

Before the Karnataka Electricity Regulatory Commission, Bangalore

Dated this the 7th day of April 2005

Present

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|-------------------------|-----|----------|
| 1. Shri K.P. Pandey | ... | Chairman |
| 2. Shri H.S. Subramanya | ... | Member |
| 3. Shri S.D. Ukkali | ... | Member |

Case No.OP.03/2005

Between

R.K. Powergen Private Limited
3423, 10th Main, 3rd Cross (Near Water Tank)
Indiranagar 2nd Stage
Bangalore 560038

(Represented by its Managing Director
Dr.(Mrs) Andal Arumugam ... Petitioner

And

Karnataka Power Transmission Corporation Limited
Cauvery Bhavan
Bangalore 560 009

(by its Managing Director) ... Respondent

1. The petitioner is a generating company and has put up a 20 MW capacity Biomass based power project in Hiriyur Taluk, Chitradurga District. The Power Purchase Agreement (PPA) between the Petitioner and the Respondent was signed on 18.10.2001 for putting up the above project. The said PPA had been approved by the Commission vide Order dated 12.10.2001. The Respondent vide letter dated 5.7.2003 had communicated termination of the said PPA with immediate effect. The petitioner was also informed through this letter that in case it intends to continue to develop the project and sell power to KPTCL, the

petitioner is requested to enter into a fresh agreement as per the tariff and other terms and conditions mentioned in the said letter. Aggrieved by the aforesaid termination of the PPA, the petitioner had filed a writ petition before the Hon'ble High Court of Karnataka seeking relief. The High Court has ordered Interim Stay of the letter dated 5.7.2003 issued by the Respondent terminating the agreement vide Order dated 16.10.2003. The said writ petition is pending before the High Court for disposal. Subsequently, the petitioner had addressed a letter to the Respondent on 18.12.2003 on the issue of synchronization order for their power project wherein, without prejudice to various contentions raised by them in the writ petition, they had agreed to supply power to the Respondent and receive tariff at the rate of Rs.2.80 per kwhr subject to final decision by the High Court.

2. Subsequently, the Respondent had intimated the petitioner vide letter dated 24.5.2004 calling upon the petitioner not to export power from 23 hours to 7 hours the next day with effect from 26.5.2004 due to "system constraints". It was also communicated that if any power is exported during the above period, the power so exported will be treated as free power and no payment will be made.

3. The Petitioner has filed a petition before the Commission on 20.01.2005 praying for the following relief:

- (i) to adjudicate the dispute between the petitioner and the Respondent and to set aside the letter dated 5.7.2003 issued by the Respondent,
- (ii) direct the Respondent to pay to the petitioner tariff as set out in the PPA dated 18.10.2001 and pay all arrears of tariff along with interest thereon as per the terms of PPA,
- (iii) direct the Respondent to pay to the petitioner an amount of s.35,79,439/-, and

- (iv) direct the Respondent to pay as Interim Relief the tariff rate of Rs.3.32 per kwhr with retrospective effect from the date of, i.e.,17.1.2004.

The petitioner has, however filed an amended petition before the Commission on 10.03.2005 wherein it has withdrawn the prayer made in the original petition to set aside the afore mentioned letter/order dated 5.7.2003 in view of the fact that the question regarding the validity or otherwise of the aforementioned letter dated 5.7.2003 is seized of by the Hon'ble High Court.

It has also been prayed that

- a) the Respondent be directed to pay to the petitioner interest at the rate of 2% over the SBI prime lending rate in respect of all delayed payments in terms of clause 6.3 of PPA dated 18.10.2001, and
- b) direct the Respondent to open a revolving letter of credit on a nationalized bank in terms of clause 6.6 of the said PPA.

4. The petition was admitted by the Commission and notices were issued to the petitioner as well as the Respondent. Counsels for both the parties were heard. At the outset, the petitioner's counsel informed that he has filed an amended petition and withdrawn the first ground raised in the original petition. The petitioner's counsel referred to the provision of Section 86 (f) of the Electricity Act, 2003 and pleaded that as a dispute exists between the petitioner and the Respondent, the Commission has jurisdiction to adjudicate the dispute. Further, the learned counsel for the petitioner reiterated various contentions stated in the petition on the other grounds. To put it in a nutshell, it was contended that the Respondent is bound to honour the terms of PPA which has been executed and entered into between the two parties after the same was

approved by the Commission. Thus, the PPA has received statutory confirmation and the terms of the PPA including tariff could be amended, modified or revised only after due approval from the Commission. The petitioner has made heavy investment in setting up the project and the letter of the Respondent dated 24.5.2004 calling upon the petitioner to back down power and not to supply power from 26.5.2004 during 23 hours to 7 hours the next day is illegal and arbitrary. Subsequently, the Respondent has, however, withdrawn its back down request with effect from 20.8.2004. The petitioner had affirmed to its stand once again by means of a letter dated 25.11.2004 and demanding the Respondent to pay tariff value for the period 26.5.2004 to 20.8.2004 aggregating to Rs.35,79,439/-. Although the reason given for the back down is "system constraints", the petitioner continued to supply power to the Respondent and the Respondent continued to receive power. There was absolutely no "system constraints" to receive power supply by the Respondent and the Respondent has utilized power supplied by the petitioner. Hence, the Respondent is duty bound to pay tariff for the power purchased. The petitioner has also pleaded that directions be issued to the Respondent to pay the tariff as set out in the PPA dated 18.10.2001 and pay all arrears of tariff as per the terms of PPA.

5. The learned counsel for the Respondent has objected to the petitioner's plea and has also filed written arguments vide letter dated 24.3.2005. It is argued that in view of the pendency of the writ petition before the Hon'ble High Court on the termination of PPA, the present petition is liable to be rejected.

6. The Commission has considered the arguments advanced by both the parties. It is a matter of record that a PPA was entered into between the petitioner and the Respondent on 18.10.2001 after being duly approved by the Commission. The writ petition filed by the petitioner challenging the termination of PPA by the Respondent is pending before

the High Court for disposal. Since the High Court has granted Interim Stay of the letter dated 5.7.2003, the PPA continues to be in force. Since the petitioner has withdrawn the plea regarding the termination of the PPA and High Court is seized of this issue, the Commission is not considering the ground related to the termination of PPA by the Respondent.

7. Regarding the petitioner's plea for payment of tariff as set out in the PPA dated 18.10.2001, the Commission finds sufficient merit in the petitioner's plea. The Respondent has not paid to the petitioner at the rates approved by the Commission. The commission is of the firm view that the Respondent has no right to alter the terms of PPA approved by the Commission without prior consent of the Commission. The Respondent is bound to honour the terms and conditions of PPA and pay the tariff due to the petitioner accordingly. The Commission, therefore directs that the Respondent shall pay the tariff at the rates specified in the approved PPA.

8. Coming to the petitioner's contention regarding non-payment of dues for the power supplied by it and purchased by the Respondent for the period 26.5.2004 to 20.8.2004, the Commission is of the view that the action of the Respondent is illegal, unjust and in violation of the terms of the PPA. Having purchased power from the petitioner, the Respondent is liable to pay tariff for the power purchased from the petitioner as per the terms agreed to between the two parties in the PPA. The statement made by the Respondent in letter dated 24.5.2004 is unsustainable in the eyes of law and even as per the Respondent's own action of purchasing the power from the petitioner. Thus, the Respondent is legally liable to pay the amount due to the petitioner for having purchased the power in accordance with the terms of PPA. Regarding the amount, including interest, payable as per the tariff invoice for the power purchased, the details have to be worked out by both the parties. Hence the

Commission directs that the exact amount payable be discussed and settled between the parties.

9. The Respondent is directed to give effect to this Order and release the amount payable to the petitioner within 30 days from the date of this Order.

The petition is accordingly disposed.

Sd/-
(K.P. PANDEY)(
Chairman

Sd/-
(H.S. SUBRAMANYA)
Member

Sd/-
(S.D.UKKALI)
Member