

No.N/40/09

**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 29/2009

Between

M/s. Rithwik Energy Generation Pvt. Ltd.
Shamboor Village
Narikombu Post
Bantwal Taluk
Dakshina Kannada – 574 231
(Represented by its Advocates M/s Holla & Holla)

... Petitioner

Vs.

1. The Managing Director, KPTCL
Cauvery Bhavan
BANGALORE – 560 009

2. BESCOM
Corporate Office, K.R. Circle
BANGALORE – 560 001

3. State Load Despatch Centre
KPTCL
28, Race Course Road
BANGALORE – 560 001

4. State Power Procurement Coordination Committee
Kaveri Bhavan,
BANGALORE – 560 009
(Represented by its Advocate Sri Sriranga)

....Respondents

1. In this petition the petitioner company has sought a declaration that there is no valid and subsisting Power Purchase Agreement (PPA) between it and the Respondent No.2 and the PPA dated 3.5.2007 is non est / void and prayed for a direction to the respondents to grant Open Access.
2. The respondents have put in appearance through their counsel and have filed a detailed statement of objections on 22.10.2009 for which the petitioner has filed a rejoinder on 24.1.2009
3. It is an admitted fact that the petitioner has entered into a PPA with the 2nd respondent on 3.5.2007 and the respondent submitted the same to the Commission for its approval on 25.5.2007. However this was returned to BESCO as by that time the BESCO had already reached the maximum limit for purchase of Renewable Energy and the Commission had circulated a discussion paper for increase in the upper limit of NCE purchase and its implications on the Tariff.
4. It is contended by the learned senior counsel appearing for the petitioner that as the PPA signed by the petitioner and the 2nd respondent was not approved by the Commission, the PPA is non est in law and consequently there is no PPA which is in force. Further it is contended by him that even assuming that there is a valid PPA the same has become null and void as per clause 2.2 of the PPA as the petitioner did not comply with the conditions precedent prescribed in clause 2 read with schedule 4(I) within the time schedule.
5. In reply, Sri Sriranga, appearing for the respondents has contended that the PPA signed between the petitioner and the 2nd respondent has not been rejected but only returned by the Commission in view of the pendency of the proceedings relating to revision of the limit for procurement of energy from renewable sources by the Distribution Licensees under Section 86(1)(e) of the Electricity Act, 2003. Therefore the argument that the PPA was rejected by the Commission is not correct. He further contends that in the letter dated 13.12.2007 addressed to the General Manager, RLPP, BESCO (produced as

Annexures R-3,4&5) the petitioner has admitted that it has fulfilled all the conditions precedent required under clause 2 of the PPA and therefore there is no question of the PPA becoming null and void as per clause 2.2 of the PPA.

6. The issues that arise for consideration and decision are –
 - (i) whether the PPA is invalid on account of the non-approval of the same by the Commission; and
 - (ii) whether the PPA signed between the parties has become null and void as per clause 2.2 of the PPA on account of the non-fulfillment of the conditions precedent specified in clause 2.1 read with schedule 4 of the PPA.

Issue No.(i):

7. It is not in dispute that the petitioner has signed a PPA with the respondent on 3.5.2007 and the same came to be submitted to the Commission for approval. Further it is an admitted fact that the Commission returned the PPA on account of the pendency of proceedings relating to the fixation of the minimum percentage of electricity to be purchased from renewable sources by the Distribution Licensee.

8. In our view, returning of the PPA by the Commission does not mean rejection of the same as contended by the petitioner. It is also our considered view that non-approval of the PPA by the Commission will not affect the validity of the Agreement entered into by the parties. As far as parties are concerned, the agreement continues to bind them. Further, approval of the Commission is a condition only applicable to the Distribution Licensees as it is the Licensees who have to purchase the electricity with the prior approval of the Commission as per Section 86(1)(a)(b) of the Electricity Act, 2003. So far as the petitioner, which is a generating company, is concerned, there is no such requirement and the agreement stands and binds till the Commission specifically refuses to approve it. Admittedly, in this case, the Commission has not refused approval but had only returned the PPA. Therefore we conclude that the PPA is still valid and binds the

petitioner and the respondents alike. Accordingly, Issue No.(i) is answered against the petitioner.

Issue No.(ii):

9. It is contended by the petitioner that as it did not achieve the conditions precedent specified in clause 2.1, the PPA has become null and void automatically. This argument is contrary to the documents placed before the Commission and gets negated by the very statements made by the petitioner in Annexure R-3 dated 13.12.2007 addressed to the General Manager, RLPP, BESCOM. The petitioner in this letter (R-3) unambiguously states that 'we have achieved financial closure with Canara Bank consortium'. Further the petitioner in this letter states that it has obtained all relevant approvals and permissions as required under the PPA. This letter is not disputed by the petitioner. Once it is admitted that the petitioner has fulfilled the conditions precedent required under clause 2.1 of the PPA, clause 2.2 of the PPA will not come into play and PPA continues to be binding. On the material placed before us, we are of the view that the agreement has not become null and void under clause 2.2 of the PPA and it continues to be valid and subsisting. Accordingly we answer this issue also in the negative.

10. For the foregoing reasons, this petition is liable to be rejected and accordingly rejected.

Sd/-

(M.R. SREENIVASA MURTHY)
CHAIRMAN

Sd/-

(VISHVANATH HIREMATH)
MEMBER

Sd/-

(K. SRINIVASA RAO)
MEMBER