

OP 05/2010

No. N/10/10

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION
BANGALORE**

Dated this 16th September 2010

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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 05/2010

Between

Chamundeshwari Electricity Supply Corporation Limited
927, LJ Avenue Commercial Complex
New Kantharaja Urs Road
MYSORE – 570 009
(Represented by its Advocate Sri N.S. Sanjay Gowda)

.... Petitioner

And

M/s Bannari Amman Sugars Limited
Flat No.202, II Block, 'Royal Residency'
No.8, Bruton Road
BANGALORE – 560 025
(Represented by its Advocate Sri Prabhuling Navadgi)

.... Respondent

1. This petition is filed by M/s Chamundeshwari Electricity Supply Corporation Limited (CESC) for declaration that the respondent is barred from seeking Open Access and selling power to any third party during the subsistence of PPA dated 11.3.2004 which is valid and subsisting.
2. The respondent has filed a detailed statement of objections contesting the petition and the prayers made therein.
3. We have heard counsels appearing for the petitioner as well as the respondent and have also considered the material placed before the Commission in support and against the petition.

4. We have also summoned the records of the order of the Commission dated 3.7.2008 as both the parties have relied upon the said order and considered the material available therein.

5. From the pleadings and records it is observed that the respondent company had initially established a 16 MW cogen power plant at Alaganchi Village, Nanjangud Taluk, Mysore District and had entered into a PPA with KPTCL on 25.9.2000 for sale of surplus electricity available after its captive use. The respondent subsequently added another 20 MW to the existing 16 MW thereby increasing the capacity to 36 MW totally. After enhancement of the capacity the respondent and the KPTCL signed a fresh PPA on 11.3.2004 fixing the rate at Rs.2.80 per unit + 2 % escalation per annum for the entire electricity generated by the 36 MW plant and submitted the same to this Commission for approval. The Commission conveyed its due approval to the combined PPA on 7.9.2004. However it appears that the respondent company did not come forward to finally execute the combined PPA and instead approached the Commission by filing OP 39/2006 for review of the approval communicated to the PPA dated 11.3.2004 and refixing the rate at the tariff applicable to 16 MW as per the PPA as modified on 9.6.2006.

6. During the pendency of OP 39/2006 a supplemental agreement was signed by KPTCL and the respondent on 19.6.2006 only in respect of 16 MW plant refixing the rates as follows and submitted for approval of the Commission. The Commission approved the same on 7.6.2006 and this has been given effect to by both the parties.

<u>Base Tariff</u>	Rs.3.32
01.04.03 to 31.03.04	Rs.3.38
01.04.04 to 31.03.05	Rs.3.45
01.04.05 to 31.03.06	Rs.3.51
01.04.06 to 31.03.07	Rs.3.58
01.04.07 to 31.03.08	Rs.3.65
01.04.08 to 31.03.09	Rs.3.71
01.04.09 to 31.03.10	Rs.3.78
01.04.10 to 24.09.10	Rs.3.85

7. In OP 39/2006 the petitioner had sought for the following prayers :

(a) Issue direction to the Respondent Corporation to pay the rate per unit as was agreed between the parties under the supplemental agreement dated 19.6.2006 for every unit exported in respect of the additional capacity of 20 MW.

(b) In the alternative be pleased to review its order approving the Draft Power Purchase Agreement dated 11.3.2004 and grant the relief as claimed above.

(c) Issue such other directions, pass such other orders as deemed fit by this Hon. Commission in the facts and circumstances of the case, in the ends of justice.

8. The respondent company had filed one more petition OP 17/2007 claiming payment for the electricity supplied from the additional 20 MW plant as per PPA dated 25.9.2000.

9. Both the above petitions were heard together. The Commission in OP 39/2006 after considering the arguments of both the sides held that the approved draft PPA of the Commission shall be taken as the valid PPA and the petitioner should be paid the tariff at the rate of Rs.2.80 per unit with 2 % escalation on the base rate for the energy already pumped into the grid from the additional 20 MW power plant of the petitioner as by that time the respondent had availed Open Access for the same and had filed a memo dated 3.6.2008 to that effect.

10. In the present petition the petitioner CESC is seeking a declaration to bar the respondent from seeking Open Access and selling power to the third parties during the subsistence of PPA dated 11.3.2004 on the ground that the said PPA is valid and subsisting.

11. Per contra the counsel for the respondent contends that the PPA dated 11.3.2004 is not a binding PPA between the parties as it was only an initialed agreement and not finally executed by the respondent. This according to him becomes clear from the order of the Commission dated 3.7.2008 passed in OP 39/2006.

12. The main question that arises for decision in the present petition is whether PPA dated 11.3.2004 is still valid and binds the parties, and whether the respondent is barred from seeking Open Access on account of the same.

13. It is observed from the records that the PPA dated 11.3.2004 was a fresh PPA initialed by the parties to cover the entire electricity generated from 36 MW power plant and the same was approved by the Commission on 7.9.2004. However thereafter the respondent did not execute the same finally and instead approached this Commission by OP 39/2006 for review of the approval given. Before the Commission could give its decision the then petitioner (present respondent) filed a memo dated 3.6.2008 stating that pending the petition the petitioner has entered into a PPA with M/s. Tata Power Trading Company Limited and therefore the dispute regarding refixation of rate did not survive and the only dispute that survived was the rate at which the energy already supplied by the 20 MW plant was to be paid for. The petitioner also took a stand that it cannot pay for the additional energy as per PPA dated 11.3.2004 as the respondent has not signed it. The Commission after considering the memo and the arguments made by both the parties held that the energy supplied from the additional 20 MW plant till the respondent went for Open Access shall be paid for at the rate of PPA dated 11.3.2004. In other words the Commission confined the PPA dated 11.3.2004 only for the purpose of payment for the additional energy supplied from the 20 MW plant since by then the petitioner had opted for Open Access and had entered into a PPA with a private trader. This order of the Commission was not questioned before any higher / appellate forum by either of the parties and has become final. Therefore it has to be held that the PPA dated

11.3.2004 has come to an end with the Commission's order dated 3.7.2008 and is no longer in force and binding on the parties.

14. Then the incidental question that arises to be decided is whether non-existence of the PPA dated 11.3.2004 will have an effect of erasing the earlier PPA dated 25.9.2000 (as modified on 19.6.2006) which covers the 16 MW plant. In our view, the PPA dated 25.9.2000 as modified by the supplemental agreement dated 19.6.2006 does survive and continues to bind the parties de hors the Commission Order dated 3.7.2008 as the same is valid for a period of twenty years from 11.3.2004 and is not replaced by any new agreement and is in subsistence. Therefore the respondent cannot sell electricity generated by this 16 MW plant to any other party than the petitioner. Admittedly as of now, the petitioner has paid all the dues relating to this 16 MW and therefore the respondent is obliged to continue to supply electricity to the petitioner only.

15. In the light of the above discussion we hold that the PPA dated 11.3.2004 is no longer in force. However the PPA dated 25.9.2000 for 16 MW continues to be valid and binding on the parties. Consequently the petitioner is not entitled to Open Access for the electricity generated by this 16 MW plant.

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

Sd/-
(VISHVANATH HIREMATH)
MEMBER

Sd/-
(K. SRINIVASA RAO)
MEMBER