

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

Dated : 21st December, 2017

Present:

Shri M.K. Shankaralinge Gowda	..	Chairman
Shri H.D. Arun Kumar	..	Member
Shri D.B. Manival Raju	..	Member

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BETWEEN:

Tungabhadra Power Company Private Limited,
9/1, 2nd Floor, Classic Court,
Richmond Road,
Bengaluru – 560 025.

..

PETITIONER

[Represented by Navayana Law Offices, Advocates]

AND:

Gulbarga Electricity Supply Company Limited,
Station Main Road,
Kalaburagi – 585 102.

..

RESPONDENT

[Represented by Shri Shahbaaz Husain, Advocate]

ORDERS

- 1) The substance of the prayers made by the Petitioner in the present
Petition are as follows:
 - (a) To refund an amount of `3,31,581/- (Rupees Three Lakh Thirty
Thousand Five Hundred and Eighty One) only, illegally deducted

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towards import of energy from the monthly tariff invoices for the months, from January, 2015 to May, 2015;

- (b) To refund an amount of `12,12,239/- and `9,48,157/- totalling `21,60,396/- (Rupees Twenty One Lakh Sixty Thousand and Three Hundred Ninety Six) only, recovered during 2015-16 and 2016-17 towards rebate of 1.8% of the invoice value of bills since no Letter of Credit was opened during these years;
 - (c) To pay an amount of `11,52,304/- (Rupees Eleven Lakh Fifty Two Thousand Three Hundred and Four) only, towards interest for delayed payments;
 - (d) Not to deduct a rebate of 1.8% of the invoice value if LC is not opened and no prompt payment of the bills made by the Respondents;
 - (e) To refund `6,66,000/- (Rupees Six Lakh Sixty Six Thousand) only, paid by Petitioner towards providing MVAR Capacitor bank of required capacity, as the same is not provided by the Respondent;
 - (f) To calculate the energy supplied for start-up purposes of the Petitioner @ 105% of the energy supplied as against 115% now being done by the Respondents, as this is against the provisions of PPA;
 - (g) Any other consequential order that the Commission deems fit and necessary.
- 2) The Petitioner is a generating company having established a Mini Hydro Power Project, situated near Thimmlapura Village, Hadagali Taluk, Ballari District. The Petitioner and the Respondent have entered into a Power Purchase Agreement (PPA) on 16.08.2006. The tariff agreed under the said PPA was `2.80 per unit. There was a delay in achieving the

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commissioning of the Project, which was not due to the Petitioner's fault. Therefore, at the request of the Petitioner, made in OP No.24/2013, the tariff payable was fixed at `3.40 per unit from 13.09.2013. The Mini Hydel Power Project achieved the Commercial Operation Date (COD) on 30.08.2012. The parties executed a Supplemental PPA dated 04.08.2016, incorporating the tariff of 3.40 per unit, as per the Order in OP No.24/2013. The material facts urged by the Petitioner in support of its prayers may be stated as follows:

- (a) *Excess deductions made towards import of energy for the months from January, 2015 to May, 2015:*

That the Respondent has deducted 115% of the energy supplied for the start-up purpose, from out of the energy injected by the generator, while calculating the amount payable for the energy supplied into the Grid for the months of January, 2015 to May, 2015. The Petitioner has stated that, Article 5.5 of the PPA provides for deduction of only 105% of the energy supplied for the start-up purpose from out of the energy injected by the generator, but not at 115%, as deducted by the Respondent. The Petitioner has claimed a sum of `3,31,381, as per the Calculation Sheet attached to ANNEXURE-P2 of the Petition.

- (b) *Deduction towards rebate on 1.8% of the invoice value of the bills:*

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That a sum of `12,12,239/- during the year 2015-16 and a sum of `9,48,157/- during the year 2016-17, were deducted by the Respondent towards rebate at the rates of 1.8% on the invoice value of the bills. That the claim for the said rebate, stated in Article 6.5(v) of the PPA, cannot be entertained in the absence of opening of a Letter of Credit (LC). The Respondent had not opened the LC, during the years 2015-16 and 2016-17, but had deducted the rebate at the rate of 1.8% on the monthly tariff invoices submitted by the Petitioner.

(c) *Interest on delayed payments of the monthly tariff invoices:*

Article 6.3 of the PPA provides for payment of interest at the rate of SBI Medium Term Lending Rate for any delayed payment of the monthly tariff invoices. The Respondent has not made the payments due, within the stipulated time and was liable to pay interest, but has not made payment of such interest for the delayed monthly tariff invoices. The amounts due towards interest would work out to `11,52,304/-, for the bills cleared upto November, 2016.

(d) *Refund of `6,66,000/-, towards non-providing of MVAR Capacitor Banks, as required in Article 5.4 of the PPA:*

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The Respondent had collected `37,000/- per MW of the installed capacity, as a one-time lumpsum payment for providing the required MVAR capacitor banks at the Sub-Station of the Karnataka Power Transmission Corporation Limited (KPTCL) / GESCOM, to which the Project was interconnected to supply the requisite reactive power to the Grid system. The said Article 5.4 of the PPA further provides that, in case the KPTCL / GESCOM fails to install the Capacitor bank before the COD, the amount collected for this purpose should be refunded by the Respondent (GESCOM) to the Petitioner-Company, within thirty days from the COD of the Project. However, the required MVAR capacitor banks at the Sub-Station concerned were not provided by the Respondent. Even after the request made by the Petitioner for refund of the said amount, the Respondent has failed to refund the same.

- (e) For the above reasons, the Petitioner has prayed for the reliefs stated above.

- 3) Upon Notice, the Respondent (GESCOM) appeared through its learned counsel and filed the Statement of Objections, the substance of which may be stated as follows:
 - (a) *Regarding excess deductions, made towards the import of energy for the months, from January, 2015 to May, 2015:*

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The Respondent has contended that, it has relied upon the clarifications given by this Commission, in letter dated 12.07.2013, for deduction of 115% of the energy supplied by it, for the start-up purpose, from out of the energy injected into the grid by the generator. The said letter giving clarifications is produced by the Respondent as ANNEXURE-R1.

- (b) *Regarding deduction towards rebate @ 1.8% on the invoice value of the bills:*

The Respondent has contended that, for the year 2015-16, it had opened the LC for an amount of Rs.77,00,000/-, as required, and has produced the letter dated 20.04.2015 (ANNEXURE – R3). The Respondent has stated that, the LC for the year 2016-17 was not opened, in view of the practical difficulties faced by it. It is stated that, its Bank has intimated that the maximum tenure of the LC would be only 40 days. Therefore, the Respondent felt that it was practically difficult to follow the process and to renew or open the LC for every 40 days period and, therefore, it did not open the LC for 2016-17. The Respondent has further contended that, rebate is a claim for prompt payment and it need not be linked with the opening of LC or otherwise and that the rebate was claimed, only during the months, when the Respondent had made prompt payments of the monthly tariff invoices, within the due date, and such, the deductions are not illegal.

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- (c) *Regarding the liability to pay interest on delayed payments on the monthly tariff invoices:*

The Respondent has contended that, normally it had made prompt payments of the monthly tariff invoices. However, when it was faced with acute shortage of funds owing to the circumstances which were beyond its control, there were delays in payments of the monthly tariff invoices. The Respondent has produced a Statement (ANNEXURE – R2), showing the details of the payments made towards the monthly tariff invoices.

- (d) *Regarding refund of `6,66,000/-, claimed by the Petitioner towards non-providing of the MVAR Capacitor Banks:*

The Respondent has stated that, the installation of the capacitors for monitoring the reactive power in the Grid system has been taken care of by it, all this while. The capacitors are being provided or added whenever the system requires to reduce the reactive power in the system. The Respondent is utilizing the amount of `6,66,000/- towards such works in maintaining the reactive power in the Grid, as required by article 5.4 of the PPA.

- (e) For the above reasons, the Respondent has prayed for dismissal of the Petition.

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- 4) We have heard the submissions made by the learned counsel for the parties and perused the material on record.
- 5) After considering the rival contentions and the material on record, our findings on the various claims, made by the Petitioner as stated above, are as follows:
- 6) *Regarding excess deductions, made towards the import of energy for the months from January, 2015 to May, 2015:*

Article 5.5 of the PPA provides that the generator shall be permitted to draw upto 10% of the installed capacity for start-up, and 105% of such energy provided by the Respondent (GESCOM) for the start-up purpose, shall be deducted from the energy injected into the Grid by the generator. However, this Commission has earlier scrutinized the correctness of this provision and found that there was a typographical error in mentioning quantum of deduction as "105%" in Article 5.5 of the approved PPA instead of "115%" and, thereafter, this Commission had issued a clarification, by letter dated 12.07.2013, to all the Electricity Supply Companies (ESCOMs) to deduct 115% of the energy supplied by it for the start-up purpose, from out of the energy injected into the Grid by the generator. The learned counsel for the Respondent, during arguments submitted that, the said clarification of the Commission, vide letter dated 12.07.2013, has been upheld by the Hon'ble Appellate Tribunal for Electricity (ATE), in Appeal No.132/2015, in the case of *Atria Brindavan Power Limited –Vs- KERC and others*. He has also produced a

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copy of the said decision of the Hon'ble ATE. The above facts are not disputed by the learned counsel for the Petitioner. Therefore, we hold that the Petitioner cannot have any grievance against deduction of 115% of the energy imported by the generator for the start-up purpose.

7) *Regarding deduction, towards rebate @ 1.8% on the invoice value of the bills:*

(a) The Respondent has stated that it had opened the LC in favour of the Petitioner for `77,00,000/-, as required. In this regard, it has produced the letter dated 20.04.2015 (ANNEXURE – R3), issued by the State Bank of Hyderabad. The authenticity of this letter is not disputed by the Petitioner. Therefore, it is established that, for the year 2015-16, the Respondent had opened the LC for `77,00,000/-.

(b) The Respondent has admitted that for the year 2016-17, due to certain practical difficulties, it had not opened the LC. It has stated that, its Bank had intimated that the maximum tenure of the LC to be issued would be only for 40 days. Therefore, it was difficult to follow the process of renewal of the LC for every 40 days' period and, thereby, the Respondent did not open the LC for the year 2016-17. The Respondent has not produced any intimation, sent by its Bank. Therefore, it is difficult to believe the said version of the Respondent. We are of the considered view that, the Respondent needs to be suitably instructed in this regard to open the LC.

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(c) The Respondent has further contended that, the claim for the rebate is allowed for prompt payment of the monthly tariff invoices within the stipulated period. The Respondent has further contended that, it had made prompt payments of monthly tariff invoices, within the stipulated time, and has claimed the rebate. The Commission notes that, the prudent utility practice in the power sector allows such a rebate for prompt payment of the monthly tariff invoice. Article 6.5 of the PPA, which deals with the LC, does not make the opening of the LC a condition-precedent, for claiming the rebate. Therefore, we hold that, the claim for refund of the amounts deducted towards the rebate, is not sustainable.

8) *Regarding the liability to pay interest on delayed payments of the monthly tariff invoices:*

The Petitioner has claimed `11,52,304/- towards interest on delayed payments of the monthly tariff invoices. The Petitioner has not produced the required particulars to calculate the actual amount of interest that would become due, on this count. The Respondent has admitted that, now and then, there was a delay in making payments of the monthly tariff invoices, due to acute shortage of funds. The Respondent has also not filed any statement showing the details of the amounts due, towards the payment of interest for the delayed payments of the monthly tariff

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invoices. Therefore, we are of the view that, the Petitioner may be granted suitable relief in this regard.

9) *Regarding refund of `6,66,000/-, claimed by the Petitioner towards non-providing of the MVAR Capacitor Banks:*

(a) Article 5.4 of the PPA provides that, the generator has to pay to the Respondent, on or before signing of the PPA, an amount of `37,000/- per MW, as a one-time payment, for the sole purpose of providing the required MVAR capacity at the Sub-Station of the KPTCL / GESCOM, to which the Project is interconnected to supply the requisite reactive power to the Grid system. Further, it provides that, the KPTCL or the Respondent (GESCOM) fails to install the capacitors of the required capacity, before the COD, the amount collected for the purpose shall be refunded, within thirty days from the COD of the Project.

(b) The Petitioner has contended that, such capacitors are not installed in the Sub-Station. In the Statement of Objections, the Respondent has stated that, Article 5.4 of the PPA has been taken care of by it all this while. However, the Petitioner has produced the letter dated 12.12.2013 (ANNEXURE – P5), issued by the Executive Engineer Ele, 220 RS KPTCL, Ittigi, addressed to the Petitioner, stating that, the Capacitor Banks had not been provided at the Sub-Station concerned. The Petitioner also wrote several letters, from 16.11.2012 to 23.08.2016, requesting to refund a sum of `6,66,000/- paid towards providing a Capacitor Bank, as the

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same has not been provided by the Respondent. Had the Respondent provided the Capacitor Banks at the Sub-Station concerned, at one point of time or the other during the above period, it would have replied that, the Capacitor Banks were provided, as required, and that the claim of the Petitioner was not entertainable. But, the Respondent has not replied to any of the letters written by the Petitioner.

- (c) The Respondent has further contended that, to reduce the reactive power in the system, the capacitors are being provided or added whenever the system requires and, therefore, the amount of `6,66,000/- paid by the Petitioner is being spent towards such works in maintaining the reactive power of the Grid system, as required by Article 5.4 of the PPA. It may be true that the installation of the capacitor of requisite capacity and its subsequent maintenance and replacement of the capacitors in case of need are necessary, and such maintenance and replacement may require incurring of certain expenses. However, the terms of the PPA, as mentioned in Article 5.4 thereof, are not supporting the claim of the Respondent that, the amount could be utilized for the subsequent maintenance of the Capacitor Banks. Article 5.4 of the PPA provides that, in case the Respondent fails to install the Capacitor of the requisite capacity before the COD, the amount collected for this purpose shall be refunded by the Respondent to the Petitioner, within thirty days from the COD. Therefore, the cause of action for claiming refund of this amount to the Petitioner, would arise soon after one month

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from 30.08.2012, i.e., the date on which the commercial operation of the Project was achieved. The present Petition is filed on 10.3.2017, i.e., nearly after a period of 4½ years from the date of the cause of action, for the recovery of the said amount. Hence, this claim of the Petitioner is barred by time and cannot be entertained at this point of time, though, on merits, it had a claim.

- 10) Regarding the liability to pay interest on delayed payments of the monthly tariff invoices as noted above, the Respondent is liable to pay to the Petitioner, the interest towards the delayed payments of the monthly tariff invoices, as per the terms of the PPA. We have noted that, the required particulars to ascertain the quantum of interest payable was not properly pleaded by either of the parties. The amount under a monthly tariff invoice would become due within 15 days from the date of receipt of the said monthly tariff invoice by the 'Designated Office' of the Respondent. If any payment from the Respondent is not made within that period, the Respondent is liable to pay penal interest, at the rate of SBI Medium Term Lending Rate per annum, for such belated payment, from the date when such payment was due until such payment is made in full. It can also be noted that, the claim for interest on delayed payments should be made within three years from the date when the interest payable became due.
- 11) For the foregoing reasons, we pass the following:

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- (a) The parties hereto shall calculate the interest payable by the Respondent (GESCOM) to the Petitioner towards the delayed payments of the monthly tariff invoices, within a period of one month from the date of this Order;
- (b) The Respondent (GESCOM) shall pay to the Petitioner, the interest found due for a period of 03 (three) years prior to the date of filing of the present Petition, i.e., from 10.03.2017, within fifteen days after making such calculation;
- (c) The Respondent (GESCOM) is hereby directed to open the Letter of Credit in favour of the Petitioner, as required under Article 6.5 of the PPA, for the current Financial Year 2017-18 and also for the subsequent Financial Years, during the remaining term of the PPA; and,
- (d) All other reliefs claimed by the Petitioner in the Petition are hereby rejected.

Sd/-
(M.K. SHANKARALINGE GOWDA)
CHAIRMAN

Sd/-
(H.D. ARUN KUMAR)
MEMBER

Sd/-
(D.B. MANIVAL RAJU)
MEMBER