

No.N/80/11

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. 34/2011

BETWEEN

Soham Mannapitlu Power Pvt. Ltd.
(previously known as Bobba Aviation Services Pvt.Ltd.)
No.137, 7th Floor, HMG Ambassador Building
Residency Road
BANGALORE – 560 025
(Represented by M/s. Holla & Holla, Advocates)

... **Petitioner**

AND

1. Karnataka Power Transmission Corporation Ltd.
Cauvery Bhawan, Kempegowda Road
BANGALORE - 560 009
2. Mangalore Electricity Supply Company Limited
1st Floor, Paradigm Plaza
A.B. Shetty Circle
MANGALORE – 575 101
3. The Chief Engineer
Karnataka State Load Despatch Centre
28, Race Course Road
BANGALORE – 560 001
(Represented by Just Law, Advocates)

... **Respondents**

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1. The Petitioner has filed this Petition on 23.8.2011, praying for a declaration that the Power Purchase Agreement (PPA) dated 26.11.2004 between the Petitioner and the 1st Respondent-Karnataka Power Transmission Corporation Limited (KPTCL), since transferred to Respondent 2, stands terminated and is not

subsisting, and for a direction to the Respondents to grant approval to the Petitioner to supply power produced by them in their Mini Hydro Power Project across Puchamogaru Stream, Karkala Taluk, Udupi District, to third parties, and such other reliefs as deemed fit. The Petitioner has also filed an Application on 31.10.2011 praying for the following additional relief, in addition to the Prayers already made:

“B)(i) Direct the Respondent No.2 to pay interest to the Petitioner on overdue payments in terms of Article 6.4 of the Power Purchase Agreement dated 26.11.2004.”

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

(a) The Petitioner has a Mini Hydro Generating Plant of 15 MW capacity at Puchamogaru Stream in Mannapitlu Village of Karkala Taluk, Udupi District. The Petitioner has entered into a Power Purchase Agreement (PPA) with Respondent No.1-KPTCL on 26.11.2004, and is supplying power to Respondent No.2-Mangalore Electricity Supply Company Limited (MESCOM) from 7.9.2009 in terms of the said PPA.

(b) It is contended by the Petitioner that the Respondent No.2 has continuously defaulted in making payments of tariff for several months as detailed in the Petition and has also not paid interest on delayed payments. It is also contended by the Petitioner that non-grant of NOC for Open Access by the Respondents, has caused the Petitioner difficulties in repaying the loans. In support of its case, the Petitioner has relied upon the Orders passed by this Commission in O.P.No.3/2009 and O.P.No.34/2009, and has prayed for a declaration that the PPA dated 26.11.2004 stands terminated and is not

subsisting, and for a direction to the Respondents to give Open Access and for other reliefs.

(c) It is further contended by the Petitioner that as per Article 6.5 of the PPA, Respondent No.1 was required to establish and maintain a transferable, assignable, irrevocable and unconditional non-revolving Letter of credit in its favour ,and inspite of this, Respondent No.2 has failed and neglected to establish the Letter of Credit in terms of the PPA, thereby Respondent No.2 has committed breach of the terms of the PPA which entitles the petitioner to go in for Open Access in terms of the Order dated 2.6.2011 of this Commission passed in OP No.34/2009.

(d) It is further submitted by the Petitioner that as per Article 6.2 of the PPA, the 2nd Respondent is required to make payment of the amounts due within fifteen days from the date of the tariff invoice and as per Article 9.3 of the PPA the Petitioner is entitled to sell power to third parties through the Grid System by entering into a Wheeling and Banking Agreement with the Corporation in the event of any default in payments by the Corporation for a continuous period of three months. It is further urged by the Petitioner that against the invoices, twelve in number, raised by the Petitioner for supply of power between November 2009 and January 2011, payments were made by Respondent 2 after the due date in each case. The petitioner had therefore on 28.4.2011 issued a request for termination of the PPA dated 26.11.2004 in which the petitioner had also pointed out the non-payment of the amounts claimed in the invoices

relating to December 2010 and January 2011 for 101 days and 71 days respectively (till the issue of the said notice/request). This amounted to continuous defaults by the Respondent 2 for over three months and that the Respondents were therefore under an obligation to permit the Petitioner to go in for Open Access under Article 9.3 of the PPA. In support of its contentions, the Petitioner has relied upon the Commission's Order dated 13.8.2009 passed in OP No.3/2009 – Sandur Power Ltd.; -Vs- KPTCL, which was affirmed by the Order dated 11.4.2011 passed by the Hon'ble ATE in Appeal No.180/2009. The Petitioner has also relied upon the Commission's Order dated 2.6.2011 passed in OP No.34/2009 – HESCOM-Vs- GMR Industries Ltd.

(e) The Petitioner has further submitted that the 2nd Respondent was also liable to pay interest on the delayed payments, as per Article 6.4 of the PPA, which has not been paid by Respondent No.2.

3. The Respondents have put in appearance through their Advocates, M/s.Just Law, and have filed their detailed Statement of Objections on 22.12.2011, denying the Petition averments and claims of the Petitioner. The Respondents have referred to the Order of this Commission in OP No. 27/2009 filed by the same petitioner in which the petitioner had contended that the PPA in question had become null and void due to the failure of the petitioner himself to fulfill the conditions precedent within the time prescribed in the PPA. The Commission had in its Order of 23.12.2010 rejected the petitioner's plea and held that the PPA dated 26.11.2004 had not become null and void and also directed

the petitioner to approach the Respondents with necessary materials to substantiate its claim for a higher tariff. It is further contended by the Respondents that the Petitioner's allegation that the Respondents have delayed in making payments of the Invoices to the Petitioner, is not true. In respect of the delay in making payments against invoices of December 2009 and January 2011, it is contended by the Respondent 2 that it had intimated the Petitioner several times that the Petitioner should get the Interconnection Approval for the generating unit which had expired on 22.12.2010 renewed from Respondent No.1-KPTCL in order to process the Petitioner's invoices. The Respondents have further contended that the Petitioner is only finding ways to wriggle out of its obligations under a valid Contract, that the PPA dated 26.11.2004 is very much valid, legal and binding on all the parties and that the Petitioner is not entitled to any of the reliefs sought for in the Petition.

4. The Petitioner has also filed its Rejoinder to the Statement of Objections of the Respondents, on 23.2.2012, denying all the averments made by the Respondents therein, and has further reiterated the contentions already made earlier in the Petition.

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 Petitioner's Counsel that the Respondents, for various periods mentioned in Annexure-L, did not make payment within the due dates and therefore, the Petitioner has terminated the PPA on 28.4.2011 and consequently, it is relieved of its obligations to supply electricity to the Respondents and is entitled to the Open Access to sell electricity to third parties.

7. Per contra, the Respondents contended that the delay in payment was not on account of any deliberate act on the part of Respondent No.2, but it was on account of non-production by the Petitioner of renewal of the Interconnection Approval given by KPTCL. Therefore, the Petitioner is not entitled to terminate the PPA on the ground that there was a default on the part of the 2nd Respondent and seek Open Access.

8. It is a fact that the Petitioner has a PPA for its Project of 15 MW and is supplying electricity to the 2nd Respondent. Further, there is no dispute on the dates on which the amounts claimed in the invoices mentioned above were actually paid which indicates that the payments were made by the Respondents after the due dates in all those cases. Further, the payments against invoices for the months of December 2009 and January 2010 were made on 2.6.2011 after the petitioner had submitted to Respondent 2 copy of the extension of provisional interconnection approval from KPTCL dated 21.5.2011.

9. The Issues that arise for consideration and decision are:

- (1) Whether the PPA dated 26.11.2004 executed by the Petitioner with Respondent No.2 stands terminated, based on the Notice dated 28.4.2011 and whether it gives a right to the Petitioner to seek Open Access?
- (2) Whether the Petitioner is entitled for payment of interest for the period of delayed payments, as per the terms of the PPA dated 26.11.2004?

10. **ISSUE NO.1 :**

To determine the above question, i.e., whether the termination of the PPA dated 26.11.2004 is valid or not, it is essential to examine closely the Notice of Termination dated 28.4.2011 issued by the Petitioner. It appears from the Notice that the Bills of October, 2009 to November, 2010, even though paid by Respondent No.2, there was delay in making payment in each month ranging from 5 to 35 days. From the records it is also seen that during this period, the Petition filed by the same Petitioner, viz., OP No.27/2009, was pending before this Commission for adjudication, till the decision of the Commission was rendered on 23.12.2010 holding that the PPA continued to be valid and binding on the parties. Delay in making payments of amounts claimed in invoices raised by the petitioner till that date was not raised as an issue in the said petition OP No.27/2009. If the period from October, 2009 to November, 2010 is taken out, as on the date of Notice, i.e., 28.4.2011, payment was due only for the months of December 2010 and January 2011.

11. From the pleadings, it is seen that the interconnection approval by KPTCL to the Petitioner's Unit had expired on 22.12.2010 and Respondent No.2 had in its letter dated 1.2.2011 asked the Petitioner to obtain and submit renewed interconnection approval, in the absence of which they could not make payments for the pending invoices. At any rate, it is undisputed that the payments due have been made by the Respondents and accepted by the Petitioner subsequently after the Petitioner furnished the renewed interconnection approval. Thus, there is some substance in the claim of Respondent 2 that the delay in making payments against invoices of December 2009 and January 2010 was due to the non-submission of the renewed interconnection approval for the unit. However, we have noted that the petitioner had on 28.4.2011 intimated Respondent 2 that the non-availability of the renewed interconnection approval does not grant the latter the power to withhold payments.

12. From the above, it is clear that the petitioner's claim that the PPA dated 26.11.2004 stands terminated is based on the request for termination of PPA issued by it on 28.4.2011 in which delay in payment beyond the due date in respect of invoices relating to the period between October 2009 and November 2010 as also the non-payment of the invoices relating to December 2010 and January 2011 were cited as the grounds for opting for sale of power to third parties. As noted above, there indeed was some delay in making the payments in respect of invoices up to November 2010 which was not raised by the petitioner as a ground for termination of the PPA till the disposal of OP 27/2009. In

respect of the invoices relating to the months of December 2010 and January 2011, there existed a request from Respondent 2 for the petitioner making available the renewed interconnection approval which was communicated to the petitioner on 1.2.2011 itself. In response the petitioner informed Respondent 2 that the payments pending in respect of the two invoices could not be withheld by the latter on the ground of non-availability of the interconnection approval. Thus, it is clear that there was a dispute between the petitioner and Respondent 2 on this issue. However, the events narrated above clearly show that Respondent 2 was making payments regularly, albeit with some delay, against the invoices received from the petitioner till December 2010 during which month the interconnection approval for the unit in question expired. It was only thereafter that Respondent 2 withheld payment for the two invoices of December 2010 and January 2011 on the ground of non-availability of the interconnection approval. Further, payment against these invoices was also settled soon after the submission of the said approval. This clearly shows that there was no attempt on the part of Respondent 2 to deny payments for the power purchased from the petitioner.

13. We have also noted that the request for termination of PPA dated 28.4.2011 issued by the petitioner does not cite the non-opening of Letter of Credit by Respondent 2 as a ground for the proposed termination.

14. Even assuming that the Petitioner had a right to terminate the PPA for payment defaults, still it cannot straight away proceed to terminate the PPA

before initiating the termination. As per Article 10 of the PPA, all disputes or differences between the parties arising out of, or in connection with, the Agreement shall be first tried to be settled through mutual negotiations promptly, equitably and in good faith. In case of failure of mutual negotiations within 90 (ninety) days, the disputes have to be referred to the Commission for adjudication. In the present case, the Petitioner has not resorted to the remedy provided for dispute resolution under the PPA. A perusal of the Notice dated 28.4.2011 makes it clear that the Petitioner has rushed to terminate the PPA without making an attempt to resolve the dispute and also without giving any time to Respondent No.2 to cure the alleged default. Therefore, in our view, the termination of the PPA effected through the Notice dated 28.4.2011 cannot be sustained and it has to be held that the PPA continues to exist and binding on the parties.

15. The Petitioner has referred to the Orders of this Commission made in OP No.3/2009 – *M/s. Sandur Power Company Limited –Vs- The Managing Director, KPTCL and others* and OP No.34/2009 – *HESCOM –Vs- GMR Industries Limited*. In the first case, this Commission has held that in case of three consecutive months' default in payment of Bills, the Generator is entitled to seek Open Access. In the second case, this Commission has held that non-opening of the Letter of Credit is also a ground for termination of the PPA. In our view, both these Judgments have no application to the facts of this case.

Accordingly, Issue No.1 is held against the Petitioner.

16. **ISSUE No.2 :**

The next Issue that needs to be decided is, "Whether the Petitioner is entitled for interest on delayed payments made by the 2nd Respondent, as per the terms of the PPA?" From the averments made by both the parties, it is clear that there was delay in making the payments. However, according to the Respondents, the delay was on account of non-production of renewal of Interconnection Approval of KPTCL by the Petitioner and therefore no interest is payable. In our view, though the Respondents paid the amount due excluding interest on receipt of the renewal of Interconnection Approval, it cannot be said that the Respondent was not liable to pay interest. As per Article 6.4 of the PPA, if either party fails to make any payment within 60 days after the due date, the overdue amount will attract interest for the delayed period at the SBI Medium Term Lending Rate per annum. From the statement produced by the Petitioner, it is clear that Respondent No.2 did not make the payment within the due dates of the invoices and there is a delay. Therefore, the 2nd Respondent is liable to pay interest as per the above Article of the PPA for the delayed payment.

Issue No.2 is therefore held in favour of the Petitioner.

17. For the foregoing reasons, we order as follows :

- (a) The PPA dated 26.11.2004 continues to be in force and the Petitioner is not entitled to sell electricity to third parties, as prayed for;
- (b) The Petitioner is entitled to interest for the period of delay in making the payments, as per Article 6.4 of the PPA dated 26.11.2004;
- (c) Respondent No.2 shall calculate the interest payable as per the terms of the PPA dated 26.11.2004 for the delayed payments and pay the same to the Petitioner within thirty (30) days from today.

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

Sd/-
(VISHVANATH HIREMATH)
MEMBER

Sd/-
(K.SRINIVASA RAO)
MEMBER