

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

**Dated : 15<sup>th</sup> October, 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.44/2012**

**BETWEEN:**

Bhoruka Power Corporation Limited,  
48, Lavelle Road,  
BANGALORE – 560 001 ..  
*[Represented M/s. Shridhar Prabhu Associates, Advocates]*

**PETITIONER**

**AND**

Chamundeshwari Power Corporation Limited,  
No.927, LJ Avenue,  
New Kantharaj Urs Road,  
Saraswathipuram,  
MYSORE – 570 009 ..  
*[Respondents represented by M/s. Justlaw, Advocates]*

**RESPONDENT**

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1) The Petitioner in this Petition has prayed for determination of tariff specific to its Mini Hydel Power Project for the term of the Power Purchase Agreement (PPA), duly considering the actual Project Cost and the achievement of the actual Plant Load Factor (PLF) and other parameters.

2) The material facts relevant for the disposal of this Petition may be stated as follows :

- (a) The Government of Karnataka , vide Government Order (G.O.) dated 24.5.2001, accorded permission to the Petitioner to install a 5 Mega Watts (MW) capacity small Hydro Project at Manjadka Falls, Manjadka river, Karike Village, near Bhagamandala Town of Madikeri Taluk, Kodagu District (Project), with the conditions that the Petitioner should achieve financial closure within eighteen months and commission the Project within three years from the date of the said Order, apart from stipulating other related conditions. In its subsequent G.O. dated 10.4.2002, the Government accorded approval for enhancement of capacity of the Project from 5 MW to 10 MW. The aforesaid two Government Orders are marked collectively as ANNEXURE – P1 in the Petition.
- (b) The Petitioner could not commence the Project for want of certain clearances, including the Forest clearance, thereby the request of the Petitioner for extension of time was granted thrice, vide (1) G.O. dated 26.6.2004 (ANNEXURE - P13), (2) G.O. dated 6.6.2006 (ANNEXURE – P14) and (3) G.O. dated 24.5.2008 (ANNEXURE – P16), finally extending the time till 30.6.2009. Meanwhile, the Petitioner got prepared a Detailed Project Report (DPR) (ANNEXRE – P5) during May, 2007 and also got the Forest clearance on 25.1.2008 (ANNEXURE – P15).
- (c) The Petitioner entered into a PPA on 22.8.2008 (ANNEXURE – P2) with the Respondent. The tariff agreed under the PPA is, Rs.2.80 per KWhr without

any escalation for the first ten years from the Commercial Operation Date (COD), and the rate to be determined by the Commission for the period from the eleventh year onwards. The total term of the PPA is 20 years. The Project achieved Commercial Operation on 20.10.2009. The generic tariff in respect of the Renewable Sources of Energy, as determined by this Commission, vide Order dated 18.1.2005, has been incorporated in the PPA.

- (d) It is contended by the Petitioner that the execution of the Project was commenced in January, 2007 and the commissioning of the Project happened in October, 2009. Such a delay in completion of the Project was due to the heavy rains during the monsoon season of 2007 and 2008, resulting in stoppage of works, thereby the Project execution period was extended to two and-a-half years as against the normal time of one and-a-half year. The delay in completion of the Project resulted in increase of interest on loans during construction period to Rs.4.16 Crores, as against Rs.2.92 Crores estimated in the DPR.
- (e) It is contended that the cost of cement and steel escalated during the construction period, and more particularly, after the commissioning of the Project in the year 2009, and this resulted in escalation of the cost of the Project to Rs.70 Crores, as against Rs.57.83 Crores estimated in the DPR.

- (f) It is contended that the PLF considered at the time of preparation of the DPR was 42.44%, whereas the actual PLF achieved during the last three years, viz., during 2009-10, 2010-11 and 2011-12, were 13.24%, 19.02% and 20.62%, respectively. Therefore, it is contended that due to increase in the Project cost and reduction in the generation of electricity, the Project has become economically unviable and the Petitioner is facing great hardship and difficulty in repaying the huge debts to financial institutions.
- (g) It is contended that the Petitioner had taken due diligence and availed the services of the best expertise in the field for preparation of the DPR, and due to reasons beyond its control, there was delay in completion of the Project, resulting in the increase of interest on loans during construction, there was sharp increase in the prices of cement and steel, resulting in increase in the Project cost. Further, the low PLF of the Project was resulting in low revenues rendering the Project unviable.
- (h) The Petitioner, relying on the decisions rendered by the Hon'ble Appellate Tribunal for Electricity (ATE) in Appeal No.179/2010, dated 23.4.2012, in the case of *M/s. Patikari Power Limited –Vs- Himachal Pradesh Electricity Regulatory Commission and others*, and in Appeal No.78/2011, dated 27.4.2012, in the case of *Uttar Haryana Bijali Vitaran Nigam Limited –Vs- Haryana Electricity Regulatory Commission and others*, has contended that this Commission has to determine the tariff specific to the Project of

- the Petitioner, considering the relevant facts, like the actual Project Cost, actual PLF, and other parameters.
- 3) Upon Notice, the Respondent appeared through its learned counsel and filed its Statement of Objections. The gist of its contentions is as detailed below:
- (a) The Petitioner has failed to follow the procedure set-out under Section 64 of the Electricity Act, 2003, for determination of tariff for a generating station.
  - (b) Where the parties are bound by a Contract, it would not be open to this Commission to modify the terms of such a Contract. The PPA in question has been approved by this Commission. The tariff stated in the PPA was mutually agreed between the parties, keeping in view the generic Tariff Order dated 18.1.2005 pertaining to Renewable Sources of Energy. The Petitioner has voluntarily entered into the PPA, knowing fully well the tariff determined, and the period of its application mentioned in the said Tariff Order.
  - (c) If an individual generator is permitted to seek revision of the tariff determined under the generic Tariff Order pertaining to the Renewable Sources of Energy, it may lead to a situation wherein every generator would start approaching the Commission seeking similar relief and that would render the generic Tariff Order redundant.

- (d) The Respondent has denied the averments made by the Petitioner regarding: (i) the delay in completion of the Project due to heavy rain during the monsoon seasons of 2007 and 2008; (ii) the increase in the construction cost due to increase in the prices of cement and steel during the construction period; (iii) the enormous increase of the interest on loans during construction due to delay in the execution of the Project for a period of two and-a-half years, as against the normal period of one and-a-half year; and (iv) the very low achievement of the PLF, as against the PLF considered at the time of preparation of the DPR.
- (e) The Petitioner was not diligent in pursuing the Project and the delay, if any, in the completion of the Project was attributable to the Petitioner itself, and any incorrect estimation of the PLF in the DPR should not be a reason for seeking any revision in the tariff.
- (f) The decisions, which are relied upon by the Petitioner, do not support the case of the Petitioner and they are not applicable.
- (g) The Respondent, therefore, has prayed for dismissal of the Petition.
- 4) We have heard the submissions made by the learned counsel for both the parties. They have generally reiterated what they have stated in their respective pleadings.

- 5) The following issues would arise for our consideration :
- (1) Whether the Petitioner has made out any grounds in support of his prayer for seeking re-determination of the tariff already concluded in the PPA, as per ANNEXURE-P2 ?
  - (2) Whether the Petitioner has proved:
    - (a) that it has incurred additional expenditure contended by it towards the construction of the Project, as against the cost estimated in the DPR?
    - (b) that it has incurred additional expenditure contended by it towards the interest on loans during construction of the Project?
    - (c) that the PLF achieved was much lower than the PLF that was estimated in the DPR?
  - (3) What Order?
- 6) After considering the submissions of the learned counsel for both the parties and the material placed on record by them, our findings on the above issues are as follows:

7) **Issues – (1) and (2) :**

- (a) Issues (1) and (2) are interconnected, both in law and on facts. Therefore, we are dealing with both these Issues together.
- (b) The learned counsel for the Petitioner submitted that the enormous increase both in the Project Cost and also the interest on loans during construction period, in addition to the achievement of lower rate of the PLF than estimated in the DPR, has entitled the Petitioner to seek re-determination of the tariff. In this regard, the Petitioner has relied upon the decisions rendered: (1) in the case of *M/s.Patikari Power Ltd. –Vs- Himalchal Pradesh Electricity Regulatory Commission and others*, in Appeal No.179 of 2010 by the Hon'ble ATE on 23.4.2012; and (2) in the case of *Uttar Haryana Bijali Vitaran Nigam Ltd. –Vs- Haryana Electricity Regulatory Commission and others*, in Appeal No.78 of 2011 by the Hon'ble ATE on 27.4.2012.
- (c) The learned counsel for the Respondent submitted that the terms regarding the tariff agreed to in the PPA between the parties cannot be reopened and that the increase in the Project Cost and the increase in the interest on loans during construction, which have been claimed by the Petitioner, are self-serving statements of the Petitioner. The learned counsel has further contended that the achievement of the lower rate of the PLF and the purported increase in the Project Cost and the increase in the interest burden during construction were attributable to Petitioner itself



and they are self-induced, and for that reason, the Petitioner cannot seek re-determination of the tariff. Further, the learned counsel has contended that the decisions relied upon by the Petitioner are not relevant and not applicable under the facts and circumstances of the present case.

(d) We agree with the Respondent's submission that the parties are bound by the terms of the validly concluded contract. Any terms of such contract can be altered as provided in the contract itself or as may be statutorily permissible. The same principle applies even in the case of the PPAs entered into between the parties. This principle is reiterated in the decision reported in **(2011) 11 SCC 34**, in the case of *Transmission Corporation of Andhra Pradesh Limited and another –Vs- Sai Renewable Power Private Limited and others*. In paragraph-63 of the said Judgment, it is held thus : “...The term 'purchase price' indicted in the PPAs, as such, would be a matter within the realm of contract but this is subject to the changes which are contractually and/or even statutorily permissible. ...”

(e) In the present case, Article 5.1 of the PPA (ANNEXURE-P2) provides the rate for the energy supplied at Rs.2.80 per KWhr without any escalation. Article 5.2. of the PPA provides that from the eleventh year onwards from the date of Commercial Operation, the rate shall be as determined by the Commission. Article 9.1.1 of the PPA states that the term of the PPA shall be twenty years from the date of Commercial Operation and it may be continued for another ten years on such terms and conditions as may be

mutually agreed upon between the parties. Therefore, it can be said that there is no provision in the PPA to revise the agreed tariff before ten years from the date of Commercial Operation.

- (f) The determination of the quantum of tariff is subject to the relevant Regulations framed under the Electricity Act, 2003. This Commission has determined tariff in respect of Renewable Sources of Energy by its Order dated 18<sup>th</sup> January, 2005. Under the said Order, for Mini Hydel Projects, the tariff determined was at Rs.2.80 per KWhr without any escalation for the first ten years from the year of Commercial Operation of the Plant. This tariff was also made applicable to the Mini Hydel Projects, for which PPAs had been submitted before the Commission on or after 10.6.2004. The Order further states that the tariff determined in this Order would be reviewed after five years, which shall be applicable to agreements to be entered into after that date between a distribution licensee and the generator.
- (g) This Commission subsequently, by its Order dated 11.12.2009, determined the tariff in respect of Renewable Sources of Energy. Under this Order, the tariff for Mini Hydel Projects was fixed at Rs.3.40 per KWhr without any escalation for the first ten years from the date of signing of the PPA. The Order further states that the tariff determined shall be applicable to all PPAs submitted to the Commission on or after 1.1.2010, for a period of ten years from the date of signing of the PPA between a distribution licensee

and the generator. The Order further states that the tariff determined in this Order would be reviewed after five years, which shall be applicable to the agreements to be entered into after that date.

(h) Both the above-mentioned Tariff Orders have been issued by this Commission under the KERC (Power Procurement from Renewable Sources by Distribution Licensees) Regulations, 2004. The said Orders and the Regulations do not provide for re-determination or modification of the tariff already concluded before the ten years' period stated therein. Therefore, one can say that the modification of the tariff agreed in the PPA, before the ten years period, is not statutorily permissible.

(j) As noted earlier, the learned counsel for the Petitioner has relied upon two decisions to contend that the tariff can be re-determined before the tariff period of ten years stated in the PPA (ANNEXURE-P2). The learned counsel for the Respondent submitted that the said decisions are not applicable in the facts and circumstances of the present case. A careful reading of the said decisions supports the contention of the learned counsel for the Respondent. In the first case, viz., *M/s.Patikari Power Ltd.*, on an appreciation of the facts of that case, it was found that the hydrology/DPR of the project provided by the Respondent No.2 therein, (Government of Himachal Pradesh) to the Petitioner therein (*M/s.Patikari Power Ltd.*) had misled the said Petitioner to estimate a higher rate of PLF during the construction of the Project, but the actual achievement of the

rate of the PLF was found to be much less after commissioning of the project. Therefore, in the said judgment, at the end of paragraph-35, it was held as follows :

*"... Thus if the river discharge is much lower than that envisaged at the planning / tendering stage, it would tantamount to change in the circumstances and the basic parameters on the basis of which the appellant developed the project and which is dependent on nature and are beyond the control of the appellant."*

Therefore, the Hon'ble ATE applied the principles laid down under Section 56 of the Indian Contract Act, 1872, and directed the State Commission concerned to re-determine the tariff, taking into consideration the low discharge in the river as per law.

- (k) In the present case, the Petitioner has contended that achievement of PLF was much lower than the one that was estimated in the DPR. However, there is no allegation by the Petitioner that the Respondent or any of its representatives were responsible for the incorrect estimation of the rate of PLF in the DPR. The DPR was got prepared by the Petitioner by a Consultant chosen by itself. Therefore, the Petitioner cannot claim any relief under Section 56 of the Indian Contract Act, 1872. In *Patikari Power Ltd. case*, the Hon'ble ATE, while referring to the case of *Eacom's Controls (Indi) Ltd. -Vs- Bailey Controls, Co.*, reported in **AIR (1998) Del.365**, has

noticed the legal principle stated therein, viz.: *"that a contracting party cannot be relieved from the performance of his part of the contract, if the frustration of contract is self-generated or the disability is self-induced."*

Therefore, if the performance of the contract becomes onerous or impossible due to the act or omission of the contracting party, the contract is not discharged on the ground of frustration.

- (l) In the present case, under the Government Order dated 24.5.2001, the Government accorded permission to the Petitioner to instal a 5 MW capacity small Hydro Project. This capacity was enhanced to 10 MW, as per Government Order dated 10.4.2002, at the instance of the Petitioner itself. In the recital of the Government Order dated 10.4.2002, it is stated that, "after examining the DPR submitted by the developer, the Karnataka Renewable Energy Development Limited (KREDL), vide letter dated 15.3.2002, has recommended to enhance the capacity from 5 MW to 10 MW. It appears that the Petitioner had got prepared a DPR for obtaining sanction for the enhanced capacity of 10 MW. There is no allegation by the Petitioner that at any point of time, it was misled by any act or omissions on the part of the Respondent.

- (m) In the DPR dated May, 2007 (ANNEXURE-P5), the PLF adopted was 42.44%. As against this, the actual PLF achieved by the Petitioner for the years 2009-10, 2010-11 and 2011-12 were 13.24%, 19.02% and 20.62%, respectively. The Respondent has not denied this fact. In the generic

Tariff Orders dated 18.1.2005 and 11.12.2009, the Commission had taken the PLF for Mini Hydel Projects as 30%. It may therefore be concluded that the actual PLF achieved is less than the PLF adopted in the Commission's generic Tariff Orders referred to above. However, this fact of achievement of lower PLF was not due to any fault on the part of the Respondent, and the Petitioner itself on loans seems to be responsible for this.

- (n) The other ground urged by the Petitioner for establishing the impossibility to perform the contract is that, there was an enormous increase in the Project Cost due to the increase in the price of cement and steel during the construction period, and that due to heavy rain during the monsoon periods of 2007 and 2008, the progress of Project work was hampered. It is also contended that due to the delay in the completion of the Project, the interest on loans during the construction period also went high.
- (p) In the Petition, it is contended that as per the DPR, the cost of the Project was estimated at Rs.60.75 Crores, and as against this, the actual cost incurred was Rs.70.07 Crores, and thereby, there was an increase Rs.9.32 Crores. Further, it is contended that the cost overrun in civil works was Rs.4.11 Crores, mainly due to the increase in the steel price in the year 2008, compared to the price in the year 2007. Further, it is contended that due to the difference in the steel price, Rs.1.53 Crores was the extra cost towards purchase of steel required for the Project. The interest on loans

during construction as per the DPR was Rs.2.92 Crores, but the actual interest incurred during construction period was Rs.7.08 Crores, and thereby the increase in interest during construction period was to be Rs.4.16 Crores.

- (q) In support of the increase in the cost of construction, etc., the Petitioner has produced the Certificate dated 30.6.2009 (ANNEXURE-P10) issued by its Chartered Accountant. In this Certificate, the total expenditure towards the Project Cost is indicated as Rs.67,19,23,450/-. The Petitioner has produced a Comparative Statement of Project Cost, as per DPR –Vs- Actual (ANNEXURE-P24), wherein the total Project Cost is shown as Rs.81.7356 Crores. The Petitioner has also produced another Certificate dated 8.11.2010 of its Chartered Accountants (ANNEXURE-P25), wherein the total project Cost is indicated as Rs.86.4069 Crores (limited to four decimal places). The total Project Cost said to have been incurred by the Petitioner as shown in the above-said documents substantially differs from each other. The difference in the interest during construction is shown as Rs.10.1096 Crores as per ANNEXURE-P24, while in the Petition, the difference in interest during construction is shown as Rs.4.16 Crores. In the same way, under other heads also, the figures shown in the Petition and the figures shown in ANNEXURE-P24 and ANNEXURE-P25 vary substantially. In the Petition, it is contended that the construction period of the Project was between January, 2007 and October, 2009. It is seen that in response to the letter dated 18.3.2008 (ANNEXURE-P22) of the Petitioner for

extension of time to complete the Project, the KREDL, vide its letter dated 17.5.2008 (ANNEXURE-P23) has recommended to the Government of Karnataka, for extension of time for completion of the Project, till the end of June, 2009. In its recommendation, the KREDL claims that it had visited the spot and found that 70% of the Project works had been completed. However, the Petitioner has not given the details of the periods during which the various components of works in respect of the Project had been completed and how increase in the prices of various materials affected the cost of the Project.

- (r) In the Commission's generic Tariff Orders dated 18.1.2005 and 11.12.2009, for Mini Hydel Projects, Rs.3.90 Crores and Rs.4.75 Crores per MW, respectively, have been taken into account towards Project Cost. In the DPR (ANNEXURE-P5), the Project Cost is estimated at Rs.6.075 Crores per MW. In the above generic Tariff Orders, the PLF considered is 30%. However, in the DPR (ANNEXURE-P5), the PLF is shown as 42.44%. As against this, the PLF achieved by the Petitioner on the Project is less than 50% of the estimated PLF mentioned in the DPR of the Petitioner.
- (s) The Petitioner knew very well that it was entitled to the generic tariff of Rs.2.80 per KWhr that was prevailing at the relevant period, for its Project. When there was such a vast variation in the Project Cost and the PLF, as taken into account by the Commission for determination of the generic tariff for the Mini Hydel Projects and as estimated in the DPR



- (ANNEXURE-P5), the Petitioner could have represented the increase in the cost before the Commission / Respondent, either before embarking on the construction or soon after the completion of Project. Instead. The Petitioner has implemented the Project being fully aware of the risk of increased costs, and the attendant business risk. The Petitioner has already set up 4 or 5 Mini Hydel Power Projects in the State of Karnataka before setting up of the present Project, as indicated in the DPR (ANNEXURE-P5). As per the records available in this Commission, the Petitioner has eleven other Mini Hydel Projects, apart from the present Project. It has also set up Mini Hydel Power Projects in other parts of the country. The Petitioner therefore had sufficient experience in constructing Mini Hydel Projects, to assess the costs and viability of the Project.
- (t) The tariff determined in the generic Tariff Order by this Commission is in the nature of a standing offer for anyone to come forward to set up the Projects in the State and to offer the energy generated to any distribution licensee at that rate of tariff. Even the distribution licensees are not obliged to purchase energy from a generator at the generic tariff determined by this Commission. The distribution licensees have the option to purchase, or not, the said energy. Therefore, once the Power Purchase Agreement is entered into between the generator and the distribution licensee, the terms of the PPA are binding on both the parties.

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- (u) For the foregoing reasons, we are of the view that the decision rendered in the case of *M/s. Patikari Power Ltd.*, is not applicable to the facts of the present case.
- (v) The decision in the other case, viz., *Uttar Haryana Bijili Vitaran Nigam Ltd.*, which is relied upon by the Petitioner, also does not apply to the facts of the present case. In the said case, the Tariff Regulations, 2008, framed by the concerned State Commission specifically provided for determination of tariff based on the actual cost of the completed Project, in the case of Mini Hydel Projects exceeding 5 MW capacity. Therefore, in the said case, the Hon'ble ATE has held that, the Regulations would override the terms of the PPA and the Commission could re-determine the tariff, taking into consideration the actual cost of the completed Project.
- (w) We, therefore, answer Issue Nos.(1), 2(a) and 2(b) in negative and Issue No.2(c) in affirmative.

8) **Issue – (3) :**

For the foregoing reasons, we pass the following :

**ORDER**

The Petition is dismissed. The Petitioner is not entitled for any of the reliefs sought in the Petition.

Sd/-	Sd/-	Sd/-
(M.R. SREENIVASA MURTHY)	(H.D. ARUN KUMAR)	(D.B. MANIVAL RAJU)
CHAIRMAN	MEMBER	MEMBER