

No.N/39/09

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION
BANGALORE**

Dated this 23rd December 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 28/2009

Between

M/s. AMR Power Private Limited
49, KHB Colony, 5th Block Koramangala
B A N G A L O R E – 560 034
(Represented by its Advocates Indus Law)

... Petitioner

Vs.

1. Karnataka Power Transmission Corporation Limited
Kaveri Bhavan, Kempegowda Road
BANGALORE – 560 009

2. Mangalore Electricity Supply Company Limited
1st Floor, Paradigm Plaza, A.B. Shetty Circle
MANGALORE – 575 101

3. Karnataka Load Despatch Centre
Karnataka Power Transmission Corporation Limited
28, Race Course Road
BANGALORE – 560 001

4. State Power Procurement Coordination Committee
Kaveri Bhavan
BANGALORE – 560 009

... Respondents

(Represented by its Advocate Sri Sriranga)

1. In this petition the petitioner has sought –
 - (i) a declaration to the effect that the PPA executed on 2.8.2006 between the petitioner and the 2nd respondent is null and void ab initio and there is no valid and subsisting PPA between the petitioner and the 2nd respondent; and

- (ii) a direction to the 1st and 2nd respondents to grant open access to the petitioner and in the alternative to fix a revised tariff at Rs.5/- per unit.

2. The respondents have put in appearance through their counsel and have also filed a statement of objections dated 8.10.2009.

3. It is the contention of the petitioner that the PPA executed by it with the 2nd respondent on 2.8.2006 has become void as per Clauses 2.2 and 3.4 of the PPA as it did not achieve the financial closure within six (6) months from the date of signing the agreement and on account of non granting of the interconnection approval by the 1st respondent before 31.7.2008, the date up to which time was granted by Respondent No.2. It is also contended that with the rate provided in the PPA, the entire project has become unviable and it is impossible to perform the contract.

4. Per contra it is contended by the respondent that the PPA has not become void as the petitioner has achieved the financial closure within the time frame and has completed the project by 31.7.2008 and all the contentions raised contrary to the factual position are just to wriggle out of the contract.

5. The questions that arise for consideration and decision are –

- (i) Whether the PPA dated 2.8.2006 has become void; and
- (ii) Whether the petitioner is entitled for the increase of tariff to Rs.5/- per unit in place of the tariff fixed in the PPA.

Issue No.1:

6. There is no dispute between the parties that the petitioner has signed the PPA with the 2nd respondent on 2.8.2006 and it has not been terminated by either of the parties as per the terms of the PPA. The 2nd respondent has not disputed the continuation of the PPA and its obligation to offtake the power in terms of the PPA.

7. The only dispute raised by the petitioner is to the effect that the PPA does not subsist any longer as it has become void as per Clauses 2.2 and 3.4 of the PPA. Therefore it is necessary to look into Clauses 2.1, 2.2, 3.3 and 3.4 of the PPA dated 2.8.2006 (Annexure-A), which are reproduced below in extenso:

Clause 2.1 Conditions Precedent:

The obligations of the MESCOM and the Company under this Agreement are conditional upon the occurrence of following in full:

- a. The Company shall have been granted and received all permits, clearances and approvals (whether statutory or otherwise) as are required to execute and operate the Project (as specifically listed out in Schedule 4) (hereinafter referred to as "Approvals").
- b. The Financial Closure shall have occurred.

The date on which the Company fulfills any of the Conditions Precedent pursuant to Clause 2.1, it shall promptly notify the MESCOM of the same. The company shall achieve the financial closure within six months (6) from the date of signing of this Agreement.

Clause 2.2 Non-Fulfillment of Conditions Precedent:

Non-fulfillment of the Conditions Precedent within the period mentioned in Schedule 4 shall render this Agreement null and void automatically and the MESCOM shall stand discharged of all obligations.

Clause 3.3: The company shall achieve Financial Closure within 6 (six) months of signing of this Agreement.

Clause 3.4: Notwithstanding anything contained anywhere else in this Agreement or any other agreement between the Parties, if the Company does not achieve Financial Closure within 6 (six) months

from the date of signing of this Agreement or commence construction of the Project before the Scheduled Date of Commencement, other than due to occurrence of Force Majeure Events, this Agreement shall automatically become null and void and MESCOM shall stand discharged of all obligations and liabilities. MESCOM shall not also in any way, be liable for any damages for any loss, whatsoever, arising from termination of the Agreement.

8. From the above Clauses 2.2 and 3.4, the agreement becomes null and void only in case the financial closure is not achieved within six (6) months of signing the agreement and for not commencing the construction of the project within twenty four (24) months from the date of achievement of the financial closure or thirty (30) months from the date of signing the agreement, whichever is later. In the letter of the petitioner dated 19.2.2007 (Annexure R-3), addressed to the Superintending Engineer, MESCOM, the petitioner has categorically stated that it has achieved the financial closure with the State Bank of India consortium on 17.8.2006. In the face of this letter, the petitioner now cannot contend that it has not achieved the financial closure within six (6) months from the date of the agreement [as 17.8.2006 is well before the expiry of six (6) months]. As regards the commencement of construction it has to be held that the same was also well within the time provided in the PPA. This is clear from the Official Memorandum of the respondent MESCOM (Annexure-D). In this Official Memorandum the petitioner's letter dated 16.8.2007 is cited. In the said letter, the petitioner has clearly stated that "their project is in the advance state of commissioning by 31.7.2008 and only interconnection approval is to be obtained". This means that the petitioner had commenced the work before the scheduled date of commencement. Thus the petitioner has not made out a case in support of his contention that the PPA had become void ab initio on account of non achieving the financial closure in time and non commencing the construction of the project in time.

9. Considering the facts as noticed above, we hold that the PPA has not become void as contended by the petitioner, as there was no violation of either Clause 2.1 or Clauses 3.3 and 3.4. Consequently we hold that the PPA continues to be in force and binds the petitioner as well as the respondents. Accordingly Issue No.(1) is answered in the negative.

Issue No.2:

10. The petitioner in its alternative prayer has sought for increase in the tariff fixed in the PPA pleading that the cost of the project has gone up considerably due to flash floods in the Netravati River during the 2nd week of August 2008 which damaged the project to a certain extent.

11. In our view a mere statement that the cost of the project has increased on account of certain unexpected factors is not enough to consider the refixation of tariff as sought by the petitioner. The petitioner has not produced adequate material to substantiate how the costs have increased along with supporting documents. The Report produced, as Annexure-C, prepared by a Private Consultant of the petitioner, in our opinion, cannot be relied upon as the same is not prepared with the concurrence of the 2nd Respondent nor the 2nd Respondent has accepted the same. Therefore we reject the prayer for refixation of the tariff. However, liberty is reserved to the petitioner if it is so advised to produce all necessary materials along with supporting documents to the 2nd respondent MESCOM and make a claim. The 2nd respondent MESCOM shall consider the same strictly on merits and take appropriate decision in accordance with law in a reasonable time frame and communicate the same to the petitioner.

12. With the above observations, the petition stands rejected.

Sd/-

(M.R. SREENIVASA MURTHY)
CHAIRMAN

Sd/-

(VISHVANATH HIREMATH)
MEMBER

Sd/-

(K. SRINIVASA RAO)
MEMBER