

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION  
BANGALORE**

**Dated this the 23<sup>rd</sup> day of March 2006**

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

**Case No.OP 09 / 2006 &  
Case No.OP.26 / 2005**

**Between:**

M/s.R.K.Powergen Private Limited,  
3423, 10<sup>th</sup> Main,  
3<sup>rd</sup> Cross (near water tank),  
Indiranagar IIInd Stage,  
Bangalore-560038  
represented by its Managing Director  
Dr (Mrs) Andal Arumugam

.. PETITIONER

**And**

Karnataka Power Transmission  
Corporation Limited,  
Cauvery Bhavan,  
Bangalore-560009  
represented by its Managing Director

.. RESPONDENT

The Petitioner is a power-generating Company and is incorporated under the provisions of the Companies Act, 1956. It is represented through its Managing Director. A petition is filed seeking the following relief:

“Quashing the letter/order bearing No.KPTCL/B35/SEE (P&M)/AEEE4/4392 dated 05.07.2003 issued by the General Manager(Technical) KPTCL.

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Notices were issued to the Petitioner as well as the Respondent. The counsels for both the parties were heard. In the course of the hearing, Shri B.Satyanarayana Udupa, General Secretary, Bharatiya Kisan Sangha, Udupi filed a petition seeking to implead himself on behalf of the consumers. The Commission informed him that as the case relates to a dispute between two parties i.e. a Generator and a Licensee, a third party has no Locus Standi to implead in the case and therefore his petition was rejected.

2. Briefly stated, the facts of the case are as under:

3. The case has a chequered history of over four years. The Petitioner Company had entered into a Power Purchase Agreement (PPA) with the Respondent and the said agreement was signed on 18.10.2001 for putting up a 20 MW capacity bio-mass based power project in Hiriyur Taluk, Chitradurga District. The PPA had been approved by the Commission vide order dated 12.10.2001. The Petitioner Company had then proceeded to put up the power project. However, the Respondent vide letter dated 5.7.2003 had communicated termination of the said PPA with immediate effect. The Petitioner was also informed through this letter that in case it intends to continue to develop the project and sell power to KPTCL, the Petitioner is requested to enter into fresh agreement as per the tariff and other terms and conditions mentioned in the said letter.

4. Aggrieved by the aforesaid termination of the PPA, the Petitioner

had filed a Writ Petition before the Hon'ble High Court of Karnataka seeking relief. The Hon'ble High Court had ordered stay of the letter dated 5.7.2003 issued by the Respondent. The said Writ Petition No.45077/03 and Writ Appeal No.3961/05 have since been disposed off. Thereafter, the Respondent Company had filed a Petition before the Appellate Tribunal for Electricity in Appeal No.2 of 2006. The Hon'ble Appellate Tribunal, vide its order dated 15.02.2006, had disposed the said appeal with the direction that the Commission will dispose off the Petition filed by the Petitioner Company before it on merits and according to law.

5. In support of the Petition, the Petitioner has referred to various statutory and other sanctions, approvals and permissions taken for setting up the power plant in terms of the stipulations in the PPA. The Petitioner had taken all necessary steps in right earnest to set up the plant within the time schedule specified in the PPA. Copies of these approvals/sanctions/permissions have been filed in the annexures enclosed to the Petition. During April 2002, the Petitioner applied to Grama Panchayat of Babbur village for grant of licence to establish the power plant. The Tahsildar of Hiriyur Taluk had already written a letter to the Petitioner to show cause as to why their construction activity should not be stopped on the ground that non-agricultural activities are sought to be carried out on agricultural land. After correspondence with the revenue authorities including the Deputy Commissioner of the district, the Tahsildar withdrew that letter. However, the Grama Panchayat had illegally rejected the application filed by the Petitioner for grant of licence

and the said licence was issued only after the Petitioner had filed an appeal before the Appellate Authority who set aside the order of the Grama Panchayat and directed the Grama Panchayat to issue necessary licence. Thereafter, on 7.6.2002, the Zilla Panchayat had cancelled the licence issued by the Grama Panchayat and directed KPTCL to disconnect the power. An appeal was filed before the GOK which allowed the appeal and set aside the order passed by the Zilla Panchayat. It is argued by the Petitioner's counsel that the Petitioner had to face roadblocks in putting up the project. Meanwhile, there was an agitation by the local people which resulted in mob violence and police firing on 25.07.2002 and a joint Legislature Committee was appointed to go into the agitation against the setting up of the power plant and the mob violence. The said Committee had submitted a report and opined that the power plant was a necessity in the district and the agitation and violence were purely for extraneous considerations. Subsequent to the above events, the Petitioner had approached the Deputy Commissioner, Chitradurga District, requesting him to permit the Petitioner to commence the work. Despite the report of the Committee and the representation by the Petitioner, the Deputy Commissioner had refused to permit the Petitioner to commence the work. The Petitioner had to approach the GOK and pursuant to the representation made, the GOK issued letter dated 14.1.2003 directing the Deputy Commissioner to permit the Petitioner to commence the work. Despite this letter, the Deputy Commissioner had again refused to sanction permission to commence the work. The Petitioner had no other alternative but to make

a representation to the Hon'ble Chief Minister and permission was granted only after the GOK had issued an order dated 26.2.2003 to that effect. The KPTCL had thereupon issued letters dated 23.4.2003 and 06.05.2003 calling upon them to remit a sum of Rs.8.75 lakhs towards supervision charges for construction of the 66 KV DC evacuation line and terminal bay which was duly remitted by the Petitioner. The Respondent had also approved all the drawings for inter-connection facilities submitted by the Petitioner and, by June 2003, the Petitioner had already invested more than Rs.20.00 crores of its funds in the said project out of a total investment of Rs.50.00 crores. The project was slated to be commissioned by the end of 2003 way ahead of the stipulated time in the PPA i.e. April 2004. While the Petitioner Company was going ahead with the construction of the project, despite all the difficulties and hurdles faced by it as referred to above, to its utter shock, it received a letter dated 05.07.2003 from KPTCL informing the Petitioner that the PPA has been terminated with immediate effect. The Petitioner pleads that the said termination letter is illegal, arbitrary and contrary to the terms of the PPA. No reason has been assigned as to why the PPA is being terminated. It would appear that the said termination letter was issued only to revise the tariff rate, which is contrary to law. This is evident from the fact that the termination letter states that the Respondent is willing to purchase power from the Petitioner if it were to accept a tariff lower than the tariff stipulated in the PPA. The Petitioner had replied vide letter dated 14.07.2003 stating out various difficulties faced by it and requesting the Respondent to withdraw the letter dated 05.07.2003. In this letter, the Petitioner had

referred to lifting of the ban on work by the GOK dated 26.02.2003 and progress of the construction work in full swing since then. There was time lapse of nearly 10 months in completing the project and in spite of that the project was completed within 23 months of signing the PPA as against 30 months permitted in the PPA. As the delays have happened purely due to Force Majeure conditions, the Respondent was requested to withdraw the termination letter dated 05.07.2003 and be allowed to proceed with the PPA signed on 18.10.2001. The Respondent by letter dated 23.07.2003 had called upon the Petitioner to attend a meeting with their officials on 29.07.2003 and discuss the termination of the PPA. Another representation was given vide letter dated 29.07.20-03 requesting for withdrawal of letter dated 05.07.2003 to which no reply was received.

6. The Petitioner's counsel has argued extensively to prove his point that the termination letter issued on 5.7.2003 was illegal, unjustified and arbitrary. No reason has been stated in the said letter for terminating the PPA which had been approved by the Commission. The PPA, having been approved by the Commission, had attained the status of a statutory contract and any termination of the same can be only with the consent and concurrence of the Commission. Since the Respondent had not obtained any such consent or concurrence, the termination is bad in law. Referring to the PPA, it is pointed that Clause 9.3 of the PPA provides for termination of the PPA. It stipulates that the PPA can be terminated only in the event of default set out in Clause 9.2.1, namely, failure or refusal by the Petitioner to perform its material obligations under the PPA. That

apart, Clause 9.3.1 further stipulates that the termination is possible and permissible only after the expiry of 30 days after the delivery of notice of default to the Petitioner and Petitioner failing to remedy the default. In the instant case, no notice had been issued and no reason, whatsoever, has been assigned for the proposed termination. The PPA has been terminated with the sole intention of securing a lower tariff and, therefore, the termination of the PPA is motivated and malafide. The termination being for a collateral purpose is vitiated with legal malafides.

7. In his written arguments, the Petitioner has further stated that as per the PPA, the plant was to be commissioned within 30 months from 18.10.2001. This is apparent from the definition of "Schedule Date of Completion" found in the PPA on page 56 as per which the project is scheduled to deliver electricity after completion of required tests and the same shall be within 18 months from the "effective date". Article 2.2 of PPA, page 57, gives a time limit of 12 months from the date of signing of the agreement to fulfill the conditions precedent. Consequently, the total time available for completion of the project and commissioning of the same would be 12 + 18 months i.e. 30 months. In the instant case, the 30 month period would end on 17.04.2004 and, therefore, the Petitioner had time till that date to commission the plant. The power plant had been commissioned on 17.01.2004 which is apparent from the Commissioning Certificate issued by the KPTCL dated 04.02.2004. Thus, the plant has been commissioned 3 months ahead of schedule. If the stoppage of work notice issued by the Tahsildar and Zilla Parishad followed by agitation by the local people resulting in delay of over 9 months 20 days

is taken into account, the plant has been commissioned virtually 13 months ahead of the schedule. Hence, the Force Majeure event referred to in Article 8.1(iii) of the PPA is squarely applicable to the facts of the case. The Petitioner has also referred to Article 9.3.1 of the PPA which reads as under:

"Where a Default Notice has been issued with respect to an Event of Default which requires the co-operation of both Corporation and the Company to remedy, Corporation shall render all reasonable co-operation to enable the Event of Default to be remedied"

8. This clearly shows that even in the case of default, the Corporation should co-operate to remedy the default and salvage the PPA and not be trigger-happy. In the present case where no default has been established, the Corporation has chosen to terminate the PPA without assigning any reason. Coming to the Respondent's charge that financial closure was not achieved within the time stipulated and consequently the order of termination was issued by them, it is pointed out by the Petitioner that since the order of termination did not mention any reason whatsoever, it is not now open to the Respondent to supplement the order of termination by fresh reasons. The stand taken by the Respondent is illegal and untenable in view of several Supreme Court decisions on the issue. Clause 1.1 (Page 54 of PPA) defines "Financial Closure" as under:

"Financial Closure" means the signing of the Financing Documents for financing of the Project and fulfillment of all the conditions precedent to the initial availability of funds thereunder and the



receipt of commitments for such equity as required by the Company in order to satisfy the requirements of the lenders, provided however that the Company has immediate access to funds (subject to giving the required drawdown notices) regarded as adequate by the Company."

9. As is evident from this definition, Financial Closure is a state-of-affairs of a project developer wherein he has immediate access to funds regarded as adequate by the project developer to develop the project in question. The Petitioner had at all times adequate funds to complete the project and that is evident from the fact that they have completed the project within a record period of 17 months from the date of signing of the PPA taking into account 10 months lost due to Force Majeure conditions. Achieving of Financial Closure by a project developer is to ensure that he has necessary funds to complete the project in time and the project does not suffer for want of funds. This is evident from Clause 3.2 of the PPA wherein there is a reference to fulfillment of Article 2.1. Fulfillment of Article 2.1 includes fulfillment of Financial Closure. When the Petitioner has completed the project in a record period of 17 months, it is preposterous to suggest that for 12 months they did not have adequate funds to complete the project and, that too, a project which costed over Rs.50 crores. In any case, the Respondent had, at no point of time, taken a stand that the Petitioner did not achieve Financial Closure or they did not have sufficient funds to complete the project. The Respondent had written a letter dated 3.1.2003 calling upon the Petitioner to intimate them as to whether Financial Closure has been achieved and all permissions, clearances and approvals for the project have been received. The

Petitioner had sent 3 replies vide their letters dated 08.01.2003, 16.01.2003 and 04.02.2003 wherein it had been stated that they have achieved Financial Closure and obtained necessary permissions/clearances etc. The Respondent did not send any reply to the Petitioner contradicting this statement of the Petitioner. The Respondent was fully satisfied that the Financial Closure has been achieved and Article 2.1 of PPA including achievement of Financial Closure have been fulfilled. Thereafter, the Respondent asked the Petitioner to pay a sum of Rs.8.75 lakhs as Supervision Charges which was duly paid and acknowledged by the Respondent. If Financial Closure had not been achieved by the Petitioner, the Respondent would not have written these letters and asked the Petitioner to make payments. This clearly indicates that the present stand taken by the Respondent that Financial Closure has not been achieved by the Petitioner is a false statement.

10. On the basis of the above, the Petitioner has vehemently pleaded for quashing the letter/order bearing No.KPTCL/B35/SEE (P&M)/AEEE4/4392 dated 05.07.2003 issued by the General Manager(Technical) KPTCL.

11. The Respondent has questioned the correctness of the arguments put forward by the Petitioner. The Respondent's counsel has taken us through the various clauses of the PPA entered on 18.10.2001 and the correspondence with the Petitioner. It is argued that the Petitioner Company had failed to comply with the conditions precedent as set out in the PPA and, therefore, the PPA had been terminated on good and justifiable grounds. The Respondent has also filed detailed written

objections and arguments objecting to the allowance of appeal filed by the Petitioner. It is claimed that the Petitioner is not entitled to seeking the relief i.e. quashing of letter dated 05.07.2003 issued by the KPTCL to the Petitioner. Reference is made to Article 2 of the PPA,

12. As per this proviso of the PPA, the Petitioner had to achieve Financial Closure within 12 months from 18.10.2001 i.e. on or before 17.10.2002. "Financial Closure" is defined in the PPA as signing of financial documents, required equity participation to the satisfaction of the lenders and the Company having access to the required funds. Further, the project had to be completed within 1 1/2 years from the "Effective Date." The Effective date is defined as the date to fulfill the Conditions Precedent as defined in Article 2 of the PPA. Hence, non-fulfillment of the provisions of Article 2 empowers either party to terminate the contract. The Petitioner did not notify the fulfillment of the above conditions including achieving of Financial Closure. The counsel would further argue that, although no notice is required to be issued as per Clause 2 of the PPA, the Respondent with an intention to giving an opportunity to the Petitioner to explain, issued notice dated 03.01.2003, calling upon the Petitioner to give details of achievement of Financial Closure before 15.01.2003 failing which the PPA will be terminated. The Petitioner had replied vide letter dated 08.01.2003 falsely claiming that the conditions have been fulfilled while simultaneously admitting its failure to construct the plant within the contractual time due to reasons beyond its control. The Petitioner had also filed one more letter dated 4.2.2003 wherein the Respondent was

informed that the Power Finance Corporation has sanctioned loan of Rs.25.00 crores on 02.12.2002 subject to fulfillment of several conditions. A draft of the loan agreement format to be entered into was also sent by the Petitioner. The counsel would further argue that mere agreement to provide loan does not amount to achieving Financial Closure and, therefore, the Respondent was entitled to terminate the PPA as notified in the notice dated 03.01.2003. According to the counsel, the time to complete the project would start to run from the date of achievement of Financial Closure which is construed as the effective date. The averment made by the Petitioner that the plant was to be set up in 30 months period (12 months + 18 months) is incorrect. The Petitioner had also not chosen to seek an extension of time for achievement of Financial Closure or executing the project. In view of this failure of the Petitioner, the Respondent was fully justified in taking action as provided in Article 2 of the PPA and terminating the PPA. Referring to the Petitioner's contention that the termination letter is illegal, arbitrary and contrary to the terms of the PPA, the Respondent argues that the above contention is false. The averment that no reasons have been assigned as to why the PPA is being terminated is also misleading. The communication of termination was preceded by a notice dated 03.01.2003 which sets out the reason as to why the PPA is liable to be terminated. The other contention raised by the Petitioner that termination was resorted to only to revise the tariff is false. The revised offer was in view of certain developments with regard to the fixation of tariff and to give an opportunity to the Petitioner to continue with the project. The contention

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that various drawings have been approved and inspections have been carried out after termination is of no relevance. All such approvals and inspections have been done at the request of the Petitioner and subject to pending Writ Petition/legal proceedings. The Petitioner's argument that the project has been commissioned 3 months ahead of schedule is termed as an attempt to cover up the non-achievement of Financial Closure. Referring to Petitioner's plea that the Respondent had no power to terminate a PPA which had been approved by the Commission, the Respondent would argue that this argument is irrelevant since the PPA has been terminated as per the terms of PPA only. Further, it is argued that, the Petitioner has only referred to Clause 9.3 of the PPA as providing for termination without reference to proviso of Clause 2 of the PPA. It is submitted that the Clause 9.3 is not of any relevance in the present case as the termination in the case has been in pursuance of Article 2 of the PPA. The Respondent had taken care to issue a prior notice on 03.01.2003 clearly stating the reason for the proposed termination, although no prior notice is contemplated under Article 2 of the PPA. The Respondent has also not accepted the averment of the Petitioner that the termination is motivated, malafide and for collateral purposes. The contention of the Petitioner that it had borrowed a sum of Rs.25.00 crores from PFC and Rs.22 crores from SBI were not within the knowledge of the Respondent as no document is filed to substantiate the same. Merely because some amounts have been borrowed from financial institutions, the PPA cannot be insulated from termination. In short, as the time schedules stipulated in the PPA were not adhered to, the letter dated ..14..

05.07.2003 had been rightly issued terminating the PPA and, therefore, it does not suffer from any legal infirmity as alleged. In his written submissions made in the course of hearing, the Respondent's counsel has reiterated the contentions made earlier in the written objections to the Petition filed earlier. It is argued that as on 05.07.2003, the Petitioner had not completed the project and it was completed subsequent to the date of termination. Reference is made to Articles 9.2.1 and 9.3.1 of the PPA and the Respondent's contention is that the Petitioner having failed to achieve Financial Closure within 12 months from 18.10.2001, Clause 9.2.1(b) squarely covers the failure. The Respondent had rightly delivered a default notice to the Petitioner and it is an admitted position that the Petitioner had not signed the financing document required for financing the project. What was furnished was only a signed letter which precedes signing of financing documents. Therefore, as per Para 2 of Clause 9.3.1. i.e. after expiry of 30 days from the date of default notice, issued the termination letter. Hence, the termination is in accordance with Clause 9.3.1 of the PPA. Since the Petitioner was served with a prior notice, the termination order did not contain the reason. Merely because the termination order does not specifically say that the termination is on account of non-achieving of Financial Closure, it cannot be said that the termination order is bad. The Respondent is also of the view that there was no need for it to call upon the Petitioner to remedy the default and that it is not correct to hold the view that only after the issuance of the said notice it gets a right to terminate the PPA. Failure of the parties to fulfill the conditions precedent will confer a right on the non-defaulting

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party to terminate the PPA. The Respondent is also not in agreement with the contention of the Petitioner that it ought to have cooperated with the Petitioner for achieving Financial Closure. The Petitioner had not sought any cooperation from the Respondent to achieve the Financial Closure. Referring to the Force Majeure events which prevented the Petitioner from achieving the Financial Closure, the Respondent has referred to Article 8.1(a) of the PPA and argued that failure to meet the milestone dates shall be due to any event or circumstances beyond the reasonable control of the parties. The stoppage of work is in no way concerned with Financial Closure and, therefore, Article 8.1(a) does not help the Petitioner.

13. Based on the above, the Respondent's counsel has contended that the Petition filed by the Petitioner needs to be rejected.

14. We have heard the counsels for both the parties extensively and perused the written arguments filed by them in support of their respective contentions. The only issue to be decided in this case is whether the termination of the PPA by issue of letter dated 05.07.2003, entered into with the Petitioner by the Respondent is justified. We have gone through the PPA entered into on 18.10.2001 between the two parties. This PPA had become effective after it was approved by the Commission on 12.10.2001. The Petitioner had come forward with a proposal to set up a 20 MW bio-mass based power project in Babbur village, Hiriur Taluk of Chitradurga District. Since the termination order dated 05.07.2003 issued

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by the General Manager(Technical) of KPTCL is stated to be in accordance with the terms and conditions of the PPA, it is relevant to reproduce the relevant "Definitions and Articles " of the PPA which are applicable to this case. The important definitions and articles referred to are:

**Article 1**

**"Effective Date"** : means the date on which all the conditions precedent pursuant to Section 2.1 are either satisfied in full or such conditions precedent which are unfulfilled are waived by the parties.

**"Financial Closure"**: means the signing of the Financing Documents for financing of the project and fulfillment of all the conditions precedent to the initial availability of funds thereunder and the receipt of commitments for such equity as required by the Company in order to satisfy the requirements of the lenders, provided however that the Company has immediate access to funds (subject to giving the required drawdown notices) regarded as adequate by the Company.

**"Scheduled date of Commencement"**: shall mean the date on which the construction work at the Project Site is actually started and such date shall be within 18 months from the date of signing of this Agreement.

**"Scheduled date of Completion"**: shall mean the date on which the Project is scheduled to deliver Electricity to the Corporation at the Delivery Point after completion of all the required tests, and shall be within one and half years from the Effective Date.

**Article 2:**

2.1: **"Conditions Precedent"**: The obligations of Corporation and the Company under this Agreement are conditional upon the occurrence of the following in full:

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a. The Company shall have been granted and received all permits, clearances and approvals (whether statutory or otherwise) as are required to execute and operate the Project (hereinafter referred to as "Approvals").

b. The Financial Closure shall have occur:

The date on which the Company fulfills any of the Conditions Precedent pursuant to Article 2.1, it shall promptly notify the Corporation of the same.

2.2: **"Non-fulfillment of Conditions Precedent"**: Non fulfillment of the Conditions Precedent or refusal to waive the Conditions Precedent which are not fulfilled, within 12 months from the date of signing of this Agreement, unless extended by mutual agreement, is a ground for termination of the Agreement by either Party.

## **Article 8 - FORCE MAJEURE**

### **8.1 Force Majeure Events:**

- (a) Neither Party shall be responsible or liable for or deemed in breach hereof because of any delay or failure in the performance of its obligations hereunder (except for obligations to pay money due prior to occurrence of Force Majeure events under this Agreement ) or failure to meet the milestone dates due to any event or circumstance (a "Force Majeure Event") beyond the reasonable control of the party experiencing such delay or failure, including the occurrence of any of the following:
- (iii) strikes, work stoppages, work slowdowns or any other labour dispute which affects a party's ability to perform under this Agreement.

## **Article 9 - TERM, TERMINATION & DEFAULT**

**9.2.1** - which deals with Company's Default reads as under:

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"The occurrence of any of the following events at any time during the Term of this Agreement shall constitute an Event of Default by Company."

- a. O&M Default on part of Company
- b. Failure or refusal by Company to perform its material obligations under this Agreement.

**9.2.3** - which deals with termination for Company's default reads as under:

" Upon the occurrence of an event of default as set out in the sub-clause 9.2.1 above, Corporation may deliver a Default Notice to the Company in writing which shall specify in reasonable detail the Event of Default giving rise to the default notice and calling upon the Company to remedy the same."

15. As discussed above, the Petitioner Company is aggrieved by the termination of the PPA by issue of letter dated 05.07.2003. The entire case of the Respondent in support of the termination hinges on their letter dated 03.01.2003 issued to the Petitioner on the ground that the Petitioner has not achieved Financial Closure within the specified date. It is admitted by the Respondent and is also clear from the termination letter that no reason has been stated in the said order for termination of the PPA. As an afterthought, the Respondent is now arguing that reason for termination has been stated in their letter dated 3.1.2003. The Respondent would further argue that this letter dated 3.1.2003 was, in fact, the show cause notice issued to the Petitioner for non-complying with the conditions precedent as set out in the PPA. The termination order reads that,

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"This is to inform that the Power Purchase Agreement entered into with your Company on 18.1.2001 in respect of purchase of power from your proposed 20 MW capacity bio-mass based power project near Chinnaiannahatti village, Hiriyur Taluk, Chitradurga District has been terminated with immediate effect...."

"In case you intend to continue to develop the project and sell power to KPTCL, you are requested to enter into a fresh agreement as per the following tariff, terms and conditions approved by KPTCL by submitting necessary relevant documents..."

16. This letter No.KPTCL/B35/SEE(P&M)/AEEE4/4395-06 dated 05.07.2003 is issued by the General Manager(Tech), KPTCL, Bangalore. In this connection, the office records maintained by KPTCL leading to the issue of termination order were called for and file No.F-149 Vol-1 and file No.B28/5003/01-02 were perused. It is seen that the said file No.F.149 starts with the order sheet recordings on 19.07.2004, wherein AGM (NC2) puts up a brief note to the General Manager(Tech) on 19.07.2004.

"Discussed with GM(T) on 19.07.2004. Copy of the letter dated 05.07.2003 is placed in the file at flag X for kind perusal. No reason for termination is detailed in the letter. The information will be available at the Office of the SEE(P&M). Paras for kind perusal.

"The reason for termination of PPA is not detailed in the letter of termination. However, detailed review of case to case by the SEE(P&M) is required to be done to take a considered decision."

In the detailed note at page 3 of the note sheet (para 9), the following is stated:

"Since this project was not yet commissioned as on date, the PPA signed on 18.10.2001 has been terminated on 05.07.2003, requesting the firm to enter into fresh PPA with the revised tariff, terms and conditions as

approved for bio-mass projects (on that date) in case the firm intends to develop the project and sell power to KPTCL. Reasons for termination is not indicated in the termination letter."

17. The second file No.B.28/5003/01-02 starts with entries in the order sheet from 02.05.2001 onwards. After 06.11.2001, there is no entry up to 17.12.2003, wherein reference has been made to filing of Writ Petition by the Petitioner against the termination of the PPA on 05.07.2003. In both the files referred to above, there is absolutely no discussion or notings leading to issue of termination order by any authority. The records show that the issue of termination of PPA was abruptly taken up and termination order was issued.

It is evident that the decision to terminate a validly concluded PPA which had been approved by the Commission has been taken by the Respondent in a casual and arbitrary manner without sufficient and convincing reasons for the said termination. In fact, no reason has been stated in the order and the Respondent, as an afterthought, is now trying to argue that the reason had been stated in the show cause notice issued on 03.01.2003. In the said letter dated 03.01.2003, the Respondent states non-fulfillment of the conditions precedent as per Article 2 of the PPA as a ground for termination of the PPA and that the Petitioner has neither notified the fulfillment of the conditions precedent, i.e. the achievement of the Financial Closure and receipt of all permits, clearances and approvals required for the project, nor obtained extension of time for the same by mutual consent and, therefore, the PPA is liable for termination. The Petitioner has been asked to intimate the Respondent by 15.01.2003

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achievement of Financial Closure and also receipt of permits, clearances and approvals of the project. It is further stated that if no reply is received from the Petitioner, it will be presumed that the Petitioner has not achieved the Financial Closure so far and also not received all permits, clearances and approvals required for the project and the PPA signed will be terminated.

18. As may be seen from the above, the Petitioner has been given less than 2 week's time to intimate them about the achievement of Financial Closure and receipt of all permits etc. The said letter is stated to have been issued under Article 2 of the PPA. As referred to above, Article 2 deals with conditions precedent and clearly states that non-fulfillment of the conditions precedent within 12 months from the date of signing the PPA, unless extended by mutual agreement, **is a ground for termination of the agreement by either party.** Thus, Article 2 provides only the ground for termination of the agreement by either party and for actual termination in respect of notice of default, the Respondent has to be guided by Article 9.3.1. In accordance with the above Article, the Respondent has to deliver a default notice to the Company in writing which shall specify in reasonable detail the event of default giving rise to the default and calling upon the Company to remedy the same. A clear 30 days' time has to be given to the developer from the date of delivery of this default notice for remedying the default, if any, and only thereafter a termination notice could be delivered to the developer. Hence, issuing of termination order straightaway under Article 2 of the PPA is in contravention of the

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terms of the PPA. It is, further, noticed that the Respondent is contradicting himself. While making reference to the letter dated 3.1.2003, the Respondent relies on failure to achieve Financial Closure and obtaining permits etc. as the reason, whereas in the note recorded in the file as referred to above in para 9 at page 653 of the file No.F.149, non-commissioning of the project as on date is said to be the reason for termination of the PPA. The letter of termination itself is conspicuously silent on the reason for termination. Significantly, it is relevant to note that if the termination letter dated 5.7.2003 was in pursuance of the so-called show cause notice issued on 3.1.2003, this termination order ought to have made reference to the show cause notice dated 03.01.2003 and the failure of the Petitioner Company to comply with the requirement as stated in the letter of 03.01.2003. No such reference has been made and a bald statement is made that the PPA has been terminated with immediate effect. It is also not the case that the Petitioner Company did not respond to the letter of 03.01.2003. The Petitioner sent reply vide letter dated 8.1.2003 wherein it has been stated that they have complied with all the conditions precedent and they are fully prepared to start the work. It has been clearly stated that all statutory clearances necessary for completion of the project have been obtained and copies of the same were enclosed to that letter in **Annexure A**. They have further stated that they have got the loan sanctioned by M/s.PFC Limited, New Delhi. Although they started construction in May 2002, the work was stopped by the Deputy Commissioner, Chitradurga citing local problems. Subsequently, another letter was sent on 4.2.2003 addressed to the

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Respondent wherein it was reiterated that all statutory clearances have been obtained and regarding Financial Closure, it is stated that they have to bring in an upfront equity of 30% i.e. Rs.15.00 crores as per the conditions of the loan sanctioned and they have already spent Rs.10.00 crores so far of this equity. The above Rs,10.00 crores has been utilized to pay advances to the suppliers and the material procured for site fabrication and construction. It has been further stated that they need to spend balance Rs.5.00 crores before they are able to get further amounts from financial institutions. However, in view of the order of the DC to stop the work, they are unable to proceed further. By their letter dated 16.1.2003, the Petitioner had sent copy of the loan sanctioned by PFC vide letter dated 2.12.2002. The above correspondence would clearly indicate that in response to the letter dated 03.01.2003, the Petitioner had informed the Respondent that it has fulfilled the conditions precedent and also indicated the extent of money spent on construction activity and also the reason for stoppage of work in the project site for reasons beyond its control. Although the letter of 03.01.2003 was not in accordance with Article 2 read with 9.3.1 of the PPA, the Petitioner Company had taken all the care to intimate immediately that it has complied with the necessary conditions precedent. There was no intimation from the Respondent whatsoever to the Petitioner that it was not satisfied with the reply given by the Petitioner Company, thereby making out a case for termination. The very fact that there is no reference at all to the letter dated 03.01.2003 in the termination order dated 5.7.2003, it is crystal clear that even the Respondent did not consider the letter dated 03.01.2003 as

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a show cause notice issued under Section 9.3.1. of the PPA.

19. We have observed that the Respondent is deliberately ignoring the fact that after stop-work notice was lifted following the GOK's intervention in February 2003, the Petitioner has completed the project and written to the Respondent by letter dated 17.12.2003 requesting for synchronisation. As rightly contended by the Petitioner, it is preposterous to argue that a project of this size costing over Rs.50.00 crores was completed without adequate funds four months ahead of schedule. This is despite a series of actions by the local authorities and the Deputy Commissioner putting up roadblocks to thwart the commencement and completion of the project. The Respondent is found to be shifting its stand as it suits it. At one stage it is stated that it was not within its knowledge that the Petitioner had borrowed a sum of Rs.25.00 crores from PFC and another sum of Rs.20.00 crores from SBI and, in the same breath, it is also argued that merely because some amounts have been borrowed from financial institutions, it does not insulate the Petitioner from termination. Alas! One has to digest this contradiction when the Respondent is bent upon terminating the PPA, even if such action has no legs to stand on.

20. The Respondent is making vain attempts to justify the termination of the PPA, whereas, in fact, there was no case at all for such termination. By issuing an order of termination without any reason and without following due procedure, the Respondent has thrown to the winds all cannons of law, especially the principles of natural justice and equity. The line of reasoning now being adopted by the Respondent to support

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termination, to say the least, is not only absurd but also dangerous. We are constrained to warn that if they adopt the same attitude in respect of the PPAs approved by the Commission, then the developers will lose confidence in the PPAs. An order of termination or for that matter any order ought to be self-supportive and not leaning on crutches. The Respondent has exposed itself to the charge of uttering nothing but a thinly veiled falsehood and contradicting itself by stating non-existent reasons for supporting the termination. No reason has been stated in the termination order as, in fact, there was no reason to state and the decision was taken abruptly and arbitrarily to terminate the PPA. The records show that the Petitioner has achieved Financial Closure and commissioned the power project despite the Force Majeure conditions well within the time stipulated in the PPA and has duly intimated such compliance to the Respondent by issue of letters referred to above. It is astonishing to see that a project approved at the level of Chairman & Managing Director of KPTCL and a PPA approved by the Commission is terminated without any justifiable reason by an Officer of the rank of General Manager.

21. A responsible and forward-looking public utility Company like KPTCL, keeping the interest of the public upper most in mind, is expected to extend all possible assistance to a developer, of course, within the legal framework, to come forward and invest in the State. On the contrary, in this case, we find that the Respondent is found to be eager to put an end to the project by terminating the PPA with utter disregard to the

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safeguards and procedure provided in the PPA itself and after such termination make the Petitioner kneel down before it and re-negotiate for a lower tariff. While charging the Petitioner of dishonouring the terms of PPA, the Respondent has virtually turned the PPA upside down. The malafide intention of the Respondent is writ large in this case.

Thus, in view of the above, the termination order dated 05.07.2003 issued by the Respondent is unsustainable as it is illegal, arbitrary and malafide and deserves to be "quashed". We do so and the Petition in OP No.09/2006 thus succeeds.

The earlier Petition in OP No.26/2005 stands automatically disposed in view of our above order.

Sd/-  
(K.P.Pandey)  
Chairman

Sd/-  
(H.S.Subramanya)  
Member

Sd/-  
(S.D.Ukkali)  
Member