

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No. 111 of 2007

Dated: January 12, 2009

Present: **Hon'ble Mrs. Justice Manju Goel, Judicial Member**
Hon'ble Mr. H.L. Bajaj, Technical Member

Karnataka Power Transmission Corporation Ltd. - Appellant(s)
Versus
M/s. Poweronics Ltd. & Others - Respondent(s)

Counsel for the Appellant(s) : Mr. M. G. Ramachandran,
Mr. Anand K. Ganesan and
Ms. Swapna Seshadri

Counsel for the Respondent(s) : Mr. G. Ramkrishna Prasad,
Mr. Bharat J. Joshi for Resp.
No.1

ORDER

Heard.

The present appeal is directed against the order of the Karnataka Electricity Regulatory Commission (the Commission for short) dated 03.05.07 whereby the Commission set aside the termination of the Power Purchase Agreement (PPA) between the appellant and the respondent No.1 and declared the PPA dated 12.04.01 as valid and substantive. The facts leading to the appeal are as under:

2) The appellant is a transmission utility and also discharges the functions of State Load Despatch Centre. The appellant entered into a PPA with the respondent No.1 on 12.04.01 in respect of a 6 MW capacity biomass plant which was approved by the Commission. Vide a notice dated 05.07.03, the appellant terminated the PPA. The respondent No.1 challenged the termination of the PPA in writ petition No. 46808 of 2003 before the High Court of Karnataka and obtained an interim stay of the notice of termination dated 18.11.03. The appellant and the respondent No.1 entered into a supplemental agreement dated 29.11.05. As per this supplemental agreement, the power from the intended generating station was to be purchased at the rate of Rs.3.10 per unit as against the initial rate of Rs.3.66 per unit. The supplemental agreement further defined certain terms like GESCOM, the successor in interest of the appellant KPTCL. The supplemental agreement contemplates obtaining approval of the Commission and also contemplates that the respondent No.1 shall be entitled to sell power generated by it to third parties in case the appellant is unwilling to purchase power at the rate approved by the Commission. It also has a clause of payment by the respondent No.1 to the appellant for providing the MVAR capacity at a sub-station of the appellant/GESCOM to which the project is interconnected to supply the requisite reactive power to the grid system. This supplemental agreement was to be construed as a part of the agreement dated 12.04.01 and all the terms and

conditions and clauses of the agreement dated 12.04.01 were to remain unaltered, enforceable as well as binding. The Commission when approached for approval informed the appellant, through its Secretary, as under:

“that modification proposed by you in the supplemental agreement in respect of M/s. Poweronics Ltd. has not been approved for the reason that the tariff proposed in the supplemental agreement for the period prior to 01.04.05 is not as per Commission’s approval in respect of co-generating power generating project communicated vide letter dated 09.06.05. Hence, this supplemental agreement is returned herewith.”

3) The Hon’ble High Court of Karnataka disposed of the Writ Petition vide the order dated 24.03.06 with the direction that operation of the termination letter dated 05.07.03 will stand stayed for a period of three weeks, that during the period of stay the respondent shall continue to pay for the power purchased by them at the rate at which payments were being made during the pendency of the writ petition and that the Commission shall pass an order on the application for stay. The High Court also expressed in this order that it was not expressing any opinion on the merit of the respective contentions of the parties before it. The respondent No.1 filed an original petition, being O.P. No. 32 of 2006 on which

the parties filed their written submissions. The Commission thereafter passed the order dated 03.05.07 which is impugned in the present appeal. The Commission, *inter alia*, said in this order that the supplemental agreement had not been approved by the Commission and, therefore, the supplemental agreement has no legal effect. The Commission also disapproved the termination of the PPA dated 12.04.01. The Commission referred to a decision of this Tribunal in the case of M/s. R. K. Powergen Pvt. Ltd., dated 29.08.06, for the purpose of holding that the termination of the PPA was bad. The Commission eventually quashed letter of termination of the PPA and concluded as under:

“consequently the second prayer of the petitioner to declare that the PPA entered between the petitioner and the second respondent vide dated 12.04.01 vide Annexure-C is valid and substantive is also granted.”

4) In the present appeal, it is contended that the Commission should not have declined to approve the supplemental agreement which did not change the original agreement except for the rate at which the power can be purchased which was lowered to the benefit of the ultimate consumer. Referring to the decision of the Tribunal in M/s. R. K. Powergen Private Limited’s case it is contended that the present case is distinguishable in as much as in M/s. R. K. Powergen’s case (*supra*) the parties had not negotiated a

supplemental agreement following the termination. The memorandum of appeal also disputes the Commission's decision to reinstate the original PPA dated 12.04.01 and for declining to approve the supplemental agreement.

5) Since the appellant does not dispute the Commission's decision to quash the letter of termination dated 05.07.03 the only factor to be considered is whether the original agreement dated 12.04.01 or the supplemental agreement dated 29.11.05 should regulate the relationship/transactions between the appellant and the respondent No.1. The Commission approved the original PPA dated 12.04.01. Nothing happened after 12.04.01 to vitiate the terms and conditions entered into in the original PPA. In fact, the Commission revived the original agreement dated 12.04.01. The only substantial change that has been brought by the supplemental agreement is the reduced cost of power purchase. There being no other change in the contract between the parties all that the Commission was required to consider was whether or not to approve the reduced cost of power purchase. The respondent No.1 itself entered into a supplemental agreement and does not say that the power purchase cost as per the supplemental agreement was unconscionable or too low. Since the reduced power purchase cost is beneficial to the ultimate consumer of electricity there was no reason for the Commission not to approve of the reduced power purchase cost. The only effect of revival of the PPA dated 12.04.01

was to raise the rate at which the power was to be purchased by the appellant from the respondent No.1. This certainly cannot be approved of by this Tribunal. In this situation, although the letter of termination of the PPA can be quashed the transaction between the parties has to be governed by the supplemental agreement read with the original agreement. To this extent the impugned order needs to be modified.

6) Accordingly, we allow the appeal and hold that termination of the PPA vide the letter dated 05.07.03 being quashed the relationship between the parties will be governed by the supplemental agreement dated 29.11.05. All payments made under the agreement dated 12.04.01 shall be uniformly adjusted against the future bills of the next twelve months. The parties shall bear their own costs.

(H. L. Bajaj)
Technical Member

(Justice Manju Goel)
Judicial Member