

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

Dated : 21st August, 2014

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

OP No.41/2012

BETWEEN :

M/s.Jindal Aluminium Ltd.,
Jindalnagar,
Tumkur Road,
BANGALORE – 560 073

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PETITIONER

[Represented by Shri S.V. Bhat, Advocate]

AND:

1) Bangalore Electricity Supply Company Limited,
K.R. Circle,
BANGALORE – 560 001.

2) The General Manager – Electrical,
Power Purchase,
Bangalore Electricity Supply Company Limited,
K.R. Circle,
BANGALORE – 560 001.

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RESPONDENTS

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

- 1) The present Petition is filed on 25.9.2012, praying for the following reliefs :
 - (a) To declare that the Power Purchase Agreement (PPA) dated 24.9.2003 has come to an end by virtue of Article 4.3 of the said PPA;
 - (b) To declare that the Petitioner is entitled to wheel the electricity generated from its Wind Power Plant mentioned in the Petition, and to direct the Respondent to execute the Wheeling and Banking Agreement (W&BA) for transmitting the electricity generated from its Plant to its factory situated in Bangalore or to sell the same to third party(s); and
 - (c) To pay the costs, etc.

- 2) The Petitioner has established a Wind Power Project of 6.6 Mega Watts (MW) capacity at Sy.No.117, Nanda Hosur Village, Chitradurga District, Karnataka State. The said Project was put to commercial operation on 27.9.2002. The Petitioner has entered into the PPA dated 24.9.2003 (ANNEXURE-A) with the Karnataka Power Transmission Corporation Limited (KPTCL), the predecessor-in-title of the first Respondent.

3) The dispute between the parties mainly revolves around Articles 4.3 and 8.1 of the PPA. Article 4 of the PPA deals with the Rates and Charges for electricity supplied. Article 4.1 of the PPA specifies the rate for electricity supplied, if the Project was commissioned beyond 31.8.2003. Article 4.2 specifies the rate for electricity supplied, if the Project was commissioned on or before 31.8.2003. In the present case, the Commercial Operation Date (COD) was on 27.9.2002 and therefore Article 4.2 of the PPA is applicable to the Petitioner's Project. The said Article 4.2 specifies that, for the first ten years from the COD, the charges to be paid for the delivered energy would be at the rate of Rs.3.25 per KWhr, with an escalation at the rate of 2% per annum over the base tariff, as specified in Article 4.1. The base tariff specified in Article 4.1 is at the rate of Rs.3.10 per KWhr. Payment for energy delivered beyond the first ten years is dealt with by Article 4.3 of the PPA, which is as follows :

“4.3 From the 11th 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 based on operating costs and incentives to be agreed upon by mutual negotiation. 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."

Article 8 of the PPA deals with the Term, Termination and Default. The relevant Article 8.1 of the PPA is as follows :

8.1 Term of the Agreement : *This Agreement shall become effective upon the execution and delivery thereof by the parties hereto and unless terminated pursuant to other provisions of the Agreement, shall continue to be in force for such time until the completion of a period of twenty (20) years from the Commercial Operation Date and may be renewed for such further period of ten (10) years and (on) such terms and conditions as may be mutually agreed upon between the parties, ninety (90) days prior to the expiry of the said period of twenty (20) years."*

4) When the tenth year was nearing completion from the date of signing of the PPA, the Petitioner demanded a higher rate of tariff for the electricity supplied than the rate of Rs.3.658 per KWhr which was being received by it during the tenth year. In this regard, the Petitioner wrote letters dated 21.3.2012 (ANNEXURE-B) and 11.4.2012 (ANNEXURE-C) to the Respondent, expressing that the present rate fixed at Rs.3.658 per KWhr was not acceptable to it for future period, as it was not in line with the present market situation, and therefore, the Petitioner would like to terminate the PPA and enter into a W&BA for utilization of the energy generated, at its factory in Bangalore.

5) The Petitioner got issued a Legal Notice dated 6.8.2012 (ANNEXURE-F) second Respondent, alleging that the generic Tariff Order dated 11.12.2009 was not applicable to it and the Petitioner claimed the tariff at the rate of Rs.5.50 per KWhr for the period from 24.9.2012 to 26.9.2013 (the period after completion of ten years from the COD and upto the beginning of the eleventh year from the date of signing of the PPA), and at Rs.5.00 per KWhr for the eleventh year onwards, i.e., from 27.9.2013, with 5% escalation every year, and in default, the Petitioner would initiate appropriate proceedings for seeking execution of the W&BA.

6) The Respondents have contended that, subsequent to coming into force of the Electricity Act, 2003, the exclusive jurisdiction to determine the generation tariff for supply of electricity by the generator to the distribution licensee, lies with the State Electricity Regulatory Commission, and therefore, Article 4.3 of the PPA has no validity and the Petitioner cannot rely on it for seeking any relief. Further, the Respondent contended that the generic Tariff Order dated 11.12.2009 relating to Renewable Sources of Energy passed by this Commission in respect of the existing Plants, which have completed ten years of PPA period, would be applicable to the present case for the purpose of tariff to be paid from the eleventh year onwards to the Petitioner. The Respondents therefore informed the same to the Petitioner, vide its reply dated 28.3.2012 (ANNEXURE-D) and subsequent letters.

7) The Petitioner has filed an application on 20.3.2013 for amendment of its pleadings, requesting for determination, by this Commission, of the tariff payable to it for the supply of electricity from the eleventh year onwards.

8) The Respondents have filed its objections to the main Petition as well as the application for amendment of the pleadings.

9) We have heard the learned counsel for both the parties and also considered the respective pleadings and records. They have reiterated the contentions raised in their respective pleadings.

10) The following Issues would arise for our consideration :

- (1) Whether the PPA dated 24.9.2003 stands terminated by virtue of Article 4.3, 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?
- (2) If not, whether the tariff determined at paragraph-13 of the generic Tariff Order dated 11.12.2009 (relating to the existing Projects which have completed ten years of the PPA period) is applicable to the Project of the Petitioner?

- (3) Whether the application dated 20.3.2013 of the Petitioner for amendment of the pleadings is to be allowed?
- (4) 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) Article 8.1 of the PPA provides that the Agreement shall come into effect from the date of its execution, unless terminated pursuant to other provisions of the Agreement, shall continue to be in force for a period of twenty years from the COD, and may be renewed for another ten years on such terms and conditions as may be mutually agreed upon between the parties.
- (b) Article 4.3 of the PPA provides that from the eleventh year onwards from the date of signing of the PPA, the Corporation (first Respondent) shall pay to the Company (Petitioner) for the energy delivered at a rate based on the operating costs and incentives to be agreed upon by mutual negotiations, and in case the parties do not arrive at a mutual agreement on the tariff, the Company shall be permitted to sell the energy to third parties, etc.

- (c) Admittedly, no consensus was reached between the parties regarding the tariff payable from the eleventh year onwards. Therefore, the Petitioner would become eligible for sale of electricity to third party(s), if Article 4.3 of the PPA is still enforceable in law. Therefore, it should be seen whether Article 4.3 of the PPA is still enforceable or not; and whether the party(s) can mutually negotiate the rate of tariff at the end of the tenth year of the PPA.
- (d) The counsel for the Respondents contended that after coming into force of the Electricity Act, 2003, the exclusive jurisdiction for determining the tariff vests with this Commission. The tenth year of the PPA from the date of its execution concluded on 23.9.2013, i.e., long after coming into force of the Electricity Act, 2003. The learned counsel for the Petitioner could not have denied this settled position of law. As the determination of tariff is within the exclusive jurisdiction of this Commission, there could not have been any occasion for the parties to negotiate tariff for the eleventh year and thereafter. Had the Electricity Act, 2003 not come into force, then the parties could have negotiated the tariff, and if there was no consensus regarding the tariff, the Petitioner would have had the right for sale of electricity to third parties, as provided under Article 4.3 of the PPA. It appears, for this reason alone, the Petitioner has made the application for amendment of pleadings, requesting to determine the tariff for its Wind Power Plant.

- (e) We may also note that Article 4.3 of the PPA refers to a rate from the eleventh year onwards, based on the "operating costs and incentives to be agreed upon by mutual negotiations", and it does not refer to any market rate prevailing at that time. The tariff determined for the existing plants which have completed ten years of the PPA period stated in the Commission's generic Tariff Order dated 11.12.2009 also takes into account the operating costs and reasonable incentives. The mutual negotiations, if any, between the parties for arriving at a tariff from the eleventh year onwards should have taken into consideration only the operating costs and incentives, but not the market rate prevailing at that time. Therefore, for the period from the eleventh year onwards, it is logical to substitute the Commission's generic tariff determined in respect of the existing plants completing ten years of the PPA period, for the rate that could be negotiated.
- (f) For the above reasons, we answer Issue No.(1) in negative.

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

- (a) The operative portion of Paragraph-13 of the generic Tariff Order dated 11.12.2009 issued by this Commission reads thus:

"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 learned counsel for the Petitioner submitted that the operative portion of paragraph-13 of the above-said Order of the Commission is not applicable to the Petitioner's Project and that it applies only to those Projects which have completed ten years period of the PPA as on the date of the Order, but not for the Projects which have not yet completed ten years period as on the date of the said Order. The counsel for the Petitioner further contended that in the present case, the ten year period of the PPA was completed on 23.9.2013, and therefore, the tariff fixed for the existing Plants which have completed ten years of the PPA period under the Commission's Order dated 11.12.2009 is not applicable to the Petitioner's Project.
- (c) On the other hand, the learned counsel for the Respondents contended that the tariff fixed in paragraph-13 of the Commission's Order dated 11.12.2009 for the existing Plants, which have completed ten years of the PPA period, not only applies to those Plants which have completed ten years period of the PPA before the date of the Commission's Order, but

also to those Projects which would complete ten years period of the PPA during the five years review period fixed in the Commission's Order.

- (d) From an analysis of the generic Tariff Order dated 11.12.2009, it could be seen that the said Order determines the tariff not only for the existing Projects, which have completed ten years of the PPA period, but also for the new Projects which would be commissioned on or after 1.1.2010. The tariff so determined in the said Order is subject to review after five years. The tariff determined for the new Projects would apply for a period of ten years from the date of signing of the PPA and the tariff determined for the existing Projects would apply for a period of ten years from the end of the tenth year of the PPA period. As already noted above, the tariff determined in the Commission's Order dated 11.12.2009 would be subject to review after five years. Therefore, this leads to the conclusion that the tariff determined for the existing Projects would apply to all the existing Projects which would complete ten years of the PPA period during the five years review period. The Commission's Order dated 11.12.2009 further stipulates that the tariff so determined for the existing Projects would also be applicable to the existing Projects which have already completed ten years of the PPA period before 11.12.2009, i.e., before the date of the said Order. This can be inferred from the last sentence of paragraph-13 of the Order dated 11.12.2009, which stipulates that, "this tariff is also applicable to such PPAs in which ten years period is already completed, but no tariff has been determined."

(e) In view of the foregoing analysis of the Commission's Order dated 11.12.2009, we are of the view that the tariff determined for the existing Projects is applicable to all the existing Projects, which would complete ten years of the PPA period during the five years review period stipulated in the said Order. This Commission in OP No.02/2011 (*MPPL Renewable Energy Private Limited –Vs- KPTCL and another*), OP No.53/2011 (*Master Power –Vs- KPTCL and another*) and OP No.54/2011 (*Graphite India Limited –Vs- MESCOM and another*), has allowed the tenth year tariff without escalation for the next ten years for the existing Projects, which have completed ten years of the PPA period during the five years review period.

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

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

(a) As Issue No.(2) is held in affirmative, the question of considering the application of the Petitioner for amendment of its pleadings does not arise.

(b) Even otherwise, the said application cannot be allowed in the present proceedings. The application for determination of tariff should contain various particulars with supporting documents, as specified in the relevant

Regulations of the Commission, to enable the Commission to determine the tariff. The scope of such application is quite different from that of the present proceedings before this Commission. In the application for the proposed amendment to the pleadings, the minimum required particulars for determination of tariff are not forthcoming. We therefore hold that the application for amendment of the pleadings filed by the Petitioner is liable to be rejected.

(c) In view of the foregoing, we answer Issue No.(3) in negative.

15) **ISSUE No.(4) :**

We therefore pass the following :

ORDER

- (a) The Petition is dismissed. The Petitioner is not entitled to any of the reliefs claimed in the Petition; and
- (b) From the eleventh year of the signing of the PPA, the tariff payable shall be at 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