

No.N/52/11

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION BANGALORE

Dated 24th May, 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. 23/2011

BETWEEN

M/s. Nandi Sahakari Sakkare Karkhane Niyamitha
Krishna Nagar

Hosur Post

BIJAPUR – 587 117

(Represented by M/s. Shridhar Prabhu Associates, Advocates)...

Petitioner

AND

1. Hubli Electricity Supply Company Limited
Navanagar
P.B. Road
HUBLI – 580 025

2. State Load Despatch Centre, Karnataka
Ananda Rao Circle
Race Course Road
BANGALORE – 560 009

(Represented by Just Law, Advocates)

... **Respondents**

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1. The Petitioner has filed this Petition on 14.6.2011, praying for: (1) a direction to the 1st Respondent to make payment in terms of the PPA along with interest for the late payment as agreed under the PPA for the energy delivered by the Petitioner from the date of execution of the Power Purchase Agreement (PPA) up to the grant of Open Access, i.e.,12.3.2011; and (2) a direction to the Respondents, jointly and severally, to make payments for the energy delivered

from 4.5.2010 till date at the rate of Rs.5.50 per Unit along with interest at 1.5% per month from the date the payments became due till the payments are made in full.

2. Subsequently, the Petitioner filed an Amended Petition on 9.12.2011, amending the Prayer made in the original Petition dated 14.6.2011, as follows :

“Direct the 1st Respondent to make payment in terms of the PPA along with the interest for the late payment, as agreed under the PPA, for the energy delivered by the Petitioner from the date of execution of the PPA up to the date of valid termination of the PPA.”

3. The Petition averments, in brief, are as follows:

(a) The Petitioner is a Co-operative Society, which owns a Plant of 18.14 MW capacity and exportable capacity of 12.06 MW at Krishna Nagar, Bijapur. The Petitioner entered into a Power Purchase Agreement (PPA) with Karnataka Power Transmission Corporation Limited (KPTCL) on 9.6.2005. As the Respondent No.1 did not adhere to the Payment Schedule, a Default Notice dated 3.5.2010 was issued to Respondent No.1, and thereafter, the PPA was terminated by the Petitioner. However, even after the termination of the PPA, energy was being pumped in by the Petitioner, as Open Access was denied by Respondent No.1 on the ground that there was a valid PPA between the Petitioner and Respondent No.1. In the meanwhile, Government of Karnataka passed an Order dated 3.4.2010 under Section 11 of the Electricity Act, 2003, directing Generators to compulsorily sell the energy to the State Grid. Even after revocation of the said Order of the Government, the Petitioner was denied Open Access on the pretext that a case in OP No.26/2010 in the matter of

validity of PPA was pending before this Commission. This case was disposed of by the Commission on 13.1.2011, holding that the parties had a valid and subsisting PPA up to 3.5.2010, from which date it was validly terminated in accordance with law. Subsequent to the said Order of the Commission, the Petitioner applied for grant of NOC for Open Access on 14.2.2011 and the same was granted by Respondent No.2 on 12.3.2011.

(b) The Petitioner alleges that inspite of making several representations, Respondent No.1 has not paid for the energy delivered under the PPA up to 3.5.2010, besides interest for delayed payments, causing huge loss. The Petitioner states that payment has to be made at Rs.5.50 per unit beyond 4.5.2010 along with interest at 1.5% per month till it was fully paid.

4. Respondent Nos.1 and 2 have put in appearance through their Advocates, M/s.Just Law, and have filed their detailed Statement of Objections on 8.9.2011 and 12.12.2011, respectively, denying the Petition averments and claim of the Petitioner.

5. We have considered the petition averments, the objections filed by the respondents and also the documents produced in support of the respective averments. We have also heard the oral arguments of both the Counsels.

6. It is submitted by the Petitioner's Counsel that Respondent No.1 was contending in the Petition filed before this Commission that the PPA dated 9.6.2005 was not validly terminated, till the Commission declared that PPA was

validly terminated in accordance with law. Therefore, it was compelled to supply electricity generated during the pendency of the said Petition and the Respondent has to pay for the same. He also submitted that the Respondents have to pay for the electricity supplied during the period when the Open Access was applied and was being considered, as there is no prohibition to inject electricity during the interregnum period, and soon after obtaining the certified copy of the Order of the Commission passed in OP 26/2010, the Petitioner applied to the Respondents for grant of NOC for Open Access and the Respondents took some time to grant the same.

7. Per contra, the Counsel for Respondents submitted that after the termination of the PPA and till the Commission disposed of the Petition in OP No.26/2010, the Petitioner did not make any application for grant of NOC for Open Access and therefore it cannot seek any other rate for the power supplied except at the rate provided in the PPA. He further submitted that after pronouncement of the Order by the Commission in OP No.26/2010, the Respondents paid the Bills submitted by the Petitioner, as the Petitioner submitted the Bills only after disposal of the Petition referred to herein.

8. There is no dispute between the parties that the Petitioner had a PPA with the 1st Respondent, and till the termination of the same, power was being supplied by the Petitioner. It is also undisputed that the PPA came to be terminated by the Petitioner on 3.5.2010 and the Petitioner filed a Petition before this Commission for a declaration that the said termination is valid and legal. Further, it is also undisputed that in the Petition for declaration, the Respondent

has questioned the validity of termination and contended that the PPA continues. The Original Petition No.26/2010 filed by the Petitioner came to be disposed of by this Commission on 13.1.2011, declaring that the termination dated 3.5.2010 is valid and legal. It is further undisputed that during the period of pendency of the Petition, the Petitioner went on supplying electricity generated to the Respondents and the Respondents received the same.

9. What is in dispute is, whether the Petitioner is entitled to be paid for the electricity supplied to the Respondents from the date of termination of the PPA to the date the Declaratory Order passed by this Commission, i.e., till 13.1.2011, and at what rate; and whether the Petitioner is entitled to be paid for the electricity supplied from the date of the Declaratory Order of the Commission to the date on which Open Access was granted by the Respondents, and if so, at what rate?

10. It is submitted by the Petitioner that since the PPA was terminated by it with effect from 3.5.2010, which is confirmed by this Commission, the Petitioner is entitled for the electricity supplied, not at the rate of PPA but at the rate of Rs.5.50 per Unit, as determined by this Commission, considering the generation cost, etc., by its Order dated 24.3.2011 in OP No.16/2010 and connected cases.

11. Per contra, the counsel for Respondents submitted that the Petitioner is not entitled to electricity charges at the rate other than what is fixed in the PPA, as the very validity of the termination of the PPA was before the Commission, at

the instance of the Petitioner, and during the interregnum period, the Petitioner had not sought for any Open Access to claim any other rate, namely, Rs.5.50 per KWH. Further, it is contended by the Counsel for the Respondents that even after the Commission's Order, the Petitioner is not entitled to be paid at any other rate than the PPA rate, as the rate determined by the Commission under Section 11 has no application for the said period.

12. In our considered view, the claim of the Petitioner for payment of the charges from the date of termination, till the date of Commission upholding the termination, viz., 13.1.2011, has to be governed by the rates fixed in the PPA, though it was terminated on 3.5.2010, as the said rate was the rate agreed between the parties in the PPA and was also fixed considering the cost of generation. The Petitioner has not produced any material in support of its claim for higher rate, except stating that the rate determined by this Commission in its Order under Section 11 determines the rate at Rs.5.50 per Unit, duly considering all the factors. According to us, the rates determined in the cases covered by Section 11 Order of the Government were in different circumstances. Under the Government Order, Generators had no option except to sell the power to the State Grid only and to generate to the maximum capacity. Whereas, during the period in which Section 11 Order was not there, the Petitioner had the option of either to generate or not to generate electricity, or to generate fully or partly. Further, the Petitioner itself was not sure of the validity of its action of termination of the PPA and therefore sought for a declaration from the Commission on the validity of its action. It cannot now say that the termination was valid with effect

from 3.5.2010 and therefore the PPA rates cannot be applied to the supply made. If termination date has to be taken for payment, the Petitioner cannot claim any amount, as there was no right with the Petitioner to pump electricity and demand charges. In our view, till the declaratory Order was passed by this Commission on the validity of termination of the PPA, the Petitioner has continued to supply electricity to the Respondents and is, therefore, to be paid at the rate fixed in the PPA. Considering the facts placed before us, we are of the view that the Petitioner has to be paid at the rate of PPA till the termination of the PPA was upheld.

13. As regards energy pumped after this Commission passed an Order, the Petitioner has to take recourse to the remedy provided under the CERC (Open Access for Inter-State Transmission) Regulations, 2008.

14. The Petitioner has also claimed interest on the amount alleged to be due according to it. In our view, this claim is also untenable, as the question of paying interest under the PPA arises only in case Invoices were raised but not paid, as contemplated under Article 6.1 of the PPA. Admittedly, the Petitioner raised the Invoices only on 16.9.2011, i.e., after filing of the Petition. Therefore, no delay can be attributed to the Respondents in making the payment and therefore, no interest can be awarded to the Petitioner. Even otherwise, since the amount payable to the Petitioner itself was ascertainable only after adjudication of the dispute raised by the Petitioner itself, no interest could be claimed by the Petitioner.

15. Accordingly, this Petition is allowed in part. It is ordered that the Petitioner is entitled to be paid for the electricity, from the date of termination of the PPA to the date of the Order of this Commission dated 13.1.2011, at the rate of the PPA payable at the relevant time, without interest, within one (1) month from the date of this Order.

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

Sd/-
(VISHVANATH HIREMATH)
MEMBER

Sd/-
(K.SRINIVASA RAO)
MEMBER