

No.N/28/09

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION
BANGALORE**

Dated this 08th October 2009

- | | |
|--------------------------|----------|
| 1. Sri. K.P. Pandey | Chairman |
| 2. Sri. K. Srinivasa Rao | Member |

Case No. OP 17/2009

Between

Bangalore Electricity Supply Co. Ltd.,
A Company incorporated under the provisions of Companies Act, 1956,
Having its Registered Office at
K.R. Circle, Bangalore,
(Represented by Just Law Advocates) ... **Petitioner**

AND

Davangere Sugar Company
A Company incorporated under the provisions of Companies Act, 1956,
Having its Registered Office at
No.73/1, P.B.No.312, Shamanur Road,
Davangere 577 004
(Represented by Prabhuling Navadgi Advocates) ... **Respondent**

1. The petitioner is a licensee for distribution of electricity within the State of Karnataka. The Respondent is a company incorporated under the provisions of Companies Act 1956 and has a captive generation plant for generating electricity for its own use and for selling the surplus electricity for which it had entered into a Power Purchase Agreement (PPA in short) with Karnataka Power Transmission Corporation

Ltd., (KPTCL in short) on 17.8.2002 having a gross capacity of 24 MW and exportable capacity of 20 MW. With effect from 10.6.2005 the Bangalore Electricity Supply Company (BESCOM in short) the petitioner herein was assigned the power purchase agreement dated 17.1.2002 and subsequently amended by a supplemental agreement dated 9.6.2005 by the Government. By this assignment all the obligations including purchase of power from the respondent came to be performed by the petitioner. On 6.6.2009 the respondent wrote a letter No.Gen/OA-05/612009 to the State Load Despatch Centre requesting for concurrence for permission to sell power through open access. The Petitioner has therefore filed this petition under Section 86 (1)(f) of the Electricity Act 2003 and has prayed the Commission to:

1) Declare the Respondent is barred from seeking open access and sell power to any third party during the subsistence of a valid PPA to be contrary to the terms of the agreement and therefore illegal and unsustainable.

2) Direct the Respondent to supply power to the Petitioner as per the terms of PPA dt.17.1.2002 and supplemental agreement dt.9.6.2005.

3) Grant cost of proceedings

4) Pass such other orders as the Hon'ble Commission deems fit in the facts and circumstances of the case.

2. The Petitioner has filed a memo for dismissal of the petition on several grounds mentioned therein. It is also mentioned in the Memo that the Respondent has issued a letter of termination dated 8.7.09 terminating the PPA dt.17.1.2002 and supplemental agreement dated 9.6.2005. On filing of Memo for the dismissal of the petition by the Respondent the Petitioner sought permission to amend the original petition filed on 26.6.2009 and after the grant of permission for amending the petition an amended petition has been filed. In the amended petition the Petitioner has prayed for the following:

- a) Declare that the Respondent is barred from seeking open access and selling power to any third party during the subsistence of a valid PPA to be contrary to the terms of the agreement and therefore illegal and unsustainable.
- b) Squash the termination notice dated 8.7.2009 issued by the Respondent (Annexure J).
- c) Direct the Respondent to sell power to the Petitioner as per the terms of the PPA dated 17.1.2002 and supplemental agreement dated 9.6.2005.
- d) Grant cost of proceedings
- e) Pass such other orders as this Hon'ble Commission deems fit in the facts and circumstances of the case.

3. During the pendency of this petition, the request for the open access of the Respondent was rejected by SLDC and finally a Writ Petition No.25431/2009 came to be filed in the Hon'ble High Court by the State Government challenging the order of CERC in OP No.114/2009 dt.17.8.2009. The Hon'ble High Court in the order dated 2.9.2009 has directed the Commission to expedite the disposal of this petition.

4. The Respondent has filed a detailed statement of objections and the Petitioner has filed rejoinder to the statement of objections filed by the Respondent. The arguments were heard on 22.9.2009. Sri. Naganand, Senior Counsel and Sri. Prabhuling Navadgi argued extensively on behalf of the Petitioner and Respondent respectively. Sri. Prabhuling Navadgi has also filed written arguments. The Counsel for the Petitioner has not filed any written arguments.

5. We have perused the petition and statement of objections along with the material documents produced along with them. After hearing the arguments and perusal of the petition and Respondent's objections along with all other materials placed before the Commission, following issues arise to be deliberated and decided:

- 1) Whether or not the Respondent is obligated to supply power to the Petitioner notwithstanding the defaults, if any, committed by the Petitioner including delayed payments to the Respondent.
 - 2) Whether or not the termination notice dated 8.7.2009 issued by the Respondent (Annexure J of the petition) is legal and valid.
 - 3) Whether or not the directions can be issued to the Respondent by the Commission to sell power to the Petitioner in terms of the provisions contained in the PPA dated 17.01.2002 and supplemental agreement dated 9.6.2005.
6. In order to have a meaningful deliberation of the above issues, it is necessary to refer to the relevant clauses in the PPA which are extracted here below:

Article 4
Undertakings

4.1 Obligations of the Company

- (i) *The Company shall obtain all statutory approvals, clearances and permits necessary for the Project in addition to those Approvals as listed in Schedule 4.*
- (ii) *The Company shall construct the Project including the Interconnection facilities.*
- (iii) *The Company shall achieve Schedule Date of Completion within one and half years from the Effective Date*
- (iv) *The Company shall make available to Corporation confirmatory letters from the Financing parties within 15 days from receipt of such documents*
- (v) *The Company shall seek approval of Corporation in respect of Interconnection facilities*

- (vi) *The Company shall undertake at its own cost construction/upgradation of (a) the Interconnection Facilities and (b) the transmission lines as per the specifications and requirements of Corporation, as notified to the Company*
- (vii) *The Company shall undertake at its own cost maintenance of the Interconnection Facilities excluding the transmission lines as per the specifications and requirements of Corporation, as notified to the Company in accordance with Prudent Utility Practices. The transmission lines so constructed shall remain as dedicated transmission line without provisions for any tapplings.*
- (viii) *The Company shall operate and maintain the Project in accordance with Prudent Utility Practices.*
- (ix) *The Company shall be responsible for all payments on account of any taxes, cesses, duties or levies imposed by the GoK or its competent statutory authority on the land, equipment, material or works of the Project or on the electricity generated or consumed by the Project or by itself or on the income or assets owned by it*
- (x) *The Company shall be responsible for obtaining license/s (if required) for the sale or transfer of Exportable Capacity under the provisions of any relevant law.*

4.2 Obligation of the Corporation

Corporation agrees

- (i) *to reasonably assist, without liability, the Company in obtaining necessary approvals for construction of the project*
- (ii) *To allow Company to the extent possible to operate the Project as a base load generating station subject to system constraints.*
- (iii) *Subject to system constraints to off-take and purchase all the Exportable Capacity made available by the Company at the Delivery Point.*
- (iv) *To make tariff payments to the Company as set out in Article 5.*

- (v) *To accord approval within a reasonable period for the Interconnection Facilities to be constructed by the Company*
- (vi) *To undertake maintenance of transmission lines at its own cost after Commercial Operation Date*
- (vii) *To provide construction power at corporation's prevailing tariff during construction of the Project, within 60 days, if possible or any other date mutually agreeable from the date of receipt of the application from the Company for the purpose and subject to fulfillment of Corporation's formalities.*
- (viii) *To provide start up power required for the plant.*

Article 5

Rates and Charges

- 5.1 *Corporation shall for the Delivered Energy pay, for the ten years with effect from 17.1.2002 (the date of signing of Agreement) to the Company every month for the period commencing from the Commercial Operation Date till 01.04.2005 at the rate of Rs.2.80 (Rupees Two and paise eighty only) per Kilowatt-hour and for the remaining period out of the block of 10 years at the rate of Rs.3.10 per Kwh 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.*
- 5.2 *After the period for which the tariff as agreed at Article 5.1 above, Corporation shall pay to the Company for the energy delivered at the Metering Point at a rate based on operating costs and incentives to be agreed upon by mutual negotiations and with the approval of the Commission. In case the Parties do not arrive at a mutual agreement on the tariff, the same shall be referred to the Commission for a determination. In case the Corporation then refuses to purchase the power generated, the Company shall be permitted to sell energy to third parties and enter into a Wheeling Agreement with Corporation to sell*

power through the Corporation grid for which it shall pay transmission and other charges to Corporation at the rates applicable from time to time as approved by the Commission.

- 5.3 *The Company shall be permitted to use 10% of the installed capacity for start up, after inspection by the concerned officers of the Corporation and 115% of such energy provided by the Corporation for startup purposes shall be deducted from the energy pumped into the Grid by the Company for determining the amount to be paid by the Corporation to the Company. If energy over and above the above requirement is drawn from the Grid, the same will be billed under the tariff applicable to HT industries..*

ARTICLE 6

BILLING AND PAYMENT

- 6.1 *Tariff Invoices: The Company shall submit to the Chief Engineer Elec, Corporation's Load Despatch Centre, Bangalore, or any other designated officer of the Corporation, a Tariff Invoice for each Billing Period in the format prescribed by Corporation from time to time setting forth those amounts payable by Corporation for the Delivered Energy in accordance with Article 5.1.*
- 6.2 *Payment: Corporation shall make payment of the amounts due in Indian Rupees within fifteen (15) days from the date of delivery of the Tariff Invoice by the Company to the designated office of Corporation.*
- 6.3 *Late Payment: If any payment from Corporation is not paid when due, there shall be due and payable to the Company penal interest at the rate of SBI Prime Lending rate plus 2% per annum for such payment from the date such payment was due until such payment is made in full*
- 6.4 *Disputes: In the event of a dispute as to the amount of any Tariff Invoice, Corporation shall notify the Company of the amount in dispute and Corporation shall pay the Company the total tariff invoice including the disputed amount. The parties shall discuss within a week from the date on*

which Corporation notifies the Company of the amount in dispute and try and settle the dispute amicably. If the dispute is not settled during such discussion then the payment made by the Corporation shall be considered as a payment under protest. Upon resolution of the dispute, in case the Company is subsequently found to have overcharged, then it shall return the overcharged amount with an interest of SBI Prime Lending rate plus 2% per annum for the period it retained the additional amount. Corporation/Company shall not have the right to challenge any Tariff Invoice, or to bring any court or administrative action of any kind questioning/modifying a Tariff Invoice after a period of one year from the date the Tariff Invoice is due and payable.

- 6.5 *Overdue accounts: If either Party fail to make any payment within 60 days after the due date under this Agreement, then such overdue amount shall attract interest for such period at the rate of SBI Prime Lending rate plus 2% per annum. While making such payment, the Party which is making payment shall specify the Tariff Invoice reference (month and date) against which the payment is made, failing which such payment shall be appropriated by the other Party against the oldest outstanding Tariff Invoice.*
- 6.6 *Letter of Credit: Corporation shall establish and maintain transferable, assignable, irrevocable and unconditional 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 the 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 of 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 therefor or at any time thereafter, without any notification, certification or further action being required.*
- (iii) *The amount of the Letter of Credit shall be equal to one month's projected payments.*
- (iv) *The Corporation shall replenish the LC to bring it to the original amount within 30 days in case of any valid drawdown*
- (v) *The Company shall allow a rebate of 1.8% of the Tariff Invoice amount or actual expenditure/charges for the LC account 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.*

6.7 *Payment under the Letter of Credit: The drawal under the Letter of Credit in respect of a Tariff Invoice shall require:*

- (i) *a copy of the metering statement jointly signed by the official representatives of the Parties, supporting the payments attributable to the Delivered Energy in respect of such Tariff Invoice.*
- (ii) *A certificate from the Company stating that the amount payable by Corporation in respect of such Tariff Invoice has not been paid by Corporation till the Due Date of Payment of the Tariff Invoice.*

ARTICLE 9

TERM, TERMINATION AND DEFAULT

9.1 Term of the Agreement: This Agreement shall become effective upon the execution and delivery thereof by the Parties hereto and unless terminated pursuant to other provisions of the Agreement, shall continue to be in force for such time until the completion of a period of twenty (20) years from the Scheduled Date of Completion and may be renewed for such further period of ten (10) years and on such terms and conditions as may be mutually agreed upon between the Parties, ninety (90) days prior to the expiry of the said period of twenty (20) years. In the event of any payment default by Corporation for a continuous period of three months, the Company shall be permitted to sell power to third parties as per Article 5.2 of the Agreement.

9.2 Events of Default:

9.2.1 Company's default: The occurrence of any of the following events at any time during the Term of this Agreement shall constitute an Event of Default by Company:

- a. O&M Default on part of Company*
- b. Failure or refusal by Company to perform its material obligations under this Agreement.*

9.2.2 Corporation's Default: The occurrence of any of the following at any time during the Term of this Agreement shall constitute an Event of Default by Corporation.

- a. Failure or refusal by Corporation to perform its financial and other material obligations under this Agreement.*

9.3 *Termination:*

9.3.1 *Termination for Company's default: Upon the occurrence of an event of default as set out in sub-clause 9.2.1 above, Corporation may deliver a Default Notice to the Company in writing which shall specify in reasonable detail the Event of Default giving rise to the default notice, and calling upon the Company to remedy the same*

At the expiry of 30 (thirty) days from the delivery of this default notice and unless the Parties have agreed otherwise, or the Event of Default giving rise to the default notice has been remedied, Corporation may deliver a Termination Notice to the Company. Corporation may terminate this Agreement delivering such a Termination Notice to the Company and intimate the same to the Commission. Upon delivery of the Termination Notice this Agreement shall stand terminated.

All payment obligations as per the Article 5 prior to the date of termination of the Agreement shall be met by the Parties.

Where a Default Notice has been issued with respect to an Event of Default which requires the co-operation of both Corporation and the Company to remedy, Corporation shall render all reasonable co-operation to enable the Event of Default to be remedied.

9.3.2 *Termination for Corporation's Default: Upon the occurrence of an Event of Default as set out in sub-clause 9.2.2 above, the Company may deliver a Default Notice to Corporation in writing which shall specify in reasonable detail the Event of Default giving rise to the Default Notice, and calling upon Corporation to remedy the same.*

At the expiry of 30 (thirty) days from the delivery of this default notice and unless the Parties have agreed otherwise, or the Event of Default giving rise to the

Default Notice has been remedied, Company may deliver a Termination Notice to Corporation. Company may terminate this Agreement by delivering such a Termination Notice to Corporation and intimate the same to the Commission. Upon delivery of the Termination Notice, this Agreement shall stand terminated.

Where a Default Notice has been issued with respect to an Event of Default which requires the co-operation of both Company and Corporation, to remedy, Company shall render all reasonable co-operation to enable the Event of Default to be remedied.

7. We shall take up the issue No.2 first regarding termination notice dated 8.7.2009 issued by the Respondent and record our findings. Depending upon the outcome of this, the other issues will need to be further discussed.

8. Article 9.1 of the PPA provides that the agreement shall continue to be in force for such time until the completion of the period of twenty (20) years from the scheduled date of completion and renewed for such further period of ten (10) years and on such terms and conditions to be mutually agreed upon between the parties within ninety (90) days to the expiry of the said period of twenty (20) years unless terminated. Article 9.1 also provides that in the event of any payment default by the Corporation for a continuous period of three (3) months, the Company, Respondent herein, shall be permitted to sell power to third parties as per Article 5.2 of the agreement. In terms of Article 9.2.2 failure or refusal by the Corporation to perform its financial and other material obligations under this agreement shall constitute as default by the Corporation.

9. Article 4.2 (iii) casts obligations on the Corporation to off take and purchase all the exportable capacity/made available by the Company at the Delivery Point, subject to system constraints, and Article 4.2 (iv) obligates the corporation to make tariff payment to the company as set out in Article 5.

10. The Petitioner is therefore obligated to off-take and purchase all Exportable capacity made available by the Respondent at the Delivery Point and to make tariff payments as set out. “Exportable capacity” has been defined as the surplus available electricity generated by the project, after providing for captive electricity consumed by the company, the Respondent herein, which shall be normally 12 MW during season and 20 MW during off season.

11. Article 5 provides the rate at which payment has to be made by the Petitioner for the delivered energy. It provides that the petitioner shall for the delivered energy pay monthly Energy Charges during the ten (10) years with effect from 17.1.2002 (date of signing of the agreement) to the Respondent every month for the period commencing from the commercial operation date till 1.4.2005 at the rate of Rs.2.80 (Rupees two and paise eighty only) per kwhr and for the remaining period out of the block of ten (10) years at the rate of Rs.3.10 per kwhr with an escalation at the rate of 2% per annum over the base tariff every year. This means that annual escalation will be at the rate of Rs.0.062 per kwhr. “Delivered Energy” has been defined as the Kilo watt hours of electricity actually fed and measured by the energy meters at the delivery point in a billing period after deducting therefrom the energy supplied by the Corporation to project as similarly measured during such billing period.

12. Article 6.1 provides that the Respondent shall submit to the Chief Engineer Electricity, Corporation’s Load Despatch Centre, Bangalore, tariff invoice for each Billing Period in the format prescribed by the Petitioner from time to time setting forth those amounts payable by the Petitioner for the delivered energy in accordance with Article 5.1. Article 6.2 obligates on the Corporation, the Petitioner herein, to make payment of the amount due in Indian rupees within 15 days from the date of delivery of the tariff invoice by the Respondent to the designated officer of the Petitioner . Article 6.3 provides that if any payment by the Petitioner is not made when due, there shall be due and payable to the Respondent penal interest at the rate of SBI Prime Prime Lending

Rate plus 2% per annum for such payment from the date of such payment was due until such payment is made in full.

13. The provisions of the PPA as set forth above do not leave any doubt in regard to the rate of payment and interest thereon, if delayed. The rate of payment has been specified in Article 5.1 and the manner in which the payment has to be made has been specified in Article 6.1, 6.2 and 6.3. Mr. Naganand, Senior Counsel for the Petitioner has tried to convince us that Articles 6.1, 6.2 and 6.3 do not constitute obligation on Petitioner as the same is not referred in Article 4.2 of the PPA. According to him, only making payment to the Company as set forth in Article 5 which is referred in Article 4.2 (iv) is the obligation and violation of this only can be construed as default as set out in Article 9.2.2. According to him not making payment as specified in Article 6.1, 6.2 and 6.3 is not a default and hence the notice of termination on the ground of non payment of certain amount by the Petitioner to the Respondent cannot be the cause for the termination of the agreement. We are not convinced with what Mr. Naganand has stated. According to us, Articles 5 and 6 are complementary to each other and particularly Article 6.1, 6.2 and 6.3 have to be read together with Article 5 to fulfill the obligation of making payment for the delivered energy to the Respondent by the Corporation. As Article 5.1 talks of only the rate at which payment has to be made, in our view the payment will be complete only when it is regulated by Article 6.1, 6.2 and 6.3. We therefore hold that non payment to the Respondent for the delivered energy at the rate specified in Article 5.1 and in the manner as specified in Article 6.1, 6.2 and 6.3 together constitute default as set forth in Article 9.2.2.

14. Even though the Petitioner has admitted that there have been delays in making payment to the Respondent, but according to the Petitioner delays are for short periods and the amount involved is also small. Though according to the Respondent this is not so and the amount involved and delays are considerable. The Petitioner has taken a view that he need not have to pay any interest for the

delay in payment up to 60 (sixty) days. We do not agree with this contention. Article 6.2 of the PPA provides only fifteen (15) days for making payment after it becomes due. Payment thereafter is treated as late payment as enjoined in Article 6.3 and attracts interest at the rate mentioned therein. We had occasion earlier to decide the issue of delayed payment and the resultant default giving right to the generators to sell power to third parties by invoking Article 9.3 of the PPA in OP No.03/2009 between M/s.Sandur Power Company Ltd., and the KPTCL and others. The Counsel for the Petitioner herein was the Counsel for the Respondent in OP No.03/2009

15. We extract below paras 13 to 16 of Commission Order dated 13.8.2009 in OP No.03/2009.

“13. It is contended by the Petitioner that as per clause 9.3 of PPA read with clauses 6.1, 6.2, 6.3 and 6.5, if there is any payment default by the purchaser Company for a continuous period of three months, the generator shall be entitled to sell power to third parties. According to him, if the contention of the Respondents is to be accepted that for any tariff invoice, the purchaser will get 90 days before provision of clause 9.3 could be invoked for third party sale, it will be contrary to the intention of the parties as specifically expressed in clause 6.2 of the PPA.

14. As against the above, it is contended by Sri. Sriranga, learned counsel appearing for the Respondents, that under clause 9.3 Petitioner will be entitled to sell the electricity generated to the third parties only in case one particular invoice remains unpaid for a continuous period of three months and not otherwise. In other words, according to him, the Petitioner will not get a right under clause 9.3 to sell to third parties unless Respondents fail to pay any particular tariff invoice amount for a continuous period of three months.

15. *In our considered view, the contention of the Petitioner's counsel is consistent with clause 9.3 of the PPA and not that of Respondent's. The argument of the Respondent's counsel though on the face of it looks attractive but close scrutiny of it will negate the same. Clause 6.2 of the PPA requires the purchaser to make payment within 15 days from the date of receipt of the tariff invoices. If the same is not made within 15 days as stipulated default occurs. Once there is an occurrence of default, the same continues to remain as an event of default even after three months, irrespective of whether dues are fully settled or otherwise. Accordingly, it is our view that whenever similar defaults occur for three consecutive invoices in a continuous period of three months, under clause 9.3 of the PPA, the Petitioner Company is entitled to sell power to the third parties. Any other interpretation adopted defeats the intention expressed in the contract in general and clause 9.3 in particular.*
16. *As held by the Hon'ble Supreme Court, the contract has to be read as a whole and intention of the parties has to be gathered from whole of the contract. The reading of the entire PPA will clearly indicate that the Respondents are liable to pay every month within fifteen (15) days of the date of submission of the Tariff Invoice and not within ninety (90) days as contended by the Respondents. If that was the intention clause 6.2 would have expressly said so and 15 days would not have been mentioned. Further, if the argument of the Respondent's counsel is accepted, it will be prejudicial to the Respondents themselves also. In other words, if any one month's payment is not made for a period of three months the Petitioner will be free to sell power to the third parties. This cannot be the intention of the parties as one month's default is quite reasonable and may occur every now and then. Therefore it has to be held that as per clause 9.3 of PPA, the Petitioner will be entitled to sell power to the third parties in case there is payment default for three months' invoices continuously. Consequently the Respondents shall have to allow the Petitioner to go for third party sale in case 2nd Respondent defaults any*

payment for three consecutive invoices during a continuous period of three months.”

16. Adopting the same, we hereby hold that the Petitioner is liable to pay interest for any delay after fifteen days and non-payment of due amount along with the interest is a default in terms of the PPA giving right to the Respondent to sell the power to third parties as per Article 9.1 or to take extreme recourse of the termination of the PPA in terms of Article 9.3.2.

17. We do not propose to get into the calculation of the amount which has remained unpaid to the Respondent by the Petitioner as the delay in payment is admitted by the Petitioner. Further, the payments due to the Respondent from KPTCL, the predecessor of the petitioner, are admitted as they are specifically not denied.

18. Article 6.6 of the PPA pertains to Letter of Credit. It lays down that Corporation shall establish and maintain transferable, assignable, irrevocable and unconditional revolving Letter of Credit in favour of and for the sole benefit of the Company. The Letter of Credit shall be established in favour 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 the 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 the Scheduled Bank. Article 6.6 (i) to 6.6 (iv) are explanatory and Article 6.6 (vi) provides that Letter of Credit shall be renewed and or replaced by the Corporation not less than 60 days prior to its expiration.

19. Sri. Naganand has urged that not opening of Letter of Credit can not be listed as default on the part of the Petitioner as it is deemed to have been waived by the Respondent in terms of Article 12.4 of the PPA. Article 12.4 provides for

waivers. It states that 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.

20. Sri. Prabhuling Navadgi opposed this argument and stated that opening of Letter of Credit is not a right of the parties. It is an obligation on the part of the Petitioner to provide payment security by opening Letter of Credit and non opening of Letter of Credit inspite of several requests made by the Respondent has to be construed a failure or refusal by the Petitioner to perform its financial and other obligation under the PPA as set out in Article 9.2.2. Sri. Navadgi has further stated that this obligation of opening of Letter of Credit is not a one time obligation, but it is a continuing obligation and the Petitioner is bound to open Letter of Credit and provide security for future payment. Article 12.4 in its 2nd sentence lays down that no waiver by a party of any right hereunder with respect to any matter or default arising in connection with this Agreement shall be considered as waiver with respect to any subsequent matter or default. According to Mr. Navadgi obligation cannot be waived and only rights can be waived. Even waiver of a right cannot be deemed to be waiver for subsequent rights.

21. We are in agreement with the statement of Sri. Navadgi in this regard and hold that opening of Letter of Credit is a material obligation and non-fulfillment of which is a default as stated in Article 9.2.2 of the PPA and therefore it gives legitimate cause for the Respondent to proceed under Section 9.3.2 of the PPA.

22. The Respondent has delivered a default notice dated 10.6.2009 to the Corporation in writing. Though the Petitioner has given a reply, but has not set right the default during the period of one month from the date of the default notice nor has sought any time from the Respondent for setting them right. The procedure laid down in Article 9.3.2 b has been followed by the Respondent. Hence the termination notice dated 08.07.2009 cannot be found faulty and has to

be upheld. We therefore hold that the Petitioner has failed to fulfill its financial and material obligation as set out in various Articles of the PPA which had been discussed extensively above and therefore has given legitimate cause to the Respondent to terminate the PPA. The Petitioner is to blame itself for this situation. The Respondent after terminating the PPA, which is held valid by us as discussed above has no obligation to fulfill the said PPA.

23. The other issues which we have listed in paras above have no relevance now in view of the termination of the PPA and therefore we are not taking up for detailed consideration.

24. In view of the discussions as set forth above, we are of the view that the Respondent has legitimately proceeded in issuing the termination notice dated 8.7.09 (Annexure J of the petition) after complying with the requirements as laid down in Article 9.3.2. We therefore hold the termination notice as legally served and valid. In view of this, the PPA dated 17.01.2002 and supplemental agreement dated 09.06.2005 stand terminated and after the termination of the PPA there is no obligation to be fulfilled either by the Petitioner or the Respondent.

25. For the reasons stated above, the petition is hereby dismissed.

Sd/-
(K.P. PANDEY)
CHAIRMAN

Sd/-
(K. SRINIVASA RAO)
MEMBER