

**CENTRAL ELECTRICITY REGULATORY COMMISSION**

**NEW DELHI**

**Petition No. 227/MP/2012**

**Coram:**

**Dr. Pramod Deo, Chairperson**

**Shri V.S. Verma, Member**

**Shri M. Deena Dayalan, Member**

**Date of Hearing: 9.4.2013**

**Date of Order : 20.5.2013**

**In the matter of**

Petition under Section 79(1) (f) of Electricity Act and in the matter of Grant of consent by State Load Despatch Centre (Karnataka) for inter-State transmission of electricity.

**And**

**in the matter of**

Ravikiran Power Projects Pvt. Limited, Hyderabad

**Petitioner**

Vs

1. State Load Despatch Centre, Karnataka, Bangalore
2. Karnataka Power Transmission Corporation Ltd, Bangalore
3. Gulbarga Electricity Supply Co. Ltd., Gulbarga
4. Karnataka Renewable Energy Development Ltd, Bangalore

**Respondents**

**Following were present:**

Shri B.P.Patil, Senior Advocate, RPPPL  
Shri Anirudh, Advocate, RPPPL  
Shri Venkata Krishna K, Advocate, RPPPL  
Shri B.S.Prasad, Advocate, RPPPL  
Shri Anand K. Ganesan, Advocate, SLDC, Karnataka  
Shri G.S.Kannur, Advocate, KREDL

**ORDER**

In this petition, the petitioner has made the following prayers, namely:

*“(a) Set aside the order/communication dated 3/7/2012 in No.CEE/EE/AEE-3/SLDC/581-82 issued by SLDC, KPTCL*

*(b) Direct SLDC issue concurrence/ NoC/ prior standing clearance to the petitioner pursuant to application dated 26.06.2012 in a time bound manner;*

*(c) Direct the respondents /GESCOM to pay damages at the rate of Rs. 5.50 per kWh of power received from petitioner from the date of Termination of PPA i.e. 28/2/2012 till grant of open access.*

*(d) Award cost of this petition;*

*(e) Pass such other further orders as this Hon'ble Commission may deem appropriate to meet the ends of justice including awarding cost to the petitioner.”*

2. The petitioner who has set up a 7.5 MW biomass-based power project (the Project) in Koppal District of the State of Karnataka, entered into a Power Purchase Agreement (PPA) dated 10.6.2002 with Karnataka Power Transmission Corporation Ltd, (the second respondent) for supply of 6 MW of power from the Project. The PPA was duly approved by Karnataka Electricity Regulatory Commission (the State Commission). Under the PPA, the tariff was fixed at ₹3.85/kWh, with an annual escalation at the rate of 5%.

3. The petitioner has alleged that the second respondent issued a letter dated 5.7.2003 terminating the PPA and seeking to unilaterally fix tariff at ₹2.80/kWh with an annual escalation at the rate of 2%. The petitioner has further alleged that it was coerced to sign a supplemental agreement with the third respondent on 14.11.2006 on the terms contained in the letter dated 5.7.2003 *ibid*. The petitioner has already filed a Writ Petition (W.P. No. 13043/2011) before the High Court of Karnataka questioning the legal validity of the letter dated 5.7.2003 and the supplemental agreement dated 14.11.2006; the said Writ Petition is said to be presently pending. The petitioner has claimed that it started supplying power from July 2005 when generation started.

4. On 31.8.2005, the PPA was assigned to the third respondent consequent to reorganisation of electricity sector in the State of Karnataka. The petitioner has submitted that the third respondent committed continuous breaches of its financial obligations under the PPA as also the supplemental agreement and failed to make payment of the amounts due despite repeated notices and opportunities. The petitioner by its letter dated 27.2.2012, delivered to the third respondent on 28.2.2012 issued notice under Article 9.3.2 of the PPA for terminating the PPA. The petitioner, however, informed the third respondent that it would continue to supply power to the third respondent as per State Government's GO NO.EN2PPC2012 dated 27.1.2012 issued under Section 11 of the Electricity Act under which power was to be purchased at the rate of ₹5.50/kWh. The petitioner has averred that the third respondent has neither questioned the termination of the PPA before any forum nor has it made payment of the outstanding dues.

5. On 1.6.2012, the petitioner entered into an agreement with PTC India Ltd. for sale of electricity through the Power Exchange. Accordingly, the petitioner made an application dated 26.6.2012 before the first respondent under Regulation 8 of the Central Electricity Regulatory Commission (Open Access in inter-State Transmission) Regulations, 2008 for grant of concurrence/No Objection/prior standing clearance for sale of electricity on the platform of Power Exchange. It has been averred that earlier PTC also by its letter dated 5.6.2012 had requested the first respondent to grant concurrence/ No Objection/prior standing clearance. However, the first respondent by its communication dated 3.7.2012 declined concurrence/ No Objection/prior standing clearance on the ground that in accordance with the State Government's GO NO.EN540NCE2008 dated 1.9.2009

all private generators having valid PPAs with State utilities are bound to supply power to the respective power utilities in the State and that petitioner was having valid PPA with the third respondent, as reported by the third respondent vide letter dated 30.6.2012. The petitioner has alleged that copy of the letter dated 30.6.2012 was not even furnished to the petitioner.

6. Feeling aggrieved by the decision of the first respondent, the present petition has been filed. The petitioner has alleged that denial of open access is in contravention of the Open Access Regulations and has caused substantial loss to it. The petitioner has averred that the respondents cannot compel it to continue to supply electricity under the PPA, by declining open access, particularly when the third respondent has not even approached any forum to seek a declaration that the termination of the PPA was not valid and/or seek specific performance of the terms of the PPA. The petitioner has further averred that the first respondent being independent of the third respondent, the former cannot act in a biased manner while considering the request of the petitioner for grant of consent for inter-State open access. The petitioner has claimed that as per the State Government of Karnataka's GO NO.EN2PPC2012 dated 27.1.2012 issued under Section 11 of the Electricity Act, the rate of tariff had been fixed at @ ₹5.50/kWh, which reflects the minimum entitlement of the petitioner and the petitioner is entitled to recover the amount at this rate from the date of termination of PPA till grant of open access, as damages from the respondents who are jointly and severally liable.

7. The second respondent has filed the counter-reply dated 5.12.2012. It has been stated that there exists a valid and subsisting PPA between the petitioner and third respondent. According to the second respondent, the petitioner is under an obligation to supply all the power generated to the third respondent by virtue of the PPA as also the State Government's GO dated 1.9.2009 ibid which ordains all private generators having valid Power Purchase Agreements with State utilities to supply power to the respective power utilities in the State. It has been alleged that the petitioner unilaterally decided to discontinue supply of electricity to the third respondent for sale to third parties. As such, according to the reply filed, there is no scope for third party sale of electricity by the petitioner and therefore, it cannot be granted open access for sale of electricity outside the State. Accordingly, the first respondent validly declined prior approval/standing clearance/NOC for availing open access by the petitioner.

8. The second respondent has stated that the issue of termination of the PPA cannot be raised in the present proceedings since the proper forum to seek appropriate relief on the issues under the PPA in the State Commission. Therefore unless and until the validity of termination was decided by the State Commission, the petitioner owed a duty to supply electricity to the consumers in the State. The second respondent has submitted that the petitioner had earlier filed a petition, being Petition No. 14/2008 before the State Commission seeking the relief that the PPA with the distribution licensee (third respondent) did not subsist. The petition was dismissed by the State Commission vide order dated 25.11.2009, wherein the State Commission affirmed existence of the valid PPA

with the distribution licensee and only thereafter the petitioner approached the Hon'ble Karnataka High Court by filing the Writ Petition which awaits adjudication.

9. The second respondent has averred that the power of the State Government of Karnataka to issue statutory orders in terms of Section 11 of the Electricity Act, has been upheld by the Honourable High Court of Karnataka which has further held that the open access is not an absolute right and is subject to the other rights and obligations of the parties.

10. The third respondent in its reply dated 26.2.2013 has raised the issue of lack of jurisdiction of this Commission to entertain the present petition on the ground that the question of validity or otherwise of the PPA can be gone into by the State Commission only and until that question is decided the question of grant of open access cannot arise. On merits, the third respondent has denied any default on its part as regards adherence to the terms of the PPA dated 3.5.2007.

11. We have heard the learned counsel for the parties. We have carefully considered the submissions made on behalf of the parties and perused the records.

12. According to the petitioner, the PPA stood terminated on 28.2.2012 when the termination notice was served upon the third respondent. The petitioner has argued that since the third respondent did not take any further steps questioning the termination, the termination had acquired finality. Therefore, according to the

petitioner, it had no contractual obligation to supply power to the third respondent. According to the petitioner, it could not be denied concurrence/No Objection/prior standing clearance based on the State Government's GO dated 1.9.2009 for the reason that there was no subsisting contract between the parties in view of prior termination of the PPA. The petitioner has relied upon the judgments of the Appellate Tribunal in Appeal No. 176/2009 (Bangalore Electricity Supply Co. Ltd Vs Davangere Sugar Co. Ltd) decided on 18.5.2010 and Appeal No. 180/2009 (Sandur Power Co. Ltd. Vs. KPTCL and others) decided on 11.4.2011. In these cases the Appellate Tribunal upheld the termination of PPAs on the ground of consistent and continuous failure of the distribution licensees to make timely payment, non-payment of penal interest and failure to establish and maintain revolving LCs in favour of the generator which amounted to breach of material, fundamental/ integral financial obligations and were the Events of Default under the PPA. Aggrieved by the said order dated 18.5.2010 in Appeal No. 180/2009, Bangalore Electricity Supply Co. Ltd. had filed SLP No. 8705/2010 before Hon`ble Supreme Court. Hon`ble Supreme Court vide its order dated 4.10.2010 dismissed the said SLP. On the other hand, the respondents in their replies have asserted that the PPA still subsists. The respondents have contended that the question of subsistence of the valid PPA cannot be decided in the present proceedings since the appropriate forum for this purpose is only the State Commission. According to the respondents, the petitioner has to approach the State Commission first for adjudication of its claim of termination of the PPA. For this, the respondents have relied upon this Commission's order dated 7.9.2012 in Petition No 188/2009.

13. It is settled position that adjudication of dispute regarding termination of the PPA which was approved by the State Commission under clause (b) of sub-section (1) of Section 86 of the Electricity Act is within the jurisdiction of that Commission by virtue of clause (f) thereof. This view has been consistently followed by this Commission, including in the order dated 7.9.2012 in Petition No 188/2009 which has been relied upon by the respondents. This Commission's view is based on the observations of the Appellate Tribunal in the order dated 1.4.2008 in Appeal No 6/2008.

14. During the hearing, learned counsel for the petitioner submitted that the petitioner has already filed a petition before the State Commission seeking a declaration that the PPA stood terminated on 28.2.2012. Learned counsel has informed that the State Commission has issued notice to the respondents.

15. The question of unreasonableness in denial of concurrence/'no objection'/prior standing clearance for inter-State open access shall be gone into by this Commission only after the termination of the PPA has been found to be valid by the State Commission on the petition filed by the petitioner and presently pending. Accordingly, the petition is not maintainable at this stage and stands dismissed. There shall be no order as to costs.

Sd/-

**(M Deena Dayalan)**  
**Member**

sd/-

**(V.S.Verma)**  
**Member**

sd/-

**(Dr.Pramod Deo)**  
**Chairperson**