

No.N/41/09

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION
BANGALORE**

Dated this 11th December 2009

1. Sri K.P. Pandey	Chairman
2. Sri Vishvanath Hiremath	Member
3. Sri K. Srinivasa Rao	Member

Case No. OP 30/2009

Between

M/s Hubli Electricity Supply Company Limited
P.B. Road, Navanagar
H U B L I – 580 029
(Represented by its Advocate Sri Sriranga)

... Petitioner

And

M/s Vishwanath Sugars Limited
Bellad Bagewadi
B E L G A U M – 591 301
(Represented by its Advocate Sri Prabhuling Navadgi)

...Respondent

1. This petition is filed by M/s. Hubli Electricity Supply Company Limited (hereinafter referred to as HESCOM) seeking declaration that the respondents M/s Vishwanath Sugars Limited is barred from seeking open access and selling power to any third party during the subsistence of the PPA in contravention of the terms of the PPA and also a direction to the respondent seeking a direction to supply power generated by it to the petitioner in terms of PPA dated 27.7.2001 and 9.6.2005.

2. The respondents on notice appeared through a counsel and have filed statement of objections seeking dismissal of the petition.

3. The case of the petitioner is that it has entered into a PPA with the respondent and during subsistence of the PPA respondent is bound to supply all the electricity generated to it at the rate prescribed in the agreement. Further it is the case of the petitioner that the consent given by it for the third party sale on account of non payment in terms of the PPA does not confer a permanent right on the respondents to supply power to the third party in violation of the PPA, as it is willing to perform its obligations under the PPA and pay for the energy supplied.

4. The respondent does not dispute that it has a PPA and it was supplying power to the respondents till it opted for third party sale in terms of the PPA. However, according to the respondent, the consent given by the petitioner for third party sale of electricity due to non payment of the charges for the electricity supplied has put an end to the contract and the petitioner has no right to demand for supply of power in terms of the PPA. Therefore it is entitled to the open access and petitioner is not entitled to enforce the PPA for supply of power till the PPA expires.

5. The question arises for consideration is whether the PPA signed between the petitioner and respondent subsists and respondent is obliged to supply power during the period of agreement.

6. For deciding the above question, it is necessary to extract the relevant clauses of the agreement dated 26.07.2001 as well as supplemental agreement dated 09.06.2005.

(1) **“9.1 Terms of 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 till the completion of the 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 the 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”.
- (ii) **“Clause 4.1 (vii)** : The Company shall undertake at its own cost maintenance of the Interconnection Facilities excluding the transmission line as per the specifications and requirements of Corporation, as notified to the Company, in accordance with Prudent Utility Practices. The transmission line so constructed shall remain as dedicated transmission line without provision for any tapplings”.
- (iii) **“Clause 4.2 (ii)** : To allow Company to the extent possible to operate the Project as a base load generating station subject to system constraints”.
- (iv) **“Clause 4.2 (iii)** : Subject to system constraints to off-take and purchase all the Exportable Capacity made available by the Company at the Delivery Point”.
- (v) **“Clause 4.2 (iv)** : To make tariff payments to the Company as set out in Article 5”.
- (vi) **“Clause 5.1:** Corporation shall for the delivered energy, pay monthly Energy Charges, during the ten years with effect from 26.07.2001 (the date of signing 'The 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”.

(vii) **“Clause 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 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 in to 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”.

(viii) **“Clause-3 of Supplemental Agreement:** This Supplement Agreement shall form and be construed as a Part of the Agreement dated 26.07.2001 and the other terms and conditions and clauses as contained in the Agreement dated 26.07.2001 shall remain unaltered and enforceable and bin ding on the Parties”.

7. Admittedly as on the date the present petition is filed, the respondent admits that the PPA continues to exist and it has not terminated the same. It is also an admitted fact that the respondent was allowed to sell electricity to the third parties in terms of Clause 9.1 of the PPA consequent to defaults in payment by the petitioner and subsequently all the payments due have been paid by the petitioner.

8. In our considered opinion the contention of the respondent that PPA stands abandoned once there is a default by the petitioner and it has opted for third party sale is not tenable. Clause 9.1 does not say so. It only gives a right to

respondent to sell the electricity to third parties in the event of any payment default by the petitioner for a continuous period of three months. This is part of the PPA and it operates only when PPA continues. In other words, obligation to supply electricity to the petitioner stands suspended only during the period of default of the petitioner and not for all the time to come. The PPA continues to exist till terminated as per Clause 9.3 and obligation of the respondent to supply electricity to the petitioner under PPA gets revived once the petitioner is ready and willing to perform the contract and the respondent shall have to perform its obligation.

9. The petitioner's claim is that it is willing to perform its obligations under the PPA and the respondent shall sell electricity to it as per PPA as intervening obligation to third party of the respondent has come to an end, in our opinion is well founded and deserves to be accepted. The contention of the respondent that once third party sale has commenced consequent to petitioner's payment default petitioner has no right to demand supply of power in terms of PPA, which has come to an end, is not correct and contrary to the terms of PPA. The terms as extracted in Para 6 above does not give such a meaning. The meaning of Clause 9.1 is clear and un-ambiguous and PPA continues irrespective of the fact that the respondent is entitled to sell electricity to third party due to payment default. The consent given for third party sale on 13.7.2006 on behalf of the petitioner is also in terms of Clause 9.1 and the same consent cannot be interpreted to mean that the consent was for all the time to come.

10. The contention of the respondent based on CERC Orders and with Hon'ble ATE Order is that the petitioner is not entitled to seek enforcement of PPA once it has availed open access to sell to the third party cannot be accepted as Hon'ble ATE in its order dated 2.4.2008 in Appeal No.06/2008, with the consent of the parties has ordered as under :

"With the consent of the parties the following order is passed :

The Applicant may approach the Karnataka Electricity Regulatory Commission for matters relating to the rights of the appellant and

the obligations of the Respondent-Generating companies under the Power Purchase Agreement including for interim orders for supply of power to the appellant, as per the rights claimed by the appellant but denied by the Respondent-Generating Companies.

In the event of any such petition is filed, the State Commission shall consider the same uninfluenced in any manner by the impugned orders of the Central Commission, expeditiously, in accordance with law.

Subject to the above, the impugned order is not interfered with in these appeals but the issues decided shall not be considered as a precedent in any other case. The existing open-access arrangement between the parties shall continue in the meanwhile.

The appeals are disposed of in terms of the above".

As per this order the petitioner is entitled to seek enforcement of PPA.

11. The contention of the respondent that the acceptance of the petitioner's argument that once payment is made, the right to sell Electricity to it gets revived, will lead to awkward consequences is not tenable, as right to sell electricity to petitioner gets revived not only after payment of dues but also after the fulfillment of the obligation undertaken in between. Admittedly the obligation of the respondent to third party Tata Power Trading Company Ltd. (Annexure R-5) was for a period of three years from 1.9.1006 and it has come to an end on 31.8.2009 and respondent has supplied electricity to the petitioner under G.O. dated 30.12.2008 till expiry of the period mentioned in the GO and thereafter petitioner is demanding supply of power under PPA.

12. In view of above we hold that the PPA of the respondent with the petitioner is valid and subsisting and respondent is bound to perform the obligation of supply of energy undertaken by it to the petitioner. As a consequence we hold that the petitioner shall also have to perform its

obligations under the PPA in particular the payments to be made for the electricity supplied, the interest to be plaid for delayed payment and opening of Letter of Credit.

13. We are of the opinion that both the parties have to honour the agreements and ensure that the purpose for which the Agreement is signed is carried out. Agreements are meant to be performed and not meant for committing breach of them on one pretext or the other. There is a sanctity to the contracts which is definitely more than a mere promise and have to be carried out faithfully. For that matter, no contract can be implemented without any problem whatsoever. Difference of opinion are bound to be there but both the parties keeping in view the spirit and sanctity of the contracts shall resolve the disputes amicably keeping in view of the interest of consumers and the State. The supply company shall make all the endeavour to generate and supply electricity so that the consumers get the power and the purchaser company which is a public utility shall strictly adhere to the terms of payment and other terms of the contract so that the generator who has invested the money and has employed several persons is not put to economic difficulties.

14. Accordingly we allow this petition and direct that :

- (1) The respondent shall supply electricity to the petitioner as per PPA with immediate effect.
- (2) The petitioner shall make all payments due including interest if any and open Letter of Credit within one month from today as per the terms of PPA.
- (3) In case the petitioner defaults in paying the dues including interest and in opening Letter of Credit within the time prescribed as above, it shall permit the respondent to avail open access and third party sale to any party of its choice as provided in the PPA.

Sd/-
(K.P. PANDEY)
CHAIRMAN

Sd/-
(VISHVANATH HIREMATH)
MEMBER

Sd/-
(K. SRINIVASA RAO)
MEMBER