

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

**Dated : 13<sup>th</sup> November, 2014**

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

**OP No.3/2014**

**BETWEEN:**

NSL Renewable Power Private Limited,  
No.601, Residency Rod, 2<sup>nd</sup> Cross,  
Bangalore – 500 025

*(Represented by M/s. Prabhuling K. Navadgi Associates, Advocates)*

.. **PETITIONER**

**AND**

1) Karnataka Power Transmission Corporation Limited,  
Cauvery Bhavan,  
Bangalore – 560 001.

2) Bangalore Electricity Supply Company Limited,  
3/1-2, Crescent Road,  
Bangalore – 560 001

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

.. **RESPONDENTS**

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**OP No.4/2014**

**BETWEEN:**

NSL Renewable Power Private Limited,  
No.601, Residency Rod, 2<sup>nd</sup> Cross,  
Bangalore – 500 025

*(Represented by M/s. Prabhuling K. Navadgi Associates, Advocates)*

.. **PETITIONER**

**AND**

1) Karnataka Power Transmission Corporation Limited,  
Cauvery Bhavan,  
Bangalore – 560 001.

2) Bangalore Electricity Supply Company Limited,  
3/1-2, Crescent Road,  
Bangalore – 560 001 ..

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

**RESPONDENTS**

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**OP No.5/2014****BETWEEN:**

NSL Renewable Power Private Limited,  
No.601, Residency Rod, 2<sup>nd</sup> Cross,  
Bangalore – 500 025 ..

*(Represented by M/s. Prabhuling K. Navadgi Associates, Advocates)*

**PETITIONER****AND**

1) Karnataka Power Transmission Corporation Limited,  
Cauvery Bhavan,  
Bangalore – 560 001.

2) Bangalore Electricity Supply Company Limited,  
3/1-2, Crescent Road,  
Bangalore – 560 001 ..

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

**RESPONDENTS**

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1) These three Petitions are filed under section 86(1)(f) of the Electricity Act, 2003, In each of these Petitions, the Petitioner has prayed for a declaration that the Power Purchase Agreement (PPA) entered into between the Petitioner and the Respondent-1 has come to an end and

that the petitioner is entitled to sell power to third parties, and for other consequential reliefs.

- 2) This common Order is being rendered by this Commission in these three Petitions, as they involve common issues of disputes between the parties.
- 3) The facts of the case as submitted by the Petitioner in OP No.3/2014 are as follows:

The Petitioner is a generating company with a wind energy plant of 6.75 Mega Watts (MW) capacity at Jagalur Taluk, Davanagere. The Petitioner entered into a PPA with Respondent-1 on 29.10.2001 (ANNEXURE-A). A Supplemental Agreement dated 5.4.07 was executed (ANNEXURE-B), modifying the tariff at Article 5.1 from the base year 2002-03. As per Article 9.1 of the PPA, the term of the PPA is 20 years. Article 5.2 of the PPA provides that after expiry of the period of 10 years, the tariff has to be mutually agreed upon and if the parties do not mutually agree on a tariff, the generating company can opt for sale of power to third parties and such sale shall be permitted by the respondents. The 10-year term of the PPA ended on 24.4.2011 but the petitioner continued to supply to Respondent-2. The Petitioner addressed a letter dated 19.10.2013 to Respondent-2 proposing a tariff of Rs.6/- per unit with 5% escalation from the eleventh year onwards, i.e., from 25.4.2011 (ANNEXURE-C). The Respondent-2 replied, vide letter dated 13.11.2013, stating that the tenth

year tariff is valid upto the term of the Agreement as per the Commission's Order dated 11.12.2009 and requested the Petitioner to supply at the tenth year tariff of Rs.3.9176 per unit (ANNEXURE-D). As the Petitioner was not agreeable to the rate, under letter dated 25.11.2013, it requested the Respondent to permit sale to third party as per Article 5.2 of the PPA (ANNEXURE-E). However, no response was received from the Respondent.

- 4) The facts of the case as submitted by the Petitioner in OP No.4/2014 are as follows:

The Petitioner is a generating company with a wind energy plant of 10.5 MW capacity at Jagalur Taluk, Davanagere. The petitioner entered into a PPA with respondent-1 on 22.3.2002 (ANNEXURE-A). A Supplemental Agreement dated 5.4.2007 was executed (ANNEXURE-B), modifying the tariff from the base year 2002-03. As per Article 9.1 of the PPA, the term of the PPA is 20 years. Article 5.2 of the PPA provides that after the expiry of the period of 10 years, the tariff has to be mutually agreed upon and if the parties do not mutually agree on a tariff, the generating company can opt for sale of power to third parties and such sale shall be permitted by the Respondents. The 10-year term of the PPA ended on 26.3.2013, but the Petitioner continued to supply to Respondent-2. The Petitioner addressed a letter dated 19.10.2013 to the Respondent-2 proposing a tariff of Rs.6/- per unit with 5% escalation from the eleventh year onwards, i.e., from 27.3.2013 (ANNEXURE-C). The Respondent-2 replied, vide letter

dated 13.11.2013, stating that the tenth year tariff is valid upto the term of the Agreement as per the Commission's order dated 11.12.2009, and requested the Petitioner to supply at the tenth year tariff of Rs.3.9176 per unit (ANNEXURE-D). As the Petitioner did not agree to the rate, it requested the Respondent to permit sale to third party as per article 5.2 of the PPA, under letter dated 25.11.2013 (ANNEXURE-E). However, the Respondent-2 rejected the request, vide letter dated 20.12.2013, quoting the decision of the Commission in the case of MPPL-Vs- MESCO, and the Tariff Order dated 11.12.2009, to the effect that the tenth year tariff is applicable for the next 10-year term (ANNEXURE-F).

- 5) The facts of the case as submitted by the Petitioner in OP No.5/2014 are as follows:

The Petitioner is a generating company with a wind energy plant of 1.9 MW capacity at Jagalur Taluk, Davanagere. The Petitioner entered into a PPA with Respondent-1 on 16.1.2004 (ANNEXURE-A). As per Article 8.1 of the PPA, the term of the PPA is 20 years. Article 4.3 of the PPA provides that after the period of 10 years, the tariff has to be mutually agreed upon and if the parties do not mutually agree on a tariff, the generating company can opt for sale of power to third parties and such sale shall be permitted by the Respondents. The 10-year term of the PPA ended on 30.8.2013, but the Petitioner continued to supply to Respondent-2. The petitioner addressed a letter dated 19.10.2013 to

- Respondent-2 proposing a tariff of Rs.6/- per unit with 5% escalation from eleventh year onwards, i.e., from 31.8.2013 (ANNEXURE-B). However, no response was received from the Respondent.
- 6) The grounds urged by the Petitioner in OP Nos.3 and 4/2014 are that the Article 5.2 of the PPA entitles them to sell power to third parties from the eleventh year, if the parties do not arrive at a mutual agreement on the tariff payable after the 10 year term, although the term of the Agreement under Article 9.1 of the PPA is 20 years. The Petitioner has raised another ground that the PPA entered into between the parties before the coming into force of the Electricity Act, 2003, is saved under Section 185 of the said Act and the right acquired under the Article 5.2 of the PPA for sale of power to third parties is also saved. The other ground urged is that the Commission's generic Tariff Order dated 11.12.2009 cannot alter the existing contracts.
- 7) In OP No.5/2014, the grounds urged by the Petitioner in addition to the above, are that, prior to the coming into force of the Electricity Act, 2003, the contracts were governed by the provisions of Section 43-A of the Electricity Supply Act, 1948, and Section 17 of the Karnataka Electricity Reforms, Act, 1999, and the rights of the contracting parties under the above enactments are saved under section 185 of the Electricity Act, 2003. In this case, although the PPA was entered into on 16.1.2004, after

- coming into force of the Electricity Act, 2003, the Act does not provide for fixation of tariff by the Commission unilaterally.
- 8) After hearing the preliminary submissions of the counsel for Petitioner in all the three Petitions, the Commission directed issuance of Notice to the Respondents. Upon service of Notice, the Respondents have put in appearance through their counsel and filed Statements of objections on 18.9.2014.
- 9) In the Statements of objections, the Respondents have submitted that, in the Order dated 19.5.2011 in OP No.2 of 2011 (*MPPL Renewable Energy Private Ltd., Vs. KPTCL*), the Commission had held that a PPA valid for 20 years cannot be terminated after 10 years, if the parties fail to arrive at a mutually agreeable rate. In this order, the Commission had held that the generic Tariff Order dated 11.12.2009, passed under the statutory powers would override the PPAs. The Respondents have also referred to the generic Tariff Order of the Commission 11.12.2009 for Renewable Energy Projects, in which the Commission has held that for the PPAs which have completed the initial period of 10 years, the tenth year tariff would be applicable for the next 10 year term without escalation. The Respondents have submitted that the provisions of Section 62, read with Section 64 of the Electricity Act, 2003 would prevail over Article 5.2 of the PPA and the Petitioner has to supply electricity to the Respondents at the rate determined by the Commission, as held in OP No.2 of 2011.

10) We have heard the counsel for both parties and perused the records in all the three Petitions. The following issues would arise for our consideration:

(1) Whether the PPAs entered into between the parties stands terminated by virtue of the relevant Article in such PPAs, as there was no consensus between the parties regarding the rate of tariff payable for the period commencing from the eleventh year from the date of signing of the PPA or the Commercial Operation Date?

(2) If not, whether the tariff determined in paragraph-13 of the generic Tariff Order dated 11.12.2009 is applicable to the Projects of the Petitioner ?

(3) What Order ?

11) After considering the submissions of the parties and the records, our findings on the above issues are as follows:

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

(a) The dispute in these Petitions revolves around Article 5.2 of the PPA in OP Nos.3 & 4 of 2014 and Article 4.3 of the PPA in OP No.5 of 2014, which read as follows:



*"5.2 From the 11<sup>th</sup> year onwards, from the date of signing of the Agreement, Corporation shall pay to the Company for the energy delivered at the Metering Point at a rate agreed by mutual negotiations. In case the Parties do not arrive at a mutual agreement on the tariff, the Company shall be permitted to sell energy to third parties and enter into a Wheeling and Banking Agreement with Corporation to sell power through the Corporation grid for which it shall pay Wheeling charges to Corporation at the rates applicable from time to time in addition to banking charges at the rates applicable from time to time as approved by the Commission, based on the month end balance of the energy banked"*

*"4.3 From the 11<sup>th</sup> year onwards, from the Commercial operation date, Corporation shall pay to the Company for the energy delivered at the Metering Point at a rate based on operating cost and incentives to be agreed upon by mutual negotiations. In case the Parties do not arrive at a mutual agreement on the tariff, the Company shall be permitted to sell energy to third parties and enter into a Wheeling and Banking Agreement with Corporation to sell power through the Corporation grid for which it shall pay Wheeling charges to Corporation at the rates applicable from time to time in addition to banking charges at the rates applicable from time to time as approved by the Commission, based on the month end balance of the energy banked."*

- (b) A perusal of the above Articles reveals that there is a slight difference between Article 5.2 and Article 4.3. In Article 5.2, the eleventh year for negotiations of tariff is from the date of the PPA, whereas in Article 4.3, the eleventh year is from the Commercial Operation Date (COD). As per Article 4.3, the rate to be paid has to be based on operating cost and incentives to be agreed upon by mutual negotiations, whereas such a stipulation is not found in Article 5.2. These differences would have been relevant, if the question before us was about the reasonableness of the rate agreed between the parties, had they agreed on a tariff. However, it is not so.
- (c) During arguments, the learned counsel for the Petitioner in these three cases tried to distinguish the Order relied upon by the Counsel for respondents in OP No.2/2011, as also the generic Tariff Order dated 11.12.2009, on the ground that the PPAs in OP Nos.3 & 4/2014, were entered into prior to the coming into force of Electricity Act, 2003, and are saved under Section 185 of the Act. Though the PPA in OP No.5/2014 was entered into after the Electricity Act, 2003 came into force, the PPA was entered into before the fixation of generic tariff by the Commission in 2005. Hence, the Commission's subsequent generic Tariff Order is not applicable. The learned counsel also submitted that the Commission cannot determine tariff for the projects unless an application is made by the generating company to that effect under section 64 of the Electricity Act, 2003. The counsel for the Petitioner further submitted that fixing tariff

for PPAs by the generic Tariff Order dated 11.12.2009 amounts to review of the concluded contracts and such generic order cannot be made applicable to PPAs entered into before the coming into force of the Electricity Act, 2003 and approved by the Commission.

- (d) We are not able to accept the above contentions of the Petitioners in these three Petitions. The function of the Commission under Section 86(1)(b) of the Electricity Act, 2003 is as follows:

*“86. Functions of State Commission - (1) The State Commission shall discharge the following functions namely:*

*(a) xxx xxx xxx*

*(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;”*

Under the above provision, the Commission has power to regulate the price of electricity to be procured by the distribution licensees from the generating companies through agreements. Further, under Section 62 of the Electricity Act, 2003, the Commission is entrusted with the function of determination of tariff for supply of electricity by a generating company to a distribution licensee.

- (e) In OP No. 5/2014, the PPA was entered into after the coming into force of the Electricity Act, 2003. Thus, the tariff in such PPA is not subject to any generic Tariff Order that may be issued by the Commission under the Electricity Act, 2003, even when it is subsequent to the date of the PPA. In OP Nos.3 & 4/2014, although the PPAs were entered into before the coming into force of the Electricity Act, 2003, the Act had come into force, when the initial 10 year period had ended. For the events thereafter, the Electricity Act, 2003 applies. Under the Electricity Act, 2003, the exclusive jurisdiction of determining the tariff vests with this Commission.
- (f) We are also unable to accept the contention of the Petitioner in these three Petitions, that after completion of the tenth Year, they are entitled to sell energy to the third parties, if from the eleventh year, the parties to the Agreement do not arrive at a mutual agreement on the tariff and that this right acquired under Article 5.2 / Article 4.3 (as the case may be) of the PPA is saved under the Electricity Act, 2003. A close reading of the relevant clause of the PPA extracted above (Article 5.2 / 4.3 of the PPA) reveals that the right of the petitioner for third party sale is dependent on the important aspect viz., whether the parties to the contract could have arrived at a mutual agreement on the tariff from the eleventh year onwards. Admittedly, Electricity Act, 2003, had come into force by the time the initial 10-year period had ended. After coming into force of the Electricity Act, 2003, the parties are not empowered to fix tariff by

negotiating among themselves. This function of determination of tariff is conferred on the Commission by the Act, under the provisions cited above. Therefore, the parties could not have negotiated the tariff, despite such a covenant in the PPAs. The covenant in the Agreements being inconsistent with the provisions of the Electricity Act, 2003, cannot be held to be saved, as clearly specified in Section 185(2)(a) of the Electricity Act, 2003. When the parties could not have negotiated the tariff amongst themselves, the option of the Petitioner terminating the Agreement on the ground of there being no consensus between the parties regarding the rate of tariff payable for the period after the initial period of ten years and then going for a third party sale of energy, does not arise.

(g) For the above reasons, we answer Issue No.(1) in negative.

13) **Issue No.(2) :**

(a) In the generic Order dated 11.12.2009, the Commission had, in detail, considered the aspect of the tariff applicable to the Projects, which have completed the initial period of 10 years, and had passed an Order as follows:

***“13. Tariff for the existing Plants, which have completed 10 years of PPA period- The Commission, during the course of public hearing, had directed the existing plants, which have***

*completed the initial PPA period of 10 years, to file proposals for fixation of tariff after the completion of 10 years.*

*IWPA had filed a proposal requesting the Commission to fix a tariff of Rs.3.70 per unit in respect of wind power projects. Konark Power projects Ltd. has proposed a tariff of Rs.6.82 per unit. Both IWPA & Konark Power have adopted different parameters as compared to the Commission approved parameters.*

***In view of the fact that, after completion of 10 years debt servicing will have been fully met and the only increase (marginal) would be in respect of O & M expenses, but at the same time the opportunity cost of the power has gone up, the Commission decides to allow the rate equal to the rate at the end of the tenth year, without escalation for the next ten years for all renewable projects. This tariff is also applicable to such PPAs in which ten years period is already completed but no tariff has been determined."***

- (b) The Commission's generic Tariff Order dated 11.12.2009, overrides the Articles of the PPAs, insofar as they relate to the tariff applicable from the eleventh year onwards, for which no specific tariff was agreed to by the parties in the PPA. It is to be noted that this generic Tariff Order of the Commission was passed after considering the proposals received by the Commission and it has attained finality.

(c) Relying on the generic Tariff Order dated 11.12.2009, the Commission had in its Orders dated 19.5.2011 and 21.8.2014 in OP No.2 of 2011 (*MPPL Renewable Energy Pvt. Ltd. -Vs- KPTCL*) and OP No.41 of 2012 (*Jindal Aluminium Ltd. -Vs- BESCO and others*), respectively, held that. after the 10-year period, where the parties have agreed on a rate only for the initial 10 years, if the parties fail to agree to a rate, the PPA would continue for the remaining 10 years, and the tenth year rate will be applicable for the sale of power without escalation. We find no reason to differ from the view taken by us in the above cases.

(d) For the above reasons, we answer Issue No.(2) in affirmative.

14) **Issue No.(3) :**

We, therefore, pass the following:

### **ORDER**

- (1) The Petitions are dismissed.
- (2) In OP Nos.3/2014 and 4/2014, from the eleventh year of the signing of the PPAs, the tariff payable shall be the rate as at the end of the tenth year, for the remaining period of the PPAs.

**OP Nos.3/2014, 4/2014 and 5/2014**

- (3) In OP No.5/2014, from the eleventh year of the Commercial Operation Date, the tariff payable shall be the rate as at the end of the tenth year, for the remaining period of the PPA.

Sd/-

(M.R. SREENIVASA MURTHY)  
CHAIRMAN

Sd/-

(H.D. ARUN KUMAR)  
MEMBER

Sd/-

(D.B. MANIVAL RAJU)  
MEMBER