

No.N/14/12

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

Dated : 13th December, 2012

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

OP No.7/2012

BETWEEN :

M/s. Gangadhar Narasingdsas Agrawal,
A Hindu Undivided Family
Anand Bhavan
Old Station Road
Margoa
GOA – 403 601
[Represented by Shri R.G. Hegde, Advocate]

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Petitioner

AND

Bangalore Electricity Supply Company Limited
K.R. Circle
BANGALORE-560 001
[Represented by Shri V.Y. Kumar, Advocate]

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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 the Petitioner a sum of Rs.1,45,14,716/-, with interest at 12% per annum from 31.7.2009 till the actual date of payment, for the electricity supplied by it to the Respondent between 29.4.2009 to 31.7.2009.

2) Upon Notice, the Respondent has entered appearance through its Counsel and filed its Statement of Objections on 9.8.2012.

3) It is the case of the Petitioner that the Government of Karnataka, vide its Order dated 28.12.2005, had accorded sanction to M/s. Sarjan Realities Limited for installation of a 44.4 Mega Watts (MW) capacity Wind Energy based Electric Power Generating Station in Gangavanasara and Kudurekonda areas of Shimoga and Davanagere Districts of Karnataka. Thereafter, the Government of Karnataka, vide its Order dated 15.5.2007, permitted Ms. Sarjan Realities Limited to enhance the capacity to 111.0 MW at Veerapur Village, Kudurekonda Area, Honnali Taluk, Davanagere District. Out of this sanctioned capacity, the Government of Karnataka, vide its Order dated 21.3.2009, approved the transfer of 4.5 MW of Wind Power at Kudurekonda Village to the Petitioner, on the condition that the Petitioner shall supply the entire electricity generated to the State Grid, and permitted the Respondent to enter into an Agreement with the Petitioner for purchase of the said electricity. It is submitted by the Petitioner that after establishing the Plant, it commissioned the same on 29.4.2009, started generating the electricity and supplied the same to the Respondent, though it signed the Power Purchase agreement (PPA) with the Respondent on 25.7.2009, after completing the other formalities. It is submitted by the Petitioner that it is entitled to be paid for the electricity supplied right from the date of commissioning the Plant, whereas the Respondent is denying the same. The total unpaid amount for the electricity supplied between 29.4.2009 and 31.7.2009 is Rs.1,45,14,716/-, and this may be ordered to be paid along with interest at 12% per annum.

4) Per contra, the Respondent, in its Statement of Objections dated 9.8.2012, has contended that the Petitioner has signed the PPA with it only on 25.7.2009 (after a lapse of 3 months from the date of commissioning) and it is liable to pay for the electricity supplied only from the said date. It is submitted by the Respondent that in the absence of a valid Contract, the Petitioner cannot claim chargers from it as per the PPA. It is submitted by the Respondent that 17 other similarly situated Generators have accepted the payments for the power supplied by them prior to signing the PPA, after giving rebates from 2% to 5% on the PPA rate and the Petitioner can also agree to give rebate and accept the payment. The Respondent has cited the Judgment of the Hon'ble Appellate Tribunal for Electricity (ATE) dated 16.5.2010, passed in Appeal No.123/2010 in the case of *Indo Rama Synthetics (I) Limited –Vs- Maharashtra Electricity Regulatory Commission and others*, and submitted that the power supplied into the Grid without a Schedule / PPA is not liable to be paid for.

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

6) The question that arises for consideration and decision is, "Whether the Petitioner is entitled to payment for the electricity generated and supplied to the Respondent during the period from 29.4.2009 to 31.7.2009, i.e., before signing the

PPA, amounting to Rs.1,45,14,716/-, with interest at 12% per annum, as sought by the Petitioner?'

7) Shri R.G. Hegde, the learned Counsel for the Petitioner submitted that the Petitioner has commissioned its Wind Mill Generating Plants (1.5 MW X 2) on 21.4.2009 as per the Commissioning Certificate issued on 29.4.2009, and as per the PPA, payment for the electricity supplied should be made from the said date, even though the PPA is signed at a later date. Further, the learned Counsel has submitted that considering the Government Order dated 21.3.2009, which mandated the Petitioner to supply all the electricity generated to the State Grid only and the participation of the Respondent-BESCOM's Officer in witnessing the commissioning report amounted to waiver of the 10 days' Notice for the COD.

8) Per contra, Shri V.Y. Kumar, the learned Counsel for the Respondent vehemently argued that the Respondent is not liable to pay for the electricity generated prior to signing of the PPA, as the obligation to purchase the electricity of the Petitioner arises only after the date of signing of the PPA. Further, according to him, the obligation to pay for electricity under Article 5.1 of the PPA read with Article 1.1 (definition of Commercial Operation Date) arises only from the date specified in a written Notice given at least 10 (ten) days in advance before the date on which the Project is available for commercial operation, and in any case, not beyond the Scheduled Date of Completion, and that in the absence of such a Notice, the obligation to pay for the electricity

supplied arises only from the date of signing of the PPA. The learned Counsel, in support of his submissions, relied upon the Judgment of the Hon'ble ATE dated 16.5.2010 in Appeal No.123/2010 in the case of *Indo Rama Synthetics (I) Limited – Vs- Maharashtra Electricity Regulatory Commission and others.*

9) From the facts placed before us, we have observed that the Respondent does not dispute that the Petitioner has generated and supplied electricity from 29.4.2009. There is also no dispute that the Petitioner's Plant was tested and commissioned on 21.4.2009, and the Plant started generation and electricity flowed to the Grid. The Respondent has not denied that the electricity produced by the Petitioner's Plant has been supplied to it. As per the records produced by both the parties, the Petitioner's case was not the only case wherein electricity was generated and supplied to the Respondent prior to signing of the PPA and there were 17 cases in all. Further, it is undisputed that the Respondent has paid for the electricity supplied to it by most of the Generators even prior to signing of the PPA, but with some discount offered by those Generators. The objection of the Respondent is that it has no obligation to pay for the electricity supplied prior to signing of the PPA under its terms.

10) As recorded at Paragraph-7 above, it is the case of the Petitioner that since its Plant has been commissioned on 29.4.2009, it is entitled to be paid for the electricity supplied at the rates provided in the PPA. Per contra, it is contended by the Respondent that it is not liable to pay for the electricity

generated and supplied by the Petitioner prior to signing of the PPA as per the PPA rates.

11) In our view, the contention of the Petitioner that the electricity generated by it and supplied to the Respondent prior to the date of signing of the PPA should be paid for at the PPA rates, cannot be accepted, as the PPA, admittedly, is signed on 25.7.2009. The terms of the PPA have not been given effect to retrospectively. However, since there is no dispute that the Petitioner had generated and supplied electricity to the Respondent, and the Respondent has not disputed this, and the Respondent in similar cases had paid for the electricity generated and supplied by other Generators, we are of the opinion that in the context of the present case, the Petitioner has to be paid for the electricity generated and supplied by it prior to signing of the PPA, at the generic Tariff determined by this Commission, which is Rs.3.40 per Unit. This is so, because it is settled law that when a party delivers goods unintended to be a gratuitous supply, the other party, which makes use of it, is liable to pay for the same. The Petitioner in this case was not intending to supply electricity, free of cost.

12) Considering the facts of this case and the law stated above, we deem it fit to direct the Respondent to pay the Petitioner for the electricity generated and supplied by the Petitioner to the Respondent prior to the date of signing of the PPA, i.e., from 29.4.2009 to 25.7.2009, at the generic Tariff determined by this Commission, viz., Rs.3.40 per Unit, within 4 (four) weeks from the date of communication of this Order.

13) As regards interest, we see no merit in the claim made by the Petitioner, since, as on the date of supply of electricity, the PPA had not been signed and the terms of the PPA had not come into force. We therefore reject the Petitioner's claim for interest.

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

Sd/-
(M.R. SREENIVASA MURTHY)
CHAIRMAN

Sd/-
(VISHVANATH HIREMATH)
MEMBER

Sd/-
(K.SRINIVASA RAO)
MEMBER