

**No.N/47/10**

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION  
BANGALORE**

**Dated this 13<sup>th</sup> January 2011**

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

**Case No. OP 26/2010**

**Between**

M/s Nandi Sahakari Sakkare Karkhane Niyamith  
Krishna Nagar, Hosur Post  
BIJAPUR – 587 117  
(Represented by its Advocate Sri Shridhar Prabhu)

... Petitioner

**Vs.**

1. The Managing Director  
Hubli Electricity Supply Company Limited  
Navanagar, P.B. Road  
H U B L I – 580 025
2. The Managing Director  
Karnataka Power Transmission Corporation Limited  
Cauvery Bhavan, Kempegowda Road  
BANGALORE – 560 009
3. State Load Despatch Centre - Karnataka  
Ananda Rao Circle  
BANGALORE – 560 009
4. Government of Karnataka  
Department of Energy, Vikasa Soudha  
Dr. Ambedkar Veedhi  
BANGALORE – 560 001  
(Represented by its Advocate Sri Sriranga)

.... Respondents

1. In this petition the petitioner has sought a declaration that the Power Purchase Agreement (PPA) dated 9.6.2005 signed by it with Karnataka Power Transmission Corporation Limited (KPTCL) is void ab initio as the same is opposed to the Electricity Act 2003. As an alternative prayer, the petitioner is seeking a

declaration that the termination of the PPA effected by the petitioner on 3.5.21010 is in accordance with the terms of the PPA and law. Further, the petitioner has sought a direction to the respondents to pay compensation for the electricity supplied at the rate of Rs.7.75 per unit minus the rate already paid.

2. The respondents have put in appearance through their advocates M/s.Just Law Associates and have filed their statement of objections on 23.9.2010.

3. We have considered the petition averments, the objections filed by the respondents and also the documents produced in support of the respective averments. We have also heard oral arguments of both the counsels.

4. It is contended by the petitioner's counsel that the PPA dated 9.6.2005 is not valid and binding on the petitioners as the same has been signed by KPTCL which on the date of signing of the PPA was barred from trading in electricity under Section 39 of the Electricity Act, 2003. It is also contended that since the agreement itself is not valid, the assignment of the same in favour of HESCOM, that too without the petitioner's consent is also bad in law and consequently does not bind the petitioner. It is further contended by the petitioner that even assuming that it was validly executed, it has been terminated by the petitioner on 3.5.2010 since HESCOM has not made payments within the time schedule for the electricity supplied and has not opened the letter of credit as mandated in the PPA. The petitioner therefore is not obliged to supply power to the 1<sup>st</sup> respondent and is entitled to sell the electricity generated by it to any person of its choice and the respondents are obliged to give open access for the same.

5. In reply the respondents have contended that the PPA executed by the petitioner with KPTCL is validly executed since on the date it was signed KPTCL still had the power to enter into trading arrangement on the strength of the Gol Notification dated 9.6.2004 issued under Section 183 of the Electricity Act, 2003 which allowed KPTCL to continue with the business of bulk purchase and sale of electricity for one more year from 10.6.2004. Consequently the assignment made

in favour of HESCOM is also valid and legal. As regards termination, it is contended that the same is not valid since the 1<sup>st</sup> Respondent has made the payments due from time to time.

6. The issues that arise for consideration and decision in this case are –
- (i) whether the PPA executed by the petitioner on 9.6.2005 with KPTCL is valid and legal; and
  - (ii) whether the termination of PPA dated 9.6.2005 effected by the petitioner on 3.5.2010 is valid and legal.

**Issue No.(i)**

7. Admittedly the petitioner has signed the PPA with KPTCL on 9.6.2005, acted upon the same and supplied electricity to the respondents in terms of the PPA and has received the payments. Therefore, in our considered opinion, the contention that PPA is not validly executed by KPTCL does not hold water. As per the GoI Notification dated 9.6.2004, KPTCL was entitled to enter into contracts for purchase and sale of electricity till 9.6.2005. A similar contention was raised by the petitioner's counsel in OP No.10/2009 which has been rejected by this Commission vide its Order dated 23.12.2010. This Commission has held that –

“It is contended by the petitioner that Section 39 of the Electricity Act, 2003 bars the KPTCL from entering into PPAs with effect from 10.6.2003 and therefore the PPA entered into by the petitioner with KPTCL is not valid and non est in law. It is also contended that even under the transitional provisions of Section 172 of the Electricity Act, 2003, KPTCL had no authority to sign a PPA since KPTCL was not a licensee under the repealed laws as required under Section 172(b), but was only a licensee under the Karnataka Electricity Reforms Act. We would have had no difficulty in accepting this contention but for the Notification dated 9.6.2004 of the Government of India issued under Section 183 of the Electricity Act, 2003 (produced as Annexure P-7 by the very petitioner). This statutory notification

allows KPTCL to continue with the function of bulk purchase and sale of electricity for one more year from 10.6.2004. The validity of this notification has not been challenged by the petitioner before any Forum. Therefore this Commission has to go by the said notification and give effect to it. Admittedly the PPA is signed on 16.1.2004, i.e., well before 9.6.2005 and therefore has to be held as validly entered into by KPTCL. Having signed the PPA, the petitioner cannot now turn around and raise the contention, that too after lapse of more than four (4) years, that the PPA is invalid. It is also noticed that the petitioner has made correspondence for payments with the respondents based on the PPA (Annexures–B&C) and in these letters the petitioner has specifically relied on the PPA and has demanded payments as per the terms of the PPA.

As regards the contention of the petitioner that KPTCL was not a Licensee under the repealed laws and hence it cannot sign the PPA under Section 172, it has to be observed that the KEB was a deemed Licensee as per the provisions of the Electricity (Supply) Act, 1948 for the purpose of the Indian Electricity Act, 1910 (Repealed Laws) and KPTCL as the successor of KEB under Section 13 of the Reforms Act had to discharge such powers, duties and functions of the Board including those under the IE Act, 1910 and the Electricity (Supply) Act, 1948 and the Rules framed thereunder. Therefore KPTCL had the competence to enter into a PPA in exercise of its rights under Section 13 of the Karnataka Electricity Reforms Act, 1999. Further the transfer of the functions of KEB was not under Section 131 of the Electricity Act, 2003 but under the KER Act. Therefore Section 131 of the Electricity Act, 2003 has no application.

Accordingly, we answer the first (i) issue in the negative".

8. As regards the issue relating to assignment of PPA from KPTCL to HESCOM, the same is also covered by our Order in OP 10/2009. In the said order, we have held that –

“The contention of the petitioner's counsel that the assignment of the PPA from KPTCL to the GESCOM is not valid as the same is contrary to clause 12.9 of the PPA does no merit acceptance. According to the petitioner, the PPA can be assigned only with its consent and since no consent has been obtained, the assignment in favour of the GESCOM is not valid and consequently the GESCOM has no right to enforce the PPA. This contention overlooks the fact that the PPA of the petitioner with KPTCL has been assigned to the GESCOM not under the terms of the PPA but under a statutory Transfer Scheme issued under Section 14 of Karnataka Electricity Reforms Act, 1999 (KER Act). The KER Act is specifically saved by the Electricity Act, 2003. When the assignment is in exercise of a statutory power, no consent of a party is necessary. Therefore we hold that the assignment of the PPA to the GESCOM from KPTCL is valid and binds the petitioner and the respondents as well. Accordingly, issue no. (iii) is also answered in the negative”.

9. The facts in the present case are similar to the facts of the above case. Therefore, duly following the above decision, we hold that the PPA executed by the petitioner on 9.6.2005 with KPTCL and assigned subsequently to HESCOM is valid and not contrary to any of the provisions of the Electricity Act, 2003. Accordingly we answer Issue No. (i) against the petitioner.

**Issue No.(ii)**

10. As regards the termination of the PPA on the ground that the respondents have defaulted in making payments and also in opening the letter of credit as per Clause 6.6 of the PPA, we notice from the statements produced along with Annexure P-14 that there were delays in making the payments. We also notice

that the 1<sup>st</sup> Respondent has till now failed to open the letter of credit and maintain the same during the term of agreement even though the same is a must in terms of Clause 6.6 of the PPA. The respondents, except for making a general denial statement, have not dealt with the issues of delay in payments and of the failure to open a letter of credit in their counterstatement filed on 23.9.2010.

11. In our opinion, non-opening of the letter of credit and non-payment within the time schedule contained in the PPA are valid grounds for termination of the PPA under Clause 9.2.2(a) of the PPA. When the petitioner served a notice of default pointing out the defaults, the respondents instead of curing the default, have in their letter dated 10.6.2010 cited their review petition filed before the Commission for modification of Clause 6.2 of the PPA which mandates payment within (15) days of supply of electricity and HESCOM's stand that the letter of credit cannot be opened due to cash flow problems, and have sought cooperation from the petitioner.

12. The issues of termination for non-payment of dues on time and the failure to open the letter of credit have been dealt with by this Commission in the case of BESCO Vs. M/s. Davangere Sugar Company in OP No. 17/2009. This Commission has held that the termination of the PPA for non-payment and non-opening of letter of credit is valid and legal. This order of the Commission has been upheld by the Hon'ble ATE in Appeal No. 176/2009. Therefore we have to hold that the termination effected by the petitioner, vide its termination letter dated 3.5.2010 is in accordance with the terms of the PPA and the PPA stands terminated with effect from the date of termination. Accordingly the second issue is answered in favour of the petitioner.

13. In view of the above findings, this petition is partly allowed in terms of Para (10).

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

Sd/-  
(VISHVANATH HIREMATH)  
MEMBER

Sd/-  
(K. SRINIVASA RAO)  
MEMBER