

No.N/44/09

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION
BANGALORE**

Dated this 2nd June 2011

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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 34/2009

Between

M/s. Hubli Electricity Regulatory Company Limited
P.B. Road, Navanagar
HUBLI – 580 029
(Represented by Just Law Advocates) ... Petitioner

And

M/s. GMR Industries Limited
Skip House, No.25/1, Museum Road
BANGALORE – 560 025
(Represented by Advocate Sri Prabhuling Navadgi) ... Respondent

1. This petition has been initiated by the petitioner HESCOM, which is a distribution licensee, seeking a declaration that the respondent generating company is barred from seeking Open Access and selling power to any third party during the subsistence of the PPA contrary to the terms of the agreement and should supply power to the petitioner as per the terms of the PPA dated 22.1.2007 signed by the respondent generating company.

2. The respondents have put in appearance through its counsel Sri Prabhuling Navadgi and have filed a detailed statement of objections dated 24.2.2010.

3. We have heard counsels appearing for both the parties and considered the respective pleadings and the documents produced in support of them.

4. The case of the petitioner is that the termination of the PPA effected under Clause 9.3 is unsustainable. According to the petitioner, unless there is a payment default continuously for (3) months or failure of the parties in reaching an agreement on the tariff payable after the tenth year the respondent cannot seek Open Access. In the absence of these two situations in the present case the respondent cannot seek permission to sell power to third parties and has to sell power to the petitioner in terms of the PPA. It is further submitted that grant of open access to the petitioner will not be in the public interest as power not supplied by the respondent will have to be purchased at higher cost from other sources.

5. Per contra it is contended on behalf of the respondent that the petitioner company has not adhered to the payment schedules and has not opened a letter of credit as per Clause 6.5 of the PPA. Thereby the petitioner has committed breach of financial obligations and other conditions of the PPA. Therefore the respondent has issued a default notice on 5.6.2009 as contemplated in Clause 9.3.2 of the PPA duly pointing out that the petitioner owes Rs.2,073.28 lakhs and has committed continuous defaults in payments. Further, as required by Clause 6.5 of the PPA the petitioner has not opened and maintained a non-revolving letter of credit equal to one month's projected payments for the power supplied. As the petitioner company did not cure the defaults pointed out in the Default Notice, the PPA was terminated by the

respondents' notice of termination dated 9.7.2009 in accordance with the terms of the PPA. Therefore, the respondent is entitled to seek Open Access for selling power to third parties.

6. In the rejoinder filed, the petitioner has contended that it has made all the payments due and now there are no outstanding dues. It is further stated that opening of a letter of credit is not a material obligation of the petitioner and the requirement of opening the letter of credit is deemed to be waived as contemplated in Clause 12.4 of the PPA.

7. The questions that arise for consideration in this case are –

(a) whether the PPA dated 22.1.2007 stands terminated as per the termination notice dated 9.7.2009? and if not,

(b) whether the respondent is barred from seeking open access during the subsistence of the PPA?

8. It is not disputed that the petitioner and the respondents had entered into a PPA dated 22.1.2007 for supply and purchase of electricity at the rate and on the terms provided in the PPA. The only dispute is whether the respondent can seek open access on the ground that PPA no longer exists on account of the termination of the same.

9. It is submitted by the petitioner that it had made all payments due to the respondent and therefore the respondent could not have invoked Clause 9.3.2 and terminated the PPA and should have continued to supply power as per the PPA.

10. It is submitted by the respondent that the petitioner has not made payments in full with applicable interest as detailed out in Annexure-1 and has also not opened the letter of credit as required in Clause 6.5 of the PPA and therefore it has terminated the PPA for breach of the contract in accordance with the terms of the PPA.

11. In our considered opinion, the facts of this case and the issue involved in this case are similar to the one decided in OP 17/2009. The order of the Commission in the said case holding that the PPA could be terminated by the Generating Company for the failure of the ESCOM to discharge its obligation of opening a letter of credit as agreed in the PPA has been upheld by the Hon'ble ATE in Appeal No. 176/2009. The civil appeal filed before the Hon'ble Supreme Court against the said order has also been dismissed on 4.10.2010. In this case also, admittedly, the petitioner has not opened the Letter of Credit as required under Clause 6.5 of the PPA.

12. Therefore duly following the order passed in OP 17/2009, we hold that this petition has to fail and accordingly stands dismissed. The termination of the PPA by the respondent in its notice dated 9.7.2009 is in order and the respondent cannot be barred from seeking Open Access to sell the electricity generated, to the third parties in accordance with law.

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

Sd/-
(VISHVANATH HIREMATH)
MEMBER

Sd/-
(K. SRINIVASA RAO)
MEMBER