

No.N/63/12

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

Dated: 22nd 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.35/2012

BETWEEN:

Sri Chamundeswari Sugars Limited
No.76, Ulsoor Road
BANGALORE-560 042
[Represented by Shri H. N. Shashidhara, Advocate]

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Petitioner

AND

1) Chamundeswari Electricity Supply Corporation Limited
No.927, L. J. Avenue
New Kantharaj Urs Road
Saraswathipuram
MYSORE-570 009

2) Karnataka State Load Despatch Centre
No.29, Race Course Road
BANGALORE-560 001
[R1 represented by M/s. Justlaw, Advocates]

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Respondents

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1) This Petition is filed by the Petitioner for a declaration that the Power Purchase Agreement (PPA) dated 19.10.2001 and the Supplemental Agreement (SA) dated 9.6.2005 with Respondent No.1 stand terminated, and for a direction to allow the Petitioner to sell electricity to third parties through Open Access.

2) It is submitted by the Petitioner that it had a PPA dated 19.10.2001 read with SA dated 9.6.2005 with the 1st Respondent - Chamundeswari Electricity Supply Corporation Limited (CESC), and it was supplying electricity to the 1st Respondent under the said PPA and SA. On 18.5.2012, the Petitioner issued a Notice to the 1st Respondent terminating the PPA, on the grounds that the 1st Respondent had not paid the interest to the extent of Rs.1,64,30,939/- accrued on account of delayed payments, that the Letter of Credit which was required to be opened under Article 6.6 of the PPA had not been opened yet, and that the Tariff for the 11th year and onwards has not been agreed to between the parties as contemplated in the PPA. It is submitted that since the above termination is in accordance with the terms of the PPA, the Petitioner is entitled to seek a declaration to the effect that the PPA stands terminated and it is entitled to avail Open Access for third party sale.

3) The 1st Respondent-CESC has filed a detailed Statement of Objections on 13.9.2012. The case of the 1st Respondent is that the termination of the PPA effected by the Petitioner is invalid, as the same is not in accordance with the terms of the PPA. According to the 1st Respondent, before termination of the PPA is effected, the Petitioner was required under Article 9.3.2 of the PPA to deliver a Default Notice in writing, calling upon the 1st Respondent to remedy the events of default committed by the 1st Respondent and only in case the default pointed out is not remedied, the Petitioner can effect Termination of the PPA. It is further submitted by the 1st Respondent that in response to the Termination Notice dated 18.5.2012 issued by the Petitioner, it had sent a reply on 27.6.2012

to the Petitioner, stating that the amounts due and payable have been paid. Further, it was stated that opening of Letter of Credit was under process and that the claim relating to the interest could be discussed and settled mutually. It is submitted that in view of this reply, the Petitioner cannot sustain the termination of the PPA.

4) We have considered the averments made by the respective parties and their submissions in the matter.

5) The only issue that arises for consideration and decision is, "Whether the termination effected by the Petitioner on 18.5.2012 (Annexure-K) is valid and in accordance with law?"

6) As the decision on termination of the PPA entirely hinges on the Termination Letter (Annexure-K at Page-73 of the Petition), it is necessary to extract the same below :

"Dear Sir,

Sub.: Termination of PPA and seeking Open Access.

Ref.: 1. Our PPA dt.19.10.2001 and Supplemental PPA dt.0.9.06.2005

2. Our letter No.SCS/KPTCL09/2009 dt.07.09.2009

3. Petition No.OP 37/2009

4. Order dt.03.03.2011 of the Hon'ble KERC in OP 37/2009

5. Proceedings dt.03.04.2010

6. Proceedings dt.08.08.2011

7. OP 50/2011 before the Hon'ble KERC

We have signed a Power Purchase Agreement on 19.10.2001 and a Supplemental Agreement in 09.06.2005 with Karnataka Power

Transmission Corporation Limited which stood assigned to you consequent to formation of ESCOM's. The ten years tariff as contemplated under the PPA is over with effect from 18.10.2011. The tariff for the remaining ten years effective from 19.10.2011 is not fixed yet. However the proposed tariff is not remunerative in view of the fact that Ten years of Commercial Operation is not over since, we have started our commercial operation only from 02.04.2008.

We would like to draw your kind attention to the various references cited above. In our letter cited at reference 2 above we have drawn the attention of the CESCO about the repeated defaults pertaining to:

1. Belated payment of power supply bills.
2. Nonpayment of escalation.
3. Non payment of interest on belated payment on supply bills.
4. Non opening of Letter of Credit as per the provisions of the PPA cited at reference above.

Interalia we have informed you that we will be terminating our PPA in case the defaults are not cured. Subsequently, since the defaults were not cured we have approached the Hon'ble KERC to direct the CESCO to cure the defaults and also to permit us to go for open access in OP No.37/2009. The Hon'ble KERC in its judgment dt.03.03.2011 has directed you to honour the terms of the PPA (Copy enclosed).

During the pendency of the petition and as per the directions of the KERC we have had a discussion with you in the meeting held on 03.04.2010 wherein the issues have been discussed. Further, after the final verdict of the KERC another meeting has been held on 08.08.2011. Copies of the proceedings enclosed.

While the issues regarding payment of supply bills and payment of escalation as per PPA have been settled, considered by the CESCO in pursuance of the judgment of the KERC, the interest on the belated payment has not been settled so far. The outstanding interest as per our records is Rs.1,64,30,939/-. In addition to this the LC which should have been opened as per the provisions of the PPA has not been opened. Therefore, it is evident that the defaults still remain uncured till now inspite of clear directions by the Hon'ble KERC.

In view of the long pending defaults remaining uncured we are invoking the provisions of Article 9 read with 9.2.2 o 3.3.1 of the PPA. And further we are informing you through this letter that we are cancelling our PPA dt.19.10.2001 and 09.06.2005 with immediate effect on the following grounds:

- 1. The interest to the extent of Rs.1,64,30,939/- arising out of belated payment of supply bills has not been paid.*
- 2. Letter of Credit as required under Article 6.6 has not been opened yet, resulting in defaults being uncured and*
- 3. The tariff from the 11th year onwards as required under Article 5.2 has not been fixed and the proposed tariff from the 11th year is uneconomical in view of the fact that we have started commercial operation of our unit only from 02.04.2008 and as such 10 years of commercial operation is not completed and we are yet to service the interest and principal of term loans.*

In this connection it would be pertinent to mention here that we had approached the Hon'ble KERC in OP No.50/2011 seeking higher tariff however we have withdrawn this Petition on 17.05.2012 under the existing circumstances.

Therefore we are cancelling our PPA and would be selling our power through open access. We request you kindly to issue a no objection certificate from your end with regard to our termination of PPA and to sell power through open access."

7) From the above Termination Notice, it is seen that the Petitioner has issued the Termination Letter without calling upon the 1st Respondent to cure the defaults mentioned therein, as required under Article 9.3.2, and has proceeded to terminate the PPA straightaway.

8) As pointed out by the 1st Respondent, before termination of the PPA, the Petitioner is required to issue a Default Notice, calling upon the 1st Respondent to cure the defaults alleged to have been committed, within 30 days from the date

of receipt of the Default Notice, and only in case of failure by the 1st Respondent to cure the defaults pointed out, the PPA can be terminated by the Petitioner. Therefore, the termination of the PPA, without issuing a Default Notice, is not in accordance with the terms of the PPA and hence cannot be sustained. The contention of the learned Counsel for the Petitioner that no fresh Notice was required for the termination of the PPA, in view of its earlier Notice dated 7.9.2009, cannot be accepted, in view of the specific language contained in Article 9.3.2 of the PPA, which requires issuance of Default Notice of 30 days before terminating the PPA.

9) The contention of the Petitioner's Counsel that in view of the Order dated 3.3.2011 of this Commission passed in OP No.37/2009, no fresh Notice is required to be issued to the 1st Respondent before termination of the PPA, is untenable. In the said Petition, the Petitioner had sought for a declaration that the PPA dated 19.10.2001, as amended by the SA dated 9.6.2005, stood terminated, on the grounds that the 2nd Respondent therein (1st Respondent herein) had defaulted in making payments to the Petitioner as per the terms of the PPA, and had not opened the Letter of Credit as required under the PPA. This Commission disposed of the said Petition with the consent of the parties, by recording that "both the parties have agreed to abide by the terms of the PPA." In view of the consent of both the parties to abide by the terms of the PPA, the Petitioner cannot rely on the Notice issued, nor on the events that had taken place earlier to the disposal of OP No.37/2009 on 3.3.2011, and cannot make use of the same for fresh termination of the PPA. The Petitioner may terminate the PPA only if

there is a fresh cause of action after the date of disposal of the Petition referred to above.

10) Even assuming that the letter of termination of the PPA itself is considered as a Notice for termination of the PPA, as contemplated under Article 9.3.2. of the PPA, the Petitioner was not entitled to terminate the PPA in view of the reply sent by the 1st Respondent to the Petitioner on 27.6.2012. We have looked into the reply given by the 1st Respondent. In our view, the said reply clearly points out that the defaults pointed out by the Petitioner in the Termination Notice have already been cured, or in the process of getting cured. The facts stated in the 1st Respondent's reply regarding the payments made, etc., are also not disputed by the Petitioner. Therefore, the termination of the PPA effected by the Petitioner, on merits also, is not sustainable.

11) For the foregoing reasons, we hold that the termination of the PPA dated 19.10.2001 and the SA dated 9.6.2005, effected by the Petitioner vide its letter 18.5.2012, is invalid and unenforceable. Consequently, the Petitioner is not entitled to sell electricity to third parties based on the termination effected by it on 18.5.2012.

12) Accordingly, the Petition is liable dismissed and stands dismissed.

Sd/-

Sd/-

Sd/-

(M.R. SREENIVASA MURTHY)
CHAIRMAN

(VISHVANATH HIREMATH)
MEMBER

(K.SRINIVASA RAO)
MEMBER