

CENTRAL ELECTRICITY REGULATORY COMMISSION

NEW DELHI

Petition No. 228/MP/2012

Coram:

Dr. Pramod Deo, Chairperson

Shri S. Jayaraman, Member

Shri V.S. Verma, Member

Shri M. Deena Dayalan, Member

Date of Hearing:10.1.2013

Date of order: 9.5.2013

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

M/S Rithwik Energy Generation Private Limited

Petitioner

Vs

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

Respondents

Following were present:

Shri Venkata Krishna K. Advocate, REGPL

Ms. Swapna Seshadri Advocate, SLDC and KPTCL

Shri Venkita Subramaniam, Advocate,BESCOM

ORDER

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

“(a) Set aside the order/communication dated 15.06.2012 in No.CEE/EE/AEE-3/SLDC/37778 issued by State Load Despatch Centre, Karnataka Power Transmission Corporation Ltd. vide Annexure –P13;

(b) Direct State Load Despatch Centre, Karnataka Power Transmission Corporation Ltd. issue concurrence/ NoC/ prior standing clearance to the petitioner pursuant to application dated 05.06.2012 vide Annexure P12 in a time bound manner;

(c) Direct the respondents /BESCOM 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. 15.05.2012 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 24.75 MW mini Hydel Power Project (the Project) across the left bank of river Nethravathi, in Dakshina Kanada District of the State of Karnataka, entered into a Power Purchase Agreement (PPA) dated 3.5.2007 with Bangalore Electricity Supply Company, (the third respondent) for supply of 24 MW of power from the Project. Under the PPA the tariff was fixed at ₹2.80/kWh of the delivered energy. The third respondent approached the Karnataka Electricity Regulatory Commission (the State Commission) for approval of the PPA which was returned by the State Commission with some observations on 6.6.2009.. The petitioner has claimed that it started supplying power to the third respondent from 28.9.2009 when generation started.

3. The petitioner has submitted that because of various developments, it felt that there was no valid and subsisting PPA between him and the third respondent. Therefore the petitioner filed a petition (O.P. No. 29/2009) before the State Commission praying for a declaration that there was no valid or subsisting PPA with the third respondent and the PPA dated 3.5.2007 was *non est*/void and prayed for a direction to the respondents to grant open access and to allow wheeling and banking of power by entering into requisite agreement. The State Commission by its order

dated 23.12.2010 rejected the petition holding that PPA dated 3.5.2007 was valid and subsisting. The petitioner filed an appeal, being Appeal No. 51/2011 before the Appellate Tribunal against the State Commission's order dated 23.12.2010. By its order dated 21.10.2011 the Appellate Tribunal dismissed the appeal. Though certain other directions were given by The Appellate Tribunal, reference to those directions is unnecessary for the purpose of the present order. The petitioner filed the second appeal before the Hon'ble Supreme Court against the order dismissing its appeal by the Appellate Tribunal. The second appeal was dismissed at the admission stage by the order dated 12.3.2012 and the petition filed by the petitioner seeking review of the order dated 12.3.2012 came to be dismissed by the Hon'ble Supreme Court by its order dated 29.8.2012.

4. The petitioner has submitted that the third respondent committed continuous breaches of its financial obligations under the PPA and failed to make payment of the amounts due despite repeated notices and opportunities and failure to open LC in accordance with the terms of the PPA. The petitioner by its letter dated 11.5.2012, received by the third respondent on 15.5.2012 issued notice under Article 9.3.2 of the PPA for terminating the PPA. 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 29.5.2012, the petitioner entered into an agreement with PTC India Ltd. for sale of electricity through the Power Exchange. Accordingly, it has been averred, PTC by its letter dated 5.6.2012 made an application 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 PTC 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 15.6.2012 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.

6. Feeling aggrieved by the decision of the first respondent, the present petition has been filed with the prayers already noted. 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 grant of Open Access particularly so 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 are bound 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. 29/2009 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 23.12.2010, wherein the State Commission affirmed existence of the valid PPA with the third respondent.

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 20.11.2012 has raised the issue of lack of jurisdiction of this Commission to entertain the present petition on the ground that the first respondent who falls within the jurisdiction of the State Commission has acted within the scope of its powers and functions under Section 32 of the Electricity Act. The third respondent has further averred that the petitioner has *inter alia* made a prayer for direction for wheeling and banking arrangement of power which is outside the scope of the Open Access Regulations and it is only the State Commission which is competent to grant the prayer for wheeling and banking arrangement. On merits, the third respondent has denied any default on its part as regards the adherence to the terms of the PPA dated 3.5.2007.

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

12. According to the petitioner, the PPA stood terminated on 15.5.2012 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. 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. In the light of the rival contentions, the first question that needs to be decided first is whether the PPA stood terminated when the petitioner sought concurrence/No Objection/prior standing clearance for open access for sale of electricity through the Exchange. Admittedly, the third respondent approached the State Commission for

approval for the PPA under clause (b) of sub-section (1) of Section 86 of the Electricity Act. The PPA was returned by the State Commission on 6.6.2009 with certain observations but without rejecting it. Thereafter, the petitioner filed a petition before the State Commission for a declaration that there was no valid and subsisting PPA as it had not been approved by the State Commission. The petition was dismissed by the State Commission holding the PPA was valid and subsisting, The further proceeding were taken by the petitioner before the Appellate Tribunal and the Hon'ble Supreme Court but the petitioner did not get any relief. These developments establish the existence of valid PPA for sale of power by the petitioner to the third respondent prior to issuance of the notice dated 11.5.2012. The petitioner's claim now is that the PPA dated 3.5.2007 stood terminated with effect from 15.5.2012 when the termination notice dated 11.5.2012 was served on the third respondent. Thus the whole case of the petitioner is based on the premise that after termination of the PPA, it was not under any obligation to supply power to the third respondent and was entitled to third party sale by availing of open access under the open Access Regulations. The allegation of termination of the PPA has been denied by the respondents and, according to them, the third respondent has not committed any default in payments or opening/maintaining LC. Therefore, adjudication of the petitioner's claim for open access on inter-state transmission system and compensation for refusal in the past is dependent upon validity or otherwise of the termination of the PPA by the petitioner. The adjudication of the dispute regarding termination of the PPA falls within the jurisdiction of the State Commission. The petitioner is aware of the legal position as in the earlier round of proceedings questioning the validity of the PPA the petitioner had approached the State Commission in the first instance. This Commission in its order dated 7.9.2012 in

Petition No. 188/2009 based on the following observations of the Appellate Tribunal in the order dated 1.4.2008 in Appeal No. 6/2008 has also held that the dispute regarding termination of the PPA is to be adjudicated by the State Commission:

"With the consent of the parties, the following order is passed:-

The Appellant may approach the Karnataka Electricity Regulatory Commission for matters relating to the rights of the appellant and the obligations of the Respondent-Generating companies under the Power Purchase Agreements including for interim orders for supply of power to the appellant, as per the rights claimed by the appellant but denied by the Respondent-Generating companies, In the event any such petition is filed, the state commission shall consider the same uninfluenced in any manner by the impugned orders of the Central Commission, expeditiously, in accordance with law. Subject to the above, the impugned order is not interfered with in these appeals but the issues decided shall not be considered as a precedent in any other case. The existing open access arrangement between the parties shall continue in the meanwhile. The appeals are disposed of in terms of the above."

14. In our view, the above observations of the Appellate Tribunal squarely apply to the facts of the case on hand. The judgments of the Appellate Tribunal relied upon by the petitioner are not of any help to the petitioner for the reason that the appeals on those cases were filed against the orders of the State Commission.

15. In view of the foregoing, the petitioner has to approach the State Commission for adjudication of the dispute regarding subsistence or otherwise of the PPA after service of notice dated 11.5.2012 on the third respondent. The question of reasonableness of denial of open access will arise only if the termination of the PPA is found to be valid by the appropriate forum under the law.

16. Accordingly, the petition stands dismissed. There shall be no order as to costs.

Sd/-

sd/-

sd/-

sd/-

(M. Deena Dayalan)
Member

(V.S.Verma)
Member

(S. Jayaraman)
Member

(Dr.Pramod Deo)
Chairperson