No.: N/94/13

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION, BANGALORE

Dated : 13th November, 2014

1. Sri M.R. Sreenivasa Murthy — Chairman
2. Sri H.D. Arun Kumar — Member
3. Sri D.B. Manival Raju — Member

OP No.26/2013

BETWEEN:

Atria Brindavan Private Limited,
No.1, Palace Road,
Bangalore – 560 001. .. **PETITIONER**
(Represented M/s. Link Legal India Law Services, Advocates]

AND:

1) Chamundeshwari Electricity Supply Corporation Limited,
No.927, L.J. Avenue,
New Kantharaj Urs Road,
Mysore – 570 009.

2) State Load Despatch Centre- Karnataka,
Ananda Rao Circle,
Race Course Road,
Bangalore – 560 001.

3) Karnataka Power Transmission Corporation Limited,
Kaveri Bhavan,
K.G. Road,
Bangalore – 560 001. .. **RESPONDENTS**

[Respondents represented by M/s. Induslaw, Advocates]

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1) The Petitioner has filed this Petition praying for a declaration that the Power Purchase Agreement (PPA) dated 20.1.2005 (ANNEXURE-P1) has been validly terminated by the Petitioner, and for the consequential relief of granting open access to the Petitioner.

2) The material facts relevant for the disposal of this Petition may be stated as follows :

(a) The Petitioner is a generating company and it has installed a 12 Mega Watts (MW) capacity Mini Hydel Project at the Head Works of Visveshwaraiah Canal, on the left bank of K.R.S. Dam, near Kannambadi Village, Sreerangapatnam Taluk, Mandya District, as per the terms and conditions of the relevant Government Order in this regard. Pursuant to this, the Petitioner executed PPA dated 20.1.2005 (ANNEXURE-P1) with the 3rd Respondent, which was subsequently assigned to the 1st Respondent.

(b) The Petitioner has contended that the 1st Respondent committed payment defaults, thereby it invoked Article 9.3 of the PPA and issued a Default Notice dated 11.7.2013 (ANNEXURE-P2). The 1st Respondent issued its reply dated 22.7.2013 (ANNEXURE-P3), stating that, as verified from the records maintained in its office, the amount outstanding and payable to the Petitioner was 'nil' as on date. The Petitioner sent its rejoinder dated 24.7.2013 (ANNEXURE-P4) to the reply of the 1st Respondent, stating that the payments made by the 1st Respondent were short of the invoices

raised by the Petitioner. Some more correspondences had taken place between the parties calling for the particulars of the accounts and for having meetings for reconciliation of the accounts. However, reconciliation meetings failed, each party blaming the other.

(c) The Petitioner issued the Termination Notice dated 21.8.2013 (ANNEXURE-P9), terminating the PPA with immediate effect and demanding grant of 'No Objection' Certificate from the 1st Respondent to apply for open access. The 1st Respondent issued its reply dated 24.8.2013 (ANNEXURE-P10) to the Termination Notice, stating that during the reconciliation meeting, all the necessary documents pertaining to the energy consumption bills of the Petitioner were produced for verification, although no records were produced on behalf of the Petitioner, and that it was made clear that all the bills raised by the 1st Respondent were in accordance with the terms of the PPA.

(d) The Respondents appeared through their counsel and the 1st Respondent filed the Statement of Objections. The 1st Respondent has contended that the claim of the Petitioner that the Tariff Invoices were being short-paid was incorrect and that the purported short-payment was actually due to the deduction of the charges towards the import of energy from the 1st Respondent's grid and towards 1.8% rebate on the Invoice amount as per Article 6.5(v) of the PPA, and as such, there were no outstanding amounts

payable to the Petitioner. The 1st Respondent has produced copies of the Statement of Accounts (ANNEXURE-R1).

3) We have heard the submissions made by the learned counsel for both the parties and they have reiterated their respective contentions raised in the pleadings.

4) Before framing the issues in this case, it is pertinent to note the following discrepancies in the PPA dated 20.1.2005 (ANNEXURE-P1) and a copy of the PPA dated 19.6.2006, entered into between the Petitioner and the 1st Respondent, which has been produced by the Petitioner along with ANNEXURE-P1:

(a) The Petitioner has produced a copy of the PPA dated 20.1.2005 (ANNEXURE-P1) entered into between itself and the 3rd Respondent (KPTCL). The Petitioner has pleaded that this PPA was subsequently assigned in favour of the 1st Respondent (CESC). It appears, the Petitioner has inadvertently produced a copy of the PPA dated 19.6.2006 entered into between itself and the 1st Respondent, relating to 4 MW Project of the Petitioner (concerning OP No.2/2014 filed by the same Petitioner), instead of producing a copy of the PPA that was entered into between itself and the 1st Respondent, upon assignment of the PPA dated 20.1.2005 (ANNEXURE-P1) in favour of the 1st Respondent. There are material differences in the terms and conditions mentioned in the PPA dated 20.1.2005 (ANNEXURE-P1) and the PPA dated 19.6.2006. We are of the

view that the PPA entered into with the 1st Respondent, after assignment, should have contained the same terms and conditions as that of the original PPA dated 20.1.005 (ANNEXURE-P1), which was entered into with the 3rd Respondent. Therefore, we proceed to dispose of this case as per the terms and conditions mentioned in the PPA dated 20.1.2005 (ANNEXRE-P1).

(b) Assuming that the terms and conditions of the PPA entered into between the Petitioner and the 1st Respondent after its assignment are similar to the terms and conditions mentioned in the PPA dated 19.6.2006 (the copy of which is produced by the Petitioner in this case), the reasons given, and the findings arrived at, on the issues in OP No.2/2014 will hold good in this case also, as the law and facts involved in OP No.2/2014 and this case would become similar and identical.

5) From the rival contentions and the facts of the case, the following issues would arise for our consideration :

(1) Whether the PPA dated 20.1.2005 (ANNEXURE-P1) provides for termination of the same by the Petitioner?

(2) Whether the Petitioner is entitled to open access for sale of electricity to third party, as provided in Article 9.3 of the PPA?

(3) Whether Article 6.3 of the PPA bars the 1st Respondent from claiming deduction of the amounts due to it, out of the amounts raised in the Tariff Invoices payable to the Petitioner?

(4) What Order?

6) After considering the terms of the PPA and the pleadings and documents produced by the parties, and the submissions of the learned counsel for the parties, our findings on the above issues are as follows :

7) **ISSUE No.(1) :**

(a) Article 9 of the PPA provides for Term, Termination and Default. This Article does not confer any right on the Petitioner to terminate the PPA. Article 9.3 of the PPA provides for open access to sell power to third party in the event of any payment default by the 1st Respondent for a continuous period of three months, on the conditions stated therein. Article 9.1 of the PPA provides that the term of the Agreement shall be for twenty years and it may be renewed for a further period of ten years, on such terms and conditions as may be mutually agreed upon between the parties. Article 9.2 of the PPA provides that, if the Petitioner commits a Construction Default or a O&M Default, the 1st Respondent has the right to terminate the PPA after following the procedure mentioned therein. Therefore, we answer Issue No.(1) in the negative.

8) **ISSUE No.(2) :**

(a) Article 9.3 of the PPA reads thus :

> *"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 through the Grid System by entering into a Wheeling and Banking Agreement with the Corporation for which it shall pay wheeling charges to the Corporation at the rates applicable from time to time in addition to banking charges at the rate applicable from time to time as approved by the Commission."*

(b) In the present case, the Petitioner has contended that an amount of Rs.33.36 Lakhs was outstanding from the 1st Respondent for more than three months, which entitled it to issue the Default Notice dated 11.7.2013 (ANNEXURE-P2). We may now consider whether there was a payment default for a continuous period of three months by the 1st Respondent, as contended by the Petitioner. The 1st Respondent, in its reply dated 22.7.2013 (ANNEXURE-P3), has denied the existence of any outstanding balance to be paid to the Petitioner.

(c) The pleadings of the parties do not throw light on why each of them has arrived at different figures regarding the amount due in respect of the energy transactions relating to the Project in question. On careful

consideration of the Statement of Accounts produced by the parties, we find that there are certain discrepancies in maintaining the energy accounts between the parties, which have resulted in the Petitioner claiming a huge amount being due to it and the 1st Respondent contending that the balance amount payable is 'nil'. These discrepancies are:

(i) Different approaches in accounting the quantum of the energy imported, irrespective of the fact whether there was generation or not :-

During each billing period, certain quantum of energy was being imported to the Project of the Petitioner from the grid of the 1st Respondent. While the 1st Respondent escalated the imported energy to 115% and deducted the same out of the exported energy to arrive at the Delivered Energy to the grid, it appears, the Petitioner deducted only the actual quantum of imported energy out of the exported energy, to arrive at the Delivered Energy.

(ii) Different approaches in billing the quantum of imported energy, when there was no generation from the Project:

During certain billing periods, there was no generation, but the Project imported certain quantity of energy from the grid of the 1st Respondent. The Petitioner accounted for the charge of the said

imported energy at the generation tariff of Rs.3.306 per unit for payment to the 1st Respondent, when there was no generation. However, the 1st Respondent has raised bills in respect of such imported energy at HT-2(a) tariff, when there was no generation. This has actually resulted in a large variation between the claims of both the parties.

(d) The parties, particularly the Petitioner, should have highlighted these controversies in the accounting. The parties should have pleaded the grounds in support of their rival claims. However, we note that the pleadings of the parties do not reflect the material facts on these aspects for taking a decision on these aspects.

(e) Now, we shall examine the merits of the above rival claims of the parties with reference to the following relevant provisions of the PPA:

(i) Delivered Energy is defined as, "the Kilowatt hour of Electricity actually fed and measured by the energy meters at the Delivery Point in a Billing Period after deducting therefrom, the energy supplied by the CESC to the Project, as similarly measured during such Billing Period and shall be computed in accordance with Article 6.1."

(ii) Article 6.1 of the PPA reads thus :

> *"**Tariff Invoices :** The Company shall submit to the Chief Engineer Elecy, Load Despatch Centre, Bangalore or any other designated Officer of the Corporation, a Tariff Invoice for each Billing Period in the format acceptable to the Corporation setting forth those amounts payable by Corporation for the Delivered Energy in accordance with Article 5.1."*

(iii) Article 5.1 of the PPA reads thus :

> *"**Monthly Energy Charges :** Corporation shall for the Delivered Energy pay, for the first ten years from the Commercial Operation Date, to the Company every month during the period commencing from the Commercial Operation Date at rate of Rs.2.90 (Rupees Two and Ninety Paise only) per Kilowatt hour (the base tariff) for energy delivered to the Corporation at the Metering Point with an escalation at a rate of 2% per annum over 'the base tariff' every year. This shall men that the annual escalation will be at the rate of Rs.0.058 per KWhr."*

Article 5.2 of the PPA provides the procedure for fixation of tariff from the eleventh year onwards during the remaining term of the PPA.

We may note that the 1st Respondent had, by its letter dated 4.7.2013, sought clarification from this Commission in respect of billing of the import energy by NCEs. The material portion of the said letter reads thus:

> *"Sub.: Clarification requested on NCE bills – reg.*
>
> *Inviting reference to the above, I am directed to seek clarification from the Hon'ble Commission in respect of billing of import energy by NCEs as detailed below:*
>
> *Hon'ble KERC in its order dated 18.08.2005, in the matter of standardization of formats for Power Purchase Agreements in respect of Non-conventional Energy projects, concludes that 'there is a provision permitting developers to use 10% of the installed capacity for startup for which 115% of such energy provided by the ESCOM for startup purposes will be deducted from the energy pumped in to the grid. If energy over and above the above entitlement is drawn, then the same would be charged under the tariff applicable to HT industries …'*
>
> *Accordingly, CESC, Mysore is deducting 115% of the energy imported by the NCE's from the energy pumped into the grid to arrive at the delivered energy.*
>
> *Article 5.5 in respect of some of the PPAs of NCE's states as follows:*
>
> *'Company shall be permitted to draw up to 10% of the installed capacity for startup, after the inspection by the concerned officers of the CESC and 105% of such energy provided by the CESC for startup purposes shall be deducted from the energy pumped into the grid by the*

Company for determining the amount to be paid by the CESC to the Company. If energy over and above the above requirement is drawn from the Grid, the same will be billed under the tariff applicable to HT industries including demand charges' These include PPAs that have been executed after 18.08.2005.

I am directed to request the clarification of the Hon'ble Commission whether the percentage of energy imported by the NCEs to be deducted from the energy pumped into the grid should be taken as 115% or as per the percentage in the relevant clause of the PPA."

This Commission, by its letter dated 12.7.2013, clarified that the action taken by the 1st Respondent in deducting 115% of the energy supplied by it for startup purpose, from out of the energy fed into the grid by the generator, was in order.

(f) The 1st Respondent, relying upon the clarification referred to above issued by this Commission, contended that deducting of 115% of the imported energy out of the exported energy was the correct step to arrive at the Delivered Energy. The Petitioner contended that the clarification issued by this Commission was without its notice, therefore it was not binding and only the import energy should be deducted from out of the export energy, for calculating the Delivered Energy and the PPA did not provide for escalation of imported energy to any extent for such calculation of the Delivered Energy. In view of the clarification issued by this Commission,

we feel the 1st Respondent cannot be blamed for deducting 115% of the imported energy from the exported energy, while calculating the Delivered Energy.

(g) As already noted above, the other controversy is regarding the charges payable towards imported energy when there was no generation. We are of the considered view that there is no question of Petitioner raising Tariff Invoice when there was no generation from the Project. The definition of 'Delivered Energy' does not expressly or impliedly lead to an inference that imported energy is to be charged at the rate of prevailing generation tariff, when there is no generation. A close reading of the terms of the PPA shows that there is no express provision in the PPA for payment of energy charges in such an eventuality. We are of the view that supply of the imported energy into the Petitioner's Project was not a gratuitous act. Therefore, even in the absence of any specific terms in the PPA, the Petitioner is liable to make good the charges for such energy received. The 1st Respondent has issued the bills, treating the Petitioner as a HT-2(a) Consumer, in respect of the imported energy, when there was no generation of energy from the Petitioner's Project. The 1st Respondent has raised the bills for such energy, calculating the charges at the prevailing HT-2(a) tariff, apart from collecting the demand charges. On the other hand, the Petitioner has treated the imported energy as the negative Delivered Energy during the months when there was no generation of energy from its Project and has raised invoices at the

prevailing generation tariff. For example, for the months of June, 2012 and July, 2012, regarding the imported energy when there was no generation from the Project, the Petitioner has raised invoices for minus (-) Rs.64,310/- for each month, at the prevailing generation tariff of Rs.3.248 per unit. On the other hand, the 1st Respondent has raised HT Bills for Rs.3,73,975/- for each month at the prevailing HT tariff. The PPA does not specifically impose a duty on the 1st Respondent to supply energy to the Project when there is no generation. Hence, any supply of energy in such cases is to be treated as supply to a consumer. The learned counsel for the 1st Respondent submitted during the argument that the 1st Respondent has been adopting the same procedure for billing even earlier, and at no time, the Petitioner has raised any objection to this. As this question is not specifically raised in the pleadings or during arguments, we refrain from giving any definite findings as to who is right and who is wrong, and to what extent. However, in the present circumstances, we are of the view that the 1st Respondent had *bonafide* reasons for raising HT Bills on the Petitioner for the imported energy, when there was no generation.

(h) In the present case, the Petitioner was aware of the actual controversies between it and the 1st Respondent, as mentioned above, before issuing the Default Notice dated 11.7.2013 (ANNEXURE-P2). The 1st Respondent had issued HT-2(a) bills for the months of January, February, March, April and May, 2013, for the energy imported, when there was no generation, and had sent them to the Petitioner under its covering letter dated

29.67.2013, demanding payment of these bills within fifteen days. It had also sent HT bill for the month of June, 2013, under its covering letter dated 8.8.2013, demanding payment of the said bill within fifteen days. The amounts claimed in these HT bills were Rs.3,40,721/-, Rs.3,29,636/-, Rs.3,29,636/-, Rs.3,18,551/-, Rs.3,16,343/- and Rs.3,28,082/-, respectively. Copies of these HT-2 bills and the covering letters referred to above have been produced by the 1st Respondent as additional documents on 10.7.2014 during the hearing. Therefore, the Petitioner must have had knowledge of the claim of the 1st Respondent towards adjustment and deduction of the HT bills out of the amounts stated in the Tariff Invoices.

(j) The 1st Respondent claiming deduction or set-off of the said amount payable by the Petitioner, out of the amounts claimed by the Petitioner, therefore, does not amount to a payment default. The claim of the 1st Respondent for HT-2(a) bills has arisen out of the same transaction between the parties. It is a cross-claim, in respect of which the 1st Respondent is entitled to claim deduction or set-off out of the amounts payable by it to the Petitioner. This adjustment amounts to payment.

(k) The Petitioner has furnished the details of the Tariff Invoices raised by it for the months of January, 2012 to December, 2012, in its correspondence dated 6.8.2013 (ANNEXURE-P6) addressed to the 1st Respondent. The 1st Respondent has also produced a copy of the Statement of Accounts (ANNEXURE-R1) maintained by it for the period from January, 2012 to

February, 2014, in respect of Tariff Invoices received by it from the Petitioner for the energy supplied from the Petitioner's Project, showing the claims of the Petitioner and the deductions and payments made by it towards the claim of the Petitioner. From the Statement of Accounts produced by the 1st Respondent, it appears, from January, 2013 to June, 2013, there was no generation from the Project of the Petitioner. The Petitioner has filed the present Petition on 11.10.2013, contending that the PPA (ANNEXURE-P1) has been terminated with immediate effect upon issuance of the Termination Notice dated 21.8.2013 (ANNEXURE-P9). As already noted earlier, there is no provision in the PPA for terminating it by the Petitioner. The material part of the Default Notice dated 11.7.2013 (ANNEXURE-P2) reads thus:

> *"Without prejudice to our rights, contentions and claim, we hereby notify you that as on date substantial amount is outstanding and payable to us. Out of the above, an amount of Rs.33.36 lakhs is outstanding for more than last three months and there is, therefore, a payment default for a continuous period of three months on your part within the meaning of Article 9.3 of the PPA which reads as under:*
>
> *'XXX XXX XXX'*
>
> *In view of the above, we hereby notify that we are entitled to and accordingly exercise our right to sell the electricity generated from the above Project to third party on account of the payment default on the part of your*

Company for a continuous period of three months. We will be applying to the concerned authorities for open access to enable us to sell such power to a third party."

Here itself, we may note from the Statement of Accounts (ANNEXURE-R1) produced by the 1st Respondent, that from 22.8.2013, the Petitioner continued to claim the tariff for the delivered energy at the rate of Rs.6.50 per unit, probably on the ground that the PPA had been terminated by it with effect from 21.8.2013. As the PPA could not have been terminated, the Petitioner was not entitled to claim Rs.6.50 per unit for the delivered energy. The 1st Respondent has rightly denied the rate of Rs.6.50 per unit for the delivered energy and has allowed only the agreed generation tariff of Rs.3.306 per unit.

(l) Article 9.3 of the PPA states that in the event of any payment default by the 1st Respondent for a continuous period of three months, the Petitioner shall be permitted to sell the energy to third parties. Therefore, the Petitioner was required to give the details regarding the payment defaults that had taken place for a continuous period of three months, which gave it the cause of action for seeking open access. The averments in the Default Notice (ANNEXURE-P2) or in the pleadings of the Petitioner do not specify any of these details, and they are only bald averments. In these circumstances, we hold that the Petitioner has failed to establish that the 1st Respondent has committed a payment default for continuous

period of three months. We, therefore, answer Issue No.(2) in the negative.

9) **ISSUE No.(3) :**

(a) The learned counsel for the Petitioner submitted that the 1st Respondent has not admittedly paid the amounts shown in the Monthly Invoices for the Delivered Energy. Relying on Article 6.3 of the PPA, he contended that the 1st Respondent was required to pay the entire amount due under the Monthly Invoices and then had to raise the dispute for its claim. Therefore, according to the learned counsel for the Petitioner, Article 6.3 of the PPA guaranteed the Petitioner, the payment of the entire amount covered under the Tariff Invoices, irrespective of any claim of the 1st Respondent.

(b) Article 6.3 of the PPA reads thus :

> "6.3 ***Disputes :*** *In the event of a dispute as to the amount of any bill, Corporation shall notify the Company of the amounts in dispute and Corporation shall pay the Company the total bill, including the disputed amount. The parties shall discuss within a week from the date on which Corporation notifies the Company of the amount in dispute and try and settle the dispute amicably. If the dispute is not settled during such discussion then the payment made by Corporation*

shall be considered as a payment under protest. Upon resolution of the dispute, in case the Company is subsequently found to have overcharged, then it shall return the overcharged amount with an interest of SBI medium term lending rate per annum for the period it retained the additional amount."

(c) Article 6.3 of the PPA provides as to what steps the 1st Respondent should follow, in the event it disputes the amount of any Monthly Invoice raised by the Petitioner towards the Delivered Energy. The said Article prevents disputing the amount, or any part of it, claimed in any Monthly Invoice, and specifies that the amount in dispute should be paid first, under protest, and subsequently the rights of the parties are to be adjusted in accordance with the final decision over the dispute. Therefore, the right of adjustment or set-off of the amount that could be set-up by the 1st Respondent is not taken away by Article 6.3 of the PPA. The 1st Respondent is not disputing the amount claimed in the Tariff Invoices in respect of the Delivered Energy, but claims set-off and deduction of the amounts due to it from the Petitioner.

(d) Article 6.5 (v) of the PPA specifically provides for deduction of 1.8% of the rebate on the Monthly Invoice amount for keeping the Letter of Credit in force, out of the Monthly Invoice amount payable to the Petitioner.

(e) At best, it can be said that the 1st Respondent could not have claimed deduction of 115% of the imported energy out of the exported energy, for arriving at the Delivered Energy, without following the procedure prescribed under Article 6.3 of the PPA. However, the amount relating to this disputed issue is a small amount when compared to the amount claimed by the Petitioner in the Default Notice. It is considered that such minor infraction, that too arising out of a clarification issued by this Commission, does not entitle the Petitioner to claim open access under Article 9.3 of the PPA or issue Termination Notice, which in any case, is not provided for under the PPA. For the above reasons, we answer Issue No.(3) in the negative.

10) **ISSUE No.(4) :**

For the foregoing reasons, we pass the following :

ORDER

The Petition is dismissed. The Petitioner is not entitled to any of the reliefs sought in the Petition.

Sd/-	Sd/-	Sd/-
(M.R. SREENIVASA MURTHY)	(H.D. ARUN KUMAR)	(D.B. MANIVAL RAJU)
CHAIRMAN	MEMBER	MEMBER