

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

Dated : 14th August, 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.37/2012

BETWEEN :

Mangalore Electricity Supply Company Limited
Registered Office
Paradigm Plaza,
A.B. Shetty Circle
MANGALORE – 575 001
[Represented by M/s. Justlaw, Advocates]

.. **PETITIONER**

AND

AMR Power Private Limited
Suite No.701-702, Prestige Meredian-2
No.30, M.G. Road
BANGALORE – 560 001
[Represented by M/s. Shridhar Prabhu Associates, Advocates]

.. **RESPONDENT**

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1) This Petition has been filed by the Petitioner praying for the following reliefs:

- (a) To quash the Termination Notice dated 22.7.2011 (ANNEXURE-G);
- (b) To declare the Power Purchase Agreement (PPA) dated 2.8.2006 to be valid and subsisting;

- (c) To direct the Respondent to act in accordance with the PPA dated 2.8.2006 and supply power in terms of the PPA;
- (d) To grant cost of proceedings and pass such other orders as this Commission deems fit in the circumstances of the case.

The Petitioner also has made an Interim Prayer, praying that pending disposal of the Petition, this Commission be pleased to stay the operation of the Termination Notice dated 22.7.2011 (ANNEXURE-G).

2) On Notice, the Respondent appeared through its counsel and filed its Objection Statement dated 13.8.2012 to the Interim Prayer made by the Petitioner in its Petition. In turn, the Petitioner also filed its Rejoinder dated 13.9.2012.

3) After hearing the parties on the Interim Prayer, this Commission passed an Interim Order on 23.8.2012, directing the parties to maintain *status quo* as existing, pending final disposal of the main Petition. The above Interim Order dated 23.8.2012 of the Commission was challenged by the Respondent in Appeal No.223 of 2012 before the Hon'ble Appellate Tribunal for Electricity (ATE). The Hon'ble ATE, by its Order dated 4.1.2013 allowed the Appeal filed by the Respondent, set aside the Interim Order passed by this Commission and also directed this Commission to dispose of the matter as expeditiously as possible and both the Appellants and Respondents in the Appeal were directed to fully

cooperate with this Commission to enable this Commission to pass appropriate orders in accordance with law.

4) Pursuant to the said Order dated 4.1.2013 of the Hon'ble ATE, the present Petition was taken up again by this Commission for hearing.

5) The Respondent has filed its Statement of Objections dated 16.4.2013 on the merits of the main Petition. Further, the Respondent, by Memo dated 4.7.2013, has filed the chronology of events and has also produced certain citations in support of its case and again, by its Memo dated 9.7.2013, has also produced certain documents in support of its case and has requested the Commission to take the said documents and details furnished in the Memo on record. The Petitioner also has filed its Rejoinder dated 25.4.2013.

6) It is submitted by the Petitioner as follows :

(a) The Petitioner had entered into a PPA dated 2.8.2006 (ANNEXURE-A) with the Respondent for purchase of 24 MW of power for a period of 20 years. On 4.1.2008, the Government approved enhancement of the capacity of the Respondent's Plant from 24 MW to 24.75 MW, vide G.O.No. EN 443 NCE 2007. The Respondent filed O.P.No.28/2009 before this Commission seeking for: (a) a declaration that the PPA dated 2.8.2006 entered into by the parties is *void ab initio*; (b) a direction to the State Load Despatch Centre (SLDC) to grant concurrence for Open Access; (c) a direction to allow Wheeling and Banking;

(d) a direction to the 2nd Respondent therein to pay to the Petitioner (Respondent herein) Rs.5/- per KWH for the electricity supplied during the pendency of the Petition, or in the alternative, to revise the tariff fixed in the PPA at Rs.5/- per KWH. This Commission, by an Interim Order dated 27.8.2009 (ANNEXURE-B) directed the Respondents therein to off-take power and pay the Petitioner (Respondent herein) at the rate of Rs.2.80 per KWH, subject to the final orders being passed in the Petition. In accordance with the Commission's Interim Order, the Respondent supplied electricity and the Petitioner made payments. The Commission, by its final Order dated 23.12.2010 (ANNEXURE-C), held that the PPA dated 2.8.2006 was valid and subsisting. The Respondent filed a Review Petition, RP No.2/2011, seeking review of the Commission's Order dated 23.12.2010. This was dismissed by the Commission by its Order dated 22.12.2011 (ANNEXURE-D).

(b) During the pendency of the Review Petition referred to above, the Respondent issued a Default Notice dated 26.5.2011(ANNEXURE-E) to the Petitioner on the ground that: (a) the Petitioner has continuously defaulted in making payments within 15 days of receipt of the invoices; (b) the Petitioner has defaulted in making payment of interest on the late payments; and the Petitioner has failed to open a Letter of Credit in terms of the PPA. The Petitioner, on 4.7.2011 sent a reply (ANNEXURE-F) to the Respondent stating that there was no default as alleged by the Respondent and there was no dishonour of cheques, and that the delay, if at all, for the months of January-March, 2011 cannot be attributed to the Petitioner, as the same was on account of failure on

the part of the Respondent in furnishing the KPTCL's interconnection approval, which was obtained only on 26.3.2011.

(c) Despite the above reply of the Petitioner, the Respondent issued a Notice of Termination of the PPA on 22.7.2011 (ANNEXURE-G), stating that the Petitioner has not cured the defaults pointed out in the Default Notice.

(d) After termination of the PPA dated 2.8.2006, the Respondent filed OP No.48/2011 on 18.10.2011 before this Commission praying for: (a) a declaration that the PPA dated 2.8.2006 entered into between the parties stood terminated and is not subsisting; (b) a direction to the Respondents therein to give Open Access to the Petitioner therein to supply the power generated by it to third parties by entering into a Wheeling and Banking Agreement; (c) a direction to the Respondents therein to pay interest at the rate of 24% per annum on delayed payments; and (d) a direction to the 1st Respondent therein (Petitioner herein) to pay damages at Rs.6.00 per KWH for the energy consumed by the 1st Respondent (Petitioner herein) after the date of receipt of the Notice of Termination of the PPA, or alternately to treat the power supplied by the Petitioner (Respondent herein) as Banked Power and allow the Petitioner to sell power to a third party. The Respondent, however, chose to withdraw the above Petition by filing a Memo of Withdrawal dated 22.3.2012 (ANNEXURE-H) and the said Memo was allowed by the Commission by its Order dated 22.3.2011 (ANNEXRE-J).

7) The Respondent, based on the termination of the PPA dated 2.8.2006, sought for open access and when the same was denied by the Petitioner, it filed a Petition before the Central Electricity Regulatory Commission (CERC). Therefore, the Petitioner is constrained to file the present Petition, challenging the Termination Notice dated 22.7.2011 issued by the Respondent.

8) In support of the challenge to the termination of the PPA dated 2.8.2006, it is submitted by the Petitioner that it had made all the payments diligently in terms of the Interim Order of this Commission in OP No.28/2009, during the pendency of the said Petition. As per the Interim Order of the Commission, no time for payment was specified nor any payment of interest on delayed payments was ordered. Further, it is submitted that since the existence of the PPA itself was questioned by the Respondent, the Petitioner was obliged to make payments to the Respondent only in terms of the Interim Order of the Commission, from September, 2009 till its final disposal on 23.12.2010 and not as per the terms of the PPA and therefore the Respondent cannot terminate the PPA on the ground that payment is not made within 15 (fifteen) days as specified in the PPA dated 2.8.2006 and interest is not paid. Therefore, the termination of the PPA dated 2.8.2006 is not valid and legal.

9) It is also submitted by the Petitioner that as the synchronization of the Respondent's plant took place pursuant to the Interim Order (ANNEXURE-B) of this Commission, the question of any payment prior to the date of Petition could not arise. The Default Notice refers to periods which are prior to the

synchronization of the Respondent's plant and hence the Default Notice is not tenable on the ground also. Further, the Respondent has failed to quantify the sum alleged due to it in both the Default Notice and the Termination Notice and therefore the Notice of Termination is invalid and cannot be sustained.

10) It is further submitted by the Petitioner that the PPA dated 2.8.2006 cannot be terminated by the Respondent, as it has replied that it is taking action to open the Letter of Credit. Only in the Default Notice, the Respondent, by invoking Article 6 of the PPA, has contended that the Letter of Credit had not been opened. Subsequently, the Petitioner opened a Letter of Credit on 10.11.2011, but the Respondent returned the same, by its letter dated 23.11.2011 (ANNEXURE-K), on the ground that the same is not in accordance with the terms of the PPA.

11) Per contra, the Respondent, in its Statement of Objections dated 16.4.2013, has denied the averments made by the Petitioner in the Petition and has contended as follows :

(a) The main prayer of the Petitioner in the present Petition is for quashing the Termination Notice dated 22.7.2011 and two consequential remedies, viz., (a) for a declaration that the PPA is valid and subsisting; and (b) for a direction to the Respondent to act as per the terms of the PPA.

(b) The reliefs sought in the Petition are in the nature of a permanent mandatory injunction and as held by this Commission in its Order dated 2.8.2002 in OP No.18/2002 in the case of *KPTCL -Vs- M/s.Tanir Bavi Power Co.*, this Commission has no powers to grant an injunction. Accordingly, this Commission, while granting the Interim Order dated 23.8.2012 in the present case, did not grant any injunction or stay, which approach has been upheld by the Hon'ble ATE in its Judgment dated 4.1.2013 (in Appeal No.223/2012).

(c) Even if the two prayers made by the Petitioner, viz., quashing of the Termination Notice and Declaration of subsistence of the PPA – are to be allowed, the Petitioner cannot enforce the performance of the PPA, since it is not entitled to the relief of injunction.

(d) Since this Commission cannot grant the relief of injunction, the only relief this Commission may consider is damages for wrongful termination (of the PPA). However, since no such relief is prayed for in the Petition, the very framing of the Petition in the present form is bad in law and is consequently liable to be set aside.

(e) The Petitioner opened the Letter of Credit only on 10.11.2011 and the Petitioner did not challenge the Termination Notice. Only when the Respondent approached the Central Electricity Regulatory Commission (CERC) against non-grant of Open Access, the Petitioner, as an afterthought and as a counter-blast, has filed the present Petition.

(f) The Termination Notice was issued for the sums outstanding from September, 2009 to February, 2011, but in the reply to the Default Notice dated 4.7.2011, the Petitioner has explained about the delays in payments relating to the period January, 2011 to March, 2011, thereby impliedly accepting the delays preceding that period.

(g) In the same reply the Petitioner has admitted about not opening of the Letter of Credit on the ground that the Letter of Credit was to be opened only upon demand and that the Respondent made such a demand for the first time only in the Default Notice. Opening of a Letter of Credit is an obligation cast upon the Petitioner under the PPA and hence no demand is required to be made. Even if the Respondent has made a demand for opening of a Letter of Credit for the first time in its Default Notice, the Petitioner should have opened the Letter of Credit as per the Default Notice and cured the Event of Default. Instead, the Petitioner admittedly opened the Letter of Credit well after the Termination Notice in December, 2011, as per the Petition averments and hence on this ground alone the Petition is liable to be rejected.

(h) The Petitioner has not challenged the Default Notice and the Events of Default mentioned therein. The Termination Notice is a consequential action, which is based on non-redressal of the Events of Default. Since the Petitioner has not disputed the Events of Default and the Default Notice, it is bound to have relinquished its rights to challenge the Termination Notice.

(j) The Termination Notice can be challenged by production of documentary evidence in proof of payment and the opening of Letter of Credit prior to the Termination Notice, but the Petitioner has not done so and hence the Termination Notice issued by the Respondent cannot be quashed. Since the Termination Notice is validly issued, the termination of the PPA is consequently valid. Since the PPA stands terminated, the parties have to enter into a fresh contract or revive the PPA with mutual consent. The terminated PPA cannot be revived by quashing an action of the past.

(k) The Petitioner has not acted as per the PPA and the Petitioner has admitted that only principal amounts were paid and the Letter of Credit was not opened before the date of Termination Notice. The Petitioner kept quiet for more than one year after termination of the PPA and hence well after one year from the date of termination of the PPA, the Petitioner cannot compel the Respondent to act as per the terminated PPA. Hence the prayer of the Petitioner is liable to be rejected.

12) Shri Sriranga, the learned counsel appearing for the Petitioner reiterated the submissions made in the Petition and submitted that the termination of the PPA dated 2.8.2006 by the Respondent is illegal and invalid. According to the learned counsel, the alleged non-payment of the bills was during the period in which OP No.28/2009 filed by the same Petitioner (Respondent herein) for a declaration that the PPA was void and hence the Respondent cannot complain

of breach of the said PPA and terminate the PPA on the ground of non-payments as per the terms of the PPA. Further, according to him, the Respondent cannot terminate the PPA when it had withdrawn OP No.48/2011, wherein it had sought a declaration to the effect that the PPA dated 2.8.2006 was validly terminated. Further, the learned counsel has argued that the Petitioner was making payment as per the Interim Order of the Commission, which did not specify any time limit for payment and payment of interest, and that the default in payment, if any, as per the terms of the PPA was only for the months of January, 2011 and February, 2011, and in the absence of default for a continuous three months, the Respondent cannot terminate the PPA and therefore the termination of the PPA effected by the Respondent is illegal and unsustainable. Consequently, the Respondent be directed to adhere to the PPA and supply electricity.

13) In reply, Shri Ananth Mandagi, the learned senior counsel appearing for the Respondent has submitted that the termination of the PPA dated 2.8.2006 is valid and legal as explained in the Statement of Objections. According to the learned counsel, for not performing the contract, the Petitioner cannot take shelter under the fact of the pendency of OP No.28/2009 or the Interim Order passed by this Commission, as the PPA continues to subsist. As demonstrated by the Respondent in the Default Notice, the Petitioner has failed to perform its part of the contract, and therefore the Respondent was well within its rights in terminating the PPA dated 2.8.2006, and it is valid and legal. Further, the learned senior counsel submitted that when the Default Notice dated 26.5.2011 for curing

of the defaults was issued by the Respondent, the Petitioner had an opportunity to cure all the three defaults pointed out by the Respondent and save the PPA. Instead, in its reply dated 4.7.2011, the Petitioner, has admitted that there was a delay in payment and does not say anything about the interest payable and why the Letter of Credit is not opened till then. Further, the Letter of Credit was opened only after issuance of the Notice of Termination of the PPA. The learned senior counsel, relying upon Order dated 30.4.0213 of the Hon'ble ATE in Appeal No.145/2012 in the case *M/s. Jasper Energy Private Limited -Vs- KPTCL and others*, submitted that the present case is similar and therefore the PPA dated 2.8.2006 has to be held to have been terminated validly.

14) We have considered the rival contentions of the parties and the documents produced in their support.

15) The issues that arise for consideration and decision of this Commission are:

- (1) Whether the termination of the PPA dated 2.8.2006 by the Respondent is illegal and invalid, as contended by the Petitioner ?
- (2) Whether the Petitioner has made out a case for a direction by this Commission to the Respondent to act in accordance with the PPA dated 2.8.2006 and supply power in terms of the PPA, as prayed for?

ISSUE No.1: *Whether the termination of the PPA dated 2.8.2006 by the Respondent is illegal and invalid, as contended by the Petitioner ?*

16) In order to decide the above issue, we have looked into the Default Notice dated 26.5.2011 (ANNEXURE-E) issued by the Respondent to the Petitioner and the reply dated 4.7.2011 (ANNEXURE-F) sent by the Petitioner to the Respondent and the Termination Notice dated 22.7.2011 (ANNEXURE-G) issued by the Respondent to the Petitioner in the light of the terms of the PPA dated 2.8.2006.

17) In the Default Notice dated 26.5.2011, Respondent has alleged that: (a) the Petitioner-MESCOM is not making payments within the specified time, as provided in the PPA, continuously; (b) the Petitioner has defaulted in paying the interest accrued on account of the delayed payments as per Article 6.3 of the PPA; and (c) the Petitioner has failed to open the Letter of Credit as per Article 6.5 of the PPA. Therefore, the Petitioner shall take action to cure the defaults within 30 (thirty) days, failing which it will take further action as per the provisions of the PPA to terminate the PPA. The Petitioner sent a reply to the Respondent on 4.7.2011, but did not deny the delay in the payments. On the contrary, by way of the statement enclosed to the said reply, the Petitioner virtually admitted the delay, but gave the reasons justifying the delay. Further, as regards delay in payment for the months of January, February and March, 2011, the Petitioner stated that it has occurred on account of non-furnishing of KPTCL interconnection approval by the Respondent. Further, the Petitioner did not

deny the liability to pay the interest, nor expressed its willingness to pay the interest as per the terms of the PPA for the delay caused while making the payments. As regards the Letter of Credit, which was required to be opened by the Respondent under Article 6.5 of the PPA, the Petitioner stated that it is taking action to open the Letter of Credit. Considering the allegation of defaults made in the Default Notice by the Respondent and the reply sent by the Petitioner, in our view, the Petitioner's contention that the termination of the PPA dated 2.8.2006 was invalid cannot be accepted and has to be rejected. When the Respondent in the Default Notice dated 26.5.2011 was alleging that the Respondent is continuously defaulting in making payments of monthly bills, is not paying any interest even though payments have been made after much delay and has not opened Letter of Credit as required under the PPA, the Respondent-MESCOM, should have taken action to clear all the pending payments, including interest within the time given for curing the defaults, and express its willingness to make the future payments within the due date. We are of the view that merely making a statement that it will endeavour to make payments still early, cannot be considered as curing of payment defaults alleged in the Notice of Default.

18) The contention of the Petitioner that there was no delay in making payments if the Interim Order dated 27.8.2009 of the Commission is taken into account, cannot be countenanced. As contended by the Respondent, the Interim Order of this Commission did not suspend the PPA and the PPA continued to exist, more so when it was held to be so in the final orders. Similarly, the contention of the Petitioner that the PPA dated 2.8.2006 cannot be held

terminated, when in OP No.28/2009, the Respondent having sought a declaration to the effect that the PPA is validly terminated, it had withdrawn the same, cannot be countenanced, as mere withdrawal of the said Petition will not have the effect of reviving the PPA which is already terminated.

19) The Respondent, drawing our attention to the Order dated 30.4.0213 of the Hon'ble ATE in Appeal No.145/2012 in the case *M/s. Jasper Energy Private Limited –Vs- KPTCL and others*, contended that the present case is fully covered by the said Judgment and the Petitioner cannot contend that during the pendency of OP No.28/2009 the Respondent could not have terminated the PPA dated 2.8.2006, as the very existence of the PPA was in dispute. The Hon'ble ATE has held that if the issues pending in a Petition do not relate to the non-payment, etc., then the pendency of the proceedings will not bar the non-defaulting party, i.e., the generator, from terminating the PPA. If the facts of the present case are seen in the light of the Hon'ble ATE's Order, the termination of the PPA dated 2.8.2006 on the ground of non-payment as per the terms of the PPA during the pendency of the original proceedings cannot be found fault with.

20) The learned senior counsel appearing for the Respondent contended that as per the Contract Law, if there are reciprocal promises to be performed by two parties to the Contract, then the party who wants performance of the Contract should state that it has performed its part of the Contract, and not otherwise. In our view, this contention need not be considered by us, as the PPA in question has been terminated and the Petitioner is only challenging the termination on

the ground that the same is invalid, and has not filed any Petition for the specific enforcement of the Contract.

21) The learned senior counsel for the Respondent submitted that even the cheques issued by the Petitioner were not honoured by the Banks and the same also amounts to default in payment. The Petitioner has asserted that there was no dishonour of cheques issued by it, as the cheques issued by it have been realized and credited to the Respondent's account, and that the statement made on behalf of the Respondent was false. The Petitioner has also produced a letter dated 17.7.2013 issued by the State Bank of Mysore in this regard. In our view, we need not go into this aspect any further, as we have held that the termination of the PPA effected by the Respondent is valid for the reasons stated above.

22) For the aforesaid reasons, we answer Issue No.1 against the Petitioner. We hold that the termination of the PPA dated 2.8.2006 effected by the Respondent on 22.7.2011 is legal and valid, and therefore the termination cannot be quashed.

ISSUE No.2 : *Whether the Petitioner has made out a case for a direction by this Commission to the Respondent to act in accordance with the PPA dated 2.8.2006 and supply power in terms of the PPA, as prayed for?*

23) As we have answered Issue No.1 in the affirmative by holding that there was a breach of the terms of the PPA dated 2.8.2006 by the Petitioner, giving rise

to a cause for termination of the said PPA by the Respondent, and hence the termination of the PPA is valid and in accordance with law, we are of the opinion that the Petitioner is not entitled for a declaration by this Commission to the Respondent to act in accordance with the PPA dated 2.8.2006 and supply power in terms of the PPA. Accordingly, Issue No.2 is also answered in the negative against the Petitioner.

24) For the foregoing reasons, the Petition is liable to be dismissed and it is accordingly dismissed.

Sd/-

(M.R. SREENIVASA MURTHY)
CHAIRMAN

Sd/-

(VISHVANATH HIREMATH)
MEMBER

Sd/-

(K.SRINIVASA RAO)
MEMBER