

No.N/43/09

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION BANGALORE

Dated 15th November, 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.33/2009

BETWEEN

M/s. Bangalore Electricity Supply Company Limited
K.R. Circle
BANGALORE-560 001
(Represented by M/s. Justlaw, Advocates)

...

Petitioner

AND

NSL Sugars Ltd.
No.60/1, Residency Road, II Cross
BANGALORE-560025
(Represented by Shri Prabhuling Navadgi, Advocate)

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Respondent

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1. This Petition is filed by Bangalore Electricity Supply Company Limited (hereinafter referred to as 'BESCOM'), praying for: (1) a declaration that the Respondent-Company is barred from seeking Open Access and selling power to third party during the subsistence of the PPA; (2) quashing the Termination Notice dated 21.11.2008 (Annexure-K) issued by the Respondent-Company; and (3) issuance of directions to the Respondent to continue to supply power as per the PPA dated 30.3.2001 (Annexure-A) and Supplemental Agreements dated 22.3.2002 (Annexure-B) and 5.4.2007 (Annexure-C).

2. On Notice, the Respondent has appeared through its Counsel and has filed its detailed Objection Statement dated 22.2.2010.

3. The Petitioner has also filed its Rejoinder dated 1.4.2010. Subsequently, on 24.3.2011, the Respondent has filed a Memo for disposal of the Petition as having become infructuous and not surviving for consideration, to which the Petitioner has filed its Objection Statement on 21.4.2011.

4. It is submitted by the Petitioner that the Respondent had a Power Purchase Agreement (PPA) dated 30.3.2001 with the Karnataka Power Transmission Corporation Limited (KPTCL) to supply electricity generated by its Co-generation Plant of 15 MW, situated at Koppa Village in Maddur Taluk, Mandya District and this PPA was modified by a Supplemental Agreement dated 22.3.2002 pursuant to the enhancement of the Plant Capacity from 15 MW to 26 MW. Further, there was another Supplemental Agreement dated 5.4.2007 modifying the rates prescribed in the PPA dated 30.3.2001, read with the Supplemental Agreement dated 22.3.2002. This PPA came to be assigned to the Petitioner under the Transfer Rules issued under the Karnataka Electricity Reform Act, 1999, and the Respondent is supplying electricity to it as per the terms of the PPA referred to above.

5. It is further submitted by the Petitioner that the Respondent issued a Notice on 19.8.2008 (Annexure-J), alleging that the Petitioner is not making payments for the electricity supplied within 15 (fifteen) days from the date of the

invoice and it was more than three months in several cases. It also alleged that the Petitioner has failed to pay the interest for the delayed payments. Therefore, the PPA shall stand terminated, if full payment is not made within 30 (thirty) days from the date of the Notice. This was followed by a Termination Notice dated 21.11.2008 (Annexure-K), informing that the PPAs dated 30.3.2001, 22.3.2002 and 5.4.2007 stand terminated with effect from 30.11.2008. The Petitioner sent a reply to the Notice of Termination on 25.11.2008, refuting the allegations of delayed payments, except the claims which were disputed before the Commission and before the Hon'ble Appellate Tribunal for Electricity (ATE). It is submitted that the termination effected, therefore, is invalid and illegal and the Respondent is bound to continue to supply electricity to the Petitioner in terms of the PPA.

6. In reply, the Respondent has submitted as follows :

(a) The KPTCL had a PPA dated 30.3.2001 with it. However, this was terminated unilaterally, and aggrieved by this, the Respondent had to file Writ Petition No.550/2004. In the said Writ Petition, there was an Interim Order, directing the Petitioner-Company to supply power generated by it to the 2nd Respondent-Corporation (Respondent in this Petition) at the rate of Rs.2.80 per KWHr for every unit of energy subject to final accounting. This Writ Petition came to be disposed of, directing the parties to approach the Karnataka Electricity Regulatory Commission for resolution of their dispute under the provisions of the Electricity Act, 2003.

(b) Pursuant to the said Order of the Hon'ble High Court, the Respondent filed OP No.25/2006 before this Commission. In this Petition, a Joint Memo came to be filed by the parties, settling the disputes. This Commission, based on the Joint Memo, by its Order dated 30.11.2006, disposed of the Petition and restored the PPA with modified rates. Though KPTCL and BESCO released the principal amount due as per the agreed terms belatedly, they did not pay the interest. BESCO thereafter also has not paid the billed amount of the year 2008-09 timely, leading to accrual of interest.

(c) The Petitioner in the first instance was regularly making payments, for all the electricity generated and supplied, without any restrictions. However, when the Respondent submitted its invoice dated 5.4.2005 for the exporting energy to the extent of 15 – 16 MW, the Petitioner restricted the payment only to the extent of 13 MW, on the ground that they are bound to take only 13 MW during season and 24 MW during off-season.

(d) Being aggrieved, the Respondent had to file OP No.12/2007 before this Commission seeking for a direction to the Petitioner to release payment for all the electricity supplied. This Commission, after considering the terms of the PPA, by its Order dated 10.7.2008, directed the Petitioner to pay for the electricity received as per the rates prescribed in the PPA, as the PPA obliges the Petitioner to off-take all the electricity made available, and also directed the Petitioner to release the arrears, to be calculated on that basis, within a period of 30 (thirty) days from the date of the Order.

(e) Instead of complying with the said Order of the Commission, the Petitioner preferred an Appeal before the Hon'ble Appellate Tribunal for Electricity (ATE) in Appeal No.15/2009. The Hon'ble ATE dismissed the said Appeal by imposing a cost of Rs.20,000/- on the Appellant / Petitioner.

(f) During the pendency of the Appeal before the Hon'ble ATE, the Respondent filed Petition OP No.1/2009 for compliance of the Order passed by this Commission in OP No.12/2007 by KPTCL, and the Petitioner. Thereafter, the KPTCL / Petitioner released the principal amount without interest.

(g) The Respondent, therefore, filed one more Petition OP No.23/2009 for a direction to pay the interest on delayed payment. This was disposed of on 11.12.2009, holding that interest is payable only from 30 (thirty) days of the Order of this Commission and not earlier to it. The Review Petitions, filed by both the parties in R P No.07/2010 and R P No.08/2010 seeking clarification on payment of interest and the rate, were disposed of by the Commission on 17.3.2009, with some minor clarifications.

(h) In the meanwhile, on the ground of non-payment of the amount due including interest, the Respondent invoked Article 9.2.2 of the PPA and issued a Default Notice dated 19.8.2008 to the Petitioner and called upon the Petitioner to cure the defaults pointed out in the said Notice within 30 (thirty) days. Though the Petitioner received the Default Notice on 19.8.2008, it did not cure the

defaults even after the lapse of 30 days. Thereafter, the PPA came to be terminated with effect from 31.11.2008, on 21.11.2008.

(i) The Respondent, based on the termination of the PPA, filed a Petition before the Central Electricity Regulatory Commission (CERC) seeking a direction to the State Load Despatch Centre (SLDC) for grant of Open Access and the said Petition was allowed by the CERC by its Order dated 11.12.2009 and issued a direction to consider the application of the Respondent (Petitioner therein) strictly in accordance with the Open Access Regulations.

(j) The Petitioner has now chosen to challenge the Termination Notice on untenable grounds, i.e., after lapse of more than 30 days given in the Termination Notice and after more than 10 months, and seeking to set aside the Termination. Therefore, according to the Respondent, the termination of the PPA cannot be challenged. If the Petitioner wants to restore the PPA, it can do so after negotiating with the Respondent with fresh terms.

7. In its Rejoinder dated 1.4.2010, the Petitioner has denied all the averments made in the Statement of Objections dated 22.02.2010 of the Respondent, and has prayed the Commission to allow the Petition.

8. We have heard Shri Sriranga, learned Counsel appearing for the Petitioner and also Shri Prabhuling Navadgi, learned Counsel appearing for the

Respondent. We have also considered the averments made in the Petition and the Rejoinder and also the averments made in the Objection Statement.

9. The submissions of both the parties as recorded above succinctly summarize the facts of the case, and therefore, need no repetition.

10. The question that arises for consideration is, 'Whether the termination of the PPA dated 30.3.2001 (Annexure-A), effected by the Respondent through its Notices dated 19.8.2008 (Annexure-J) and 21.11.2008 (Annexure-K), is valid and legal?'

11. We have examined the Default Notice dated 19.8.2008 (Annexure-J). In the said Notice, the Respondent has alleged that the Petitioner has not paid a sum of Rs.2,59,54,273/-, payable to it for the electricity supplied but not paid, within 30 (thirty) days from the date of Notice, as per the Orders of this Commission, and the non-payment amounts to an Event of Default. Further, it is alleged in the said Notice that interest of Rs.3,25,37,152/- is also due (besides an amount of Rs.8,58,546,486/- due by KPTCL towards interest) and the same also amounts to an Event of Default in terms of the PPA. It is also stated that if both these Events of Default are not cured within 30 (thirty) days from the date of the Notice, as contemplated in the terms of the PPA, the PPA stands terminated. The Respondent thereafter issued a final Notice of Termination on 21.11.2008 (Annexure-K), informing the Petitioner that, as it has failed to pay Rs.2,59,54,273/- towards principal amount and Rs.3,25,37,152/- towards interest, thereby failed to

cure the defaults pointed out in the Notice, the PPA stands terminated with effect from 30.11.2008. The Petitioner, after final termination of the PPA, by its letter dated 25.11.2008 (Annexure-L), disputed the Events of Default mentioned in the Notice and stated that the amount claimed in the Termination Notice as default is not paid, as it has not accepted the Order of this Commission and gone in Appeal to the Hon'ble ATE, and therefore, non-payment will not amount to the breach of the terms of the PPA.

12. In our view, the stand taken by the Petitioner in reply to the Termination Notice was not a valid defense for non-payment of the amount ordered by this Commission for the electricity supplied based on Article 5 of the PPA. It is well-settled that mere filing of an Appeal will not stop the operation of the Order, unless it is specifically stayed by any superior Forum. Admittedly, in this case, though the Order of this Commission dated 10.7.2008 was challenged by the Petitioner before the Hon'ble ATE, no Order of Stay was granted. In the absence of a Stay Order, the Petitioner's liability to pay under the PPA and the Commission's Order continued. In fact, the Petitioner did pay the amount during the pendency of the Appeal, when the Respondent filed a Petition under Section 142 of the Act. Therefore, the contention of the Petitioner that there was no payment default cannot be accepted. Non-payment despite Notice, in our view, gave a right in favour of the Respondent to terminate the PPA on the ground of breach of the term on payment contained in the Contract. Therefore, the termination of the PPA has to be held valid and legal.

13. In a similar case, wherein there was a payment default and the default did not get cured inspite of the Notice issued, this Commission, in its Order dated 8.10.2009 passed in OP No.17/2009 – BESCO –Vs- Davanagere Sugar Company and others, at Paragreaph-22 has held that:

“The Respondent has delivered a default notice dated 10.6.2009 to the Corporation in writing. Though the Petitioner has given a reply, but has not set right the default during the period of one month from the date of the default notice nor has sought any time from the Respondent for setting them right. The procedure laid down in Article 9.3.2 b has been followed by the Respondent. Hence the termination notice dated 08.07.2009 cannot be found faulty and has to be upheld. We therefore hold that the Petitioner has failed to fulfill its financial and material obligation as set out in various Articles of the PPA which had been discussed extensively above and therefore has given legitimate cause to the Respondent to terminate the PPA. The Petitioner is to blame itself for this situation. The Respondent after terminating the PPA, which is held valid by us as discussed above has no obligation to fulfill the said PPA.”

14. Aggrieved by the above Order of this Commission, the Petitioner therein (BESCO), and the Petitioner herein, had filed an Appeal in Appeal No.176/2009 before the Hon'ble Appellate Tribunal for Electricity (ATE). In the said Appeal, repelling the similar contention now raised in this Petition by the Petitioner (BESCO), the Hon'ble ATE has observed that :

“22. In the instant case, the Appellant has taken a stand that in the event any payment of the principal sum not made in time or even if there is any delay on their part in this regard, it would not give a right to the Respondent to terminate the contract since there is a provision for penal interest. We are unable to appreciate this stand. If there is a failure to make payment within 15 days, it amounts to breach of the contractual obligation. Merely because the

payment was made belatedly would not be considered to be the compliance of the clauses 6.1 and 6.2 of the PPA. Furthermore, under clause 6.3, penal interest is payable for SSR Page 17 of 51 Judgment in Appeal No. 176 of 2009 the late payment. If penal interest is not paid, that is also a breach of the obligation under the contract. So when there is a failure to carry out the obligation under the contract in making the payment in time or not making the payment of interest would amount to breach of the integral obligation as contemplated in the contract."

15. The Appellant therein (BESCOM) had approached the Hon'ble Supreme Court in Civil Appeal D.No.25623/2010, challenging the Orders of this Commission as well as the Hon'ble ATE. The said Appeal came to be dismissed on 4.10.2010 by the Hon'ble Supreme Court.

16. In our view, the Order of the Commission, as well as that of the Hon'ble ATE referred to above, squarely apply to this case. In this case also, the Petitioner failed to make the payment, which became due as per the PPA and the Orders of this Commission, and did not pay the same within the time granted by the Commission, nor did it make payment thereafter when called upon to do so by the Respondent in its Notice prior to termination of the PPA. Further, for the delayed payment, interest was also not paid as per the terms of the PPA. Therefore, we hold that the termination of the PPA was valid and legal, as the same was in accordance with the terms of the PPA.

17) The submission of the Petitioner that the amount initially not paid, as ordered by this Commission, came to be paid subsequently with interest and

hence the termination of the PPA was not valid, does not merit acceptance. As observed by the Hon'ble ATE in the case referred to above, the fact that the amount payable as per the Orders of this Commission came to be paid subsequently, as per the directions of this Commission in the Enforcement Proceedings, will not revive the PPA already terminated, as the PPA does not provide for such revival. The Petitioner could have saved the PPA, if it had paid the amounts due, when it was called upon by the Respondent to do so, without prejudice to its rights in the Appeal filed by it before the Hon'ble ATE or by seeking an appropriate Order from the Hon'ble ATE.

18) During the course of the arguments, it was observed from the material placed on record that even after the termination of the PPA, the Respondent continued to supply electricity and collected the charges at the rate provided in the PPA. Therefore, a question arose whether this supply of electricity as per the PPA rates will in any way affect the termination of the PPA effected by the Respondent and can be construed as an act of abandonment of termination. The Respondent has submitted a series of documents with a Memo on 12.10.2012. Based on the documents, the Respondent's Counsel explained the circumstances under which the Petitioner has to continue the supply of electricity and receive the Bills as per the PPA terms. We have considered the argument of the Respondent's Counsel. As per these documents, after the termination of the PPA, the Respondent started raising the bills at the UI rates and also approached the CERC in Petition No.157/2009, when its application for 'NOC' for Open Access was not considered by the SLDC. The CERC, after

hearing both the parties, vide its Order dated 11.12.2009, held that denial of Open Access is not sustainable and issued a direction to examine the application filed by the Petitioner therein (Respondent herein) for Open Access, duly observing at Paragraph-10 as follows :

“10. From the above extracted statutory provision, it is evident that while examining the request for open access, the SLDCs are required to consider the(i) existence of the infrastructure facility for energy metering and accounting and (ii) availability of surplus transmission capacity in the State network. In doing so, the SLDC will need to take into account ‘the contracts entered into with the licensees or the generating companies operating in that State’ because the quantum of power meant for flow in the system would be borne out of such contracts for off-take or injection. Usually, an applicant seeking open access would submit or produce in support of its application for open access a copy of the contract entered into by it with the licensee or generating company, as the case may be. SLDC is only required to verify prima facie, whether there is a contract for sale of power by the utility proposing to inject power for the open access transaction. This does not empower the SLDC to sit on judgment on the validity or otherwise of a contract or adjudicate upon disputes as in the present case, which otherwise is within the scope of Section 86(1)(f). Any party disputing the contract cited by the party seeking open access or claiming that it has a subsisting PPA with the generating company in question, will have to approach the appropriate forum to get the matter adjudicated. SLDC cannot assume the role of adjudicator to decide as to which of the two contracts is valid.”

The above Order of the CERC was challenged by the Government of Karnataka in W.P.No.38932/2009 before the Hon'ble High Court of Karnataka and obtained stay on 4.1.2010, but later the Government withdrew the same on 22.7.2011.

19) It is submitted on behalf of the Respondent that during the pendency of proceedings before this Commission questioning the validity of the termination of the PPA, and, on account of the Stay Order granted by the Hon'ble High Court of Karnataka to the CERC's Order dated 11.12.2009 passed in Petition No.157/2009, it had no option except to supply electricity to the Petitioner and collect charges as per the PPA. According to the Petitioner's Counsel, the supply of electricity and collection of charges as per the PPA, cannot be understood to mean that the Respondent gave up the termination of the PPA effected by it and continued with the Contract. According to the learned Counsel for the Respondent, anything done, after filing of the Petition and during the pendency of the same, will always be subject to the results of the pending proceedings.

20) In our view, the above submission made on behalf of the Respondent as regards supply of electricity after termination of the PPA is correct in law and has to be accepted. The legal position that anything done during the pendency of the proceedings will be subject to the results of the pending proceedings, needs no elaboration, nor any emphasis, as it is a well-known proposition. Therefore, the action of supplying electricity and collecting charges for the same as per the

PPA will in no way affect the termination of the PPA effected in accordance with the terms of the PPA.

21) For the foregoing discussion, we hold that the termination of the PPA effected on 21.11.2008 was valid and legal. Consequently, the Petitioner is not entitled to any of the reliefs claimed in the Petition and accordingly this Petition stands dismissed.

22) Since the subsistence of the PPA was in question before this Commission till today and considering the facts of the case, we deem it proper to direct both the parties to treat the termination of the PPA effective only from today and anything done till now by both the parties shall not be disturbed.

Sd/-

(M.R. SREENIVASA MURTHY)
CHAIRMAN

Sd/-

(VISHVANATH HIREMATH)
MEMBER

Sd/-

(K.SRINIVASA RAO)
MEMBER