located at Chitradurga District.

The Petitioner has executed a Power Purchase Agreement on 24.09.2002 with Respondent in respect of its 21 MW Wind Power based Project in Chitradurga District of Karnataka. The said Power Purchase Agreement is approved by the Commission vide its Order dated 17.09.2003.

The brief facts of the case are as stated below:

The Respondent has been procuring the energy from the Power Project of the Petitioner from 14.05.2003 on which date the Project of the Petitioner was certified to be commissioned and hence is termed as the Commercial Operation Date (COD) of the Project.

Bills were regularly paid by the Respondent. When things stood thus, all of a sudden a sum of Rs.2,029,268/- (Twenty Lakh Twenty Nine Thousand Two Hundred Sixty Eight Only) has been deducted terming it as "excess payment in view of yearly escalation date has been revised as per SPPCC meeting (Statement Enclosed)."

On an enquiry made with Respondent, the Petitioner obtained a copy of a letter issued by General Manager Ele of the Respondent Company to the Controller SPPCC, GOK dated 25.10.2006 intimating the methodology adopted for deductions alongside seeking clarifications from SPPCC as which procedure needs to be adopted as also seeking SPPCC to issue an official memorandum to this effect.

The Petitioner held a series of meetings with Respondent starting from 20.10.2006 till 14.11.2006. Further to which the Petitioner has made representations to the Respondent calling upon to revert back the unauthorized deductions.

It is alleged by the Petitioner that even during the months of December 2006 and January 2007, the Petitioner held series of meetings with Directors and

Managing Director of the Respondent and requested the Respondent to make good the unauthorized deductions. But Respondent has not replied to any of the communications and representations made by the Petitioner.

Having exhausted any remedial mechanisms available under the Power Purchase Agreement, being aggrieved by the inaction of the Respondent to resolve the grievances of the Petitioner and challenging the illegal deductions effected by the Respondents the Petitioner has filed this Petition before the Commission on the following among other

The unauthorized deductions effected by the Respondent are illegal, unjustified and bad in law and hence deserve to be quashed and ordered to be refunded to the Petitioner by the Commission.

Respondent has certified the Commercial Operation Date (COD) as 14.05.2003 and has issued commissioning certificate, admitting invoices, making payments, effecting escalations for more than three years from the Commercial Operation Date(COD). In a clear departure from this practice, without notifying, intimating, communicating or raising a dispute the Respondent has chosen to deduct payments on some hypothetical premise adopting some untenable methodology citing as basis, communications from an entity alien to the contractual scheme of the Power Purchase Agreement.

The Petitioner submits that the Power Purchase Agreement contemplates a single Commercial Operation Date (COD) and scheme, purport, intent and spirit of the Power Purchase Agreement does not contemplate more than one Commercial Operation Dates, either in phases or otherwise. The Respondent has used this untenable ground as a pretext to deduct the payments due to the Petitioner.

It is further alleged that the Respondent besides violating contractual terms and legal tenets, has also violated the established principles equity such as

fair expectations and promissory estoppel and unauthorisedly enriched itself at the cost of the Petitioner.

The Power Purchase Agreement executed by and between the Petitioner and Respondent has been duly approved by the Commission. Besides being an instrumentality of State and being mandated by law to be an ideal contractor, the Respondent is a Licensee under the Commission. Making unauthorized deductions, altering contractual understanding contained within the framework of a Power Purchase Agreement duly approved by the Commission is a gross violation of the authority of the Commission as also the violation of the terms and conditions of the license, hence the same is wholly illegal and unjustified.

As per Clause 5.4 of the Power Purchase Agreement, the parties shall not have any right to challenge any Tariff Invoice, or to question/modify a Tariff Invoice after a period of one year from the date of the Tariff Invoice after a period of one year from the Tariff Invoice is due and payable. The Respondent's action of effecting illegal deductions is violative of this provision of the Power Purchase Agreement, hence is not tenable under the law.

In view of the above submissions, the Petitioner most respectfully prays this Commission to:

1. Quash/Set Aside the Communication of the Respondent.
2. To direct the Respondent to refund the deducted amounts to Petitioner along with interest charges at SBI Medium Term Lending Rates.
3. To pass any other order/s to meet the ends of justice and equity.

Notices were issued to both the Petitioner and the Respondents. Both have put in their appearances.

The Respondents have filed the objections submitting that the plant of petitioner has been commissioned in two phases 7.2. Mw was commissioned on 14.5.2003 and 13.8 Mw was commissioned on 26.8.2003. Upto 10.6.2005, power was procured by KPTCL and thereafter the same is being taken by Respondent. As provided in Article 1.1 of PPA, date of commercial operation is the date of commissioning of the project as certified by the competent authority of the Corporation. PPA also defines project to mean a Wind Mill Power station established by the company at Doddapuram, Yarehalli, Thekalavatti, Holhalu, Jogimatti Wind Zone in Chitradurga District comprising of 35 units with an individual installed capacity of 600 KWs and a total installed capacity of 21 MW. The project was not commissioned fully on 14.5.2003. The entire project became operational only on 26.8.2003 and as per PPA this shall be the Commercial Operation date and is for grant of escalation, this would have the base date. Annexure B to the petition itself makes this position clear. This only shows that only 12 units had been commissioned on 14.5.2003 and not the project as defined in the PPA. Petitioner has not produced record to show that the entire project containing 35 units was commissioned on 14.5.2003.

In view of this peculiar situation, meetings were held to decide as to what should be the date of commissioning of the project. After detailed discussions and deliberations, it was decided to adopt the weighted average method which will be equitable and by the said process, 21.7.2003 was considered as the date of commissioning. This is also confirmed by the State Government in its letter dated 30.9.2006. Before arriving at this figure, detailed discussions were held with the Petitioner represented by Mr.K.R.Srinivasa and Mr.Sridhar Prabhu on 20.10.2006 to 14.11.2006 and on 29.12.2006. IN the light of the foregoing, Respondent was fully justified in deducting the amounts. It is submitted that the petitioner is trying to take advantage of the delay it has caused.

The contention that 14.5.2003 is the commercial operation date is false and hereby denied. As stated above, the commercial operation date would be the date of commercial operation of the entire project and not the date on

which the plant was partially commissioned. Annexure B and C would reveal the fallacy and contentions raised by the petitioner.

The Respondent submits that the Question of reverting back deduction will not arise as the escalation has to be calculated only from the commercial operation date which is now calculated on the basis of weighted average of the commissioning of the project, otherwise commercial operation date has to be taken as 26.8.2003 and not 14.5.03. The deduction is wholly justified.

The contention that the deduction is unauthorized and hence deserves to be quashed is false. Respondent has explained the method of calculating commercial operation date and Petitioner is aware of what is the commercial operation date as per PPA. There is no departure from practice as alleged. Series of meetings have been held with the Petitioner's representatives in this regard to find equitable solution. Even though PPA contemplates single commercial operation date as Petitioner has not achieved commercial operation on a single date for the entire 21 MW on 14.5.2003, the same cannot be construed as the date of commercial operation for calculating escalation. Such an interpretation would be contrary to Article 1.1 of PPA. There is no violation of contractual terms as alleged. In fact the action taken is fair and in compliance of principles of equity. The question of applying principle of promissory estoppel will not arise in case of a concluded contract. There is no unjust enrichment at the cost of Petitioner as alleged. Petitioner is not entitled to any of the reliefs claimed.

All other averments in the above petition contrary to the above are hereby denied as false by the Respondent.

The Respondent prays that the Commission may be pleased to dismiss this petition with exemplary costs in the interest of justice.

The Petitioner wishes to state additional facts which are it thinks necessary for the just decision of the case, under Regulation 25(5) of the KERC (General and Conduct of Proceedings) Regulations, 2000. Hence, the above named Petitioner begs the leave of the Commission to submit the following as rejoinder to the Statement of Objection filed by the Respondent.

The affidavit in support of the Statement of Objections was sworn by one Sri Achyutarao, a resident of Bangalore claiming that he was working as General Manager Technical of the 2nd Respondent. However, it is a matter of record that there is only one Respondent in the proceedings. The affidavit does not even claim that the said Sri Achyutarao was authorized to swear the affidavit in question, on behalf of the Respondent. Further, the affidavit claimed that the statement made in para 1 to 12 of the Statement of Objections were based on information received, whereas, the Statement of Objections filed on behalf of the Respondent contained 10 paragraphs only. Even the Annexure R1 referred in the Affidavit has no mention in the Objection Statement and the copy of Annexure R1 was not served to the Petitioner. The Affidavit filed in support of the Statement of Objections is not in accordance with Regulation 21(4) read with Form NO.2 of the KERC (General and Conduct of Proceedings) Regulations 20000, governing filing of such affidavits. Hence, the Statement of Objections purportedly filed on behalf of the Respondent is liable to be rejected *in limini*.

The averment made in para 2 of the Statement of Objections that the plant was assigned to the Respondent with effect from 10.6.2005 is not true. The Petitioner submits that the PPA dated 24.9.2003 entered into between the Petitioner and the Karnataka Power Transmission Corporation Ltd (KPTCL) was assigned to the Respondent with effect from 10.6.2005, as KPTCL was prohibited from trading in electricity, under the provisions of the Electricity Act 2003.

The reference about the meeting allegedly held to decide as to what should be the date of commissioning of the project as averred in para 4 of the

Statement of Objections was totally unnecessary and irrelevant as far as the enforcement of the PPA dated 24.9.2003 is concerned. As contended in the petition itself, such meeting or any decisions allegedly arrived at are not binding on the petitioner, as the Petitioner was not a party to the same. The Petitioner submits that discussion held between the representatives of the Petitioner on 20.10.2006 to 14.11.2006 did not arrive at any decisions, much less determining the date of commissioning of the projects, as alleged.

The averment made in para 7 of the Statement of Objections that the commercial operation date would be the date of commercial operation of the entire project is not true.

The averment made in para 9 of the Statement of Objections that Petitioner did not achieve commercial operation on a single date for the entire 21 MW on 14.5.2003, the same could not be construed as single commercial operation date as contemplated under the PPA is not correct. The averment that the action taken by the Respondent was fair and in compliance of principles of equity is not correct. The averment that question of applying principles of promissory estoppel would not arise in case of concluded contract is not correct.

The Petitioner submits that the PPA dated 24.9.2003 was approved by the Commission vide Order dated 17.9.2003. Admittedly, up to 9.6.2005, KPTCL was the contracting party and only after 10.6.2005, Respondent has become the contracting party, as an assignee of the PPA. There was no privity of contract between the Petitioner and the Respondent for the period up to 9.6.2005 and the assignment of the PPA in favour of the Respondent with effect from 10.6.2005 did not transfer the mutual rights and obligations of the Petitioner and KPTCL, that accrued up to 9.6.2005, in favour of the Respondent. According to the Statement attached to the letter dated 30.9.2006, issued by the Office of the Director(Procurement), State Power Procurement Coordination Centre, Rs.14,71,099/- was claimed for the period up to 9.6.2005 and a sum of

Rs.5,58,169/- was claimed for the period from 10.6.2005 till 31.7.2006, aggregating to Rs.20,29,268/- towards adjustment of alleged excess payment. The said Statement clearly taken into account the period up to 9.6.2005 as one part and period covering after 10.6.2005, as another part. Hence, even by assuming without admitting that the Petitioner received an excess amount of Rs.20,29,268/-, KPTCL alone was entitled to claim the alleged excess amount of Rs.14,71,099/- for the period up to 9.6.2005 and not the Respondent, subject to the limitation period stipulated in Clause 5.4 of the PPA itself.

The Petitioner submits that the KPTCL has already included the payments actually made by it to the Petitioner till 9.6.2005, in its annual accounts. ERC etc. and the same were passed on the consumers of the entire Karnataka State, proportionately, by including the same in the bulk tariff collected from all the ESCOMs. If the amount illegally withheld by the Respondent is allowed to be retained by it and even if the same is subsequently passed on the consumers, the benefiting consumers are the consumers of the Respondent alone, thereby depriving the consumers of other ESCOMs. Hence, the Respondent is now trying to get unjust enrichment by including the KPTCL period also in its claim.

The Petitioner submits that the PPA does not define the word "year" used in Article 4.1 and 4.2 of the said PPA. But Article 1.1 of the PPA defines "Contract Year" and "Fiscal Year" under Article 1.1 of the PPA. "Fiscal Year" should mean with respect to the initial year, the period beginning on the Commercial Operation Date and ending at 12.00 midnight on the following March 31. Each successive Fiscal Year should begin on April 1 and end on the following March 31, except the Final Fiscal Year should end on the date of expiry of the PPA. Under Article 1.1 of the said PPA, "Contract Year" should mean with respect to the initial year, the period beginning on the Commercial Operation Date of the **Unit** and each successive year shall coincide with the Succeeding Fiscal Year except that the Final Contract Year. Hence, from the combined reading of the two definitions, for the first year, "year" should be from the commercial operation

date of the **Unit** till the following March 31 and thereafter from 1st April to the following March 31 of each year.

The Petitioner submits that the PPA was approved by the Commission under Section 17 of the Karnataka Electricity Reform Act, 1999 (hereafter referred as "KER Act). Hence, the definition contained in the KER Act may also be taken for ascertaining the true meaning of the word "year" used in Article 4.1 and 4.2 of the PPA. But the KER Act did not define the word "year". Section 2(p) of the KER Act provides that words and expressions used but not defined in the said Act and defined in the Electricity (Supply) Act 1948 (Central Act No.54 of 1948) have the meanings respectively assigned to them in that Act. Under Section 2(13) of the Electricity (Supply) Act 1948, "year" means, in relation to the Board or a Generating Company, the year commencing on the first day of April.

To this Rejoinder filed by the Petitioner, a Sur-Rejoinder is filed by the Respondent on 10.1.2008.

The Respondent hereby reiterates the statements made in statement of objections. The Respondent states that Mr.Achutha Rao was fully authorized to swear to the affidavit. The Company also hereby reiterates the Contentions raised therein. It is settled law that even if a person was not authorized at a given point of time, the action could be ratified post facto. IN view of the same, the technical contentions regarding the swearing of the affidavit do not hold any water and may be ignored.

It is false to contend that the meeting of V SPPCC was not attended by anybody on behalf of Petitioner. Mr.K.R.Srinivas had attended the said meeting. Petitioner is trying to make false statement before the Commission.

Contents of para 7 of the statement of objections is reiterated. The provisions of PPA are unambiguous. The date of commercial operation would

be the commercial operation date of the entire project. Article 1.1 of PPA also makes the position clear.

The statements in this para are misleading. It is contended that the Respondent that the commercial operation date is arrived at by taking an average of dates on which parts of the projects were operationalised instead of taking the date on which complete 21 MW became operational. This is stated to show that the Respondent was acting fairly. Contentions to the contrary are incorrect.

The averment that KPTCL has already included the payments actually made in its annual accounts at ERC and has passed on the same to consumers by adding it to bulk tariff is false. The averment that unjust enrichment is false and is hereby denied.

Petitioner is trying to confuse the issue by referred to contract year and fiscal year. There is no reference to these two terms in Article 4.1 and 4.2 of PPA. These articles only refer to the term "Year" which means calendar years. Contentions to the contrary are a result of fertile imagination of Petitioner.

Reference to Section 17 and Section 2(q) of KER Act are wholly inappropriate. Reference to Section 2(13) of Electricity Supply Act is also misleading. The reading of Article 4.1 would clearly indicate that the dates and tenure of the Agreement are linked to commercial operation date which is defined as the date of commissioning of the project as certified by competent authority of the Corporation. The project includes entire 21 MW installed capacity. In view of the same, separating the term "Year" mentioned in the said clause by assigning a definition contained in the "Supply Act" would render the entire clause unworkable. It is a basic principle of interpretation of contract that an interpretation which would take away meaning of the clause read as a whole and which renders some portion of the agreement redundant should not be resorted to.

The contentions in these paras are repetitions and verbal jugglery about the contentions raised earlier and therefore they are not specifically traversed herein.

The contention that commercial date of operation was 14.5.2003 is false. Reference to the term "Unit" and "Contract Year" while drawing parallel reference to Article 4.1 and 4.2 is an attempt to mislead the Commission. On strict construction of the contract, it may be correct to suggest that there was no obligation on part of the Respondent to take delivery of power till all the unit were made commercially operational. However, as per article 5, Respondent is liable to pay for the energy supplied and received because of which payments have been made. The escalation granted on 14.05.2004 was erroneous and therefore, a dispute has been raised by the predecessor of Respondent even before the PPA was assigned in favour of Respondent.

The Petitioner has relied on the judgement of the Appellate Authority. An extract of the same cannot be applied in isolation without having regard to the facts of the decided case. Further, the contract which was being dealt with by the Appellate Authority is also not before the Commission. At any rate the said order of the tribunal is stayed by the Hon. Supreme Court. The Commission has to look into the peculiar facts and circumstances of the present case while determining the issues in dispute. The averment that commercial operation date has no relevance in determining effective date for escalation is contrary to the terms of PPA. The averment that the only difference would be the difference in base tariff is untenable.

Petitioner is not entitled to any of the relief claimed in the Petitioner. The prayers in the rejoinder are not maintainable as they do not find a place in the Petition itself.

An Application is filed by the Petitioner, under Regulation 11 of KERC (General and Conduct of Proceedings) Regulations 2000, to strike out the objection statement and sur-rejoinder dated 10.1.2008 filed by the Respondent in the above case.

That the Sur-rejoinder dated 10.1.2008 filed by the Respondent was supported by an affidavit dated 10.1.2008, sworn by one C.S.Ramachandra, claiming as the General Manager (Technical) of the Respondent. The said affidavit was attested by an Oath Commission and not by a Notary. Under Regulation 21(4) of the EKRC (General and Conduct of Proceedings) Regulations, 2000, every affidavit filed before the Commission shall be notarized. This Commission has not dispensed with the requirement of attestation of any affidavits filed before it by a Notary and permitted the affidavits attested by an Oath Commissioner, generally or specifically to this case.

That the Oath Commissioner is a person appointed by the High Court, under Section 139 of the Code of Civil Procedure 1908, to administer the oath in the case of any affidavit under the Code of Civil Procedure 1908. Such Oath Commissioners appointed under the Code of Civil Procedure 1908, are not Notaries appointed under the Notaries Act, 1952 or cannot be equated to the Notaries appointed under the Notaries Act, 1952. Since any affidavits filed before the Commission is not an affidavit under the Code of Civil Procedure 1908, an Oath Commissioner has no authority to attest any affidavit filed before the Commission and has no validity.

That the acts of the Respondent are nothing but the abuse of the process of the Commission. The failure of the Respondent to get the affidavit notarised, as provided under Regulation 21(4) of the KERC (General and Conduct of Proceedings) Regulations 2000, is illegal and has resulted in miscarriage of justice.

The Petitioner prays that the Commission may be pleased to:

- a) Strike out the Sur-rejoinder dated 10.1.2008 filed by the Respondent, by allowing this Application with cost; and
- b) Pass such other and further orders, as the Commission deems fit to pass, in the interest of justice.

The Petitioner craves the leave of the Commission to file the Notes of Arguments, in support of its case.

Now the main dispute between the parties is that what was the actual Commercial Operation Date (COD), under the above said PPA, for the purpose of reckoning the annual escalation prescribed under the PPA.

To answer this real controversy between the parties, averments made in the Petitioner and rejoinder to the Objection Statement filed may be read as part of these notes of arguments, in order to avoid repetition.

The Petitioner submits that after the signing of the said PPA, KPTCL as well as the Petitioner understood that the actual Commercial Operation Date (COD), under the above said PPA was 14.5.2003, on the date on which 7.2 MW was commissioned, and KPTCL allowed escalation from May of each year starting from 2004 onwards. Otherwise there was no reason to accept the bills of the Petitioner by KPTCL till the PPA was assigned to the Respondent.

However, Director (Procurement) State Power Procurement Coordination Centre (SPPCC), in his letter dated 30.9.2006, for the first time, disputed the correctness of the date of escalation of May of each year taken by both the parties so far and introduced a new concept of weighted average, based on the different dates of COD for giving escalation, on the basis of a decision arrived at the SPPCC meeting held on 5.10.2005.

The Petitioner submits that SPPCC was established under Government Order No.EN 131 PSR 2003 dated 10.5.2005. The functions of SPPCC enumerated under the said Notification does not contain any power akin to the one it exercised for determining the COD under the PPA in its meeting held on 5.10.2005. Hence any decision arrived at about the COD under the PPA, in the SPPCC meeting held on 5.10.2005 has no validity in the eye of law.

The Petitioner submits that "Indian Wind Power Association (IWPA)" was included as an invitee to the SPPCC meetings vide addendum to Government Order No.EN 131 PSR 2003 dated 10.5.2005.

The Meeting Notice dated 5.10-.205 to the meeting of SPPCC held on 10.10.2005 did not have any agenda of the meeting and no separate agenda paper was sent to Indian Wind Power Association, at any point of time. Hence, question of participating in any meeting to arrive at a settlement is totally erroneous.

Copy of the Minutes of SPPCC meeting held on 10.10.2005 clearly shows that there was no discussion held between the IWPA representative and the Respondent or no opportunity was given to IWPA representative to put forward the case of the Petitioner. Further, the IWPA representative was merely an invitee to the meeting and he had no right to participate in the SPPCC meetings, unless expressly invited to do so by the Chairman of the SPPCC meetings. The minutes of the meeting does not disclose any such invitation to participate in the discussion or asked to submit the view of IWPA, before arriving at the alleged decision to decide the COD. Further, the IWPA representative was an invitee to represent the wind power generators in general and not any of the individual wind power generators like the Petitioner. The list of members present attached to the minutes of SPPCC meeting held on 10.10.2005 clearly shows that One Sri K.R.Srinivas and Sri Shridhar Prabhu, attended the meeting of SPPCC as representatives of IWPA and not as the representative of the Petitioner. Hence, any decisions allegedly arrived at in the said SPPCC meeting concerning the

Petitioner is not expressly or impliedly accepted by the Petitioner or not binding on the Petitioner. It was not the case of the Petitioner that Mr.K.R.Srinivas not attended the 5th SPPCC meeting held on 10.10.05, but the contention of the Petitioner is that the said Mr.K.R.Srinivas attended the 5th SPPCC meeting in capacity of the representative of IWPA and not as the representative of the Petitioner. The addendum dated 6.9.2005 as well as the list of members present attached to the minutes of SPPCC meeting held on 10.10.2005 clearly shows that the representatives of IWPA attended the SPPCC meeting held on 10.10.2005 and not the representative of the Petitioner.

The contention made in para 6 of the Sur-rejoinder that Rs.14,71,099/- for the period up to 9.6.2005 was accounted and passed on to KPTCL is irrelevant for the purpose of this case. No documents in support of such contention also have been produced. Even by assuming that such amount was really transferred, the same is not binding on the Petitioner or the same would not affect the merits of the case in any way. The Government Order dated 10.5.2005 assigning the PPA from KPTCL to the Respondent does not assign the right to recover any amount which was due to KPTCL by the assignee ESCOM. Hence, the Respondent has no right to claim any amount for the period up to 10.6.2005.

The Respondent has not produced any documents in support its various contentions and claims made in the proceedings. Hence, adverse inference may be taken on all those points.

The Petitioner humbly submits that since, all the documents filed along with this Notes of Arguments are either public documents or some of them are undisputed documents, there is no impediment to consider those documents by the Commission while deciding the matter.

Wherefore, the Petitioner prays the Commission to allow the Petition as prayed in the Petition and in the Rejoinder, in the interest of justice.

The Commission has considered the facts of the case and arguments traversed by the Counsels for the Petitioner as well as for the Respondents.

The Petitioner has raised technical contentions of the validity of the Affidavit filed along with statement of objections on behalf of the Respondent stating Mr.Achutha Rao is not authorized to swear to the Affidavit. The Respondent agrees that it is settled law that even if a person was not authorized at a given point of time, the action could be ratified post facto. In view of the same, the Respondent argued that the technical contentions regarding swearing of Mr.Achutha Rao did not hold any water and has requested to ignore them. Further, Petitioner also raises objection on Mr.C.S.Ramachandra's affidavit not properly attested by the Notary. The Commission ignores the technical contentions of the Petitioner and proceeds further.

The main argument in this Petition is on the date of commercial operation and on the effective date of the year of grant of annual escalation.

It is alleged by the Petitioner that the Respondent in earlier years has paid as per the provisions of the PPA and subsequently has deducted certain amounts disputing the date of commercial operation.

It is learnt that out of 21 MW of wind power, 7.2 MW was commissioned on 14.5.2003 and 13.8 MW was commissioned on 26.8.2003. The SPPCC has tried to fix up the date of commercial operation based on the weightage average of commissioning of the project and this date has been arrived at 26.8.2003. The Petitioner says that there is no justification for calculating the weightage average to decide on commercial operation date. The PPA contemplates single commercial operation date which in this case is 14.5.2003.

The Respondent has disputed this date of commercial operation and states that the Petitioner's Representatives have attended the meeting of SPPCC to resolve the commercial operation date and states that as per the decision taken the weightage average date of the commissioning is to be considered for calculation of annual escalation.

The Commission has made it clear to the Government of Karnataka to its Principal Secretary, Energy Department, that SPPCC cannot act on behalf of the Respondent. The ESCOMs shall be allowed to work independently. In this case, SPPCC cannot work out any weighted average commercial operation date. The COD is decided as per the terms and conditions of the PPA. There is no scope for the third party to decide something contrary to the provisions of the PPA. The Commission decides that the Commercial Operation Date as 14.05.2003.

The year for the purpose of this PPA are to be decided from the definitions at Article 1 of the PPA wherein "Commercial Operation Date", "Contract Year" and "Fiscal Year" are defined. They are reproduced here below.

"Commercial Operation Date" shall be the date of commissioning of the Project as certified by the competent authority of the Corporation."

"Contract Year" shall mean, with respect to the initial Contract Year, the period beginning on the Commercial Operation Date of the Unit and ending at 12.00 midnight on 31st March of that Fiscal Year. Each successive Contract Year shall coincide with the succeeding Fiscal Year, except that the final Contract Year shall end on the date of expiry of the Term or on Termination of this Agreement whichever is earlier."

"Fiscal Year" shall mean, with respect to the initial Fiscal Year, the period beginning on the Commercial Operation Date and ending at 12.00 midnight on the following March 31. Each successive Fiscal Year shall begin on April 1 and

end on the following March 31, except that the final Fiscal Year shall end on the date of expiry of the Term or on termination of this Agreement, whichever is earlier.”

From these definitions, the Commission is of the view that the year for the purpose of the PPA is the Contract Year.

Articles 4.1 and 4.2 also are reproduced hereunder:

4.1 Monthly Energy Charges: If the project is commissioned beyond 31st August 2003, the Corporation shall for the Delivered Energy pay, for the first 10 years from the Commercial Operation Date, to the Company every month during the period commencing from the Commercial Operation Date at the rate of Rs.3.10 (Rupees Three and Ten paise only) per kilowatt-hour (“the base tariff”) for energy delivered to the Corporation at the Metering Point with an escalation at a rate of 2% per annum over “the base tariff” every year. This shall mean that the annual escalation will be at the rate of Rs.0.062 per Kwhr.”

4.2. Further, in case the Project is commissioned on or before 31st August 2003, the Corporation shall for the Delivered Energy pay, for the first 10 years from the Commercial Operation Date to the Company every month during the period commencing from the Commercial Operation Date at the rate of Rs.3.25 (Rupees Three and Twentyfive paise only) for Kilowatt-hour for energy delivered to the Corporation at the Metering Point with an escalation at a rate of 2% per annum over “the base tariff” as herein indicated in Article 4.1.

Articles 4.1 and 4.2 deal with the rates and charges to be paid and the annual escalation every year is mentioned. Even if the project is commissioned in the middle of year, the next year should start from 1st of April as defined in the Fiscal Year. Therefore, the Commission is of the view that while considering the escalation every year, the year should tally with the Fiscal Year. The year here is

the Contract Year and each successive Contract Year shall coincide with the succeeding Fiscal Year.

Under such circumstances, it is ordered that the Commercial Operation Date of Petitioner Project is 14.05.2003 and the year of escalation is the Fiscal Year as per the definition of Contract Year. The amount already deducted from the payment due to be made to the Petitioner be paid to the Petitioner by the Respondent within one month's time.

Sd/-
K.P.PANDEY)
CHAIRMAN

Sd/-
(S.D.UKKALI)
MEMBER

