

N/13/07

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION
BANGALORE**

Dated this 6TH Day of March 2008

1. Shri K.P.Pandey	..	Chairman
2. Shri H.S.Subramanya	..	Member
3. Shri S.D.Ukkali	..	Member

Case No.OP 11 / 07

Between

Reliance Energy Limited, Reliance Energy Centre, Santacruz (E) MUMB AI-400055	..	Petitioner
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And

1. Karnataka Power Transmission Corporation Ltd. Kaveri Bhavan, Bangalore-560009 Through its Managing Director		
2. Bangalore Electricity Supply Company Ltd. K.R.Circle, Bangalore-560001 Represented by its Managing Director	..	Respondents

The Petitioner Company is engaged in the business of generation and distribution of Electricity. It had taken over the wind energy project allocated to M/s.Enercon (India) Limited with a capacity of 7.59 MW out of the total 15 MW allocated to the former allottee. The Government of Karnataka had approved the above transfer vide its letter No.DE 133 NCE 97 dated 1.6.1999. Thereupon, the Company had entered into an agreement with KPTCL for sale of power

generated from the above project. Subsequently, on 17.5.2003, transfer of additional capacity of 1.8 MW from the capacity allotted to M/s.Enercon (India) Limited for its project at Jogimatti wind zone, Chitradurga district was approved by the Government. Another agreement was entered into with the KPTCL for sale of power from this project also. In pursuance of the above, the Petitioner Company is operating the above mentioned generating stations with a gross capacity of 7.59 MW plus 1.8 MW. The Petitioner had entered into a Power Purchase Agreement on 5.4.2002 with KPTCL which was amended on 18.7.2003. The original PPA as well the amended PPA were duly approved by the Commission. Subsequent to the above, the PPA was assigned by the 1st Respondent in favour of the 2nd Respondent from July 2 005 onwards. The tariff for the sale of power as per the PPA dated 5.4.2002 was based on the MNES guidelines with 5% escalation per annum. Both the projects were commissioned on 30.9.1999.

The Petitioner Company has now filed this Petition with the following prayers.

1. This Hon'ble Commission be pleased to order and direct the Respondents to make payment of the tariff to the Petitioner as per the terms of the PPA;
2. This Hon'ble Commission may be pleased to order and direct the Respondents to pay to the Petitioner the sum of Rs.371 lakhs;
3. The cost of this Petition be provided for;
4. That further and other orders be passed and directions given as the nature and circumstances of the case may require.

In support of the above prayer, it is stated that the 1st Respondent has failed to make payments as per the terms of the said PPA. Instead, they are making payment at the lower rate of Rs.3.32 per unit. Consequently an amount

of Rs.114.40 lakhs up to February 2007 has remained unpaid in respect of the first project of 7.59 MW.

The applicable tariff as per the PPA and the tariff paid by the 1st Respondent is stated to be as under:

Sl. No.	PERIOD	Applicable Tariff as per PPA (Per Unit)	Tariff considered by respondents (Per Unit)
1.	2003-04	3.49	3.32
2.	2004-05	3.66	3.32
3.	2005-06	3.84	3.32
4.	2006-07	4.03	3.32

The Petitioner had submitted the invoices for sale of power and the 1st Respondent was required to make payment within 15 days from thereof. Hence, the Petitioner is entitled to interest towards delayed payment amounting to Rs.41.45 lakhs and Rs.7.02 lakhs respectively for 7.59 MW and 1.8 MW capacities. In July 2005, the PPA was assigned to the 2nd Respondent i.e. BESCO and the 2nd Respondent is also making payment at the lower rate of Rs.3.32 per unit only with respect to 7.59 MW resulting in tariff different of Rs.206.37 lakhs up to February 2007. Interest for the delayed payment, according to the Petitioner, works out to Rs.97,000 for 7.59 MW and Rs.29,000 for 1.8 MW capacity up to February 2007.

Although the Petitioner had addressed several letters to the Respondents requesting them to release payments as per the terms and conditions, the Respondents have failed to make the payments. Copies of these letters have been annexed to the Petition.

Notices were issued to the Petitioner as well as the Respondents and the Counsels for both the parties were heard. The Respondents have also filed written objections. It is stated therein that the amounts claimed by the Petitioner are not due and payable. Although the Respondent has admitted that the PPA

was entered into with the Petitioner and Article 5 of the PPA specifies the payment of tariff as per the MNES guidelines, yet it is argued that the feasibility of paying the tariff as per MNES guidelines was re-considered by the State Government and on an overall consideration of the factors, the tariff fixed as per the MNES guidelines was on the higher side and that the Respondents will not be able to pay the same. It is further argued that the tariff so fixed was opposed to the general consumer interest and, therefore, the Government of Karnataka took a policy decision not to accept the MNES guidelines vide Government Order No.145 NCE 2002 dated 17.9.2002. Accordingly, the tariff payable to Cogen plants was frozen at Rs.3.32 per unit and the same yardstick was applied to wind energy units also. In this regard, mention is also made of fixing of tariff for NCE projects by the Commission vide its Order dated 18.1.2005 awarding the tariff for wind energy at Rs.3.40 per unit. It is submitted that the Respondent has by and large made payment within 15 days of submission of monthly invoices by the Petitioner and, therefore, disagreed with the computation of interest on delayed payment and stated that the total interest amount due to the Petitioner in respect of 7.59 MW and 1.8 MW is Rs.79.59 lakhs and Rs.5.90 lakhs respectively. It is also pointed out that the difference between the agreed rate of tariff as per the PPA and the current rate is Rs1.145 crores and not Rs.3.71 crores.

We have considered the submissions made by Counsels of the Petitioner as well as the Respondents and perused the records. It is not in dispute that the 2 power plants were allotted to the Petitioner by the Order of the Government of Karnataka and the Respondents had entered into a PPA with the Petitioner for purchase of power and the Petitioner Company had commissioned the project within the stipulated time. The PPA was duly approved by the Commission. The PPA was assigned to the 2nd Respondent and there was no change in the terms and conditions of the PPA at any time. It is also not in dispute that the tariff for purchase of power was fixed on the basis of MNES guidelines. The relevant portion of the PPA dated 5,4,2002 reads as under:

“.....**Article 4.1- Monthly Energy Charges:** Corporation shall for the Delivered Energy Pay, for the first 10 years from the commercial operation date of the project, to the company every month during the period commencing from the date of signing of this agreement on the basis of the base price applicable for the year 1994-95 at the rate of Rs.2.25 (Rupees two and twenty five paise) per kilowatt hour (the tariff) for energy delivered to the corporation at the metering point with an escalation at a rate of 5% per annum over the tariff applicable for the previous year as per guidelines issued by the ministry of non-conventional energy sources of the GOI.....”

“..... **Article 5.2 Payment** Corporation shall make payment of the amounts due in Indian rupees within fifteen days from the date of receipt of the tariff invoice by the designated office of the corporation.....”

As the PPA had been validly entered into with the Respondents and the terms and conditions of tariff were clear and as the Petitioner had completed all the statutory formalities of setting up of a power plant and commissioning the project within the time stipulated in the PPA, the Respondents were bound to honour the PPA. The issue before the Commission is whether the Respondents have honoured the terms of the PPA which had been approved by the Commission. In accordance with the above produced Article 5.2 of the said PPA, the Respondents were legally liable to make payments to the Petitioner Company at the rates specified in the said clause for the energy received by them. There was no clause in the said PPA which enabled variation of the tariff payable unilaterally by the Respondents. As the Petitioner Company had not committed any default in terms of the PPA, it was entitled to receive full and timely payment for the energy supplied to the Respondents. The defence put forward by the Respondents for non-payment of tariff agreed to sounds hollow in the face of the facts of the case. The first Respondent had entered into a bilateral agreement with the Petitioner Company and the said agreement was assigned to the 2nd Respondent. There is no scope for bringing in extraneous reasons such as policy decision of the Government or the so-called general

consumer interest in view of the binding nature of the PPA. The Petitioner Company had complied with all the technical and financial commitments specified in the PPA and supplied energy to the Respondents regularly and submitted invoices. Thus, the Respondents had no other option but to honour the PPA And make payment to the Petitioner Company. The action of the Respondents in freezing the tariff amounts to violation of the PPA. The other argument put forward by the Respondents in support of the freezing of the tariff , that is, passing of the Order dated 18.1.2005 by the Commission fixing tariff from NCE sources, is irrelevant, misplaced and far-fetched. Needless to mention in this context that the Commission had fixed the Tariff for purchase of energy from NCE sources in its Order dated 18.1.2005 and this Order is applicable only for those PPAs which are entered into after 18.1.2005. In this case, the PPA had been entered into way back on 5.4.2002 and, therefore, the Commission's Order dated 18.1.2005 is not applicable. Thus, the tariff agreed to between the parties through the PPA would alone prevail and tariff payment has to be solely guided by the terms of the PPA.

Based on the above facts and reasoning, we hold that the PPA entered into on 5.4.2002 with subsequent amendment is valid, conclusive and binding and, therefore, has to be honoured fully. The rate at which the tariff has to be paid is stipulated in Article 5 of the PPA and the Respondents have no alternative but to pay the Petitioner Company as per Article 5 of the PPA. We order the Respondents to pay the amount due to the Petitioner Company fully for energy supplied at the tariff agreed to in the PPA along with interest at the rate of 6.5% for the period of delayed payment. We also order that the above payment shall be made to the Petitioner Company within one month from the date of this Order.

The Petition is allowed.

Sd/-
(K.P.Pandey)
Chairman

Sd/-
(H.S.Subramanya)
Member

Sd/-
(S.D.Ukkali)
Member