

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION

No. 16 C-1, Miller Tank Bed Area, Vasanth Nagar, Bengaluru- 560 052

Dated : 8th August, 2019

Present:

Shri Shambhu Dayal Meena	..	Chairman
Shri H.M. Manjunatha	..	Member
Shri M.D. Ravi	..	Member

OP No.86/2018

BETWEEN:

Harekrishna Metalics Private Limited,
Sy.No.20, Kasankandi Road,
Village & Post: Hirebaganal.
Koppal District – 583 228,
Karnataka.

.. **PETITIONER**

[Represented by Shri Anish Acharya, Advocate]

AND:

- 1) Power Company of Karnataka Limited,
Room No.15,
Cauvery Bhavan,
KPTCL Building,
Bengaluru – 560 009.
- 2) Bangalore Electricity Supply Company Limited,
K.R. Circle,
Bengaluru – 560 001.
- 3) Chamundershwari Electricity Supply Corporation Limited,
No.29, Kaveri Grameena Bank Road,
Vijayanagar, 2nd Stage, Hinkal,
Mysuru – 570 019.
- 4) Gulbarga Electricity Supply Company Limited,
Station Main Road,
Kalaburagi – 585 101.

- 5) Hubli Electricity Supply Company Limited,
P.B. Road, Navanagar,
Hubballi – 580 025.
- 6) Mangalore Electricity Supply Company Limited,
MESCOM Bhavana,
Kavoor Cross Road,
Bejai,
Mangaluru – 575 004.

.. **RESPONDENTS**

*[Respondents-1,2, 4,5 & 6 - represented by Shri Shahbaaz Husain, Advocate
Respondent-3 (CESC) - not represented by any Advocate]*

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ORDERS

- 1) This Petition is filed under Sections 86(1)(f) of the Electricity Act, 2003, praying to:
- (a) direct Respondent No.1 to 6 to refund the amount of Rs.20,45,814.55 towards wrongly calculated open access charges by not accounting for reduced contractual capacity due to non-acceptance for alternative supply;
 - (b) direct the Respondent Nos.1 to 6 to refund the balance amount of Rs.29,23,969.44 of open access charges as the Hon'ble KERC Order is selectively applied by Respondent;
 - (c) direct the Respondents to ascertain the dues claimed under the surcharges, as per the Power Purchase Agreement and pay the dues under surcharge against the amount of recovery for illegal deductions; and,
 - (d) pass such other Orders to meet the ends of justice and equity.
- 2) The material facts pleaded by the Petitioner, in support of the reliefs claimed, may be stated as follows:

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- (a) That, the Petitioner, a Company having a Coal-based Thermal Power Generating Station of 10 MW capacity, situated at Koppal District in Karnataka, had participated in the bid proceedings conducted by the 1st Respondent-Power Company of Karnataka Limited (PCKL), for purchase of short-term power on behalf of the Electricity Supply Companies (ESCOMs) (Respondent Nos.2 to 6 herein). The Petitioner was one of the successful bidders and a Letter of Intent (Lol) dated 30.08.2013 was issued to the Petitioner, for supply of 7 MW of RTC power, from September, 2013 to June 2014, on the terms and conditions to be fulfilled, as noted in the said Lol. Accordingly, the Petitioner executed a Power Purchase Agreement (PPA) on 06.09.2013 with the ESCOMs, for sale of electricity, in bulk, to the ESCOMs, for the contracted capacity of 7 MW, in accordance with the terms and conditions of the said PPA.
- (b) The Petitioner was scheduling 7 MW of RTC power, on a daily basis, with due intimation to the State Load Despatch Centre (SLDC) and the ESCOMs. During the contract period, the Petitioner could not supply energy from its Generating Station, for the period from 17.10.2013 to 27.11.2013, due to break down of the Generating Unit.
- (c) As per the terms of the PPA, the Petitioner offered alternative source of supply of power from another Generating Plant, by name, Koganti Power Limited, to the extent of 6.5 MW of RTC power, for the period from 17.10.2013 to 27.11.2013. The alternative source of 6.5 MW of RTC power was supplied for the period, from 23.10.2013 to 31.10.2013. It was the contention of the Petitioner that, non-supply of power from the alternative

source for the period, from 17.10.2013 to 22.10.2013 (6 days) and from 01.11.2013 to 27.11.2013 (27 days), was initially due to the delay in accepting and later due to the illegal rejection, by the Respondents, of the alternative source of energy.

- (d) The Respondents made certain claims, deducted certain amounts from the Tariff Invoices submitted by the Petitioner and also made certain demands against the Petitioner, for the short delivery of energy. The Petitioner opposed the said deductions, as well as the demands made by the Respondents. This dispute ended in filing of OP No.10/2016 by the Petitioner, on the file of this Commission, against the Respondents.
- (e) After contest, this Commission passed the Order dated 01.08.2017 in OP No.10/2016, directing the parties therein, as follows:
- “(i) The parties [Respondent-1 (PCKL) and Respondents-2 to 6 (ESCOMs)] are directed to settle the accounts, in terms of the findings given above on different issues, in respect of the energy supplied in terms of the PPA dated 6.9.2013, within 8 (eight) weeks from the date of this Order and make necessary payments / adjustments as per the said settlement of accounts; and,*
 - (ii) Once the accounts are settled with the Petitioner, the ESCOMs are at liberty to apportion their respective rights and liabilities as per the share of energy and payment allocation made by the Government of Karnataka.”*
- (f) In the present Petition, the Petitioner has urged the following grounds, in support of its claims:

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- (i) That, the Respondents had not claimed the open access charges, for the short delivery of energy, from all other suppliers, who had also been awarded with Letters of Intents and had executed PPAs. Therefore, it is contended by the Petitioner that, the Respondents should not have made a claim against it, even though the finding given by this Commission, in OP No.10/2016, authorized to collect the open access charges for the short delivery of energy. Therefore, the Petitioner claims refund of a sum of Rs.49,69,784/-, which has been deducted toward the open access charges, for the quantum, alleged to be the short delivery of energy.
- (ii) That, the Respondents had enhanced the quantum of short delivery of energy, as they had wrongly omitted to consider the quantum of alternative source of energy offered, which was held to be valid, as per the findings of this Commission in OP No.10/2016. It is, therefore, contended by the Petitioner that, had there been a proper calculation of the short delivery of energy by the Respondents, in terms of the said Order passed by this Commission, the Petitioner would have been entitled for refund of a sum of Rs.20,45,814.55. Therefore, the Petitioner has claimed, alternatively, refund of a sum of Rs.20,45,814.55.
- (g) The Petitioner has also alleged that, the Respondents have not accounted for the Surcharges that might be payable, as per the terms of the PPA, as ordered by this Commission in OP No.10/2016.

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- 3) Upon Notice, the Respondents (except Respondent No.3) have appeared through their counsel. Respondent No.3 was not represented by any Advocate.
- 4) The 1st Respondent (PCKL) has filed its Statement of Objections. Respondent Nos.2, 4, 5 and 6 have adopted the said Statement of Objections filed by the 1st Respondent (PCKL). The defence taken by the Respondents may be stated, as follows:
- (a) It is contended that, the Respondents have followed the directions given by this Commission in OP No.10/2016, while recovering the open access charges, for the short delivery of energy, from the Petitioner. The Respondents have not denied the contention of the Petitioner that, they had not collected the open access charges as against the other Suppliers, for the short delivery of energy. The Respondents have contended that, totally, a sum of Rs.49,69,785 was deducted towards the open access charges, for the short delivery of energy, from the Petitioner. Therefore, it is contended that, the deduction of the said amount is in order and the Petitioner cannot claim refund of the same, on the ground that, as against the other Suppliers, the open access charges were not claimed, for short delivery of energy.
- (b) The Respondents have contended that, the calculation made by them, to find out the quantum of short delivery of energy, is in accordance with the directions issued by this Commission in OP No.10/2016, as there was no clear direction in the said Order, to consider the quantum of alternative

source of energy, offered by the Petitioner, while calculating the open access charges.

(c) The Respondents have contended that, their calculation, arrived at towards the open access charges, is in accordance with the terms of the Order passed by this Commission in OP No.10/2016. Therefore, the Respondents have prayed for dismissal of the Petition.

5) We have heard the heard the learned counsel for the parties. The following issues would arise, for our consideration:

(1) Whether the Respondents 2 to 6 are barred from making a claim against the Petitioner towards the open access charges for the short delivery of energy, as such a claim was not made as against all other similarly situated suppliers of energy, in the transaction in question, inspite of the findings of this Commission, given in OP No.10/2016, authorizing the Respondents, therein, to collect the open access charges for such short delivery of energy, from the Petitioner?

(2) Whether the Respondents 2 to 6 were required to consider the quantum of alternative source of energy, offered by the Petitioner, while arriving at the open access charges?

(3) If Issue No.(2) above is answered in the affirmative, whether the Respondents 2 to 6 are liable to refund an amount of Rs.20,45,815/- to the Petitioner, towards the excess open access charges collected?

(4) What Order?

6) After considering the submissions of the parties and the pleadings and material on record, our findings on the above issues are as follows:

- 7) **ISSUE No.(1)**: *Whether the Respondents 2 to 6 are barred from making a claim against the Petitioner towards the open access charges for the short delivery of energy, as such a claim was not made as against all other similarly situated suppliers of energy, in the transaction in question, inspite of the findings of this Commission, given in OP No.10/2016, authorizing the Respondents, therein, to collect the open access charges for such short delivery of energy, from the Petitioner?*
- (a) It is not in dispute that, the Respondents have not collected the open access charges, against the quantum of short supply, from the other suppliers. The Respondents, in the Statement of Objections, have stated that, the Order dated 01.08.2017 of this Commission in OP No.10/2016 is applicable only to the parties in that case and not to others, therefore, the open access charges for short delivery of energy could not be claimed against others. The Respondents may be right, technically, in contending that the directions given by this Commission in OP No.10/2016 are applicable only to the parties in that case, but not others, thereby they had not collected the open access charges, for short delivery, from others. However, such a contention may not convince a common man, as it would lead to an inference of discrimination between two persons, situated in a similar circumstance.
- (b) The disputed facts and the findings arrived at in OP No.10/2016, would reveal that the Respondents had made certain claim against the Petitioner, for the quantum of short supply of energy, but such a claim was not in terms of the PPA. This fact is noted in Paragraph-9(e), at Page-20 of the Order dated 01.08.2017 in OP No.10/2016, while discussing Issue No.(2), which reads thus:

“The Respondents have contended that, the Petitioner is liable to repay at the agreed tariff for the quantum of short-supply of energy as against the scheduled energy. There is no specific term in the PPA for such a claim. Therefore, we hold that, the claim of the contesting Respondents in this regard is not maintainable in terms of the PPA. Hence, we answer Issue No(2), accordingly.”

Under Issue No.(2) in the said Petition, this Commission had considered what were the liabilities of the Petitioner under the terms of the PPA, for short delivery of energy. This Commission has held that, the Petitioner was liable to pay the U.I. charges to the State Load Despatch Centre (SLDC) and has to pay the Liquidated damages in terms of Article 6.2.4 of the PPA and also liable to pay the open access charges, as per the last part of Article 6.2.4 of the PPA, towards the short delivery of energy. This Commission had also determined the open access charges, to be reimbursed, at the rate of 39.74 Paise per unit. It was also held that, as per the last part of Article 6.2.4 of the PPA, the Petitioner was liable to reimburse to the ESCOMs, the transmission charges for the capacity not made available, due to short delivery of energy, by the Petitioner and this short delivery of energy was to be calculated, being the difference between the contracted energy, for which the open access charges were computed and the actual energy, injected into the Grid.

- (c) From the above facts, discussed under Issue No.(2) in the said Order in OP No.10/2016, it is clear that, the Respondents had claimed repayment, at the agreed tariff, for the quantum of short supply of energy, as against the scheduled energy. This claim was rejected by this Commission, as there

was no specific term in the PPA for making such a claim. From the above narrations, it is clear that, the Respondents had made, even against the other suppliers, a claim, as made against the Petitioner, for short supply of energy, as against the scheduled energy. It is submitted by the learned counsel for the Respondents that, the Petitioner and another supplier, by name, Tata Power, were the only persons, who had disputed the claims made by the Respondent towards the short delivery of energy, and that the other suppliers had paid the amounts claimed by the Respondents for short delivery of energy. Therefore, it is clear that, though compensation is not claimed on the other suppliers, under the head, "Open Access Charges and other Charges", for the short delivery of energy, a claim was made against them and they voluntarily agreed to pay the same. Therefore, one can say that, the Petitioner was not singled out, in claiming the open access charges.

- (d) For the above reasons, we answer Issue No.(1), in the negative.
- 8) **ISSUE No.(2):** *Whether the Respondents 2 to 6 were required to consider the quantum of alternative source of energy, offered by the Petitioner, while arriving at the open access charges?*
- (a) In OP No.10/2016, it is held that, the refusal by the Respondents to accept the alternative source of energy, offered by the Petitioner, for the period from 17.10.2013 to 22.10.2013 (6 days) and from 01.11.2013 to 27.11.2013 (27 days), was not justified. Therefore, it is obvious that, while calculating the open access charge for the short delivery of energy, the quantum of 6.5 MW capacity power, offered by the Petitioner as alternative source for

the above-said periods, should have been considered, treating the said quantum of energy as having been supplied. The Respondents have not taken into consideration, such 'deemed' supply of energy.

(b) Therefore, we answer Issue No(2), in the affirmative.

9) **ISSUE No.(3):** *If Issue No.(2) above is answered in the affirmative, whether the Respondents 2 to 6 are liable to refund an amount of Rs.20,45,815/- to the Petitioner, towards the excess open access charges collected?*

(a) The Petitioner has produced a Calculation Sheet, showing that, the excess amount calculated towards the open access charges, by not considering the power deemed to have been supplied from the alternative source, works out to Rs.20,45,815/-. This amount, calculated by the Petitioner, is neither admitted nor disputed by the Respondents. Therefore, we hold that, the Respondents 2 to 6 are liable to refund the excess open access charges collected from the Petitioner, as per the Payment Schedule agreed in the PPA dated 06.09.2014.

(b) Therefore, we answer Issue No.(3), in the affirmative.

10) **ISSUE No.(4):** *What Order?*

(a) The Petitioner has also requested for a direction against the Respondents, to ascertain the amount that would become due towards the Surcharge, as per the terms of the PPA, for the delay in making payment. The Petitioner may file a separate complaint for this grievance, as such a direction is already given in OP No.10/2016.

(b) For the foregoing reasons, we pass the following:

ORDER

The Petition is partly allowed, directing that:

- (i) The 1st Respondent (PCKL) shall calculate, forthwith, the excess open access charges collected from the Petitioner, taking into consideration the findings on Issue No.(2) above and intimate the liability of each of the Respondents 2 to 6, as per the Payment Schedule, agreed to in the PPA dated 06.09.2013;
- (ii) The Respondents 2 to 6 are hereby directed to refund the excess open access charges collected, as may be intimated by the 1st Respondent (PCKL), within 4 (four) weeks from the date of receipt of the said intimation; and,
- (iii) The Petitioner is at liberty to file a separate Complaint regarding its grievance, if any, pertaining to the Surcharge.

Sd/-
(SHAMBHU DAYAL MEENA)
CHAIRMAN

Sd/-
(H.M. MANJUNATHA)
MEMBER

Sd/-
(M.D. RAVI)
MEMBER