

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

Dated : 13th November, 2014

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

OP No.2/2014

BETWEEN:

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

PETITIONER

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,ch

Race Course Road,
Bangalore – 560 001.

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

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

RESPONDENTS

1) The Petitioner has filed this Petition praying for a declaration that the Power Purchase Agreement (PPA) dated 19.6.2006 (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 4 Mega Watts (MW) capacity Tail Race Mini Hydel Project downstream 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 19.6.2006 (ANNEXURE-P1) with the 1st Respondent.

(b) The Petitioner has contended that the 1st Respondent committed payment defaults, thereby it invoked Article 9.2 of the PPA and issued a Default Notice dated 15.7.2013 (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 correspondence 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) in this regard.

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

(1) Whether the PPA dated 19.6.2006 (ANNEXURE-P1) has been validly terminated?

(2) Whether Article 6.4 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?

(3) What Order?

5) 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 :

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

- (a) The term of the PPA is for a period of twenty years, unless it is terminated pursuant to the other provisions of the Agreement. Article 9.2.2 of the PPA deals with the Events of Default on the part of the 1st Respondent. Article 9.3.2 of the PPA provides the procedure for termination of the PPA by the Petitioner. It states that there should be an Event of Default as set-out in Article 9.2.2 by the 1st Respondent and then the Petitioner has to issue a Default Notice to the 1st Respondent, in writing, which shall specify, in reasonable detail, the Event of Default giving rise to the Default Notice and calling upon the 1st Respondent to remedy the same. Further that on expiry of thirty days from the delivery of the Default Notice, if the Event of Default has not been remedied or the parties have not agreed otherwise, the Petitioner may deliver a Termination Notice, and on service of such Termination Notice, the Agreement shall stand terminated. In the present case, the Petitioner has contended that an amount of Rs.11.24 Lakhs was outstanding from the 1st Respondent for more than three months, which entitled it to issue the Default Notice (ANNEXURE-P2). Further, it contended that the Event of Default was not cured by the 1st Respondent within thirty days from the date of service of the Default Notice. Therefore, the Petitioner has contended that on service of the Termination Notice, the PPA stood terminated.

- (b) We may now consider whether there was an Event of Default committed by the 1st Respondent, as contended by the Petitioner. The 1st Respondent has denied the existence of any outstanding balance to be paid to the Petitioner. The Petitioner has furnished 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 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.
- (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 the following discrepancies in maintaining the energy accounts between the parties have resulted in the Petitioner claiming some amounts as balance due to it and the 1st Respondent contending that the balance amount payable is 'nil':

- (i) Different approaches in accounting the quantum of the energy imported:-
- 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 escalated the imported energy to 105% and deducted the same 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 rate of Rs.2.80 per unit for payment to the 1st Respondent. 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 notice that the pleadings of the parties do not reflect the material facts 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 hours 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 designated officer of CESC, a Monthly Invoice for each Billing Period in the format prescribed by CESC from time to time setting forth those amounts payable by CESC for the Delivered Energy in accordance with Article 5.1."*

(iii) Article 5.1 of the PPA reads thus :

***"Monthly Energy Charges :** CESC 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.2.80 (Rupees Two and Eighty Paise only) per Kilowatt hour without any escalation for energy delivered to the CESC at the Metering Point."

- (iv) The other provision relied upon by both the parties is Article 5.5, which reads thus :

"Company shall be permitted to draw upto 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."

Here itself, we may note that the 1st Respondent had sought clarification from this Commission on Article 5.5 of the NCE PPAs, as to whether the percentage of energy imported by the NCE Projects to be deducted from the energy pumped into the grid should be taken as 115% or as per the percentage mentioned in Article of the PPA. This Commission, by its letter dated 12.7.2013, informed 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 Article 5.5 of the PPA and 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 the escalation of the imported energy could be only to the extent of 105% for calculating the Delivered Energy. However, both the parties appear to have not applied their mind to ascertain whether in all cases the imported energy could be treated as energy drawn for 'startup' for applicability of Article 5.5. On the facts and in the circumstances of the case, we are of the view that the 1st Respondent had *bonafide* reasons for deducting 115% of the imported energy out of the exported energy, to arrive at the Delivered Energy, in view of the clarification issued by this Commission.
- (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 Invoices 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 generation tariff, i.e., Rs.2.80 per unit, 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 during the periods 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 rate of Rs.5.35 per unit, apart from collecting the demand charges, as applicable to a HT-2(a) Consumer. 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 rate of the generation tariff of Rs.2.80 per unit. For example, for the months of June, 2012 and July, 2012, when there was no generation from the Project, the Petitioner has raised invoices for minus (-) Rs.21,000/- and minus (-) Rs.20,160/-, respectively. On the other hand, the 1st Respondent has raised HT Bills for Rs.1,30,260/- and Rs.1,28,413/-, respectively, for those months. 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 for this. As this question is not specifically raised in the pleadings or during arguments, we refrain from

- giving any findings on the correctness of the method of calculation adopted by either party. 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) Article 9.3.2 of the PPA provides for issuance of Default Notice for the 1st Respondent's default. It states that upon the occurrence of an Event of Default, the Petitioner may deliver a Default Notice to the 1st Respondent, in writing, which shall specify, in reasonable detail, the Event of Default giving rise to the Default Notice and calling upon the 1st Respondent to remedy the same, and further provides that if the Event of Default is not cured within thirty days, etc., the Petitioner is entitled to issue a Termination Notice for terminating the PPA. In the present case, the Petitioner was aware of the actual controversies between it and the 1st Respondent, as mentioned in paragraph-6(c) above, before issuing the Default Notice dated 15.7.2013 (ANNEXURE-P2). The 1st Respondent had issued HT-2(a) bills for the months of March, April and May, 2013 for the imported energy, when there was no generation, and had sent them to the Petitioner under the covering letter dated 5.7.2013. Copies of these HT-2(a) bills and the covering letter dated 5.7.2013 have been produced by the 1st Respondent as additional documents on 10.7.2014 during the hearing. Therefore, the Petitioner should have specified in the Default Notice the details of the Events of Default committed by the 1st Respondent, clearly stating the reasons as to how the deductions claimed by the

1st Respondent were incorrect, as understood by it. Then only, the 1st Respondent would have been in a position to give a proper reply to the Petitioner, explaining its stand.

- (j) In the Default Notice (ANNEXURE-P2), the Petitioner has claimed Rs.11.24 Lakhs as the amount outstanding for more than three months. The 1st Respondent, in its reply, has stated that the balance amount outstanding as on that day was 'nil'. There was thus no unanimity between the parties in calculating the quantum of energy imported and also its value. This has resulted in arriving at different balances by the parties in respect of the energy transaction account. The Petitioner had to show that the accounting method adopted by the 1st Respondent is wrong and incorrect. This would have established the proof of the Event of Default committed by the 1st Respondent, which entitles the Petitioner to issue Termination Notice. If the accounting method of the 1st Respondent is found to be correct or if the accounting method of both the parties requires any correction or modification, then also the Event of Default would not be established. In our view, the Default Notice itself is defective for want of details in describing the Events of Default. On the basis of such a defective Default Notice, the Petitioner could not have issued a Termination Notice.

- (k) Non-payment of the amount claimed in the Default Notice of the Petitioner, on *bonafide* and genuine grounds, by the 1st Respondent,

claiming deduction or set-off of the said amount payable by the Petitioner, 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.

- (l) For the above reasons, we hold that the termination of the PPA by the Petitioner is not valid. Accordingly, Issue No.(1) is answered in the negative.

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

- (a) The learned counsel for the Petitioner submitted that admittedly the 1st Respondent has not paid the amounts shown in the Monthly Invoices for the Delivered Energy. Relying on Article 6.4 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 6.4 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 6.4 of the PPA reads thus :

*"6.4 **Disputes** : In the event of a dispute as to the amount of any Monthly Invoice, CESC shall notify the Company of the amounts in dispute and CESC shall pay the Company the total Monthly Invoice, including the disputed amount. The parties shall discuss within a week from the date on which CESC 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 the CESC 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. CESC's / Company shall not have the right to challenge any Monthly Invoice or to bring any court or administrative action of any kind questioning / modifying a Tariff Invoice after a period of one year from the date of the Monthly Invoice is due and payable."*

(c) Article 6.4 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 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 set-off that could be set-up by the 1st Respondent is not taken away by Article 6.4 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 disputed the escalation of imported energy to 105%, as claimed by the Petitioner, for arriving at the Delivered Energy, without following the procedure prescribed under Article 6.4 of the PPA. However, the amount relating to this disputed fact 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 issue a Termination Notice, which can be invoked only on substantive defaults.
- (f) For the foregoing reasons, Issue No.(2) is answered in the negative.

OP No.2/2014

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

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/-

(M.R. SREENIVASA MURTHY)
CHAIRMAN

Sd/-

(H.D. ARUN KUMAR)
MEMBER

Sd/-

(D.B. MANIVAL RAJU)
MEMBER