

**No.N/41/12/1835**

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION, BANGALORE**

**Dated 2<sup>nd</sup> November, 2012**

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

**OP No.21/2012**

**BETWEEN:**

Narayanpur Power Company  
No.44, Bharat Apartments  
Ground Floor, No.44  
Race Course Road  
BANGALORE-560 001  
(Represented by Shri Shridhar Prabhu, Advocate)

... **Petitioner**

**AND**

Gulbarga Electricity Supply Company Ltd.  
Station Road  
GULBARGA – 585 102  
(Represented by M/s. Justlaw, Advocates)

... **Respondent**

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1) The Petitioner, who has a Mini Hydro-Electric Generation Station at Narayanapura Right Bank Canal, has filed the present Petition for a declaration that the Power Purchase Agreement (PPA) dated 12.2.2008, signed by it with the Respondent, stands validly terminated with effect from 23.4.2012.

2) On Notice, the Respondent has appeared through its Counsel and has filed its objections dated 23.8.2012.

3) It is submitted by the Petitioner that pursuant to the sanction accorded by the Government of Karnataka, it has set up a 7.2 MW Mini Hydro-Electric Project at Narayanapura Right Bank Canal, near Somanamaradi Village, Deodurga Taluk, Raichur District and has executed a PPA on 12.2.2008 with the Respondent. The Petitioner, however, disputed the validity of the said PPA and filed a Petition in OP No.19/2009 before this Commission. This Commission rejected the said Petition on 19.8.2010, holding that the PPA executed by the Petitioner was valid and binding, and that the Petitioner had to supply electricity as per the terms of the PPA.

4) Challenging the above Order dated 19.8.2010 of the Commission, the Petitioner filed an Appeal in Appeal No.195/2010 before the Hon'ble Appellate Tribunal for Electricity (ATE). The Hon'ble ATE dismissed the said Appeal on 15.12.2011, upholding the Order dated 19.8.2010 of this Commission.

5) Thereafter, the Petitioner, on 22.3.2012, issued a Notice of Termination to the Respondent (Default Notice) on the following grounds :

- "1. The PPA contemplates payments as per Article 6, wherein the tariff, late payment charges and payment under the letter of credit are especially detailed;*
- 2. It is our specific contention that you have committed an Events of Default by not opening the Letter of Credit as per Article 6.5 of the PPA;*

3. *Further, you have defaulted in making payment of Rs.55,41,933 (Rupees Fifty Five Lakh Forty One Thousand Nine Hundred Thirty). The details of the invoices raised and amounts due along with the aggregate due upto February 2012 is enclosed herein as **Annexure-1**;*
4. *You are hereby called upon to make payment of all the defaulted amounts along with applicable interest due as on the date within 30 (thirty) days from the date of receipt of this Default Notice."*

The Petitioner has also stated in the above Default Notice that if the Events of Default are not remedied within 30 (thirty) days of the delivery of the Notice, it will deliver the Termination Letter to the Respondent.

6) It is submitted by the Petitioner that on 23.4.2012, through its Advocate, it has issued the final Termination Letter to the Respondent and thereby the Contract has come to an end and the Petitioner is entitled to avail Open Access and sell electricity to third parties.

7) According to the Petitioner, in view of the issuance of Notice of Termination (Default Notice) dated 22.3.2012 and the Termination thereafter, and the reply of the Respondent dated 16.4.2012 admitting that it has not opened the Letter of Credit, the PPA stands validly terminated and therefore this Commission may be pleased to give a declaration as sought.

8) The Respondent, in its objections, has submitted that the PPA dated 12.2.2008 is valid and subsisting, and there was no default as alleged by the Petitioner. It is further submitted that the unilateral termination of the PPA is wholly untenable and illegal. It is further submitted that the claim of the Petitioner for a sum of Rs.55,41,933/- towards interest, and compound interest thereon, is not in accordance with the terms of the PPA and therefore it cannot be a valid ground for termination of the PPA. It also submitted that since the Respondent has opened a Letter of Credit for a sum of Rs.85 Lakhs on 24.7.2012, the termination of the PPA effected on this ground is also unsustainable, and therefore, the Petition is liable to be dismissed.

9) We have considered the averments made in the Petition, the Rejoinder and the Objection Statement, and also the documents submitted. We have also considered the oral arguments addressed by the Counsel appearing for both the parties.

10) The question that needs to be examined and decided by this Commission is, "Whether the Termination of the PPA effected by the Petitioner on 23.4.3012 is valid and legal?"

11) There is no dispute that the Petitioner had executed a PPA with the Respondent on 12.2.2008 and disputed the validity of the same in OP No.19/2009 before this Commission, on the ground that the same has not been approved by the Commission, among other grounds. It is also not in dispute that the said

Petition came to be dismissed by this Commission on 19.8.2010 and this Order of the Commission came to be upheld by the Hon'ble ATE in Appeal No.195/2010 on 15.12.2011.

12) What is in dispute is the termination effected by the Petitioner on 23.4.2012 and the grounds on which the said termination has been effected.

13) From the Notice of Termination (Default Notice) dated 22.3.2012, it is seen that the two grounds taken for termination of the PPA are that: (i) the Respondent has defaulted in making payment of Rs.55,41,933/- towards interest; and (ii) Letter of Credit has not been opened as required under the PPA.

14) Let us first consider the first ground of non-payment of interest of Rs.55,41,933/- (as detailed in Attachment-1 to Annexure-P5 produced at Page Nos.96 and 97 of the Petition). It is observed that nowhere in the Notice of Termination, nor in its Annexure, the Petitioner has stated that it had raised the claim for interest and the same was not paid by the Respondent. Under article 6.1 of the PPA, the Petitioner has to raise invoices, setting forth the amounts payable. Only after raising of invoices, the amount claimed and interest thereon become due. The Petitioner has not produced the invoices raised in respect of interest claimed. In the absence of production of invoices and in the absence of any other material to show that the interest was duly demanded from the Respondent at any time before the issue of the Default Notice, we cannot hold that the Respondent defaulted in payment and interest thereon. Further, it

appears to us that the Petitioner may not have raised this issue during the pendency of its proceedings before this Commission and the Hon'ble ATE, as the same may have adversely affected its claim that the PPA was not subsisting. If the Petitioner was genuinely interested in payment of interest, it could have raised necessary invoices and brought the same to the notice of this Commission. Further, as pointed out by the learned Counsel for the Respondent, the interest calculated and claimed in the Termination Notice is also not in accordance with the terms of the PPA, as there is no provision in the PPA to compound the interest. Article 6.3 of the PPA, which provides for payment of interest, does not contemplate any compounding of the interest. Considering the facts of this case, in our view, the termination of the PPA on this ground cannot be sustained.

15) As regards the second ground of termination of the PPA, i.e., non-opening of the Letter of Credit, we are of the view that the same is also not sustainable as the Petitioner has not produced any material to show that it had called upon the Respondent to open Letter of Credit and the Respondent did not comply with the same, before issuing the Default Notice. Apparently, the Petitioner may not have called upon the Respondent for giving a Letter of Credit, for the very reasons that the same would have adversely affected its stand taken in the earlier proceedings before this Commission and the Hon'ble ATE, that the PPA does not subsist. Therefore, we hold that the second ground of termination is also unsustainable.

16) For the foregoing reasons, we hold that the termination of the PPA effected by the Petitioner is not valid and the PPA continues to be in force and binding on the parties.

17) The Hon'ble ATE, while dismissing Appeal No.195/2010 filed by the Petitioner, had observed at Paragraph-22 of its Order dated 15.12.2011 that :

*"In our opinion, the appellant has only tried to find an excuse to wriggle out of the PPA for material gains. . . . . The sequence of event point out that appellant wanted the comfort of the PPA with the distribution licensee till the commissioning of its power station and thereafter wanted to wriggle out of the agreement on some pretext."*

18) In our view, the observations of the Hon'ble ATE equally hold good for the present action and the Petition. In our view, the present termination of the PPA is another attempt made by the Petitioner to wriggle out of the binding PPA. This is obvious from the Notice of Termination dated 22.3.2012 itself. The claim for interest, on which the termination of the PPA has been sought to be effected, relates to the very period when the dispute of the Petitioner on subsistence of a valid PPA was pending before this Commission and the Hon'ble ATE from 1.7.2009 to 15.12.2011, and the present termination has been effected soon after it failed in the said proceedings, i.e., on 22.3.2012. In our view, as observed earlier, the action of the Petitioner in terminating the PPA is not *bonafide*, but is another "attempt" to escape from the obligations undertaken under the binding PPA. If the Petitioner was really aggrieved by the non-payment of interest and

non-opening of Letter of Credit, nothing stopped it from approaching this Commission or other forum available under law to enforce the same and seek necessary orders, more so when proceedings were pending on the same PPA. We also find that the Petitioner's conduct in this case is clearly contrary to Articles 10.1 and 10.2 of the PPA, which require that the parties attempt to resolve disputes between them in good faith and through mutual negotiations.

19) For the foregoing reasons, this Petition is liable to be rejected and accordingly it stands rejected.

Sd/-	Sd/-	Sd/-
(M.R. SREENIVASA MURTHY)	(VISHVANATH HIREMATH)	(K.SRINIVASA RAO)
CHAIRMAN	MEMBER	MEMBER