

No.N/87/12

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

Dated : 18th April, 2013

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| 1. Sri M.R. Sreenivasa Murthy | Chairman |
| 2. Sri Vishvanath Hiremath | Member |
| 3. Sri K. Srinivasa Rao | Member (Will pronounce
Separate Order) |

OP No.45/2012

BETWEEN :

Sri Maruthi Power Gen (India) Private Limited
No.22/4, Race Course Road
Gandhinagar
BANGALORE – 560 009
[Represented by Shri V. Krishna Murthy, Advocate]

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Petitioner

AND

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

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Respondent

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1) In the above Petition, the Petitioner has prayed for a direction to the Respondent to pay a sum of Rs.60,52,796/- for the excess energy supplied to the Respondent during the period from August, 2004 to October, 2011, along with interest at 18% per annum on the above-said amount.

2) Upon Notice, the Respondent has appeared through its Counsel and filed its Objections on 13.12.2012.

3) The case of the Petitioner, in brief, is as follows :

(a) The Petitioner has set-up a Mini Hydro-Electric Power Generating Station (Mini Hydel Plant) of 1.5 Mega Watts (MW) capacity at Gorur Village, Hemavathi Right Bank Canal, which is duly approved by the Government of Karnataka, vide its Order dated 20.7.2000 (Annexure-A). It has also entered into a Power Purchase Agreement (PPA) dated 28.2.2004 (Annexure-C) with the Karnataka Power Transmission Corporation Limited (KPTCL) for sale of energy generated from its above Mini Hydel Plant. Subsequently, the Government of Karnataka, vide its Order dated 18.6.2004 (Annexure-D), accorded approval for enhancement of the capacity of the Petitioner's Plant from 1.5 MW to 3.00 MW. Later, the PPA was assigned in favour of the Respondent-Mangalore Electricity Supply Company Limited (MESCOM) and the Petitioner also entered into a Supplemental Agreement dated 26.11.2004 (Annexure-D) with KPTCL for the enhanced capacity of 3.00 MW. As requested by the Respondent, the Petitioner entered into another Supplemental Agreement dated 16.3.2010 with the Respondent for the enhanced capacity of 3.00 MW and submitted the same for the approval of this Commission. However, the Commission, based on the Affidavit filed by the Respondent-MESCOM that the Petitioner had not added to the original capacity of the unit which was more than 1.5 MW from the beginning, vide its Order dated 10.5.2012, did not approve the Supplemental Agreement dated 16.3.2010 (Annexure-K) entered into by the Petitioner with the Respondent. The contracted capacity of the plant for supply to MESCOM therefore stands at 1.5 MW only, eventhough admittedly the rated capacity of

the unit was more than 1.5 MW, i.e., 1.75 MW + 20% overloading. The Petitioner has generated and supplied power over and above the quantum that could be generated with a plant of 1.5 MW capacity during the period from August, 2004 to October, 2011.

(b) It is submitted by the Petitioner that the KPTCL and the Respondent, after obtaining a Bank Guarantee, have made part –payment on an ad-hoc basis at Rs.2.80 per Unit, as against the PPA rate of Rs.2.90 per Unit, energy delivered and that the Respondent is liable to pay to it a total sum of Rs.60,52,796/-, along with interest at 18%, for the excess energy supplied beyond 1.5 MW for the period from August, 2004 to October, 2011. The Petitioner has relied upon the Order dated 14.5.2010 passed by this Commission in OP No.1/2010 in the case of *Pioneer Genco Ltd. –Vs- BESCO*, in support of its case,

4) Per contra, the Respondent, in its Objections, has stated that the PPA entered into by the Petitioner with KPTCL was for 1.5 MW capacity only and since this Commission did not approve the Supplemental PPA, the PPA is valid only for 1.5 MW capacity. It is contended that based on the Bank Guarantee furnished by the Petitioner, the Respondent made payment of Rs.80,57,560/- to the Petitioner, on an ad-hoc basis at the rate of Rs.2.80 per Unit, for the energy supplied by the Petitioner outside the purview of the valid and binding PPA and that the Petitioner is liable to refund the said amount to the Respondent, as it was payment made by the Respondent in accordance with the Supplemental

Agreement, which is not binding on the parties in view of the Order of this Commission rejecting the Supplemental Agreement.

5) We have considered the averments made in the Petition and also the Statement of Objections, and the documents placed on record in support of the case, and also heard the oral submissions made by the Counsel for the parties.

6) Shri. V. Krishna Murthy, the learned Counsel for the Petitioner appearing for the Petitioner, submitted that the case of the Petitioner is covered by the Order of this Commission in OP No.1/2010, dated 14.5.2010 and that the Respondent has received the energy supplied by it and sold the same, and hence the Respondent is liable to pay the Petitioner for the energy delivered.

7) Per contra, the learned Counsel appearing for the Respondent submitted that the PPA is for only 1.5 MW and therefore the additional off-take of energy is not approve, eventhough the same has been received and utilized by the Respondent.

8) It is an undisputed fact that the PPA was signed by the Petitioner with KPTCL on 28.2.2004 for 1.5 MW capacity, which was later assigned to the Respondent. It is also undisputed that the Petitioner has generated and supplied excess electricity to the Respondent and the Respondent has paid the Petitioner only at the ad-hoc rate of Rs.2.80 per Unit, on the ground that the PPA signed by the parties does not cover the excess energy generated by the Petitioner, and

hence there is no obligation on the part of the Respondent to pay for the same. However, the parties signed a Supplemental PPA for 3 MW, but this Commission did not approve the same as there was no revised capacity added.

9) The issue that arises for consideration and decision is, "Whether the Petitioner is entitled to be paid for the additional energy generated and supplied to the Respondent at the PPA rates, eventhough the Plant capacity remains at 1.5 MW only?"

10) We have looked into the PPA signed between the parties on 28.2.2004 in order to find out whether the Petitioner is entitled to claim charges for the additional energy generated and supplied to the Respondent.

11) Article 2.2(ii) of the PPA signed between the parties states as follows :

"to off-take all the Electricity made available by the Company at the Delivery Point subject to system constraints and Force Majeure conditions."

Further, Article 3.1 of the PPA states as under :

"Monthly Energy Charges: Corporation shall for the Delivered Energy pay, for the first 10 years from the Commercial Operation Date, to the Company every month during the period commencing from the Commercial Operation Date at the rate of Rs.2.90 (Rupees Two and Ninety Paise only) per Kilowatt-hour ('the base tariff') for energy delivered to the Corporation at the

Metering Point with an escalation at the rate of 2% per annum over 'the base tariff' every year. This shall mean that the annual escalation will be at the rate of Rs.0.058 per Kwhr."

12) This Commission, vide its Order dated 14.5.2010 in OP No.1/2010, which is produced by the Petitioner as Annexure-M to the Petition, wherein the facts were similar, relying on its earlier Order dated 10.7.2008 passed in OP No.12/2007 – *SCM Sugars – Vs- KPTCL and another*, has held that the Petitioner was entitled to payment for all the energy delivered, at the same rates as specified in the PPA. Further, the Appeal filed before the Hon'ble ATE against the Order passed in OP No.12/2007 also came to be rejected.

13) In view of Articles 2.2(ii) and 3.1 of the PPA and the view already taken by this Commission in the case referred to above, we hold that the Petitioner is entitled to be paid for the additional energy also at the PPA rates. The fact that the contracted capacity of the Plant remains at 1.5 MW, in our view, should not materially alter the position, as the PPA does not limit the generation. The PPA only mentions about what the Project is. Further, the Petitioner's plant is a mini-hydel generating plant and the generation will essentially depend upon the availability of water which varies from month-to-month and year-to-year. This Commission under Section 86(1)(e) of the Electricity Act, 2003, has a duty to encourage generation from renewable sources of energy, mini-hydel power generation being one of them. Therefore, we are of the view that any additional generation shall be welcome, as it adds to the availability of energy to the State utility.

14) The Respondent has also not made out any case that the excess generation and supply of power by the Petitioner has in any way adversely affected its operations. However, the Counsel for the Respondent submitted that since the additional energy supplied by the Petitioner is over and above the capacity of the Plant, this Commission may consider ordering a lower tariff than the one fixed for the generator of 1.5 MW capacity. In our view, this contention cannot be accepted, as the generic tariff fixed by this Commission for mini-hydel generators does not take into account the capacity of individual Plants and all the generators get the same tariff, regardless of the installed capacity. Further, the generic tariff fixed by this Commission is a single part tariff based on the Units generated. When the power plant capacity of the Petitioner remains the same but the quantum of energy available becomes more because of the designed capacity of the unit, it is advantageous to the Respondent itself. Therefore, for any additional generation of power, the Respondent really should not have any objection in paying for the same.

15) Even assuming that there is no Contract for supply of additional electricity generated by the Petitioner, under the provisions of Section 72 the Contract Act, a person who uses goods (electricity in the present case), which are not intended to be given gratuitously, shall have to return the goods received or shall have to pay for the same. Since, in the instant case, admittedly additional electricity generated and supplied by the Petitioner has been used by the

Respondent, the Respondent is bound to pay the Petitioner for the same at the rate provided in the PPA.

16) Considering the facts and circumstances of the case and the energy generated and supplied by the Petitioner to the Respondent, we are of the view that the Petitioner is entitled to be paid at the PPA rates for the additional energy generated and supplied at the PPA rates.

17) Consequently, we allow this Petition and direct the Respondent to pay the Petitioner for the energy generated and supplied by it at the PPA rates during the subsistence of the PPA.

Sd/-

(M.R. SREENIVASA MURTHY)
CHAIRMAN

Sd/-

(VISHVANATH HIREMATH)
MEMBER

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1) I am generally in agreement with the facts and details of the submissions made by the Petitioner as well as the Respondent, as detailed in the Order of my colleague-Members. However, I am not in agreement with the conclusion regarding payment to the generator for the excess energy supplied, for the reasons outlined hereunder.

2) A perusal of the facts of the case reveals that though the Petitioner entered into a PPA dated 28.2.2004 with KPTCL, the plant of the Petitioner was commissioned as early as 8.1.2003 and the Synchronization Certificate for the same has been issued by KPTCL, vide No.EEE/RT/MYS/F-325/3771-81, dated 4.2.2003. The Synchronization Certificate indicated the details of the generator

as 1944 kVA / 1750 KW. Whereas, the Commissioning approval granted by the Chief Electrical Inspector to Government of Karnataka, vide No.CEIG/D3/T3/QRS17-2.1/02-03, dated 21.1.2003 details the generator as of Jyothi Make with 1750 KW (15% overload).

3) While on this, vide communication No.S/03/0/4417, dated 23.5.2008 from the Secretary of this Commission to the Managing Director of MESCOM (Respondent), it has been stated that though the capacity of the Project as indicated in the PPA is observed to be 1 X 1.5 MW, in the copy of letter No.SPPCC/A15/504/2007-08/3574-75, dated 5.7.2007, enclosed along with MESCOM's letter No.18272, dated 5.12.2007, the firm (Petitioner herein) has been reported to be contending that the capacity that was commissioned on 8.1.2003 was of 3.00 MW. At that time itself, the Secretary of this Commission had questioned that it was not clear as to how the firm could contend that the capacity commissioned on 8.1.2003 was 3.00 MW and advised MESCOM to furnish copies of the Commissioning Report as well as approval of CEIG.

4) It is further to note that a draft initialed Supplementary PPA was produced to this Commission by the parties for approval of 3.00 MW installed capacity. This matter was heard by the Commission. During the hearings, the Petitioner had also pleaded that the installed capacity of the machine synchronized on 8.1.2003 was of 3.00 MW capacity. However, no documentary evidence for the same was made available to this Commission. After considering the submissions, the Commission passed an Order dated 4.5.2012, the operative portion of the which is reproduced hereunder:

“(8) On consideration of the documentary evidence placed before the Commission and from the Affidavit filed on behalf of MESCOM on 24.1.2012 it is clear that the capacity of the Plant continues to be only 1.5 MW, and not 3 MW. Therefore, the Commission does not approve the Supplemental Agreement dated 16.3.2010.”

5) From the above and from the copy of the approved Detailed Project Report (DPR) furnished by the Petitioner, it is seen that the DPR had provided for the installation of a generating machine of capacity of 1.5 MW with 20% continuous overload. On the contrary, from the Synchronization Certificate of KPTCL and the Commissioning Approval of CEIG, it is observed that a generating machine of capacity 1.75 MW with 15% continuous overload has been installed. In addition, a communication from M/s.Jyothi Limited, Vadodara (supplier of the generator equipment for the Project), bearing No.KS:300389:2002, dated 27.6.2002, about seven months prior to the synchronization of the generating machine on 8.1.2003, addressed to Sri Maruthi Power Gen (India) Pvt.Ltd., Gandhinagar, Bangalore (enclosed at Page-53 of the Petition), indicates in the subject as the 'Despatch of Material for 1 X 2.35 MW for Hemavathy Project' and includes Rotating Assembly, Generator and Control and Relay Panels. These details contradict with each other and the information on the actual installed capacity of the generating machine has been left to anybody's guess. These are irregularities not noticed by the concerned and the generator has been continuously generating using this machine for years and receiving payments for the energy supplied. Further, for reasons known to itself, the generator (Petitioner) has been consistent in contending that the capacity installed on

8.1.2003 was only 3.00 MW. The monthly energy generation figures furnished by the Petitioner indicate that the capacity of the machine installed may be of higher value even than that of 1.75 MW, recognized both by KPTCL and CEIG in their Certificates.

6) Although the energy generated and supplied to the Grid has not been disputed, and has been used, by the Respondents, the same cannot be the reason for one to agree to award payment for the entire energy that has been injected into the Grid for the reason that the Petitioner has not come before the Commission with proper and correct facts for consideration.

7) In view of the above, and keeping in view the Order of this Commission dated 4.5.2012 clearly bringing out that the capacity of the plant continues to be only 1.5 MW, I am of the considered opinion that the payment to the Petitioner in any month shall stand restricted only to the energy that can be generated by a generating machine of 1.5 MW capacity with 20% continuous overload during the month. In a 30-day month and 31-day month, the energy output of the generating machine of 1.5 MW capacity with 20% continuous overload works out to 12.96 Lakh Units (KWH) and 13.392 Lakh Units (KWH), respectively. In a 28-day month and 29-day month, the same works out to 12.096 Lakh Units (KWH) and 12.528 Lakh Units (KWH), respectively.

8) Accordingly, the Petition is allowed in part, in the above terms.

Sd/-
(K.SRINIVASA RAO)
MEMBER