

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

APPEAL NO. 4 OF 2015

Dated: 1st December, 2015

**Present: Hon'ble Mr. Surendra Kumar, Judicial Member
Hon'ble Mr. I.J. Kapoor, Technical Member**

In the matter of:

Khandaleru Power Company LimitedAppellant
807, 08th Floor, Raghava Towers,
Chirag Ali Lane, Abids,
Hyderabad-56001.

Versus

1. Gulbarga Electricity Supply Company Limited,Respondent No.1
Station Road, Gulbargha-585102
2. State Load Dispatch CentreRespondent No.2
Cauvery Bhavan, K.G. Road,
Bangalore-560009.
3. Karnataka Electricity Regulatory CommissionRespondent No.3
9/2, 06th & 07th Floor,
Mahalaxmi Chambers, M.G. Road,
Karnataka, Bangalore-560001.

Counsel for the Appellant(s) : Mr. Shridhar Prabhu
Mr. Anantha Narayana M.G.

Counsel for the Respondent(s) : Mr. Ujjal Banerjee,
Mr. Nishant Patil
Mr. Akshay Vasist for R-1&2

JUDGMENT

PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER

The present Appeal has been filed by M/s. Khandaleru Power Company Limited (hereinafter referred to as “**Appellant**”) under Section 111 (2) of the Electricity Act, 2003 against the Impugned Order dated 25.09.2014 of the Karnataka Electricity Regulatory Commission (hereinafter referred to as “**Respondent No.3**”).

2. The Appellant is a company registered under the provisions of the Companies Act, 1956 and is a generating company within the meaning Section of Section 2 of the Electricity Act, 2003. M/s. Gulbarga Electricity Supply Company Limited (hereinafter referred to as “**Respondent No.1**”) is a company registered under the provisions of the Companies Act, 1956 and is a Distribution Licensee in the State of Karnataka. State Load Dispatch Centre (hereinafter referred to as “**Respondent No.2**”) is the nodal agency established under Section 31 of the Electricity Act, 2003 for grant, administration and supervision of the Intra State Open Access in the State of Karnataka.

3. The State Commission (“**Respondent No.3**”) vide Impugned Order dated 25.09.2014 dismissed the petition filed by the Appellant seeking relief for issuance of a direction to the Respondent No.1 and 2 to provide wheeling and banking facility to the Appellant.
4. The Appellant aggrieved by the Impugned Order of 25.09.2014 of the Respondent No.3 has filed the present Appeal.
5. Facts of the Appeal
 - a) The Appellant had been accorded sanction for setting up of 1.4 MW Mini Hydro Eclectic Power Generating Station on the right bank canal of the Tungabhadra Dam in the Bellary district of the State of Karnataka.
 - b) Consequent upon sanction, a Power Purchase Agreement (**hereinafter referred to as “PPA”**) was entered into by the Appellant with the Respondent No.1 on 09.10.2007 for purchase of electricity generated from the project. As per the PPA, this Mini Hydro plant was required to be commissioned by the Appellant by 25.04.2009.

- c) Subsequent to the above, the Government of Karnataka, by its order dated 18.06.2010, extended the time period for installation of the project from 25.04.2009 till 30.09.2011.
- d) The Appellant commissioned the said project and synchronized to the grid system on 31.08.2013 and the same was certified by the Respondent No.1 vide letter dated 04.09.2013. Thus the Commercial Operation Date (COD) for the project was 31.08.2013.
- e) As per the PPA, the Respondent No. 1 had to establish and maintain transferable, assignable, irrevocable and unconditional non-revolving Letter of Credit (LC) in favour of the Appellant and the said LC was to be made operational before 30 days prior to COD . The provisions relating to the opening of LC in the PPA are extracted below:-

“6.5. Letter of Credit: GESCOM shall establish and maintain transferable, assignable, irrevocable and unconditional non-revolving Letter of Credit in favour of, and for the sole benefit of, the Company. The Letter of Credit shall be established in favour of, and issued to, the Company on the date hereof and made operational thirty (3) days prior to the Commercial Operation Date of the project and shall be maintained consistent herewith GESCOM at any and all times during the Term of the Agreement. Such Letter of Credit shall be in form and substance acceptable to both the Parties and shall be issued by any Scheduled Bank and be provided on the basis that:

- (i) In the event a Tariff Invoice or any other amount due and payable by GESCOM pursuant to the term of this***

Agreement is not paid in full by GESCO as and when due, the Letter of Credit may be called by the Company for payment in full of the unpaid Monthly Invoice or any such other unpaid amount.

- (ii) **The foregoing as determined pursuant hereto, upon representation of such Monthly Invoice or other invoice or claim for such other amount by the Company on the due date therefore or at any time thereafter, without any notification, certification or further action being required.**
 - (iii) **The amount of the Letter of Credit shall be equal to one month's projected payment payable by the GESCO based on the average of annual generation.**
 - (iv) **The GESCO shall replenish the Letter of Credit to bring it to the original amount within 30 days in case of any valid drawdown.**
 - (v) **The Company shall allow a rebate of 1.8% of the Tariff Invoice or actual expenditure/charges for the LC account incurred, whichever is higher, and the same shall be deducted from the monthly Tariff Invoice payable to the Company.**
 - (vi) **The Letter of Credit shall be renewed and/or replaced by the GESCO not less than 60 days prior to its expiration."**
- f) Since the Respondent No.1 did not comply with the said Clause of PPA by not making LC operational 30 days prior to COD, the Appellant alleged that Respondent No.1 violated the terms and conditions of the said PPA. It has been submitted by the Appellant that the generation commenced from the project and was received by the Respondent No.1 and even the process of issuance of invoices by the Appellant for the energy generated from 29.08.2013 till 31.08.2013 were raised and the Appellant, in the covering letter to

the said invoices requested the Respondent No.1 to make the payments towards the said invoices.

The Appellant stated that though the said invoice was acknowledged by the Respondent No.1 on 23.09.2013 but it did not honour the same, within the time stipulated in the PPA, thereby by, committing the default under Clause1 Article 9.2.2 of the PPA and this is in addition to the default already committed by the Respondent No.1 in not complying with the condition of PPA in respect of operationalising the LC as stipulated i.e. 30 days prior to COD.

- g) The Appellant stated that Default Notice dated 17.09.2013 under Article 9.3.2 of the PPA was issued to the Respondent No.1 and in the said Default Notice, the Appellant specifically notified the Respondent No.1 that there is a default by the Respondent No.1 in not opening and operationalising LC, as contemplated under the PPA and further requested the Respondent No.1 to hand over and operationalised the LC as per PPA within 30 days of the receipt of the said Default Notice. The said Default Notice was received and acknowledged by the Respondent No.1 on 23.09.2013.

- h) The Appellant stated that there was no response from the Respondent No.1 for the said Default Notice and the Respondent No.1 neither issued nor operationalised the LC even after 30 days of the Default Notice and as a result, the Appellant issued a termination letter dated 24.10.2013 to the Respondent No.1 terminating the said PPA with immediate effect. And a copy of the same was also faxed to Respondent No.3 for information, as contemplated in the PPA. Copy of the same was also addressed to the Respondent No. 2.
- i) Consequent upon the above termination, the Appellant issued a letter dated 28.10.2013 to Respondent No.1 and 2 requesting for grant of Standing Clearance /No Objection Certificate(NOC) enabling the Appellant to avail wheeling and banking facility.
- j) The Appellant stated that on 11.11.2013, they received a letter dated 07.11.2013 from the Respondent No.1 enclosing therewith a LC dated 22.10.2013 issued by the State Bank of Hyderabad favouring the Appellant.
- k) The Appellant stated that the PPA has been validly terminated by the Appellant and in absence of issuance of NOC by the Respondent No.2, there was no other alternative but to continue feeding power to

the grid of the Respondent No.1 and as a consequent, the Appellant continued to issue invoices for the electricity supplied under protest to Respondent No.1 even after the termination of the said PPA.

- l) The Appellant stated that the Respondents have not granted the standing clearance to the Appellant for the Open Access as requested in the letter dated 28.10.2013 and even the payment was also made belatedly and beyond the time prescribed under the PPA and aggrieved by this the Appellant approached the Respondent No.3, the State Commission by way of Petition under Section 86 of the Electricity Act, 2003 seeking their intervention for directing the Respondent Nos. 1 & 2 for grant of Open Access.
 - m) The Respondent No.3, the State Commission passed the Impugned Order on 25.09.2014 dismissing the Petition filed by the Appellant therein.
6. In light of the above, the following issues are before us for our consideration;

A. Whether the PPA has become null and void?

B. Whether the Appellant should be granted Open Access for wheeling and banking the electricity generated from its 1.4 MW Mini Hydel Electricity Power Project?

7. Mr. Sridhar Prabhu, Learned Counsel for the Appellant and Mr. Ujjal Banerjee, Learned Counsel for the Respondent Nos. 1 & 2 were heard at length and the written submissions and the deliberations made by the rival parties have been considered.
8. The following issues are brought out for our consideration.
 - (i) During the deliberations, the Appellant mentioned that Article 2.2 of the PPA specifies certain conditions precedent upon the parties upon non-fulfillment of which shall render the PPA null and void automatically and LC opening and operationalisation is the main condition precedent and further stated that even the approval for inter-connection of the project to the grid system by the Respondent Nos.1 and 2, should have been in place within 6 months after the date of signing of the PPA, however, the same was done on 24.08.2013.
 - (ii) The Appellant submitted that the LC for Rs.30,62,300/- (Rupees Thirty Lac Sixty Two Thousand only) was opened by

the Respondent No.1 much after the due termination of the PPA by the Appellant and it was enclosed to the letter dated 7.11.2013 issued by the Respondent No.1 informing the Appellant that LC has been opened with respect to the project of the Appellant and this was received by the Appellant on 11.11.2013 and the Appellant has rightly issued a termination letter on 24.10.2013 after expiry of 30 days of the default period. The Default Notice has been issued by the Appellant on 17.09.2013 and the same was received and acknowledged by the Respondent on 23.09.2013.

- (iii) During the deliberations made before us, the Appellant alleged that Respondent No.1 neither furnished draft, format and contents of the LC nor at any stage discussed other relevant details and terms and conditions of the said LC with the Appellant and more importantly all this has been done after the due termination of the PPA by the Appellant.
- (iv) The Respondent No.1 responded that they have not violated any clause of PPA and pursuant to receipt of letter from the Appellant about event of default, the Respondent No.1 promptly opened the LC on 22.10.2013 i.e. within the stipulated time

period of 30 days from the receipt of the Default Notice and stated that clause 9.3.2 of the PPA clearly stipulates that only at the expiry of the 30 days from the delivery of the Default Notice, the Appellant may deliver a termination notice to the Respondent No.1 and further stated that it is evident from the submissions made herein above that the LC was opened within 30 days from the receipt of the Default Notice, and no fault has been made by the Respondent No.1 which render termination letter to be devoid of any substance and liable to be set aside.

- (v) The Respondent No.1 further stated that nowhere in the PPA or otherwise it was stipulated or required that the opening of LC has to be communicated to the other party as and when the same is done. The Respondent No.1 upon opening of LC curing the default within the stipulated period informed the Appellant regarding the same after a delay of few days and as a result of the same communication of opening of LC was only received by 11.11.2013.
- (vi) Respondent No.1 further stated that this delay in communication of opening and operationalising LC has nowhere been held as a valid cause for termination of

agreement as strictly time bound communication of the same is nowhere a condition precedent in the said PPA.

(vii) Respondent No.1 alleged that the Appellant had undertaken to complete the said project by 8.04.2010 and fail to do so and repeatedly sought extension from the State Government from time to time and even Appellant was allowed to use water from the Public Irrigation Project for generation of electricity. Having taken benefit of public resources for its project, the Respondents alleged that it would be unfair on the part of the Appellant to try to wriggle out its obligation to supply power to a public utility merely on the fact that the communication of establishing LC was delayed by the Respondent No.1

(viii) On careful examination of the Impugned Order, we observed that the relevant facts of the case have been considered and its conclusion is reproduced below;

“7 (b) The Default Notice dated 17.9.2013 (ANNEXURE-P9) was served on the 1st Respondent on 23.9.2013. The event of Default of not furnishing the Letter of Credit was required to be remedied within thirty days from the date of receipt of the Default Notice. The 1st Respondent has established the Letter of Credit on 22.10.2013, well within thirty days from the date of receipt of the Default Notice.

The establishing of the Letter of Credit, however, came to the knowledge of the Petitioner on 11.11.2013, when it received the letter dated 7.11.2013 (ANNEXURE-P12). Paragraph-2 of Article 9.3.2 of the PPA reads as follows:

....At the expiry of 30(thirty) days from the delivery of the default notice and unless the Parties have agreed otherwise, or the Event of Default giving rise to the Default Notice has been remedied, Company may deliver a Termination Notice to GESCOM. Company may terminate this Agreement by delivering such a Termination Notice to GESCOM and intimate the same to the Commission. Upon delivery of the Termination Notice this Agreement shall stand terminated and Company shall stand discharged of its obligations.

From then above, it is clear that, if the Event of Default giving rise to the issuance of Default Notice had been remedied within thirty days from the date of receipt of the Default Notice, the Petitioner is not entitled to issue Termination Notice. The above clause does not require the communication of the curing of the Event of Default mentioned in the Default Notice within thirty days to the other party. Hence, mere non-communication of the urging of the Event of Default within thirty days from the date of receipt of the Default Notice, does not entitle the Petitioner to issue the Termination Notice. For the above reasons, the first ground urged by the Petitioner has no validity.

(c) The main clause of Article 6.5 of the PPA provides that the Letter of Credit shall be established in favour of, and issued to, the Company on the date of execution of the PPA itself and it is to be made operational thirty days prior to the Commercial Operation Date (COD) of the Project. Admittedly, in the present case, the Letter of Credit was not established on the date of signing of the PPA, i.e. 9.10.2007. The Petitioner also did not raise the issue of the Letter of Credit not being opened for nearly six years thereafter, till the Project was commissioned. It was only after the Project was commissioned by the Petitioner

with a delay of about forty months beyond the thirty months provided in the PPA that the Petitioner has chosen to raise the matter by issuing the Default Notice (ANNEXURFE-P9) to the 1st Respondent, calling upon it to remedy the defect. The Petitioner itself has stated that it received the Letter of Credit dated 22.10.2013 on 11.11.2013 with the covering letter dated 17.11.2013 (ANANEXURE-P10) from the 1st Respondent. Therefore, one can say that on 11.11.2013, the Petitioner was well-aware that the Letter of Credit was opened in its favour. It can also be seen that subsequent to 11.11.2013, the Petitioner had not objectg4d, either orally or in writing, regarding the form and the contents of the Letter of Credit. The main clause of Article 6.5 of the PPA further states that the Letter of Credit shall be in a form and substance acceptable to both parties. It does not stipulate that the form and substance of the Letter of Credit should be accepted by the other party, before it is got issued from the Bank.

(d) Normally, there would be a prescribed format of Letter of Credit, and the specific terms and conditions of a Letter of Credit are separately drafted and annexed to the same. We, therefore, of the view that the drafting of the Letter of Credit and its terms and conditions is not a complicated issue. IN such circumstances, a party can obtain the Letter of Credit with its usual terms and conditions and forward it to the other party. If the other party needs any further clarification/modifications, it can come forward with its suggestions. In the present case, the cover-page of the Letter of Credit issued by the State Bank of Hyderabad, Super Market Branch, Gulbarga, indicating the various particulars of the Letter of Credit, states that, "The enclosure to this form conations terms and conditions governing the LC and forms on integral part of the LC." The Petitioner, in paragraph 28(d) of the Petition, has alleged that it had not received the enclosure containing the terms and conditions of the letter of Credit, though such a fact was mentioned in the cover-page of the Letter of Credit. This allegation appears to be not true. If really

such enclosure was missing from the cover-page of the Letter of Credit, the Petitioner should have immediately brought this fact to the notice of the 1st Respondent or of the issuing Bank. It is not the case of Petitioner that till drafting of the Petition, it had not noticed the contents of the cover-page of the Letter of Credit. The Petitioner has not given any reason for not noticing such an endorsement on the cover-page of the Letter of Credit. If really such an endorsement was noticed for the first time at the time of preparing the Petition, the Petitioner would have taken steps to call for the copy of such terms and conditions from the 1st Respondent or the issuing Bank. The Petitioner has not taken any such steps during the pendency of these proceedings. Therefore, it appears that there is no basis for the allegation that the Petitioner had not received the terms and conditions of the Letter of Credit shown to have been annexed to the cover-page of the Letter of Credit. It also appears that the Petitioner had no suggestions or modifications to propose in respect of the terms and conditions of the Letter of Credit received by it. For the above reasons, we hold that there is no merit in the Petitioner's contention that the Letter of Credit furnished by the 1st Respondent does not comply with requirements of Article 6.5 of the PPA, which entitles the Petitioner to issue the Termination Notice. Therefore, the second ground urged by the Petitioner also has no validity.

(e) It may not be out of place to observe here that Petitioner appears to be seeking to wriggle out of the Contract on invalid and flimsy grounds. The Petitioner executed the PPA on 9.10.2007, undertaking that the Project would be completed, at the latest, within thirty months from the date of signing of the PPA. Such date would have expired on 8.4.2010. The Petitioner failed to complete the Project before that date. It sought extension of time from the Government of Karnataka three times, repeatedly, and finally could achieve COID on 31.08.2013. The Petitioner has been allowed to use the water from a public irrigation project for generation of electricity. Having taken advantage from a public resource for its Project, it is unfair

on the part of the Petitioner to seek to wriggle out of its obligation to supply power to a public utility, instead of resolving the difference, if any, through mutual negotiations, as provided under Article 10 of the PPA. It appears that the moment the Project was ready for generation, the Petitioner has attempted to look for ways to terminate the PPA. Even in the first invoice for the delivered energy, the Petitioner has demanded for payment of the amount within fifteen days from the date of receipt of the invoice, and in default, threatened to terminate the PPA. It can be seen that mere delayed payment or non-payment of tariff invoices does not entitle the Petitioner to terminate the PPA. At best, it may lead to issuance of a Default Notice on this count. One can also take note of the fact that, while the Letter of Credit is opened to assure the timely recovery of the amount due under the monthly tariff invoice, or any other head at the time of issuing the Default Notice, even that first monthly tariff invoice, or any other amount, had not become due to the Petitioner.”

9. In a normal course such a kind of situation should not arise. Respondent No.1 should have taken timely action to opening and establishing requisite LC in favour of the Appellant and communicated the same to the Appellant within the stipulated period but it did not happen so. It must be taken into account that the Appellant being a small generating company should be assured of timely payments due as per the PPA so as to avoid the financial hardships.
10. We further noticed that even after the COD of the project, it took around 52 days for establishing LC by the Respondent No.1. Such

lapses should have been avoided. Establishment of LC does give confidence to the Appellant that there is timely recovery of any amount which becomes due upon commencement of commercial generation and supply to the Respondent No.1.

11. We noticed that the PPA (stated to be draft PPA) was categorically signed and agreed upon by the both parties and was subsequently submitted and approved by the State Commission.
12. Further, we are of the considered view that merely delayed receipt of communication regarding LC cannot be a ground for termination of PPA until and unless there has been considerable delay in release of payments causing financial hardships to the Appellant. Even if we look at time gap between establishment of LC and the Appellant's communication of commercial generation to the grid is not much and would not warrant issuance of a termination notice.
13. In our opinion, the Respondents have been quite cooperating with the Appellant while providing the repeated time extensions as sought by the Appellant and allowing them to use water for the said project from the Public Irrigation Project. This fact cannot be overlooked.

14. After careful examination of the entire case as put forth by the rival parties, we are in agreement with the findings of the State Commission in the Impugned Order dated 25.09.2014 and are of the considerate view that the PPA termination is not called for since LC was established within curing period from the date of receipt of Default Notice and as such Appellant's requirement of grant of Open Access for wheeling and banking by the Respondent No.2 does not arise at all.

ORDER

In view of the above, the Appeal No. 4 of 2015 is hereby dismissed and the Impugned Order dated 25.09.2014 is hereby affirmed. No order as to costs.

Pronounced in the open court on this **1st day of December, 2015.**

(I.J. Kapoor)
Technical Member

(Justice Surendra Kumar)
Judicial Member

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REPORTABLE/NON-REPORTABLE