

No.: N/17/2013

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

Dated : 17th October, 2013

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

OP No.6/2013

BETWEEN :

Bangalore Electricity Supply Company Limited
K.R.Circle
Bnagalore-560 009
[Represented by M/s. Justlaw, Advocates]

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PETITIONER

AND:

Rithwik Energy Generation Pvt. Ltd.
Unit No.701-702
Prestige Meridian-2
No.30, M.G. Road
Bangalore-560 001
[Represented by M/s. Shridhar Prabhu Associates, Advocates]

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RESPONDENT

1) This Petition is filed by the Purchaser, Bangalore Electricity Supply Company Limited, seeking a declaration that the Power Purchase Agreement (PPA) dated 3.5.2007 is valid and binding on the parties, and a direction to the Respondent to act in accordance with the PPA and supply electricity in terms of the same.

2) In support of the above prayer, it is contended on behalf of the Petitioner that there was no default on its part for terminating the PPA and therefore issuance of the Termination Notice by the Respondent on 11.5.2012 is unsustainable and contrary to law, and therefore the same is liable to be set aside.

3) On Notice, the Respondent has appeared through its counsel and filed a detailed Statement of Objections on 13.8.2013 and has sought dismissal of the Petition.

4) We have heard Shri Sriranga, counsel for the Petitioner, Shri Ananth Mandagi, Senior Counsel assisted by Shri Shridhar P. Prabhu, counsel appearing for the Respondent, and have also considered the Petition averments and the documents produced along with the Petition and the Rejoinder, and the contentions raised in the Statement of Objections and the documents produced along with the Statement of Objections.

5) Before proceeding to deal with the issues raised for our decision, we deem it proper to record the relevant facts of the case.

6) The Petitioner and the Respondent have entered into a PPA dated 3.5.2007 to sell and purchase electricity generated by the Mini-Hydel Generating Plant of the Respondent. During the subsistence of the PPA, the Respondent sought for Open Access by filing an Application through PTC India Limited. This

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Application was not accepted by the State Load Despatch Centre (SLDC) on the ground that there was a valid and subsisting PPA with BESCO, the Petitioner herein. The Respondent filed OP No.29/2009, seeking a declaration that there was no valid and subsisting PPA between it and the Petitioner, on the ground that the same has become null and void on account of non-fulfilment of the conditions precedent specified in Article-2 of the PPA. Further, in the said Original Petition, it was contended by the Respondent that the PPA dated 3.5.2007 was not binding on it, as the same is not approved by the Commission. This Commission, by its Order dated 23.12.2010, dismissed the said Petition, duly observing as follows :

“6. The issues that arise for consideration and decision are –

(i) whether the PPA is invalid on account of the non-approval of the same by the Commission; and

(ii) whether the PPA signed between the parties has become null and void as per clause 2.2 of the PPA on account of the non-fulfillment of the conditions precedent specified in clause 2.1 read with schedule 4 of the PPA.

Issue No.(i):

7. It is not in dispute that the petitioner has signed a PPA with the respondent on 3.5.2007 and the same came to be submitted to the Commission for approval. Further it is an admitted fact that the Commission returned the PPA on account of the pendency of proceedings relating to the fixation of the minimum percentage of electricity to be purchased from renewable sources by the Distribution Licensee.

8. In our view, returning of the PPA by the Commission does not mean rejection of the same as contended by the petitioner. It is also our considered view that non-approval of the PPA by the Commission will not affect the validity of the Agreement entered into by the parties. As far as parties are concerned, the agreement continues to bind them. Further, approval of the Commission is a condition only applicable to the Distribution Licensees as it is the Licensees who have to purchase the electricity with the prior approval of the Commission as per Section 86(1)(a)(b) of the Electricity Act, 2003. So far as the petitioner, which is a generating company, is concerned, there is no such requirement and the agreement stands and binds till the Commission specifically refuses to approve it. Admittedly, in this case, the Commission has not refused approval but had only returned the PPA. Therefore we conclude that the PPA is still valid and binds the petitioner and the respondents alike. Accordingly, Issue No.(i) is answered against the petitioner.

Issue No. (ii):

9. It is contended by the petitioner that as it did not achieve the conditions precedent specified in clause 2.1, the PPA has become null and void automatically. This argument is contrary to the documents placed before the Commission and gets negated by the very statements made by the petitioner in Annexure R-3 dated 13.12.2007 addressed to the General Manager, RLPP, BESCOM. The petitioner in this letter (R-3) unambiguously states that 'we have achieved financial closure with Canara Bank consortium'. Further the petitioner in this letter states that it has obtained all relevant approvals and permissions as required under the PPA. This letter is not disputed by the petitioner. Once it is admitted that the petitioner has fulfilled the conditions precedent required under clause 2.1 of the PPA, clause 2.2 of the PPA will not come into play and PPA continues to be binding. On the material placed before us, we are of the view that the agreement has not become null and void under clause 2.2 of the PPA and it continues to be valid and subsisting. Accordingly we answer this issue also in the negative. "

7) Against the above Order of the Commission, the Respondent filed Appeal No.51/2011 before the Hon'ble Appellate Tribunal for Electricity (ATE). The Hon'ble ATE, by its Order dated 21.10.2011, dismissed the Appeal, upholding the Order of this Commission. The Hon'ble ATE further heard the Appellant therein on 3rd and 4th Issues raised before it based on the subsequent events, namely:

- (a) Whether the subsequent events regarding default in payment of dues and interest thereon can be considered by the Tribunal for providing relief to the appellant regarding grant of the open access for sale of power to PTC Ltd.; and
- (b) Whether the appellant is entitled to open access on account of default in payment of dues and interest thereon by the respondent no. 2 subsequent to the passing of the impugned order, and the Hon'ble ATE answered them in the negative. However, the Hon'ble ATE gave a direction to the Petitioner to pay up-to-date interest on the delayed payments as per the interest rate prescribed in the PPA, and also gave a direction to this Commission for determination of the correct amount of the Letter of Credit, if it is found that the Letter of Credit provided is inadequate.

8) The Respondent, on 11.5.2012, issued a Termination Notice of the PPA, on the ground that the Petitioner has failed to cure the defaults pointed out in its letter dated 5.5.2011, and called upon the Petitioner to provide Open Access for supplying electricity to third parties.

9) The Petitioner did not accept the termination, and instead, sent a reply dated 29.5.2012 refuting the grounds on which the termination had been effected. It contended that the PPA was valid and subsisting, and that the Respondent was liable to supply electricity under the PPA.

10) Challenging the action of the Respondent in terminating the PPA dated 3.5.2007, the Petitioner has filed the present Petition on 21.2.2013.

11) It is contended by the Petitioner that the action of the Respondent in terminating the PPA dated 3.5.2007, vide its Termination Notice dated 11.5.2012, is contrary to the terms of the PPA and illegal. According to the Petitioner, the PPA dated 3.5.2007 continues to be valid and binding, as there is no default on its part in performing the terms of the PPA. It is asserted that it has made all the payments due to the Petitioner and has also provided a Letter of Credit, as required under the PPA. Further, it is contended that the letter dated 5.5.2011 is not a Notice for termination in terms of the conditions of the PPA and it only a letter calling upon to grant permission for third party sale.

12) Per contra, it is contended on behalf of the Respondent that the PPA has been validly terminated by it, as the Petitioner failed to cure the defaults mentioned in its letter dated 5.5.2011 and the termination of the PPA is in accordance with Article 9.3.2 of the PPA.

13) As the termination of the PPA dated 3.5.2007 by the Respondent is wholly based on the letter dated 5.5.2011, we may have to examine whether the said letter can be considered as Notice in terms of the conditions in the PPA, and based on the said letter, whether the Respondent can terminate the PPA.

14) From the letter dated 5.5.2011, it is observed that the said letter was not a Notice issued for terminating the PPA dated 3.5.2007, but for seeking permission under Article 9.2.2 of the PPA to sell electricity to the third parties. This is clear from the following wordings of the said letter :

"... Thus, BESCO defaulted in its financial and material obligations, that too for over a continuous period of three months.

Therefore, BESCO shall permit, in terms of Article 9.2.2 of the disputed PPA, our Company to sell power from the Project to third parties and for entering into Wheeling and Banking Agreement with it.

So, we request you to confirm that you will permit us to sell the power to third parties and enter into Wheeling and Banking Agreement with us. We are willing to pay the applicable charges. Since power generation will start from June '11 after the onset of monsoon, great irreparable damage will be caused to us if we are denied the opportunity to sell power to third parties as we have a valid and subsisting Power Purchase Agreement with PTC India Limited.

Thus, we request you to agree confirm your permission to allow open access and to enter into Wheeling and Banking Agreement in terms of Article 9.2.2 within 10 days of receipt of this letter. ..."

15) The very Respondent had filed an Affidavit before the Hon'ble ATE on 4.7.2011 in Appeal No.51/2011, which has been taken note of by the Hon'ble ATE at Paragraph-12.7(vi) of its Order dated 21.10.2011, to the following effect :

"...vi) Subsequently on 4.7.2011 the appellant filed an affidavit indicating the following:

- a) The respondent no. 2 has failed and neglected to pay the tariff for the electricity supplied for the months of January, February and March, 2011.*
- b) The delay in payment in the months of January, February and March, 2011 was for 94 days, 39 days and 36 days respectively.*
- c) Respondent no. 2 is liable to pay interest for delayed payments.*
- d) LC has been opened for Rs. 87.65 lakhs against the requirement of Rs. 151.77 lakhs.*
- e) As there has been default on the part of respondent no. 2 for a continuous period of over 3 months, the appellant is entitled to sell electricity to third parties, by entering into Wheeling and Banking Agreement with the second respondent."*

16) The Hon'ble ATE, after considering the Affidavit referred to above, has held that :

"12.8. We notice from the affidavit filed on 4.7.2011 filed by the appellant, that the payment from January, February and March 2011 have been made on 26.5.2011 i.e. within 8 days of the order of this Tribunal and within 7 days of the letter dated 5.5.2011 sent by

the appellant to the respondent no. 2 on 19.5.2011 seeking permission to sell power to third parties.

12.9. We notice that the respondent no. 2 had made requests to the appellant for getting the approval of the State Commission for the PPA processed to enable it to make payment against the invoice raised by the appellant. Apparently, the appellant did not want to get the approval of the State Commission for the PPA and instead challenged the order of the State Commission. The appellant sought interim orders from the Tribunal and the Tribunal was pleased to issue interim directions to the respondent no. 2 to make payment for the energy supplied by the appellant from January 2011 onwards at PPA rate. We find that the respondent no. 2 promptly made the payment following the order of this Tribunal.

12.10. In view of the circumstances of the case, we do not find any substance in the argument of the appellant seeking termination of the PPA for default in payment."

17) The Hon'ble ATE has explained the procedure to be followed by the Respondent for termination of the PPA at Paragraphs-12.12 and 12.13 of its Order and in the light of the procedure provided in the PPA for termination of the PPA, recorded that the letter dated 5.5.2011 based on payment default is not a Notice to remedy the default or Termination Notice.

18) The above observations of the Hon'ble ATE affirm our conclusion that the letter dated 5.5.2011 was not a Notice issued prior to termination of the PPA, but it was only a letter seeking permission for third party sale of electricity in terms of Article 9.2.2 of the PPA.

19) During the course of the hearing, the learned senior counsel appearing for the Respondent again vehemently contended that the Respondent was very much within its rights to terminate the PPA based on the letter dated 5.5.2011, in view of the Judgment of the Hon'ble ATE in Appeal 14/2013, in the case of *M/s Sri Chamundeshwari Sugar Limited -Vs- Karnataka Electricity Regulatory Commission and others*, rendered on 17.4.2013.

20) We have considered this contention in the light of the Judgment of the Hon'ble ATE in the Respondent's Appeal No.51/2011, which has been referred to above by us, and the Judgment of the Hon'ble ATE in Appeal No.14/2013. In our view, the contention raised by the learned senior counsel for the Respondent has to be rejected. Once the Hon'ble ATE has held that the letter dated 5.5.2011 is not a Notice for remedying the default nor a Notice for termination of the PPA, as contemplated under the terms of the PPA, there is no question of considering the same again as Notice for termination. The Judgment of the Hon'ble ATE relied upon by the senior counsel for the Respondent, in our view, has no application to the facts of the present case. In the case of *M/s.Sri Chamundeshwari Sugar Limited*, the Notice issued by the Generating Company was for termination of the PPA, whereas in the present case, no Notice to cure the defaults was issued, but only a letter seeking permission to sell electricity to third parties was issued.

21) The contention of the learned senior counsel for the Respondent based on non-opening of Letter of Credit 30 (thirty) days prior to the Commercial

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Operation Date, is also not tenable, as the same has also been considered by the Hon'ble ATE in the Appeal. The Hon'ble ATE, after considering the contention of the Respondent herein, had only remitted the matter to this Commission regarding determination of the correct amount of the Letter of Credit, according to the terms and conditions of the PPA. However, the Respondent, instead of pursuing this with this Commission, has returned the Letter of Credit. Therefore, there was no default on the part of the Petitioner as regards opening of the Letter of Credit.

22) As regards the contention of the Respondent's counsel on non-payment of interest on the Bills that was due, we have to reject the same also in view of the payment made as reflected in the reply given by the Petitioner in its letter dated 29.5.2012. In the said letter, it is stated that :

"... With regard to the demand for payment of interest towards delayed payment, it had been contended that there was no delay on the part of BESCO. The Hon'ble APTEL as directed that the interest upto date in payment of monthly invoices has to be paid within the time stipulated. In this regard, you have now made a claim for payment of Rs.12,32,321/- from September 2009 to December 2011. Please note that the calculation of interest is based on wrong facts. We are enclosing a detailed calculation of interest and we are also enclosing a Cheque bearing No.856700 dated 29.5.2012 drawn on Syndicate Bank towards the same. The detailed calculation statement is herewith enclosed. ...!"

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The above assertion made is not disputed by the Respondent, except making a statement that the interest payment is not made as directed by the Hon'ble ATE. Therefore, the Respondent was not entitled to terminate the PPA on the ground of non-payment of interest.

23) In view of the above discussion, the Petition is allowed. The termination effected by the Respondent on 11.5.2012 is held invalid and it is declared that the PPA dated 3.5.2007 continues and binds the parties. Consequently, the Respondent cannot seek Open Access based on the termination of the PPA effected on 11.5.2012.

Sd/-

(M.R. SREENIVASA MURTHY)
CHAIRMAN

Sd/-

(VISHVANATH HIREMATH)
MEMBER

Sd/-

(K.SRINIVASA RAO)
MEMBER