

No.N/58/11

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION BANGALORE

Dated 7th June 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. 28/2011

BETWEEN

Jasper Energy Private Limited,
No.49, KHB Colony, Koramangala
BANGALORE - 560 022
(Represented by M/s. Indus Law Advocates)

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Petitioner

AND

1. Karnataka Power Transmission Corporation Ltd.
Cauvery Bhawan, Kempegowda Road
BANGALORE - 560 009
2. Hubli Electricity Supply Company Limited
Navanagar, P.B. Road
HUBLI- - 580 029
3. Karnataka State Load Despatch Centre
28, Race Course Road
BANGALORE – 560 001
4. State Power Procurement Co-ordination Committee
Cauvery Bhawan
BANGALORE – 560 001
(Represented by Just Law Advocates)

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Respondents

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1. The Petitioner has filed this Petition on 24.6.2011, praying for a declaration that the Power Purchase Agreement (PPA) dated 1.2.2007 between the Petitioner and the 2nd Respondent stands terminated and for directions on the following: (1) Respondents to grant approval to the Petitioner to sell electricity to

third parties; (2) Respondents 1 and 2 to execute the Wheeling and Banking Agreement with the Petitioner; (3) Respondents to pay the Petitioner a sum of Rs.3,60,26,760/- being the amount due and payable for electricity supplied from August, 2010 onwards; (4) Respondents to pay the Petitioner a sum of Rs.25,30,313/- towards interest due and payable for delayed payments towards tariff invoices and additional interest calculated at the rates prescribed under the PPA, and such other orders as deemed fit.

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

(a) The Petitioner has a Mini Hydel Power Plant in Sindagi Taluk, Bijapur District, comprising 3 Units of a total capacity of 10.5 MW. The Petitioner entered into a Power Purchase agreement (PPA) with Respondent No.1 - Karnataka Power Transmission Corporation Limited (KPTCL) on 1.2.2007 for sale of power generated by the Petitioner. The PPA has since been assigned to Respondent 2. The Petitioner had filed a Petition in O.P.No.22/2010 before the Commission against the Respondents, seeking a declaration that the PPA was invalid on various grounds, which was resisted by the Respondents contending that the PPA was valid and binding between the parties. The Commission disposed of the said Petition in O.P.No.22/2010, holding that the PPA was valid and subsisting between the parties. The Petitioner then filed a Review Petition in No.1/2011 before this Commission, which was pending adjudication. (This Review Petition is disposed of on 8.9.2011 in view of the filing of the present Petition.)

(b) It is contended by the Petitioner that based on the Orders of this Commission in O.P.22/2010 and in terms of the PPA, the Petitioner supplied electricity to the 2nd Respondent and submitted invoices for the power supplied. Respondent No.2 did not adhere to the payment schedule and there was a continuous default in payment by Respondent No.2, and therefore, the Petitioner issued a Default Notice dated 3.2.2011 to Respondent No.2 under Article 9.3.1 of the PPA setting out the defaults committed by Respondent No.2. However, despite the Petitioner giving sufficient time, Respondent No.2 failed to cure the said defaults, and hence the Petitioner, vide letter dated 5.4.2011, terminated the PPA between the parties, under Article 9.3.2 of the PPA. However, the Petitioner continued to pump in the energy to Respondent No.2's grid, as Respondent No.2 did not grant NOC for Open Access to the Petitioner.

(c) The Petitioner has further contended that Respondent No.2 has not paid for the energy delivered from August, 2010 to March, 2011 and is due in a sum of Rs.3,60,26,760/-, besides interest in a sum of Rs.25,30,313/- for delayed payments till 31.5.2011. It is also alleged by the Petitioner that Respondent No.2 has not opened Letter of Credit as required under Article 6.5 of the PPA, inspite of several requests made by the Petitioner and that, though under Article 9.2.2(2) of the PPA the Petitioner is entitled to sell the power to third parties by entering into Wheeling and Banking Agreements, Respondent No.2 has not afforded the facilities for wheeling the power to third parties, and that the Petitioner is suffering from losses due to non-payment of the energy charges by Respondent No.2 and also in not allowing the Petitioner to sell the power to third parties.

3. The Respondents have put in appearance through their Advocates, M/s. Just Law, and have filed their detailed Statement of Objections on 19.12.2011, denying the Petitioner's averments and claims. It is contended by the Respondents that there is no delay on the part of Respondent No.2 in making payments to the Petitioner for the energy delivered; that Respondent No.2 had requested for certain documents from the Petitioner in September, 2010 for processing the Petitioner's invoices and in response to this request the Petitioner did not submit all the documents sought in their reply dated 28.10.2010. Further, Respondent No.2 again pointed out the documents required in its letter dated 18.3.2011 and upon receipt of the said documents, the Petitioner's Invoices were processed and Respondent No.2 has made payment of a sum of Rs.3,60,00,148/- to the Petitioner by Cheque No.659934 dated 20.7.2011. It is contended by the Respondents that the delay caused by Respondent No.2 in making payment of Invoices to the Petitioner was due to the Petitioner's own delay in submitting the documents sought by Respondent No.2, and hence the claim of the Petitioner for payment of interest of Rs.25,30,313/- by Respondent No.2 on delayed payments as per Article 6.3 of the PPA, is baseless and unfounded. It is also contended by the Respondents that they are in the process of opening the Letter of Credit in favour of the Petitioner, as required under Article 6.5 of the PPA.

4. The Petitioner has also filed its Rejoinder on 13.1.2012 to the Statement of Objections of the Respondents, denying all the averments made by the Respondents therein and has further contended that all the documents sought

by the Respondents in their letter dated 22.9.2010 from the Petitioner were already in the possession of the Respondents themselves and were again submitted by the Petitioner on 28.10.2010. Further, the Respondents could not legally withhold payments for power supplied on such grounds as non-submission of documents. Also, Respondent No.2 has made payment of only an amount of Rs.3,60,00,148/- against their total Invoice amount of Rs.3,60,26,760/- and is still due to pay for the energy delivered from August, 2010 to March, 2011. It is further contended by the Petitioner that the Respondents are liable to pay the Petitioner a sum of Rs.25,30,313/- as interest on delayed payments till 31.5.2011.

5. We have considered the averments made in the Petition and the Rejoinder by the Petitioner, the objections filed by the Respondents and 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 Counsel for the Petitioner that the Respondent No.2 – HESCOM failed to make payments for the electricity supplied within the due dates as per the terms of the PPA. Therefore, the Petitioner issued a Default Notice on 3.2.2011 under Article 9.3.1 of the PPA. Despite Notice, the Respondents did not remedy the defaults pointed out. Therefore, the Petitioner terminated the PPA by its Notice of Termination dated 5.4.2011. On termination of the PPA, the Petitioner is entitled to have Open Access, as per the Open Access Regulations and the Respondents are bound to grant the same in accordance with law.

7. In reply, it is contended by the Counsel for the Respondents that the termination of the PPA is invalid, as the Respondents have paid for the electricity supplied. It is further submitted that there was delay in making the payments, because the Petitioner had not submitted the documents for processing the Invoices. In support of his argument, the Counsel for the Respondents drew the attention of the Commission to Annexure-D – a Letter dated 28.10.2010 (produced by the Petitioner), in order to show that the Petitioner had not produced the required documents for processing the Invoices and making the payments. The Counsel for the Respondents also drew the attention of the Commission to the Respondents' Reply dated 18.3.2011 to the Default Notice dated 3.2.2011 and submitted that the termination itself is invalid, as the Petitioner all along was contending that the PPA is not in existence.

8. We have seen from the records that the Petitioner had filed OP No.22/2010 seeking a declaration that the PPA dated 1.2.2007 had become null and void for non-fulfillment of the conditions precedent and it is under no obligation to sell electricity to the Respondent No.2. Rejecting the arguments advanced by the Petitioner, this Commission on 23.12.2010 held that the PPA cannot be held to have become void, as it was the Petitioner who had failed to commence construction and complete the Project on time.

9. From the Notice dated 3.2.2011 issued by the Petitioner, read with the Statement produced at Annexure-G, it is observed that the defaults pointed out are covered by invoices dated 2.9.2010 to 3.1.2011 for the power supplied from August, 2010 to December, 2010, during the pendency of the proceedings in OP

No. 22/2010 initiated by the Petitioner, wherein the Petitioner was contending that there was no PPA, as it had become void. In those proceedings, the non-payment of the dues against the invoices issued by the petitioner was not urged as a ground for the cancellation or annulment of the PPA. If the Petitioner was really aggrieved by the non-payment of Bills, it could have then moved the Commission to terminate the PPA dated 1.2.2007 on grounds of non-payment. However, the Petitioner did not do so and kept quiet, probably waiting for the orders of this Commission in OP No.22/2010. Thus, it is doubtful if the petitioner can base the notice of termination on the defaults in payment relating to the period before the disposal of OP No.22/2010 by the Commission on 23.12.2010. However, after the disposal of the said petition by the Commission, the payment for the entire period from September 2010 to January 2011 had clearly become due by 3.2.2011 when the default notice was issued by the petitioner under Article 9.3.1 of the PPA. In its response dated 18.3.2011 to the said notice, Respondent 2 contended that several documents were required to process the bills submitted by the petitioner and the same had been sought for in the communication dated 25.10.2010 sent to the petitioner. The Respondent pointed out that the processing of bills was delayed due to the delay in the submission of the said documents by the petitioner and there was no default committed by Respondent 2. Further, Respondent 2 also stated in the said communication that before the termination of the PPA could be considered any dispute should be sought to be settled through negotiation as per Article 9.3.2 of PPA. We are of the view that this contention of Respondent 2 merits acceptance in view of the unequivocal of the terms incorporated in the PPA

which mandates resolution of disputes between parties by mutual negotiation only upon the failure of which the parties could consider other remedies.

10. As regards the default in opening of the Letter of Credit pointed out by the Petitioner in its Notice dated 3.2.2011 is concerned, a reply has been sent by Respondent No.2 (HESCOM) on 18.3.2011. In the said letter, at paragraph-3, Respondent No.2 has not refused to open the Letter of Credit. On the contrary, it has stated that it will consider opening of the Letter of Credit once its financial position improves. This would mean that there is no refusal on the part of the Respondent.

11. Even assuming that disputes arose on account of non-payment or non-opening of Letter of Credit, the Petitioner cannot straightaway proceed to terminate the PPA without following the Dispute Resolution Mechanism provided in the PPA. In Article 10 of the PPA, parties have specifically agreed to settle the disputes first through mutual negotiations, promptly, equitably and in good faith, and only in case of non-resolution of the disputes within 90 (ninety) days, the same shall be referred to the Commission for adjudication. In fact, Respondent No.2 has, in his reply dated 18.3.2011 to the Notice given by the Petitioner, pointed out this clause to the Petitioner. From the Notice of Termination dated 5.4.2011 issued by the Petitioner, it is clear that the Petitioner, without following the procedure provided under Article 10 of the PPA, has straightaway resorted to termination of the PPA, which makes the termination itself invalid.

12. In the light of the foregoing discussion, we are of the clear view that the termination of the PPA effected by the Petitioner, vide its letter dated 5.4.2011, is unsustainable and invalid. Consequently the PPA dated 1.2.2007 continues to be in force and the parties shall abide by the same.

13. As regards the prayer of the petitioner for payment of interest, we hold that in view of our conclusion that the PPA is in force, interest is payable for all delayed payments as per the terms of the PPA and we direct the Respondent 2 to pay interest due on all delayed payments mentioned in the notice of termination, within thirty (30) days from the date of this Order.

Accordingly, this Petition is allowed in part in terms of the above.

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

Sd/-
(VISHVANATH HIREMATH)
MEMBER

Sd/-
(K.SRINIVASA RAO)
MEMBER