

No.N/04/11

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION
BANGALORE**

Dated this 19th May 2011

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

Case No. OP 02/2011

Between

M/s MPPL Renewable Energy Private Limited
1st Floor, Maliks Building
No.29, Hospital Road
BANGALORE - 560 001
(Represented by M/s. Nayak & Srikumar Advocate)

.... **Petitioner**

And

1. Karnataka Power Transmission Corporation Limited
1st Floor, Cauvery Bhavan, Kempegowda Road
BANGALORE – 560 009

2. The Managing Director
MESCOM
Paradigm Plaza, 4th Floor
A.B. Shetty Circle
MANGALORE – 575 001

.... **Respondents**

(Represented by its Advocate Sri Sriranga)

1. This petition has been filed with the following prayers :

(1) To declare that the PPA dated 25.9.2000 and the Supplemental Agreement dated 31.5.2006 between the Petitioner and the Respondents have come to an end by virtue of Article 5.2 of the PPA;

- (2) To declare that the petitioner is entitled to sell power to third parties from 24.9.2010;
- (3) To direct the 1st Respondent to provide necessary permission to sell power to third parties; and
- (4) To direct the Respondent enter into a wheeling and banking agreement and to pay compensation for the losses suffered by the petitioner on account of not being able to sell electricity to M/s. J.K. Tyre & Industries Limited, a third party, from 11.1.2011.

2. The respondents have put in appearance through M/s. Just Law Advocates and have filed their statement of objections dated 17.2.2011.

3. We have heard counsels appearing for both the parties and considered the pleadings and the documents placed before the Commission on behalf of both the parties.

4. It is the case of the petitioner that it had entered into a PPA dated 25.9.2000 with the 1st Respondent KPTCL for supply of electricity generated by its biomass plant at Malavalli. The said PPA came to be modified by a Supplemental Agreement dated 31.5.2006 which amended Article 5.1 of the PPA with effect from 1.4.2003. As per Clause 5.2 of the said PPA, the 2nd Respondent from 11th year onwards has to pay to the Company at the rate agreed to by mutual negotiation and in case of the parties not arriving at a mutually acceptable rate, the petitioner be allowed to sell power to the 3rd parties by executing a wheeling and banking agreement.

5. The Commission vide its Order dated 11.12.2009 has determined the rate payable to a NCE generating companies issuing different fuels and technologies. According to this order, the tariff for supply of power by generating companies using biomass after the completion of the first ten years period shall be the last rate prevailing in the tenth year. In the case of the Petitioner's unit, the last rate payable in the tenth year as per the agreements referred to earlier is Rs.3.8512 per kwh. According to the petitioner, this rate is not viable as the cost of generation of its plant is much above this and therefore the rate fixed by the Commission is not acceptable to it. Consequently, as per Clause 5.2 of the PPA, it wants to sell electricity generated by it to 3rd parties by availing open access.

6. The respondents in reply have contended that the tariff determined by the Commission vide its order dated 11.12.2009 is binding on both the petitioner and respondents as it is the Commission which is empowered to fix the tariff under the provisions of the Electricity Act, 2003 and not the parties. Therefore the petitioner has to sell electricity to MESCOM as per this rate and cannot go for 3rd party sale. It is further contended that the plea of the petitioner that the rate fixed by the Commission is not viable is not tenable as Commission while fixing the rate has taken into consideration all the relevant factors including the cost of generation. It is further submitted by the respondents that they are not liable to pay any damages to the petitioner on account of the Petitioner not being allowed to sell power to M/s. J.K. Tyre & Industries Limited or any 3rd party in view of the Commission's Order dated 11.12.2009 and the Respondents' willingness to purchase power at the rate already determined by the Commission.

7. The questions that arise for consideration in this case are –
- (1) whether the PPA dated 25.9.2000 has come to an end on expiry of the first (ten) years period;
 - (2) whether the petitioner is entitled to sell the power generated by it after the first ten years period to 3rd parties in view of the failure of the parties to reach an agreement on the tariff applicable after the tenth year; and
 - (3) whether the petitioner is entitled to any damages for the Respondents not allowing it to sell the electricity generated by it to the 3rd parties after the first ten year period.

Re. Issue No.(1) :

8. As the entire case of the petitioner revolves around understanding of Clause 5.2 of the PPA, it is necessary to notice the same verbatim before considering the respective arguments.

“5.2 From the 11th year onwards, from the date of signing of Agreement, Corporation shall pay to the Company for the energy delivered at the Metering Point at a rate agreed by mutual negotiations. In case the Parties do not arrive at a mutual agreement on the tariff, the Company shall be permitted to sell power to third parties and enter into a Wheeling and Banking Agreement with Corporation to sell power through the Corporation grid for which it shall pay wheeling charges to Corporation at the rates applicable from time to time in addition to banking charges at the rates applicable from time to time based on the month and balance of the energy banked.”

9. In our view the contention of the petitioner that PPA comes to an end after the tenth year if parties do not arrive at a mutually acceptable tariff is not correct in view of the very wordings of Clause 5.2 on which heavy reliance is placed by the petitioner and Clause 9.1 of the PPA. The opening words of Clause 5.2 extracted above states that 'from the 11th year onwards'. This means that the agreement is not contemplated for only ten years. Further, Clause 9.1 of the PPA also states that unless terminated pursuant to the other provisions of the agreement, agreement shall continue to be in force until the completion of the (20) years from the scheduled date of completion. Admittedly, neither twenty years period has elapsed nor the agreement has been terminated by either of the parties. If the intention of the parties was that the PPA shall come to an end automatically after the ten year period if both the parties do not arrive at a mutually acceptable rate, wordings of Clause 5.2 would have been different and would have said so. As stated above, Clause 5.2 specifically uses the words "that from 11th year onwards" which mean that the agreement is contemplated to continue beyond the ten year period. Considering the understanding of the parties as reflected in the wordings used in Clause 5.2 and 9.1 of the PPA, we have to hold that the PPA is not for ten years and does not come to an end after the completion of the first ten year period merely because there is no agreement between the parties on the tariff. We therefore hold that PPA dated 25.09.2000 continues to be in force for the entire period agreed to between the parties in Clause 9.1 of the PPA, i.e., (20) years and consequently this issue is decided against the petitioner.

Re. Issue No.(2) :

10. The next issue for consideration is whether the petitioner is entitled to sell the power generated by it to the 3rd parties on the ground that the parties have not arrived at a mutually acceptable tariff as contemplated under Clause 5.2 of the PPA. It is vehemently contended by the petitioner that the wordings of Clause 5.2 are very clear to the effect that in case the parties failed to arrive at a mutually acceptable tariff, the petitioner is entitled to sell the electricity to third parties by availing the facility of wheeling and banking. We could have accepted this argument but for the provisions of the Electricity Act, 2003 which has come into force subsequent to the execution of the PPA. Under Section 62 of the Electricity Act, 2003, it is only the appropriate Commission which has to determine the tariff for supply of electricity by a generating company to a distribution licensee and not the parties. As held by us while dealing with Issue No.1, the contract for the supply of electricity of the petitioner with the respondent is for a period of twenty years and the said contract is still alive and the obligation of the petitioner to sell electricity to the respondent continues. In such a situation it is this Commission which has to determine the tariff and not the parties as provided in the contract. The provisions of Section 62 read with Section 64 of the Electricity Act, 2003 prevail over Clause 5.2 of the PPA and the petitioner has to supply electricity to the respondent at the rate determined by the Commission. This Commission has vide its order dated 11.12.2009 determined tariff payable by the Distribution Licensees to the generating companies which have completed the first ten years period. This order binds the petitioner as well as the respondents and both the parties have to implement the same.

11. It is well settled law that the statute always overrides a private contract. The determination of tariff under the Electricity Act, 2003 is a statutory power conferred on the Commission and this Commission's Order overrides the contractual rights of the parties under Clause 5.2 of the PPA. Section 174 of the Electricity Act, 2003 specifically gives primacy to the Electricity Act over other laws and instruments.

12. The Hon'ble Supreme Court in the case of BSES Ltd., Vs. Tata Power Co. Ltd. & others (2004) 1 SCC 195 while interpreting the Electricity Regulatory Commissions Act, 1998 has held that 'The provisions of the Act and Regulations show that the Commission has exclusive power to determine the Tariff'. The same is the position under the provisions of the Electricity Act, 2003. Further, the Hon'ble Supreme Court in the case of M/s. PTC India Limited Vs. CERC 2010 (4) SCC 603 has held that the Regulatory Commissions are entitled to intervene and overwrite the existing contracts under Section 178 as a part of regulatory framework.

13. As stated above this Commission in exercise of its regulatory power has determined the tariff payable to the generating companies after the tenth year after considering all the relevant factors. The said tariff therefore overrides the contractual rights of the parties under Clause 5.2 of the PPA to determine the tariff themselves.

14. The contention of the petitioner that therefore there is no enforceable contract since tariff is not determined by the parties as contemplated in Clause 5.2 of the PPA cannot stand in view of the above discussion.

The judgments in the case of *May & Butcher Vs. The King* 1934 (2) KB 17 and other cases cited by the counsel appearing for the petitioner have no application to the facts of this case. The contracts which were subject matter of dispute in those cases were not governed by any statutory provision like the one in this case. Similarly the judgment of the Hon'ble High Court of Karnataka in the case of the Coffee Board also has no application to this case.

15. The contention of the petitioner that since PPA expressly provides for mutual negotiation and therefore the petitioner cannot be compelled to accept the Tariff Order dated 11.12.2009 cannot be countenanced in view of the statutory provisions conferring power on the Commission to determine the tariff and the same overriding the contractual rights of the parties. In our view, the respondent is right in contending that the tariff order of the Commission dated 11.12.2009 binds the petitioner and the petitioner has to sell the electricity generated by it for a period of twenty years at the rates determined by the Commission. Further, the contention of the petitioner that if the generator chooses not to renew the contract in the eleventh year it cannot be forced to do so simply because the tariff has been fixed by the Commission is also not acceptable as the contract is not for ten years but is for twenty years and the question of renewing the contract by the petitioner does not arise.

The law declared by the Hon'ble Appellate Tribunal for Electricity in the case of Small Hydro Power Developers' Association Vs. Transmission Corporation of A.P. Ltd., referred to by the petitioner's counsel is no longer a valid law as the same has been reversed by the Hon'ble Supreme Court in the case of Transmission Corporation of A.P. V/s. Sai Renewable Power reported in 2010 ELR SC 697. The Hon'ble Supreme Court in the said case has held that the APERC has the jurisdiction to determine the tariff of electricity generated by NCE developers of generators in the facts and circumstances of the said case.

16. The order of CERC in the case of Tata Power Co. Ltd., Vs. Western Regional Load Dispatch Centre, etc., referred to by the petitioner's counsel has no application to the present case as in the present case the petitioner has to supply power to the respondent, even after the tenth year as per the tariff determined by this Commission in view of the agreement and provisions of the Electricity Act, 2003.

17. The contention of the petitioner that the Commission is estopped from changing the terms of the PPA by tariff order cannot be accepted. In the first place the doctrine of estoppel has no application to the statutory power of the Commission. Secondly this Commission is not changing the terms of the PPA as contended but is only interpreting the existing terms of the PPA in accordance with law.

18. The contention of the petitioner that compelling the petitioner to accept the tariff determined by this Commission results in grievous loss and injustice and is unconstitutional has no merit. While determining the tariff applicable after the

tenth year this Commission vide its order dated 11.12.2009 has considered all aspects including the cost of generation and other costs. Further this order has been passed after considering all the material placed before it and hearing the stakeholders including the petitioner; however, till date, petitioner has not also agitated his grievance after issue of tariff order by Commission on 11th December 2009.

19. In the light of the foregoing discussion, we hold that the petitioner cannot go in for third party sale under Clause 5.2 of the PPA and is bound to sell the electricity generated by it at the rate determined by the Commission in its order dated 11.12.2009 till the expiry of the remaining period of the PPA or termination of the PPA in accordance with law. Accordingly this issue is answered in the negative.

Re. Issue No.(3) :

20. In view of our findings that the petitioner is bound to supply electricity to the respondents at the rate determined by the Commission vide its order dated 11.12.2009, there is no question of the petitioner suffering any damage and this Commission granting any damages to the petitioner. Accordingly this issue is answered against the petitioner.

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

Sd/-
(VISHVANATH HIREMATH)
MEMBER

Sd/-
(K. SRINIVASA RAO)
MEMBER