

**No.N/01/10**

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION  
BANGALORE**

**Dated this 14<sup>th</sup> May 2010**

- |                               |          |
|-------------------------------|----------|
| 1. Sri M.R. Sreenivasa Murthy | Chairman |
| 2. Sri Vishvanath Hiremath    | Member   |
| 3. Sri K. Srinivasa Rao       | Member   |

**Case No. OP 01/2010**

**Between**

M/s Pioneer Genco Limited  
No.156, Golf Link Road  
Amarjyothi HSBC Layout, Domlur  
Bangalore – 560 071  
(Rep. By its Advocate Sri Shridhara Prabhu) ... Petitioner

**And**

Bangalore Electricity Supply Company Limited  
K.R. Circle  
BANGALORE – 560 001  
(Represented by its Advocate Sri Sriranga) ... Respondent

1. This petition is filed by M/s Pioneer Genco Limited (hereinafter referred to as 'Petitioner') against Bangalore Electricity Supply Company Limited (hereinafter referred to as 'Respondent') praying for the following :

- (1) Making payment for all the Delivered Energy together with interest of 11.75% per annum, compounded annually, from the date when such payments were due up to the date such payments are made in full;
- (2) Establishing Letter of Credit in terms of Article 6.6 of the PPA;
- (3) Granting the cost of this petition; and any other order/s in the interest of justice.

2. On notice the respondents have appeared through their counsel and have also filed their statement of objections on 18.3.2010.

3. The undisputed facts are that the petitioner, a generating company, has set up a mini hydel plant at Shivanasamudram, Malavalli taluk, Mandya district and had entered into a PPA with KPTCL on 8.1.2004 for supply of energy

generated from the mini hydel plant of 21 MW established by it. On 18.11.2004 a supplemental agreement was signed between the petitioner and KPTCL in which the capacity of the plant was enhanced from 21 MW to 24.75 MW and some clauses of the original PPA were changed. On account of unbundling of KPTCL, the PPA came to be assigned to CESC as per the Government of Karnataka Notification dated 6.7.2005 and thereafter came to be reassigned to the respondent BESCO vide Government Notification dated 31.8.2005. Since then the plant is generating and supplying electricity to the respondent.

4. In the present petition the petitioner has claimed payment for the energy supplied but not paid for by the respondent on the ground that the power generated is in excess of the capacity for which PPA has been entered into i.e., 24.75 MW. Further the petitioner is claiming interest at the rate of 11.75 % for the energy to which no payment is made till the same is made and also prayed for opening of letter of credit as agreed to in Clause 6.3 of the PPA.

5. The respondents have contended that as per the PPA, the installed capacity of the generating plant is 24.75 MW and therefore there is no obligation to pay for the additional energy generated in excess of the capacity, particularly at the PPA rates. Relying on the generation figures it is further contended by the respondent that since generation is beyond 25 MW, the project ceases to be a non-conventional project and any generation beyond 25 MW will have an adverse impact on the generating plant thereby the life of the plant gets affected. It is also contended that the payment for excess energy at PPA rates would be an unnecessary burden on the consumers as the respondent has made prompt payments towards the power generated as per the capacity mentioned in the PPA. As regards interest, it is contended by the respondents that no interest is payable for any delayed payments as the original clause providing for interest for delayed payment has been deleted in the supplemental agreement signed between the parties on 18.11.2004. In respect of the prayer for opening of letter of credit it is contended by the respondent that the right to seek the facility of a letter of credit shall be deemed to have

been waived as per Clause 12.4 of the PPA as the said clause has not been enforced by the petitioner till now.

6. In reply the petitioner's counsel has submitted that the issue relating to payment for energy supplied over and above the capacity of the plant mentioned in the PPA is covered by the orders of this Commission dated 2.3.2009 in OP No.19/2008 which is produced as part of Annexure P-2.

7. The questions that arise for consideration and decision are;

(1) Whether the petitioner is entitled to payment at the PPA rates for the energy delivered beyond the capacity of 24.75 MW mentioned in the PPA?

(2) Whether the petitioner is entitled to interest and at the rate of 11.75 % compounded annually, for the payments if ordered by the Commission?

(3) Whether respondents are obliged to open a letter of credit as per Article 6.6 of the PPA?

8. Issue No.1 As submitted by the petitioner's counsel this question is no longer Res Integra. This Commission in a similar case of SCM Sugars (OP No.12/2007) has (including the one relied upon by the petitioner) taken the view that the respondent is liable to pay for all the delivered energy at the PPA rates independently of the capacity mentioned in the PPA.

In the instant case also Clause 5.1 of the PPA states that –

*“Corporation shall for the delivered energy pay, for the first ten years from the Commercial Operation date, to the Company every month during the period commencing from the Commercial Operation Date at the rate of 2.90 (Rupees two and ninety paise only) per Kilowatt-hour (the base tariff) for energy delivered to the Corporation....”*

Considering the above issue in the light of the view already taken by the Commission it has to be held that the petitioner is entitled to payments for all the energy delivered at the same rates as specified in the PPA. Therefore the

respondents are liable to pay for the energy already delivered but not paid for at the PPA rates.

9. The contention of the respondents that if energy generated is beyond 24.75 MW it will make the plant a Non-NCE project, in our opinion, has no relevance to the issue on hand. Further even presuming that generation beyond 25 MW will have an adverse impact on the life of the generating plant, the supply of reduced energy, if any, by the generator will have an obligation on the part of the respondent to make payment only to the extent of energy supplied and hence is also a non-issue for this case.

10. Issue No.2 Even though we have held that the petitioner is entitled to be paid for the energy supplied but not paid till now, the petitioner is not entitled to any interest as claimed in view of the specific deletion of the interest condition in the supplemental agreement dated 18.11.2004 signed between the parties. However, if respondents fail to pay the amount now ordered, the amount will carry an interest of 6 % per annum from the expiry of three months period till it is paid.

11. Issue No.3 Clause 6.6 of the PPA on which petitioner claim for opening of letter of credit reads as under :

*“**Letter of Credit:** Corporation, shall establish and maintain transferable, assignable, irrevocable and unconditional non-revolving Letter of Credit in favour of and for the sole benefit of the Company. The Letter of Credit shall be established in favour of, and issued to, the Company on the date hereof and made operational thirty (30)days prior to the Commercial Operation Date of the Project and shall be maintained consistent herewith by Corporation at any and all times during the Term of the Agreement. Such Letter of Credit shall be in form and substance acceptable to both Parties and shall be issued by any Scheduled Bank and be provided on the basis that :*

- (i) *In the event a Tariff Invoice or any other amount due and payable by Corporation pursuant to the terms of this Agreement is not paid in full by Corporation as and when due, the Letter of Credit may be called by the Company for payment in full of the unpaid Tariff Invoice or any such other unpaid amount.*
- (ii) *The foregoing as determined pursuant hereto, upon presentation of such Tariff Invoice or other Invoice or claim for such other amount by the Company on the due date therefore or at any time thereafter, without any notification, certification of further action being required.*
- (iii) *The amount of the Letter of Credit shall be equal to one month's projected payments payable by the Corporation based on the average of the annual generation.*
- (iv) *The Corporation shall replenish the LC to bring it to the original amount within 30 days in case of any valid draw down.*
- (v) *The Company shall allow a rebate of 1.8 % of the Tariff Invoice amount or actual expenditure/charges for the LC amount incurred, whichever is lower, and the same shall be deducted from the monthly Tariff Invoice payable to the Company.*
- (vi) *The Letter of Credit shall be renewed and/or replaced by the Corporation not less than 60 days prior to its expiration.*

12. According to the petitioner the above clause obliges the respondent to establish and maintain a letter of credit in favour of the petitioner.

13. Per contra it is contended by the respondents that as the petitioner did not insist on opening of a letter of credit as contained in PPA all these years, the right to seek this facility is deemed to be waived as per the Clause 12.4 of the PPA and the same cannot be enforced now.

14. To decide whether the respondents are liable to open L.C. now as demanded we may notice Clause 12.4 of the PPA in addition to Clause 6.6 referred to above.

**Clause 12.4:** *“Waiver: Any failure on the part of a Party to exercise, and any delay in exercising, exceeding three years, any right*

*hereunder shall operate as a waiver thereof. No waiver of a party of any right hereunder with respect to any matter or default arising in connection with this Agreement shall be considered a waiver with respect to any subsequent matter or default" (emphasis supplied).*

15. In our considered opinion, the respondents are obliged to open a letter of credit as per Clause 6.6 of the PPA extracted above. The said clause not only deals with establishing a letter of credit at the beginning but also maintaining the same at any and all times (emphasis supplied) during the term of the agreement. The waiver Clause 12.4 on which the respondents rely upon does not assist them. On the contrary, it says that no waiver of any right earlier shall be considered as a waiver with respect to any subsequent matter of default. The requirement of maintaining the L.C. for the future therefore doesn't get waived under Clause 12.4.

16. In the light of the above discussion we allow the petition in part.

(1) We direct the respondent to pay the petitioner for the energy supplied but not paid till now at the rates provided in the PPA within a period of three months from the date of receipt of copy of the order without any interest thereon.

(2) If the respondent fails to make the payment within three months as stipulated above, the amount shall carry an interest at the rate of 6 % per annum from the date of expiry of three months till it is paid.

(3) The respondent shall open a letter of credit as provided in the PPA within a period of three months.

No order as to cost.

Sd/-  
(M.R. SREENIVASA MURTHY)  
CHAIRMAN

Sd/-  
(VISHVANATH HIREMATH)  
MEMBER

Sd/-  
(K. SRINIVASA RAO)  
MEMBER