

No.N/50/12

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

Dated : 17th January, 2013

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

OP No.28/2012

BETWEEN :

Tuppadahalli Energy India Private Limited
C1-001, Tower-C, Ground Floor
The Millenia, No.1 & 2
Murphy Road, Ulsoor
BANGALORE – 560 008

.. **Petitioner**
[Represented by M/s. Shridhar Prabhu Associates, Advocates]

AND

Mangalore Electricity Supply Company Limited
Paradigm Plaza, A.B. Shetty Circle
MANGALORE – 575 001

.. **Respondent**
[Represented by M/s. Justlaw, Advocates]

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1) In the above Petition, the Petitioner has prayed for: (1) a declaration that reimbursement of Letter of Credit (LC) charges to the Respondent is contemplated as a one-time measure and no rebate on a month-to-month basis at 1.8% on the Tariff Invoice is contemplated under the Power Purchase Agreement (PPA); (2) a declaration that the deductions effected by the Respondent on a month-to-month basis towards LC charges as per Article 6.5 of the PPA are *ultra vires* the PPA; and, (3) a direction to the Respondent to repay

the amounts deducted in contravention of the PPA along with interest at 2% per month.

2) Upon Notice, the Respondent has entered appearance through its Counsel and filed its Statement of Objections on 13.9.2012. The Petitioner has also filed a Rejoinder on 3.10.2012.

3) It is the case of the Petitioner that it has a Wind Energy Project of capacity 57.75 MW at Attighatta, Gondihosahalli, Gangaondanazhalli, Tuppadahalli, Malahu Village, Pennasamudra, Devarahosahalli and Bettakadur, Shimoga District and it has entered into a Power Purchase Agreement (PPA) with the Respondent – Mangalore Electricity Supply Company Limited (MESCOM) on 2.5.2011 (Annexure-P2), and it has also signed an Addendum to the said PPA on 2.9.2011. It is submitted by the Petitioner that though, as per Article 6.5 of the PPA, the Respondent is required to establish and maintain a transferable, assignable, irrevocable and unconditional non-revolving Letter of Credit (LC) 30 days prior to the Commercial Operation Date (COD) in its favour, the Respondent did not do so, but, however, sent a letter dated 15.9.2011 (Annexure-P3) informing about its intention to open the LC, and that later the Respondent sent a letter dated 2.2.2012 (Annexure-P4) to it, resembling a Letter of Credit, for Rs.2,44,85,860/-, issued by the Vijaya Bank, Mangalore in its favour. It is further submitted by the Petitioner that vide letter dated 9.2.2012 (Annexure-P5), it sent a reply to the Respondent, seeking certain clarifications regarding the LC amount and informing the Respondent that the LC should be in accordance

with Article 6.5 of the PPA. The Respondent replied by its letter dated 17.2.2012 (Annexure-P6) that the LC amount had been calculated based on the average of four months' Bills between August, 2011 and November, 2011, and would be modified in case there is a significant variance from the Bill amount in future. It is further submitted by the Petitioner thereafter it received a Cheque for Rs.2,50,06,116/- against its Bills for the month of January, 2012, and by letter dated 7.3.2012 (Annexure-P8), it requested the Respondent for increasing the LC amount to Rs.4,20,50,223/- and for making payment without further deduction of rebate of 1.8% from its future Bills. It is further contended by the Petitioner that as per Article 6.5(v) of the PPA, the LC charges could be collected by the Respondent as a one-time measure and not on a month-to-month basis, as LC will be opened only once, and that inspite of several requests and representations made by it to the Respondent to resolve the issue relating to interpretation Articles 6.5 and 6.6 of the PPA, the Respondent had been deducting the amount on a month-to-month basis from its Tariff Invoices.

4) Per contra, the Respondent, in its Statement of Objections dated 13.9.2012, has contended that Article 6.5(v) of the PPA clearly contemplates that the rebate be availed of by the Respondent on a month-to-month basis and not only the LC establishment charges. The Respondent has further contended that it is a settled law that while interpreting the terms of the Contract, the plain meaning of the words used in the Clause should be adopted, unless there is ambiguity in the words used, and that it is evident from a perusal of the said Article that the parties intended to provide for a rebate on the tariff invoices on

a month-to-month basis, and that the Agreement in the Form prescribed by the Commission and the PPA has been approved by the Commission. It is contended by the Respondent that the Petitioner has filed this Petition in an attempt to wriggle out of the contractual obligations.

5) In its Rejoinder dated 3.10.2012, the Petitioner has denied the averments by the Respondent in the Statement of Objections, and has reiterated the stand taken by it in the Petition, that the LC charges could be collected by the Respondent as a one-time measure, as LC is opened only once.

6) We have considered the averments made by the Petitioner in the Petition and the Rejoinder, and the averments of the Respondent in its Statement of Objections. We have also considered the documents placed on record by both the parties in support of their respective case and also the oral submissions made by the Counsel for both the parties.

7) It is contended on behalf of the Petitioner that Article 6.5 of the PPA only seeks to provide repayment of the cost of opening of Letter of Credit as a one-time measure and the said clause does not provide for a month-to-month deduction. Further, it is contended that Article 6.5 - Establishment of Letter of Credit – does not provide for a mechanism to recover the rebate every month as LC charges, as LC is opened as security for the payment. It is further contended that deduction of the rebate in the Bills was not contemplated in the Order

passed by the Commission on 11.12.2009 in the matter of, "Determination of Tariff in respect of Renewable Sources of Energy"

8) Per contra, it is contended by the Respondent that Article 6.5(v) of the PPA is clear and the same provides for deduction of rebate or LC expenses, whichever is higher, per month and therefore the deduction is in accordance with law.

9) As the entire controversy between the parties in this case revolves around Article 6.5 of the PPA, we deem it necessary to extract the said clause below, in toto :

“6.5 Letter of Credit: ...ESCOM shall establish and maintain transferable, assignable, irrevocable and unconditional non-revolving Letter of Credit in favour of, and for the sole benefit of, the Company. The Letter of Credit shall be established in favour of, and issued to, the Company on the date hereof and made optional thirty (30) days prior to the Commercial Operation Date of the Project and shall be maintained consistent herewith by ..ESCOM at any and all times during the Term of the Agreement. Such Letter of Credit shall be in form and substance acceptable to both the Parties and shall be issued by any Scheduled Bank and be provided on the basis that:

- (i) In the event of Tariff Invoice or any other amount due and payable by ...ESCOM pursuant to the terms of this Agreement is not paid in full byESCOM as and when due, the Letter of Credit may be called by the Company for payment in full of the unpaid Monthly Invoice or any such other unpaid amount.
- (ii) The forgoing as determined pursuant hereto, upon representation of such Monthly Invoice or other invoice or claim for such other amount by the Company on the due

date therefor or at any time thereafter, without any notification, certification or further action being required.

- (iii) The amount of the Letter of Credit shall be equal to one month's projected payments payable for ...ESCOM based on the average of annual generation.*
- (iv) The ...ESCOM shall replenish the Letter of Credit to bring it to the original amount within 30 days in case of any valid drawdown.*
- (v) The Company shall allow a rebate of 1.8% of the Tariff Invoice or actual expenditure/charges for the LC account incurred, whichever is higher, and the same shall be deducted from the monthly Tariff Invoice payable to the Company.*
- (vi) The Letter of Credit shall be renewed and/or replaced by theESCOM not less than 60 days prior to its expiration."*

10) The Hon'ble Supreme Court in the case of *The Central Bank of India Ltd. Amrutsar –Vs- The Hartford Fire Insurance Co.Ltd., (AIR 1965 SC 1288)*, has held that:

"It is the Court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The Court must give effect to the plain meaning of the words however it may dislike the result."

11) The Hon'ble Supreme Court In the case of *General Assurance Society Ltd. –Vs- Chandmull Jain and another, (AIR 1966 SC 1644)*, has held that:

“In interpreting documents relating to a contract of insurance, the duty of the court is to interpret the words in which the contract is expressed by the parties, because it is not for the court to make a new contract, however reasonable, if the parties have not made it themselves.”

12) The Hon'ble Supreme Court in the case of *Delta International Ltd. –Vs- Shyam Sundar Ganeriwalla and another* **[(1999) 4 SCC 545]**, after referring to another decision of the Hon'ble Supreme Court in the case of *Sohan Lal Naraindas –Vs- Laxmidas Raghunath Gadit*, has held that:

“The intention of the parties is to be gathered from the document itself. Mainly, the intention is to be gathered from the meaning and the words used in the document except where it is alleged and proved that the document is a camouflage. If the terms of the document evidencing the agreement between the parties are not clear, the surrounding circumstances and the conduct of the parties have also to be borne in mind for ascertaining the real relationship between the parties.”

13) The Hon'ble Supreme Court in the case of *Oil & Natural Gas Corporation Ltd. –Vs- Saw Pipes Ltd.* **[(2003) 5 SCC 705]**, after referring to the earlier decision, has held that:

“It is settled law that the intention of the parties is to be gathered from the words used in the agreement.”

It has further held that :

"If the words are unambiguous and are used after full understanding of their meaning by experts, it would be difficult to gather their intention different from the language used in the agreement. If upon a reading of the document as a whole, it can fairly be deduced from the words actually used therein that the parties had agreed on a particular term, there is nothing in law which prevents them from setting up that term. Further, in construing a contract, the court must look at the words used in the contract unless they are such that one may suspect that they do not convey the intention correctly."

14) In the light of the settled law on interpretation / construction of documents / deeds, we may now consider the grievance of the Petitioner.

15) It is submitted on behalf of the Petitioner that a plain reading of Article 6.5(v) of the PPA makes it clear that the clause does not contemplate, but only seeks to provide for recovery of cost for opening Letter of Credit (in the format and quantum stipulated therein) as a one-time measure and there is no provision in the PPA for recovering the rebate month-on-month. Further, it is submitted by the Petitioner that since the Letter of Credit is opened for the benefit of the Petitioner as a security for payment, the same cannot be used as a mechanism to recover the amount from the Petitioner for the energy generated every month. The Respondent only can recover the charges or expenditure on actual basis from the Petitioner. It is also submitted by the Petitioner that if the rebate was payable every month as claimed by the Respondent, the Commission

would have made a specific provision and reckoned the same while computing the rate of return in the Order passed on 11.12.2009 [In the matter of Determination of Tariff in respect of Renewable Sources of Energy].

16) Considering the language adopted in Article 6.5(v) of the PPA, we are not inclined to accept the contention put forward on behalf of the Petitioner. The words of Article 6.5(v) of the PPA are very clear and therefore this Commission cannot give any other meaning than what is provided in the PPA. In our view, Article 6.5(v) of the PPA cannot be read to mean that it provides only for recovery of charges incurred for opening Letter of Credit, in view of its clear wordings. If it was intended by the parties to recover only the charges incurred to open Letter of Credit charges, Article 6.5(v) of the PPA would not have made any reference to the rebate and would not further have added that, "the same shall be deducted from the Monthly Tariff Invoice payable to the Company." The term would have referred only to Letter of Credit charges and stopped at that. In our view, the interpretation placed by the Respondent-Company is in accordance with the wordings used in Article 6.5(v) of the PPA, and not the one the Petitioner is trying to place upon after realizing that the rebate is recurring and quite substantial. Merely the term is onerous, it cannot be ignored. The contention that deduction of rebate every month will have an impact on the Petitioner's Tariff and hence the interpretation placed by the Respondent runs counter to the orders of this Commission dated 11.12.2009, is not tenable. We have looked into the Order referred to by the Petitioner. The said Order only deals with fixation of Tariff and factors considered while fixing tariff. At any rate,

there is nothing in the said Order which will have any bearing on the interpretation of Article 6.5(v) of the PPA in view of the clear language used therein. The Order of the Hon'ble Appellate Tribunal for Electricity (ATE) referred to by the Petitioner has no application to the present case, as the issue in this case is the interpretation of a clause agreed to in the Contract.

17) So far as the grievance of the Petitioner, if any, on the form of Letter of Credit or the amount covered by the Letter of Credit is concerned, it may approach the Respondent-Company to bring the Letter of Credit in line with the terms of the Contract and the Respondent-Company shall consider the same and take appropriate steps, if the same is required as per the terms of the PPA.

18) In view of the foregoing discussions, we hold that the interpretation placed by the Respondent is correct and unexceptionable. Therefore, the relief sought by the Petitioner cannot be granted.

19) Accordingly, this Petition is dismissed.

Sd/-

(M.R. SREENIVASA MURTHY)
CHAIRMAN

Sd/-

(VISHVANATH HIREMATH)
MEMBER

Sd/-

(K.SRINIVASA RAO)
MEMBER