

No.N/92/11

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION BANGALORE

Dated : 27th September 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.43/2011

BETWEEN

M/s. M. K. Agrotech Private Limited
No.389, Kaveri Layout
M.B. Road
SRIRANGAPATNA – 571 438
(Represented by M/s. Shridhar Prabhu
Associates, Advocates)

... **Petitioner**

AND

1. Hubli Electricity Supply Company Limited
Nava Nagar, P.B. Road
HUBLI – 580 025
2. Karnataka Power Transmission Corporation Limited
Kaveri Bhavan
BANGALORE - 560 009
(Represented by M/s. Justlaw, Advocates)

... **Respondents**

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1. This Petition is filed by the Petitioner, seeking a declaration that the termination of the Power Purchase Agreement (PPA) dated 21.3.2007, effected by it on 2.8.2007, is valid, and for issuance of a direction to the 2nd Respondent to grant 'in principle' approval for Wheeling and Banking facility to the Petitioner's Project.

2. On Notice, the Respondents have appeared through their Counsel and have filed a detailed Statement of Objections on 26.4.2012.

3. We have considered the respective pleadings and also the oral submissions made during the hearing of the case.

4. It is submitted by the Petitioner that it had signed a Power Purchase Agreement (PPA) dated 21.3.2007 with the 1st Respondent in respect of 0.8 Wind Mill Power Station, located at Majjur Village, Shirhatti Taluk, Gadag District. On 29.6.2011, it issued a Notice to the 1st Respondent, alleging that under the terms of the PPA, it has no obligation to deliver the entire power generated to the Respondent and therefore can opt for captive usage or third party sale during the PPA period. Further, it was alleged in the Notice that the Respondent has not paid a sum of Rs.4,88,294/- towards interest for delayed payments and the same is required to be paid within 30 (thirty) days. It was also alleged that the Letter of Credit, which was required to be operational as per the PPA by the Respondent, has not been opened. Therefore, the Respondent was called upon to cure the defaults pointed out. As the Respondent did not cure the defaults pointed out in the Notice, it has terminated the PPA, vide its letter dated 2.8.2011. Since the Respondent in its reply dated 2.9.2011 has disputed the termination, it has sought for a declaration from this Commission to the effect that the PPA dated 21.3.2007 executed by it with the Respondent stands validly terminated, and consequently to issue a direction to the Respondents to provide Wheeling and Banking arrangement to sell the electricity to third parties.

5. Per contra, the 1st Respondent has submitted that as stated in its reply dated 2.9.2011, the termination of the PPA is invalid, as the Petitioner did not come forward for discussion to resolve the disputes as contemplated in Article 9.3.2 of the PPA and the Petitioner is bound to supply electricity generated to it only.

6. We have heard Sri Shridhar Prabhu, leaned Counsel for the Petitioner and Sri Sriranga, learned Counsel for the Respondents, and have also considered the entire material placed before us, including the written averments in the Petition and the Statement of Objections.

7. In order to find out whether the Petitioner has validly terminated the PPA dated 21.3.2007 or not, we have to look into the Termination Notice issued by the Petitioner to the 1st Respondent on 29.6.2011, which is produced as Annexure-P2. In the said Notice, the Petitioner, though has stated that there are delays in making the payments, has not stated that before issuing the Notice of default, it had called upon the 1st Respondent to make payments on time as per the terms of the PPA, nor took up the matter for discussion, at any time, as contemplated under Article (10) of the PPA. The Notice also does not disclose the details of the payment defaults with reference to specific invoices. Further, from the Notice it is observed that the Petitioner, though has stated that the 1st Respondent has failed to open the Letter of Credit, it has not stated about any demand made by it prior to issuance of Notice of default calling upon the 1st Respondent to open

the Letter of Credit. This leads to the conclusion that the Petitioner, till the date of the Notice, had not raised any issue about the delay in making payments and in the Respondent not opening the Letter of Credit.

8) As per Article 10 of the PPA dated 21.3.2007, all disputes or differences that arise between the parties have to be first tried to be settled through mutual negotiations, and only in case there is no resolution of the disputes, further action can be taken in accordance with law, i.e., to refer the disputes to the Commission under Section 86(1)(f) of the Electricity Act, 2003.

9) Indisputably, the Petitioner has not invoked the remedy provided in Article(10) of the PPA referred to above. Instead, the Petitioner has straightaway proceeded to terminate the PPA by issuing a Notice of Termination following a Default Notice. The Petitioner, who complains that the other party has failed to perform its obligations under the PPA, has also not acted as per Article 10 of the PPA. Therefore, in our view, the termination effected by the Petitioner, without following the procedure available for dispute resolution, cannot be held to be valid.

10. This Commission in its Order dated 7.6.2012 passed in OP No.34/2011, has held that:

“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."

The above view taken by the Commission applies to this case also with equal force. Therefore, the termination of the PPA effected in this case cannot be upheld. Accordingly, the declaration sought by the Petitioner to the effect that the PPA is validly terminated by the 1st Respondent, has to be negated and rejected. Consequently, we have to hold that the Petitioner is bound by the PPA and is not entitled to seek Wheeling and Banking facilities from the 2nd Respondent.

11) For the foregoing reasons, this Petition is liable to be rejected and accordingly it stands rejected.

Sd/-

(M.R. SREENIVASA MURTHY)
CHAIRMAN

Sd/-

(VISHVANATH HIREMATH)
MEMBER

Sd/-

(K.SRINIVASA RAO)
MEMBER