

**Nos. N/5/12 and N/6/12**

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

**Dated 13<sup>th</sup> December, 2012**

- |                               |          |
|-------------------------------|----------|
| 1. Sri M.R. Sreenivasa Murthy | Chairman |
| 2. Sri Vishvanath Hiremath    | Member   |
| 3. Sri K. Srinivasa Rao       | Member   |

**OP No.5/2012**

**BETWEEN**

Shree Doodhganga Krishna Sahakari  
Sakkare Karkhane Niyamith  
CHIKODI – 591 247 ..  
[Represented by Shri Prabhuling K. Navadgi, Advocate]

**Petitioner**

**AND**

- 1) Hubli Electricity Supply Company Limited  
P.B. Road, Navanagar  
HUBLI – 580 029
- 2) The Chief Engineer (Electricity)  
State Load Despatch Centre  
Karnataka Power Transmission Corporation Limited  
BANGALORE-560 009 ..  
[Represented by M/s. Justlaw, Advocates]

**Respondents**

**RP No.1/2012**

**BETWEEN**

Shree Doodhganga Krishna Sahakari  
Sakkare Karkhane Niyamith  
CHIKODI – 591 247 ..  
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**Respondents**

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## **ORDER**

**PER SHRI M.R. SREENIVASA MURTHY, CHAIRMAN, KERC AND  
SHRI VISHVANATH HIREMATH, MEMBER, KERC :**

- 1) The Petitioner, Shree Doodhganga Krishna Sahakari Sakkare Karkhane Niyamith, has filed these two Petitions, viz., OP No.5/2012 and RP No.1/2012.
- 2) In OP No.5/2012, the Petitioner has prayed for the following:
  - (a) Declaration that the action of Respondent No.2 in denying Open Access, vide Endorsement dated 2.11.2011 (Annexure-F) is illegal and to set aside the same;
  - (b) Direction to Respondent No.2 to grant Open Access to the Petitioner for export of the power generated by it;
  - (c) Grant of such other and further relief as deemed fit by this Commission in the facts and circumstances of the case.
- 3) In RP No.1/2012, the Petitioner has sought review of the Order dated 8.9.2011 passed by this Commission in OP No.12/2011.

4) On Notice, the Respondents have put in appearance in both the Petitions and have filed Statement of Objections in OP No.5/2012 and Preliminary objections in RP No.1/2012. As both the Petitions are interconnected, we have heard them, together.

5) The case of the Petitioner is that it had entered into a Power Purchase Agreement (PPA) with Respondent No.2 – Karnataka Power Transmission Corporation Limited (KPTCL) on 13.6.2001 (Annexure-A) for supply of exportable energy from its Generating Unit situated at Nandi Village, Chikodi Taluk, and the said PPA thereafter was assigned to Respondent No.1 – Hubli Electricity Supply Company Limited (HESCOM). The Petitioner issued a Default Notice to the 1<sup>st</sup> Respondent on 8.3.2010 (Annexure-C) as per Article 9.3.2 of the PPA, pointing out the defaults committed by the 1<sup>st</sup> Respondent and informing the 1<sup>st</sup> Respondent that if the said defaults were not cured within 30 days from the date of Notice, the PPA would stand terminated. As Respondent No.1 did not cure the defaults mentioned in the Default Notice, the Petitioner issued Termination Notice to the 1<sup>st</sup> Respondent on 13.5.2010 (Annexure-D), terminating the PPA.

6) It is submitted by the Petitioner that though it was entitled for grant of Open Access for sale of electricity to third parties, in view of the Government Order issued by Government of Karnataka in exercise of the powers conferred under Section 11 of the Electricity Act, the Petitioner continued to pump electricity generated by it to the State Grid. It is further submitted that, after the lapse of the period mentioned in the Government Order, when the Petitioner

applied for 'NOC' for Open Access, Respondent No.2 arbitrarily denied grant of Open Access to it.

7) It is further submitted that in view of the denial by Respondent No.2 to grant Open Access to it, the Petitioner approached this Commission on more than one occasion and a series of Orders were passed by the Commission, and in the last Order, the Commission directed Respondent No.1 to open a Letter of Credit, and though the Letter of Credit was opened by Respondent No.1, it is not in accordance with the PPA and it could not have revived the PPA, which according to the Petitioner, stood terminated.

8) It is further submitted that the Petitioner applied for 'NOC' for Open Access on 21.10.2011 in order to sell electricity to third parties. This Application was not considered by Respondent No.2 – SLDC, and Respondent No.2 issued an Endorsement dated 2.11.2011 (Annexure-F) to the Petitioner, stating that in view of the Order date 8.9.2011 of this Commission passed in OP No.12/2011, the Application is not considered.

9) In the Review Petition filed, the Petitioner has submitted that it could not earlier bring to the notice of the Commission the fact that the Power Purchase Agreement (PPA) dated 13.6.2001 (Annexure-A) has already been terminated by it on 13.5.2010 (Annexure-D). Because of not bringing the fact of termination of the PPA to the notice of the Commission, this Commission disposed of OP No.12/2011, without granting the relief prayed for, on the ground that the

Respondents have made payments and have also opened the Letter of Credit as per the terms of the PPA. Considering the termination of the PPA on 13.5.2010 (Annexure-D) by the Petitioner, this Commission needs to review the Order passed in OP 12/2011 on 8.9.2011 and allow Open Access by setting aside the Endorsement issued by the 2<sup>nd</sup> Respondent - SLDC on 2.11.2011 (Annexure-F).

10) The Respondents in RP No.1/2012 have raised Preliminary Objections against the review of the Order dated 8.9.2011 sought by the Petitioner. It is contended by the Respondents that the Review Petition filed by the Petitioner is barred by time, as the Order sought to be reviewed was served on the Petitioner on 20.9.2011, but the Review Petition has been filed in January, 2012, i.e., after a lapse of three months. Further, it is contended by the Respondents that it is settled law that a party can seek review of an Order only on discovery of a new and important matter or evidence, which after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the Decree was passed or Order made. The other instances are when the Decree made suffers from a mistake or error apparent on the face of the record. It is submitted that in the case on hand, none of these elements are pleaded or exist and therefore the Review Petition is liable to be rejected.

11) It is further submitted by the Respondents that in OP No.12/2011, the Petitioner had not pleaded the termination of the PPA, nor referred to it, and no explanation is provided for not bringing the termination of the PPA to the notice of this Commission. It is submitted that having obtained the benefit of the Order

passed by the Commission, the Petitioner cannot now plead for review of the Order.

12) In OP No.5/2012, the Respondents have contended that the Petition is barred by the principle of *Res judicata*, as in several earlier proceedings filed by the very same Petitioner, the Petitioner has failed in its prayer for Open Access. It is further contended by the Respondents that having received payments in terms of the PPA by initiating proceedings before this Commission under section 142 of the Electricity Act, 2003, the present Petition cannot be maintained. It is also contended that even if it is considered for the sake of argument that there was a valid termination of the PPA, the parties never acted on the said termination and this constitutes a waiver in terms of Article 10.4 of the PPA. Therefore, the Petitioner cannot rely upon the termination of the PPA and seek Open Access.

13) We have heard the oral submissions made by the Counsel for both the parties and also considered the averments made in the Petition, Statement of Objections in OP No.5/2012 , Preliminary Objections in RP No.1/2012 and also the documents submitted by the parties in support of their case.

14) The Issues that arise for consideration and decision are :

- (1) Whether the Endorsement dated 2.11.2011(Annexure-F), issued by Respondent No.2 denying Open Access, is valid and sustainable?

- (2) Whether the termination of the PPA made by the Petitioner on 13.5.2010 (Annexure-D) is in accordance with law?
- (3) Whether the initiation of proceedings for grant of Open Access, non-payment, etc., despite termination of the PPA, will have the effect of nullifying act of the termination of the PPA, as contended by the Respondents?

**ISSUE No.1 :**

15) The fact that the Petitioner had a PPA with Respondent No.1 and the Petitioner is supplying electricity in terms of the said PPA is not in dispute. We have seen the Endorsement dated 2.11.2011(Annexure-F) issued by the 2<sup>nd</sup> Respondent, which is produced as Annexure-F along with the Petition. In the said Endorsement, it is stated by the 2<sup>nd</sup> Respondent that the application of the Petitioner for Open Access for the month of November, 2011, is not considered as per the directives issued by the KERC in OP No.12/2011 dated 8.9.2011.

16) According to the Petitioner, this Endorsement dated 2.11.2011 (Annexure-F) is illegal, as this Commission in OP No.12/2011 did not issue any direction to the 2<sup>nd</sup> Respondent not to grant Open Access, nor has this Commission considered whether the PPA between the parties continues to exist or not. It is submitted by the Petitioner that the PPA between the parties had been terminated by the Petitioner on 13.5.2010 (Annexure-D), but it could not bring the said fact to the notice of this Commission, by inadvertence, when this Commission passed its final Order on 8.9.2011. It is further submitted that considering the fact of termination

of the PPA by the Petitioner, independently of the Order dated 8.9.2011 of this Commission, the Petitioner is entitled to seek Open Access and the Respondent cannot deny the same.

17) It is the case of the Petitioner that the Endorsement dated 2.11.2011 (Annexure-F), issued by the 2<sup>nd</sup> Respondent pursuant to the Order dated 8.9.2011 passed by this Commission in OP No.12/2011, does not take into consideration the termination of the PPA. If the termination of the PPA effected by the Petitioner on 13.5.2010 (Annexure-D) is taken into account, the Order of this Commission, on which the 2<sup>nd</sup> Respondent relies in the said Endorsement, would not have been the same. Therefore, we have to conclude that the basis for the said Endorsement gets completely altered due to the fact of the termination of the PPA earlier to the said Endorsement.

18) In order to decide the validity of the Endorsement dated 2.11.2011 (Annexure-F) issued by the 2<sup>nd</sup> Respondent, it is necessary to examine the said Endorsement, which is extracted below :

*“Adverting to the above, your STOA application for sale of power to an extent of 14.2 MW for the month of November 2011 is not considered as per the directives issued by KERC in respect of OP 12/2011 issued on 8<sup>th</sup> September 2011.*

*This is for your kind information.”*



From the above Endorsement, it is observed that the STOA application of the Petitioner has not been considered only on the ground that this Commission on 8.9.2011 in OP No.12/2011 had issued a direction.

19) We have looked into the Order passed by this Commission on 8.9.2011 in OP No.12/2011. In the said Order, this Commission has not issued any direction to the 2<sup>nd</sup> Respondent-SLDC not to grant the Open Access. What has been ordered is :

*“5. Considering the fact that payment which was due has been made and a letter of credit has been opened by the 2<sup>nd</sup> Respondent (HESCOM) as per PPA and orders of this Commission, the petitioner’s prayer for seeking Open Access on the ground of non-payment and non-opening of letter of Credit does not survive for consideration. Accordingly the petition is disposed of as having become infructuous.”*

Therefore, the Endorsement dated 2.11.2011 (Annexure-F) issued by the 2<sup>nd</sup> Respondent is not as per any direction of this Commission and therefore unsustainable. Consequently, we set aside the Endorsement dated 2.11.2011 (Annexure-F). Issue No.1 is answered accordingly.

**Issue No.2 :**

20) It is the case of the Petitioner that, it had terminated the PPA on 13.5.2010 (Annexure-D), pursuant to the Default Notice dated 8.3.2010 (Annexure-C), on the ground that Respondent No.1 had failed to open a Letter of Credit as

required under the terms of the PPA and had failed to make several payments due to it within the prescribed time and the said termination is in accordance with Article 9.2.2 read with Article 9.3.2 of the PPA and valid, and therefore it is entitled to seek Open Access and the same cannot be denied by the Respondents.

21) We have perused the records. It is observed that the Petitioner issued a Default Notice on 8.3.2010 (Annexure-C) to the 1<sup>st</sup> Respondent, stating that as per Article 6.5 of the PPA, Respondent No.1 – Hubli Electricity Supply Company Limited (HESCOM) had not opened the Letter of Credit, as per the terms of the PPA and this is a material breach of Contract, within the meaning of Article 9.2(a) of the PPA. Further, it was stated that Respondent No.1 - HESCOM has defaulted in making payments for the electricity supplied, as per the detailed Statement enclosed and the same also amounted to an 'Event of Default' as per Article 9.2.2 of the PPA, and therefore, under Article 9.3.2 of the PPA, it is issuing the Default Notice calling upon Respondent No.1 to cure the defaults within 30 days from the date of receipt of the Default Notice. It is noted that there was no reply to this Default Notice from Respondent No.1 to the Petitioner.

22) On 13.5.2010, the Petitioner issued a Final Notice (Annexure-D), terminating the PPA on the ground that Respondent No.1 has failed to cure the defaults alleged in the Notice. In response to the said Final Notice, Respondent No.1 sent a letter dated 25.6.2010 to the Petitioner (produced by the Petitioner

at Page-50 of the Memo for Production of Additional Documents dated 26.9.2012). In the said reply Respondent No.1 has stated as under :

*“On receipt of Your Default Notice & Notice of Termination of PPA vide above reference, I am directed to convey the following opinion on behalf of HESCOM.*

- 1) *We have filed a Review Petition before KERC to modify / amend Article 6.2 of PPA for extending due date for payment of purchase bill from present 15 days to 90 days. Final decision regarding interest criterion will be subject to outcome of above Petition by KERC. HESCOM has already clarified before the Hon'ble KERC that due to severe financial crunch faced by the Company, Letter of Credit facility cannot be opened for Co-gen & Wind Mill consumers.*
- 2) *Article 9.3.2 of PPA emphasizes on the fact that, process of Termination of Agreement requires the Co-operation of both the Society and Corporation and Society render all reasonable cooperation to enable to the Event of Default to be remedied.*

*As such, your unilateral decision to terminate the Agreement dated 9.06.2005 is not acceptable to HESCOM and you are requested to cooperate with HESCOM.”*

23) From the above reply, it is noticed that Respondent No.1 has not denied the delay caused in the payments made to the Petitioner. It only stated that it has filed a Review Petition before this Commission for amending the due date provided in the PPA. Further, Respondent No.1 in the reply stated that it has submitted to the Commission that due to severe financial problems faced by it, the Letter of Credit cannot be opened by it. Further, it is stated hat as per Article

9.3.2 of the PPA, the process of termination of the PPA requires cooperation of both the parties and therefore the Petitioner shall render all reasonable cooperation in remedying the defaults.

24) It is observed that the above reply was sent by Respondent No.1 (signed by its General Manager) only on 25.6.2010, i.e., after expiry of more than 30 days of the Termination Notice. Further, the reply indicates that the Petitioner has not cured the defaults pointed out by the Petitioner. On the contrary, Respondent No.1 expressed its inability to adhere to the terms of the PPA.

25) According to us, once there is a binding PPA between the parties, till the same is modified in accordance with law, it continues to bind the parties and has to be performed. Non-performance of the terms of the PPA by either of the parties will give a cause of action to the other party to take such action as is available in law. Article 9.3.2, read with Article 9.2.2 of the PPA, in this case specifically provides for the termination of the PPA in case of occurrence of any of the 'Events of Default' and non-curing of the said events of default within 30 (thirty) days. In the instant case, Respondent No.1 has failed to open the Letter of Credit as required under the PPA, when it was called upon to do so and it chose to open the Letter of Credit only after the termination of the PPA. Mere writing to the Commission on change of due date clause or about its inability to open the Letter of Credit will not excuse the Respondent No.1 from performing the Contract signed, till the same is considered and approved by the Commission. Further, Respondent No.1 has also failed to make the payments as

per the terms of the PPA for the electricity supplied. Several proceedings initiated by the Petitioner for recovery of the payments support the argument of the Petitioner that it was not paid by Respondent No.1 several times as per the terms of the PPA. Further, the Respondents have also not denied that there were delays in making the payments to the Petitioner by it. On the contrary, in its reply to termination, Respondent No.1 virtually admits that it will not be able to pay as per the terms of the PPA.

26) The Hon'ble Appellate Tribunal for Electricity (ATE), in a similar case, vide its Order dated 18.5.2010 passed in Appeal No.176/2009 in the case of *Bangalore Electricity Supply Company Limited -Vs- Davanagere Sugar Company and another*, while upholding the Order dated 8.10.2009 of this Commission passed in OP No.17/2009, has held at Paragraphs 32 to 34 that (the relevant portion is extracted below):

*"32. From the perusal of the Default Notice dated 10.06.2009 and the reply of the Appellant dated 02.07.2009, the following factors have emerged:*

*(1) The claim of the Respondent company, in so far as the delayed payment as well as the non-payment of interest, is admitted.*

XXX

XXX

XXX

*(6) It has been categorically stated in the Default notice dated 10.6.2009 that the Letter of Credit has not been opened by the Appellant despite several reminders sent by the Respondent. The fact that several reminders have been sent to the Appellant*

*insisting for opening of LOC as per the PPA has not been denied by the Appellant in its reply dated 02.07.2009.*

*(7) The failure to open LOC completely dislocates the obligation of the Corporation (Appellant). For these reasons, the Respondent company went on making representation to the Appellant insisting them to open the LOC, but there was no response.*

*33. In view of the stand taken by the Appellant through its reply dated 2.7.2009, the Respondent was constrained to issue the Notice of Termination. Since the default continued, the Respondent company sent a Default Notice giving them the opportunity to cure the defaults. However, the Appellant refused to open the LOC resulting in a situation where the default is not cured. When the default is not cured, then the inevitable result would be the dissolution of the Agreement.*

*34. In view of the above discussion, the contention urged by the Learned Senior Counsel for the Appellant that the acts of omission committed by the Appellant cannot be construed to be defaults, giving rise to the cause action for the Respondent company to terminate the contract is misconceived and, therefore, the same is rejected."*

27) In view of the foregoing discussions, we hold that the Petitioner had terminated the PPA validly and in accordance with law.

**ISSUE No.3 :**

28) It is vehemently contended on behalf of Respondent No.1 that even though the termination of the PPA was effected by the Petitioner on 13.5.2010 (Annexure-D), the same was abandoned by conduct. This is evident from the

fact that after termination of the PPA, the Petitioner filed OP No.7/2010 for enforcement of the Commission's Order dated 11.12.2009 passed in OP No.31/2009, wherein the Respondent was directed to open Letter of Credit and continue to make payments as per the terms of the PPA. The said Petition was rejected on 29.7.2010 on the ground that the same has become infructuous in view of the payments made. Further, thereafter, the Petitioner had filed one more Petition, OP No.39/2010, and sought Open Access, on the ground of non-payment of dues. However, this Petition came to be withdrawn by the Petitioner on 6.1.2011. The Petitioner thereafter filed one more Petition, OP No.12/2011 (the Order of which is sought to be reviewed in the present RP No.1/2012) to set aside the Endorsement issued by Respondent No.2 – SLDC denying Open Access to the Petitioner. This Petition was disposed of by the Commission on 8.9.2011 on the ground that the Letter of Credit, which had not been opened earlier, has been opened and the payments due had been cleared by the Respondent.

29) Therefore, it is submitted on behalf of Respondent No.1 that, the conduct of the Petitioner in initiating several proceedings for enforcement of its rights under the PPA, after the termination of the PPA, will debar the Petitioner from seeking Open Access. The learned Counsel for Respondent No.1, in support of his contention that the conduct of a party after termination materially alters the right if accrued, has referred to the following Judgments :

- (a) AIR 2001 KAR 145 – Vijay Kumar Khandre –Vs- Prakash Khandre
- (b) AIR 1993 SC 212 – Sewaram –Vs- Sobaran Singh

- (c) (2005) 11 SCC 73 – Claude-Lila Parulekar –Vs-Sakal Papers (P) Ltd.& others
- (d) (2010) 6 SCC 178 – Naresh Agarwal –Vs- Canbank Financial Services.

30) In reply to the above contention, the learned Counsel for the Petitioner has submitted that Respondent No.1 has not challenged either the Default Notice or the Final Notice of Termination of the PPA dated 13.5.2010 at any time and therefore the termination has become final and cannot be questioned by the Respondents now. He further submitted that after termination of the PPA, even if the parties want to continue the Contract, it will not result in restoration of the PPA, as any restoration of the PPA, once terminated, has to be with the approval of this Commission as per Section 17 of the Karnataka Electricity Reforms Act. He also submitted that the restoration of the Contract could be done only by the parties with mutual consent or by an appropriate Legal Authority, like the Commission.

31) The arguments advanced by the leaned Counsel for Respondent No.1, on the face of it, appear very attractive and would give an impression that the conduct of the Petitioner in this case has brought back the Contract which was earlier put an end to. However, a closer scrutiny of the facts, as well as the Judgments cited by the learned Counsel for Respondent No.1, will not support this argument of the Respondents.

32) As contended by the learned Counsel for the Petitioner, the Contract can be brought back into force only by the parties or by an appropriate Legal



Authority. Once termination of the PPA has come into force, which is so in the present case, any subsequent conduct of the parties, or the parties acting according to the terms of the PPA, will not have the effect of their re-entering into a Contract. In the facts of this case, we have observed that the parties never intended to bring back the Contract already terminated. It is settled law that an Agreement can come only if there is consensus *ad idem* between the parties. In our view, the facts pleaded in this case by the Respondents, such as enforcement of the payments, Petitioner suffering certain Orders, etc., cannot be equated to re-entering the Contract. As contended by the Petitioner and in our view also, the PPA already terminated can continue only if this Commission comes to the conclusion that the termination effected by the Petitioner was invalid. However, while dealing with Issue No.2, we have held that the termination of the PPA effected by the Petitioner on 13.5.2010 (Annexure-D) is in accordance with the terms of the PPA and law. Consequently, the conduct of the parties of supplying and receiving electricity, and making payment for the same in this case, will not have the effect of nullifying the termination and giving a new lease of life to the Contract (PPA).

33) The contention of the Respondent's Counsel that non-enforcement of the termination of the PPA effected by the Petitioner will amount to waiver in terms of Article 12.4 of the PPA, shall not detain us for long. Article 12.4 of the PPA, on which reliance is placed by the Respondents, is part of the PPA. Once the PPA is terminated, no term of the PPA will come to the rescue of the Respondents, nor can it be relied upon by the Respondents.

34) It is contended by the Respondent's Counsel that the earlier proceedings initiated by the Petitioner will bar it from seeking the same relief of Open Access. We have examined this contention by looking into the records pertaining to the concerned Petitions. In none of those proceedings, the questions that have arisen in the present case were in issue, i.e., regarding the validity of the termination of the PPA effected by the Petitioner and consequent right to Open Access. In the first Petition, the issue was whether grant of Open Access as per the terms of the PPA will result in putting an end to the Contract. In the second Petition, the issue was whether the Respondent has made the payment and opened Letter of Credit, as directed by this Commission. In the third Petition, the Petitioner had requested for Open Access on the ground of non-payment. This Commission, in all those cases, had no occasion to consider the issue of validity of the termination of the PPA. Therefore, in our view, the earlier proceedings will not bar the present proceedings initiated by the Petitioner for declaration that the PPA is validly terminated and that consequently it is entitled to seek Open Access.

35) The cases cited by the learned Counsel for the Respondents of the Hon'ble High Court and the Hon'ble Supreme Court will not advance the case of the Respondent any further. In all those cases, the Contracts were not terminated as per the terms of the Contract, and therefore, the Hon'ble Supreme Court and Hon'ble High Courts have held that the Contracts in question there continued to be in force. Further, the Judgments cited by the Respondent's Counsel clearly establish a principle that each case has to be

examined on its merits and decision arrived at. In the present case, considering the facts pleaded, i.e., default in payments, default in opening of Letter of Credit, Default Notice and Final Notice of Termination of the PPA and reply sent by the Respondent, it cannot be said that the Contract was not conclusively terminated. Accordingly, we hold that the subsequent conduct of the parties has not nullified the termination effected by the Petitioner. Accordingly, Issue No.3 is answered in the negative against the Respondents.

36) In view of our above findings, we allow OP No.5/2012. The Endorsement dated 2.11.2011 (Annexure-F) issued by the 2<sup>nd</sup> Respondent is set aside. Consequently, the Petitioner is entitled to seek Open Access hereafter in accordance with law.

37) As regards RP No.1/2012 filed for review of the Order passed by this Commission in OP No.12/2011 on 8.9.2011, in our view, the same does not require to be reviewed, as the Commission, in its Order, has not dealt with the dispute raised on merits and has disposed of the same on the ground that the payment that was due has been made and the Letter of Credit has been opened. Accordingly, RP No.1/2012 is rejected.

Sd/-

(M.R. SREENIVASA MURTHY)  
CHAIRMAN

Sd/-

(VISHVANATH HIREMATH)  
MEMBER

**ORDER**

**PER SHRI K. SRINIVASA RAO, MEMBER, KERC :**

Being not in agreement with the views expressed by my colleague-Members in their Order, I am detailing my points in respect of this Order as under:

1) The Petitioner has filed OP No.5/2012, RP No.1/2012 seeking review of Commission's Order in OP No.12/2011 and various related earlier Petitions on the issues.

2) In the Review Petition it is the submission of the Petitioner that it could not earlier bring to the notice of the Commission the fact that the PPA dated 13.6.2001 was already terminated by it on 13.5.2010. However, from the records, as well as the submissions made by the Petitioner, no reasonable explanation is forthcoming in respect of the Petitioner not intimating the Commission about its termination of the PPA. In the course of addressing the issues on hand, the issue of *bonafide* or otherwise on the part of the Petitioner in not intimating to the Commission the fact of its termination of the PPA is being examined, as it is seen that the Petitioner had an ongoing Petition before this Commission at the time of termination of the PPA and also filed subsequent Petitions after the said termination. In each of these Petitions, the Petitioner has not brought the fact of its terminating the PPA to the notice of the Commission. Even when this Commission was seized with the disposal of OP No.12/2011 (filed on 31.3.2011),

the ground advanced by the Petitioner was that the Respondents have not made the payments and also not opened the Letter of Credit as per the terms of the PPA [emphasis supplied]. Whereas, much before filing of OP No.12/2011, the Petitioner had terminated the PPA on 13.5.2010. No reason has been advanced as to why at the time of filing, as well as during the proceedings of the Petition before this Commission, the Petitioner failed to bring to the notice of the Commission the termination of the PPA by it. No one can appreciate the fact that the Petitioner itself has terminated the PPA as early as May, 2010, and during the proceedings in 2011, the Petitioner pleads for relief on the ground of non-payment and non-opening of the Letter of Credit in terms of the PPA [emphasis supplied]. One cannot afford to make light of this error, whether intentional or otherwise, on the part of the Petitioner. Also one cannot appreciate the fact that much later after the termination of the PPA the Petitioner makes a casual plea during the course of oral submissions, that due to inadvertence it has not brought to the notice of the Commission the fact of termination of the PPA.

3) The Respondents in RP No.1/2012 have raised objections against the review of the Order dated 8.9.2011 passed in OP No.12/2011 sought by the Petitioner. It is contended by the Respondents that the Review Petition filed by the Petitioner is barred by time, as the Order sought to be reviewed was served on the Petitioner on 20.9.2011, but the Review Petition has been filed in January, 2012, i.e., after a lapse of three months. Further, it is contended by the Respondents that it is settled law that a party can seek review of an Order only on discovery of a new and important matter or evidence, which after exercise of

due diligence, was not within his knowledge or could not be produced by him at the time when the Decree was passed or Order made. The other instances are when the Decree made suffers from a mistake or error apparent on the face of the record. It is submitted that in the case on hand, none of these elements are pleaded or exist and therefore the Review Petition is liable to be rejected.

4) It is further submitted by the Respondents that in OP No.12/2011, the Petitioner had not pleaded the termination of the PPA, nor referred to it, and no explanation is provided for not bringing the termination of the PPA to the notice of this Commission. It is submitted that having obtained the benefit of the Order passed by the Commission, the Petitioner cannot now plead for review of the Order.

5) It is a matter of record that the Petitioner has been pursuing its request for grant of Open Access from as early as 2006 by way of filing various Petitions before this Commission, as well as CERC, and has suffered Orders on its Petitions. Some of the Petitions have also been withdrawn by the Petitioner. It is now on record from the submissions of the Petitioner that it has terminated the PPA on 13.5.2010. During this period, the Petitioner had filed OP No.7/2010 dated 18.2.2010, on which the final Order of this Commission was issued on 29.7.2010. In all fairness, the Petitioner should have informed the Commission about its terminating the PPA. However, the same was not done. Further, RP No.6/2010 was also filed on 4.3.2010 before this Commission and suffered the final Order of the Commission on 29.7.2010, with no intimation being given to the Commission

about the termination of the PPA on 13.5.2010 during the pendency of the Petition. Further, had the Commission been informed about the termination of the PPA, the issuance of directions to open Letter of Credit in terms of the PPA would not have been necessary. Further, OP No.39/2010 was filed by the Petitioner on 26.8.2010, on which this Commission passed the final Order on 6.1.2011. This Petition was withdrawn by the Petitioner. The whole proceedings in these Petitions were rendered infructuous on account of the Petitioner's conduct in not bringing the fact of PPA termination to the Commission's notice in time. Thereafter, the Petitioner filed OP 12/2011, the Order in which is sought to be reviewed in Review Petition on hand, viz., RP No.1/2012, by the Petitioner. Petition OP No.12/2011 was filed on 31.3.2011 and the final Order was issued on 8.9.2011. Once again, the Commission was not informed of the termination of the PPA, which was made as early as on 30.5.2010, even till 8.9.2011.

6) Finally, OP No.5/2012 and the present Review Petition RP No.1/2012 have been filed by the Petitioner on 11.1.2012 and 12.1.12012, respectively. While OP NO.5/2012 finds a mention, for the first time, about the issuance of Default Notice and Termination Notice of the PPA in March, 2010 and May, 2010, respectively, no reasons have been furnished by the Petitioner for not intimating the Commission in its earlier Petitions. The Review Petition RP No.1/2012 simply makes a mention, as one of the grounds for review, that the Order in OP No.12/2011 was passed by this Commission directing the Respondent to open Letter of Credit and release payments, etc., on the premise that the PPA between the parties continued to exist, and it was not brought to the notice of

this Commission that by the time the said Order came to be passed, the PPA had stood terminated.

7) It is interesting to note that for the first time, after about 1½ years of termination of the PPA, the fact has been brought to the notice of the Commission; however, no explanation regarding the reasons for not intimating the fact of termination to the Commission was forthcoming.

8) In fact, it is both the Petitioner as well as the Respondents, who, by their act of not bringing the fact of termination of the PPA to the notice of the Commission, and by their approach, have caused wasteful utilization of the valuable time of this Commission. The action of the parties in this regard is highly condemnable in strongest of terms. Having said that, since the Petitioner is pursuing its cause before this Commission, it is its primary responsibility to come clean with all the facts.

9) In view of the conduct of the Petitioner detailed above, I find no reason to conclude that the actions of the Petitioner are *bonafide*, since the Petitioner even with ample opportunities available to it, failed to bring the fact of termination of the PPA to the notice of this Commission for almost 1½ years – for which no reasons have been put forth by the Petitioner. I also find logic and reason in the points raised by the Respondent. However, it is to reiterate that the Respondent is also guilty of not bringing the fact of termination of the PPA to the notice of the Commission in time during the proceedings of the Petitions.



10) In view of my findings above, it is seen that the Petitioner's Prayers both in OP No.5/2012 and RP No.1/2012 are liable to be rejected, and the Petitions are liable to be dismissed.

11) Accordingly, OP No.5/2012 and RP No.1/2012 are hereby dismissed.

Sd/-

(K.SRINIVASA RAO)  
MEMBER