

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.145 of 2012

Dated: 30th April, 2013

**Present : HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER**

In the Matter of:

**M/s Jasper Energy Private Limited
701 & 702, Prestige Meredian-II M.G.Road
BANGALORE -560 001, Karnataka
Represented by Mr. T.Rajesh, Director**

...Appellant

Versus

- 1. Karnataka Power Transmission Corporation Ltd.,
Cauvery Bhawan, Kempegowda Road,
Bangalore-560 009, Karnataka.**
- 2. Hubli Electricity Supply Company Limited
Navanagar, P.B. Road,
HUBLI – 580 029, Karnataka.**
- 3. Karnataka State Load Despatch Centre
28, Race Course Raod,
BANGALORE-560 001, Karnataka.**

4. **State Power Procurement Co-ordination Committee
Cauvery Bhawan,
BANGALORE-560 001, Karantaka.Thane Belapur
Industries,**
5. **Karnataka Electricity Regulatory Commission
6th & 7th Floor, Mahalaxmi Chambrs,
9/2, M.G. Road, Bangalore-56 001, Karnataka.**

.....Respondent(s)

Counsel for the Appellant(s) : Mr.Basava Prabbu Patil, Sr.Adv.
Mr. Lokesh R.Yadav
Mrs. N. Shoba
Mr. Sriram J. Thalapathy
Mr. V. Adhimoolam
Mr. Venkatakrishnan
Mr. Anikudh Sanganeria
Mr. B.S. Prasad

Counsel for the Respondent(s):Mr. Anand K.Ganesan for R-1
Ms. Swapna Seshadri for R-1
Mr. D. Nagarajan for R-2
Mr. Venkata Subramaniam
Mr. Raghavendra S. Srivatsa for R-2

J U D G M E N T

PER HON'BLE MR. JUSTICE M. KARPAGAVINAYAGAM, CHAIRPERSON

1. M/s Jasper Energy Private Limited, the Appellant filed a petition before the Karnataka State Commission praying for declaration that the PPA entered into between the Appellant

and the Respondent (HESCOM) stood terminated on its issuance of termination notice and for consequential direction to grant approval to the Appellant to sell electricity to third parties.

2. This petition was dismissed by Karnataka State Commission. Aggrieved by this, the Appellant has filed this Appeal.
3. The short facts leading to the filing of this Appeal are as follows:-
 - i) The Appellant is a generating company. It has established mini Hydel power project in Bijapur District in the State of Karnataka.
 - ii) The Karnataka Power Transmission Corporation, the 1st Respondent is the transmission licensee.
 - iii) Hubli Electricity Supply Company(HESCOM), the 2nd Respondent is a distribution licensee.
 - iv) Karnataka State Load Despatch Centre, is the 3rd Respondent.
 - v) State Power Procurement Coordination Committee is the 4th Respondent.
 - vi) The Karnataka State Commission is the 5th Respondent.

4. The Appellant on 01.2.2007 entered into a PPA agreement with HESCOM,R-2 for sale of power to be generated from its project. Even before the commissioning of the Project, some dispute arose between these two parties since the required approvals were not obtained within 6 months from the date of PPA by the HESCOM(R2).
5. The Appellant felt that the PPA became impossible to be performed in view of the abnormal increase of the cost. Hence, the Appellant filed a petition before the State Commission in O.P. No.22 of 2010 dated 12.5.2010 praying for declaration that the PPA was null and void. This petition was hotly contested by the 2nd Respondent (HESCOM). The State Commission, ultimately dismissed the said petition rejecting the prayer of the Appellant by the order dated 23.12.2010.
6. In the meantime, on 4.8.2010, the Project was commissioned. From then onwards the Appellant supplied power to HESCOM, R-2 from the date of COD and submitted invoices for the power supplied as per the terms of PPA. However, HESCOM,R-2 failed to make the payment within 15 days on receipt of invoices as required under the PPA. R-2(HESCOM) failed to make the payments i.e. the outstanding amount of Rs.3,58,36,416 for the energy delivered from August,2010 to December,2010, That apart the HESCOM also failed to pay

the interest for the delay for the period for over six months. In addition to this, the HESCOM,R-2 failed to open the Letter of Credit in spite of reminders.

7. Therefore, on 3.2.2011, the Appellant sent a default notice to HESCOM,R-2 bringing to its notice of its defaults such as (1) failure to open the Letter of Credit, (2) failure to pay the invoice amounts in prescribed time and (3) failure to pay the interest on delayed payments.
8. Through this notice, the Appellant called upon HESCOM,R-2, to remedy the same within 30 days. Despite the receipt of the default notice on 19.2.2011 calling upon to cure the defaults within 30 days, HESCOM, R-2, instead of curing those defaults sent a reply on 18.3.2011 to the Appellant raising various contentions.
9. Under these circumstances, the Appellant, in exercise of the rights conferred under PPA issued a termination notice on 5.4.2011 to the HESCOM,R-2 terminating the PPA dated 01.2.2007. Thereupon, the Appellant sought open access and permission to sell power to third parties. The Respondent refused the same.
10. Therefore, the Appellant on 24.6.2011 filed a petition in O.P. No.28 of 2011 before the State Commission praying for

declaration that the PPA stood terminated and for the consequent direction to Respondent to grant approval for the Appellant to sell the electricity to third parties.

11. Contesting this petition, HESCOM, R-2 filed objection to the grounds raised in the petition mainly on the ground that the Appellant alone was mainly responsible for the said defaults and that the Appellant, instead of following dispute resolution redressal mechanism as per the PPA could not straight away proceed to terminate the PPA and that therefore the Petition filed by the Appellant was liable to be dismissed.
12. After hearing the parties, the State Commission by the impugned order dated 7.6.2012 rejected the petition filed by the Appellant and held that the termination of the PPA was invalid and consequently PPA continues to be in force. However, the State Commission found that there was a delay in payment of tariff invoices and accordingly directed the HESCOM, R-2 to pay the interest within 30 days to the Appellant.
13. Challenging this impugned order dated 7.6.2012, the Appellant has filed the present Appeal before this Tribunal.

14. While assailing the impugned order, the Learned Senior Counsel for the Appellant has made the following submissions:-

- i) The State Commission ought not to have accepted the contention of the HESCOM,R-2 justifying the delay in payment on the ground that certain documents were not submitted by the Appellant to HESCOM,R2 though, in fact, the Appellant submitted all the documents sought for by the HESCOM, R2 and the proof of the same were furnished to the State Commission.
- ii) The reason adduced by the State Commission for doubting the validity of the termination notice on the ground that event of default relates to the period even before the disposal of OP No.22 of 2010 that is on 23.12.2010, is quite wrong. In fact, the default in payment and non payment of interest on delayed payments despite the issuance of default notice has afforded a fresh cause of action for terminating the PPA.
- iii) The State Commission has totally ignored the fact that there was no dispute between the parties which needed for the recourse to the Dispute redressal process under Article 10 of PPA. Non recourse to mutual negotiation process does not affect the validity of the termination of

the PPA in any manner, since the procedure for termination provided under Article 9.2 is different from procedure for Dispute redressal process under Article 10. Therefore, dismissal of petition on the ground of non recourse to mutual negotiation is totally unjustified.

- iv) It is an admitted fact that HESCOM, R-2 not only defaulted in payment of interest but refused to pay any interest which constitutes an event of default under Article 9.2.2. Further, the default in opening Letter of Credit (LC) has been admitted by the HESCOM (R-2) itself and the same constitutes an event of default in terms of Article 9.2.2(1) of PPA. Despite the service of default notice HESCOM, R-2 failed to open the Letter of Credit on the ground that its financial position has not improved. The State Commission wrongly held that since the HESCOM, R-2 has not refused to open the Letter of Credit, it cannot be an event of default. The State Commission has failed to consider Article 9.2.2 which provided that event of failure on the part of Respondent to perform its financial and other material obligations under the Agreement would result in an event of default.
- v) This Tribunal in Appeal No.176 of 2009 i.e. BESCO Vs Davangere Sugar Company Ltd, while dealing with the

similar issue “ as to the validity of the termination of PPA” interpreted similar provisions contained in PPA, held that failure to make payment within the time frame, non payment of penal interest and failure to open the Letter of Credit would amount to event of default and once the default notice is issued in the absence of purchaser having cured the defaults, issuance of termination notice is proper and valid. The State Commission has not taken into consideration the settled principle laid down by this Tribunal in the above decision. Moreover, the State Commission having accepted the plea of the Appellant that there was a delay in payment and consequently, having directed the HESCOM, R-2 to pay the penal interest to the Appellant for the delayed payment, the State Commission ought not to have held that the termination notice was invalid.

15. In reply to the above submissions, the learned Counsel for the Respondent in justification of the impugned order has made the following submissions:-
 - i) There cannot be said to be delay in payment by the Respondent as the delay was caused only by the Appellant due to non furnishing of the documents sought for by the Respondent for verification. Further, even

during the pendency of the proceedings, the amounts claimed had been fully paid.

- ii) There is no inconsistency in the impugned order regarding the direction on the payment of interest. The payment of interest is the term of contract. Since the State Commission has held that the PPA was valid and subsisting, the interest is payable as per the contract itself, if there is any delay. The order of the State Commission only directs adherence to the terms of the contract. The statement that the non payment of interest leading to the event of default has given a cause of action for termination is not tenable. The contract itself cannot be sought to be terminated as the remedy for the non payment of interest cannot be termination of the contract.
- iii) The amounts due as per the invoices had actually been paid by the HESCOM, R-2 on 25.6.2011 and the same had been received by the Appellant. The Letter of Credit had also been opened on 7.5.1012. Therefore, the Appellant cannot harp on any default on these counts.
- iv) The Appellant earlier filed O.P. No. 22 of 2010 before the State Commission contending that there was a breach of clause-2 of PPA and consequently seeking for a direction that the PPA dated 01.2.2007 was null and void.

However, this Petition was dismissed by the State Commission on 23.12.2010 holding that PPA was valid and in existence. This period of alleged default would come from August to December, 2010. Therefore, the cause of action for non payment of the invoice amount for the termination of the PPA had arisen even during the pendency of O.P. No.22 of 2010 which was dismissed on 23.12.2010. In the said proceedings, the Appellant had made no mention whatsoever of the validity of the PPA on account of non payment of invoice amount for those periods. Even after dismissal of the Petition No.22 of 2010, the Appellant once again approached the State Commission and filed R.P.No.1 of 2011 seeking for review of the order dated 23.12.2010 which was subsequently dismissed as withdrawn. Having not raised this issue before the State Commission during those proceedings, the Appellant cannot now be permitted to raise the issue of the said cause of action in the present proceedings as it is barred by the principle of constructive resjudicata.

- v) According to the Appellant, its right to terminate the agreement is distinct from the rights of the parties under Article 10. This is not correct. Although the agreement provides the right to terminate the same, when the

agreement provides for particular procedure to do so, the same has to be followed strictly in accordance with the said procedure before resorting to termination. In the present case, the Appellant has exercised its right to terminate without first invoking the Article 10 and attempting to settle the same amicably. Such an act is contrary to the terms of agreement. Therefore, the Appellant is not entitled to the reliefs sought for in the present proceedings.

16. In the light of the above rival contentions made by both the parties, the following questions would arise for consideration.

- i) Whether the termination notice dated 5.4.2011 issued by the Appellant to the Respondent is in accordance with the procedure contemplated in PPA and is legally valid or not.?**
- ii) Whether the issue in O.P. No.22 of 2010 filed by the Appellant earlier for declaring PPA as being null and void is relevant to the issue in the present proceedings for deciding the validity of the termination notice issued by the Appellant?**
- iii) Whether the State Commission is right in holding that the issuance of termination notice effected by the**

Appellant by recourse under Article 9 of PPA is invalid on the ground that the Appellant could not straight away resort to the said recourse without taking recourse to mutual negotiation process as per Article 10 of the PPA?

17. Before dealing with these questions, it would be appropriate to refer to the observation and the findings on these issues in the impugned order passed by the State Commission. The relevant portion is as follows:-

“5. We have considered the averments made in the Petition and the Rejoinder by the Petitioner, the objections filed by the Respondents and the documents produced in support of the respective averments. We have also heard the oral arguments of both the Counsels.

6. It is submitted by the Counsel for the Petitioner that the Respondent No.2 , HESCOM failed to make payments for the electricity supplied within the due dates as per the terms of the PPA. Therefore, the Petitioner issued a Default Notice on 3.2.2011 under Article 9.3.1 of the PPA. Despite Notice, the Respondents did not remedy the defaults pointed out. Therefore, the Petitioner terminated the PPA by its Notice of Termination dated 5.4.201. On termination of the PPA, the Petitioner is entitled to have Open Access, as per the Open Access Regulations and the Respondents are bound to grant the same in accordance with law.

7. In reply, it is contended by the Counsel for the Respondents that the termination of the PPA is invalid as the Respondents have paid for the electricity supplied. It is further submitted that there was delay in making the

payments because the Petitioner had not submitted the documents for processing the invoices. In support of his argument, the Counsel for the Respondents drew the attention of the Commission to Annexure-D – a Letter dated 28.10.2010(produced by the Petitioner), in order to show that the Petitioner had not produced the required documents for processing the Invoices and making the payments. The Counsel for the Respondents also drew the attention of the Commission to the Respondents Reply dated 18.3.2011 to the Default Notice dated 3.2.2011 and submitted that the termination itself is invalid as the Petitioner all along was contending that the PPA is not in existence.

8. We have seen from the records that the Petitioner had filed OP No.22/2010 seeking a declaration that the PPA dated 1.2.2007 had become null and void for non-fulfilment of the conditions precedent and it is under no obligation to sell electricity to the Respondent No. 2. Rejecting the arguments advanced by the petitioner, this Commission on 23.12.2010 held that the PPA cannot be held to have become void, as it was the Petitioner who had failed to commence construction and complete the Project on time.

9. From the notice dated 3.2.2011 issued by the Petitioner, read with the Statement produced at Annexure-G. it is observed that the defaults pointed out are covered by invoices dated 2.9.2010 to 3.1.2011 for the power supplied from August, 2010 to December, 2010 during the pendency of the proceedings in OP No. 22/2010 initiated by the Petitioner, wherein the Petitioner was contending that there was no PPA, as it had become void. In those proceedings, the non-payment of the dues against the invoices issued by the petitioner was not urged as a ground for the cancellation or annulment of the PPA. If the Petitioner was really aggrieved by the non-payment of Bills, it could have then moved the Commission to terminate the PPA dated 1.2.2007 on grounds of non-payment. However, the Petitioner did not

do so and kept quiet, probably waiting for the orders of this Commission in OP No.22/2010. Thus, it is doubtful if the petitioner can base the notice of termination on the defaults in payment relating to the period before the disposal of the said petition by the Commission on 23.12.2010. However, after the disposal of the said petition by the Commission, the payment for the entire period from September 2010 to January 2011 had clearly become due by 3.2.2011 when the default notice was issued by the petitioner under Article 9.3.1 of the PPA. In its response dated 18.3.2011 to the said notice, Respondent 2 contended that several documents were required to process the bills submitted by the petitioner and the same had been sought for in the communication dated 25.10.2010 sent to the petitioner. The Respondent pointed out that the processing of bills was delayed due to the delay in the submission of the said documents by the petitioner and there was no default committed by R-2. Further, Respondent 2 also stated in the said communication that before the termination of the PPA could be considered any dispute should be sought to be settled through negotiation as the Article 9.3.2 of PPA. We are of the view that this contention of Respondent 2 merits acceptance in view of the unequivocal of the terms incorporated in the PPA which mandates resolution of disputes between parties by mutual negotiation only upon the failure of which the parties could consider other remedies.

10. As regards the default in opening of the Letter of Credit pointed out by the Petitioner in its Notice dated 3.2.2011 is concerned, a reply has been sent by Respondent No. 2 (HESCOM) on 18.3.2011. In the said letter, at paragraph-3, Respondent No. 2 has not refused to open the Letter of Credit. On the Contrary, it has stated that it will consider opening of the Letter of Credit once its financial position improves. This would mean that there is no refusal on the part of the Respondent.

11. *Even assuming that disputes arose an account of non-payment or non-opening of Letter of Credit, the Petitioner cannot straightaway proceed to terminate the PPA without following the Dispute Resolution Mechanism provided in the PPA. In Article 10 of the PPA, parties have specifically agreed to settle the disputes first through mutual negotiations, promptly, equitably and in good faith and only in case of non-resolution of the disputes within 90 (ninety) days, the same shall be referred to the Commission for adjudication. In fact, Respondent No. 2 has, in his reply dated 18.3.2011 to the Notice given by the Petitioner pointed out this clause to the Petitioner. From the Notice of Termination dated 5.4.2011 issued by the Petitioner, it is clear that the Petitioner without following the Procedure provided under Article 10 of the PPA, has straightaway resorted to termination of the PPA, which makes the termination itself invalid.*

12. *In the light of the foregoing discussion, we are of the clear view that the termination of the PPA effected by the Petitioner, vide its letter dated 5.4.2011 is unsustainable and invalid. Consequently the PPA dated 1.2.2007 continues to be in force and the parties shall abide by the same.*

13. *As regards the prayer of the petitioner for payment of interest, we hold that in view of our conclusion that the PPA is in force, interest is payable for all delayed payments as per the terms of the PPA and we direct the Respondent 2 to pay interest due on all delayed payments mentioned in the notice of termination, within thirty (30) days from the date of this Order”.*

18. The crux of the findings are as follows:-

- i) Before filing the present proceedings seeking for declaration that the PPA stood terminated in pursuance of the termination notice dated 5.4.2011, the generator i.e.

petitioner earlier filed O.P. No.22 of 2010 seeking for a declaration that the PPA dated 01.2.2007 had become null and void for non fulfilment of the conditions precedent. This petition was rejected by the State Commission by the order dated 23.12.2010. The present proceedings would relate to the defaults for payment of invoice amount dated from 2.9.2010 to 3.1.2011 for the power supply from August,2010 to December,2010. This is evident from the default notice dated 3.2.2011. Therefore, the period between August,2010 and December,2010 would relate to the period during the pendency of the earlier proceedings in O.P. No.22 of 2010 which was ultimately disposed of on 23.12.2010. Thus, even during the pendency of those proceedings in O.P. No.22 of 2010, the Petitioner knew about the non payment of dues against invoices issued by the petitioner for the supply of power during that period. However, this was not pointed out and brought to the notice of State Commission by the Petitioner during the said proceedings urging the same as ground for cancellation and for annulment of the PPA. If the Petitioner was really aggrieved by the non payment of the bills for the period from August, 2010 to December, 2010, the Petitioner would have prayed the State Commission in the said

proceedings to terminate the PPA dated 01.2.2007 on the ground of non payment. However, the Petitioner did not do so but merely kept quiet. Probably, the Petitioner was waiting for the orders of the State Commission in O.P.No. 22 of 2010 before taking further action.

ii) It is doubtful whether the petitioner can base the notice of termination on the defaults in payment relating the period during which the proceedings in O.P.No.22 of 2010 was pending. Therefore, if the period of default is to be calculated, it should be done only after the disposal of the said petition by the State Commission on 23.12.2010. If it is so, the payment for the entire period from September, 2010 to Jan.2011 would become due only from 3.2.2011. In the present proceedings, the Petitioner issued default notice on 3.2.2011 itself to the HESCOM.

iii) In response to this notice dated 3.2.2011, HESCOM(R2) sent a reply dated 18.3.2011 intimating the Petitioner that several documents were required to process the bills and therefore, demanded those documents from the Petitioner. But, the said documents were furnished with delay. Thus, the process of the bills was delayed only due to the delay in the submission of

the said documents by the Petitioner. As such, there was no default committed by the HESCOM.

iv) The HESCOM, in its reply indicated that even before the termination PPA, the Petitioner ought to have taken recourse to the Dispute Resolution Mechanism through negotiation as per Article 10 of the PPA. The perusal of the PPA would reveal that it mandates Dispute Resolution between the parties by mutual negotiation and only upon failure of such recourse the parties would seek for other remedies. In this case, such recourse has not been adopted. When a dispute arose on account of non payment or non opening of Letter of Credit, the Petitioner can not straightaway proceed to terminate the PPA without following Dispute Redressal Mechanism provided in the PPA as per Article 10.

v) The Petitioner has contended that the HESCOM committed a default in opening the Letter of Credit as pointed out by the Petitioner in its default notice dated 3.2.2011 but it is noticed from the reply sent by the HESCOM on 18.3.2011 that the HESCOM had not refused to open the Letter of Credit. It merely stated that it would consider opening of Letter of Credit when its financial conditions improve. As such, the reply on the

opening of Letter of Credit did not indicate that there is a refusal on the part of Respondent to open the Letter of Credit. Therefore, the termination notice dated 5.4.2011 is unsustainable. Consequently, it has to be held that the PPA would be in force.

vi) Though we have held that there was no default since the payment was made as per PPA, there was delay in payment and hence the interest is payable for the delayed payments by the HESCOM to the Petitioner. Hence, we direct HESCOM to pay to the Petitioner the interest amount due on all delayed payments mentioned in the notice of termination dated 5.4.2011 within 30 days from the date of this order.

vii) Thus, this petition is allowed in part in terms of above.

19. The reading of the impugned order would show that the State Commission concluded that termination is invalid as there was no default but since the amount was not paid in time and it was made only belatedly, the Appellant/Petitioner is entitled to get the interest which has not been paid so far, and consequently, HESCOM is liable to pay the interest for the delayed payment to the petitioner which shall be paid within 30 days from date of the impugned order.

20. Keeping these findings of the State Commission in our mind, we will now discuss the issues in the light of the arguments made by both the parties.

21. Before doing the same, let us recapitulate the chronological events to understand the background of the case, which are as follows:-

- i) The Appellant, the generating company had established its mini Hydel power project in the State of Karnataka.
- ii) HESCOM, Respondent-2 is a Distribution Licensee.
- iii) PPA was entered into between the Appellant and HESCOM,R-2 on 01.2.2007, for supply of 10.5. MW of power from its mini Hydel electric project. The tenure of PPA was for 20 years.
- iv) PPA contemplates the conditions precedent to be complied with within the time frame stipulated. This was not complied with.
- v) Since the Appellant felt aggrieved over the non compliance of the conditions precedent, by the HESCOM(R-2) and due to that there was a delay in execution of the project beyond the time stipulated in the PPA, the Appellant had filed petition in O.P.

No.22 of 2010 on 12.5.2010 before the State Commission complaining about non compliance of the condition precedent and seeking for the declaration to declare the PPA dated 01.2.2007 as being rendered null and void and for consequent directions.

- vi) During the pendency of the said proceedings, the Appellant's project was commissioned on 4.8.2010.
- vii) After commissioning, the Appellant began to supply power to HESCOM,R2 from the date of COD(Commercial Operation Date). At this stage, O.P. No.22 of 2010 was taken up for final hearing.
- viii) Ultimately, the State Commission, after hearing the parties held that the PPA was valid and subsisting and thereafter rejected the petition filed by the Appellant on 23.12.2010.
- ix) In the meantime, the Appellant submitted invoices to the HESCOM for the power supplied from August, 2010 to December,2010 as per the terms of PPA.
- x) Instead of clearing the invoices, the HESCOM, R2 asked the Appellant to furnish certain documents to enable it to process the bills by the communication

dated 22.9.2010. Even though those documents were said to be already available in the possession of the HESCOM(R2), the Appellant, in order to avoid delay, sent the documents sought for under the covering letter dated 25.10.2010.

- xi) Despite the receipt of the documents, HESCOM,R2 failed to make the payments for the invoices towards the power supplied from August,2010 to December,2010. At this stage, as mentioned above, O.P. No.22 of 2010 was disposed of holding that PPA was subsisting, by the order dated 23.12.2010.
- xii) The arrears of the payments in respect of the invoices for the power supplied to the HESCOM,R2 from August,2010 to December,2010 had accrued to the tune of Rs.3,58,36,416. For this delay period, there was also no interest paid.
- xiii) That apart, HESCOM as per the PPA failed to open the Letter of Credit as contemplated under the PPA. Since this default continued to exist for a period of more than three months which would entitle the Appellant to sell the electricity to third parties, the Appellant was constrained to issue default notice dated 3.2.2011 as per Article 9.3.1. of the PPA. The

following defaults were brought to the notice of the Respondent.

- a) Failure to open a Letter of Credit.
 - b) Failure to pay the invoice amount within the prescribed time.
 - c) Failure to pay the interest on the delayed payments.
- xiv) The Appellant, through its default notice dated 3.2.2011 called upon the HESCOM,R-2 to remedy the same within 30 days. After receipt of the default notice, the HESCOM,R-2 replied to default notice through its letter dated 18.3.2011 denying the incidents of default and pointing out that the documents asked for were not furnished by the Appellant. However, the HESCOM did not deny its obligations to open Letter of Credit and assured that Letter of Credit would be opened after the financial conditions improved.
- xv) Thus, these defaults pointed out in the notice dated 3.2.2011 were not cured within 30 days. Hence, the Appellant sent a termination notice dated 5.4.2011 terminating the PPA. Thereupon, the Appellant

sought for open access permission from the Respondent to sell the power generated from its projects to third parties. But this was refused by the Respondent on the ground that the PPA was subsisting.

- xvi) In that situation, the Appellant on 24.6.2011 filed O.P.No.28 of 2011 before the State Commission praying for declaration that the PPA stood terminated and for a consequent direction to the Respondents to grant open access to the Appellant to sell the electricity to third parties.
- xvii) During the pendency of this proceedings before the State Commission, the HESCOM, forwarded a cheque to the Appellant for Rs. 3.6 crores towards the invoice raised during August,2010 to March,2011. This amount did not include the interest on delayed payments. During the course of these proceedings HESCOM, R-2 filed reply before the State Commission stating that there was no default and as such the PPA was valid and subsisting and therefore the Appellant is not entitled to sell power to any third parties since the amount claimed has already been paid.

xviii) After hearing the parties, the State Commission by the impugned order dated 7.6.2012 rejected the prayer of the Appellant holding that the termination notice is invalid. However, the State Commission in the impugned order held that there was a delay in payment of tariff invoices and therefore, directed HESCOM to pay the interest amount within 30 days to the Appellant. This impugned order dated 7.6.2012 is now the subject matter of this Appeal.

22. The above chronological events would reflect the following factors:-

- i) The PPA was entered into between the Appellant and HESCOM (R-2) on 01.2.2007. Since the condition precedent was not fulfilled, the Appellant approached the State Commission in O.P.No.22 of 2010 for declaration that the PPA became null and void. The same has been rejected by the order dated 23.12.2010.
- ii) Meanwhile, the Appellant's project was commissioned on 4.8.2010. From then onwards, the power generated from its project was supplied to the Respondent-2 and for this supply, the Appellant furnished the invoices. However, the

amounts for this supply were not paid. On the other hand, the HESCOM, R-2 asked for some documents and the same were furnished. Even then, the arrears to the tune of more than 3 crores have not been paid. Interest for the delayed payment had also not been paid. Letter of Credit has also not been opened by the HESCOM,R-2 as per the PPA.

- iii) Hence, the Appellant sent the default notice dated 3.2.2011 to the HESCOM. This notice was received by the HESCOM,R-2 on 19.2.2011. Without making any payment and without curing those defaults the HESCOM,R-2 simply sent a reply dated 18.3.2011 putting the entire blame on the Appellant for the delay in payment due to non supply of documents by the Appellant and giving assurance to open the Letter of Credit after its financial conditions had improved.
- iv) In that situation, the Appellant approached the Respondent for getting permission for open access. The same was refused. Hence, the Appellant filed the Petition before the State Commission on 24.6.2011 for declaration. Thus, till 24.6.2011 the

HESCOM had not sent the invoice amount or arrears.

- v) Only during the pendency of the said proceedings, the HESCOM sent a cheque of 3.6 crores towards the invoices raised during August,2010 to March,2011. Even these amounts did not include the interest for the delayed payments. The Letter of Credit has also not been opened till the date of filing the O.P. No.28 of 2011 on 24.6.2011.

- 23. Bearing these factors in our mind, let us now discuss the issues framed above one by one.
- 24. The first question relates to the validity of the termination notice dated 5.4.2011 which is said to be not in accordance with the procedure incorporated in the PPA.
- 25. The said question is this. **“Whether the termination notice dated 5.4.2011 is in accordance with the procedure contemplated under the PPA and is legally valid or not?”**
- 26. While dealing with this question it would be appropriate to refer to some of the Articles of the PPA which provided the definition of various terms as well as the procedures. Article 4.2 of PPA stipulates the obligation of the HESCOM, R-2. The same is as follows:-

4.2. Obligations of HESCOM:

HESCOM agrees

i) To allow Company to the extent possible to operate the Project as a base load generating station subject to system constraints.

ii) Subject to system constraints to off-take and purchase the electricity generated by the Company at the Delivery Point.

iii) To make tariff payments to the Company as set out in Article-5.

27. As per this Article the 3rd obligation of the HESCOM, R-2 is to make the tariff payments to the generator, the Appellant as stipulated in the Article 5.

28. We shall now refer to Article 5. Article 5 deals with rates and charges, which is as follows:-

"5.1. Monthly Energy Charges:

a. HESCOM shall for the Delivered Energy pay, for the first 10 years from the Commercial Operation Date, to the Company every month during the period commencing from the Commercial Operation Date at the rate of Rs. 2.80(Rupees Two and Eighty paise only) per Kilowatt-hour without any escalation for energy delivered to the HESCOM at the Metering Point."

29. As per this Article HESCOM, R-2 being the Distribution Licensee shall pay for the energy delivered by the Appellant

generator to the HESCOM, R-2 from the Commercial Operation Date every month at the rate of Rs.2.80 per kWh for the first 10 years. Thus, in this Article the rate has been fixed and the period has also been provided.

30. Article 6 of the PPA deals with the procedure for billing and payment. The relevant portions of Article 6.1 to 6.3. are as follows:-

"6.1. Tariff Invoices:

The Company shall submit to the designated officer of HESCOM, a Monthly Invoice for each Billing Period in the format prescribed by HESCOM from time to time setting forth those amounts payable by HESCOM for the Delivered Energy in accordance with Article- 5.1

6.2. Payment:

HESCOM shall make payment of the amounts due in Indian Rupees within fifteen (15) days from the date of receipt of the Tariff Invoice by the designated office of HESCOM.

6.3. Late Payment:

If any payment from HESCOM is not paid when due, there shall be due and payable to the Company penal interest at the rate of SBI medium term Lending rate per annum for such payment from the date such payment was due until such payment is made in full.

31. As per Article 6.1, the generator shall submit to HESCOM monthly invoices for each billing period from time to time.
32. As per Article 6.2. HESCOM shall make the payments of amounts in Indian rupees within 15 days from the date of receipt of tariff invoice.
33. Article 6.3 provides that if the payment is not made within the prescribed time, the HESCOM shall pay the penal interest at the rate of SBI medium term lending rate. So, these Articles would clearly provide that the generator after supply shall submit monthly invoice from time to time and on receipt of the invoice, the HESCOM shall make the payment of the invoice amount within 15 days and if there is any delay in payment, the HESCOM shall pay the penal interest for such a delayed payment.
34. Then we will refer to the Article 6.5 which provides the course, if these Articles i.e. 6.1, 6.2 and 6.3 have not been fulfilled by HESCOM,R-2.
35. Article 6.5 deals with the Letter of Credit which is again referred to below:-

“6.5 Letter of Credit:

The HESCOM 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(30) days prior to the Commercial Operation Date of the Project and shall be maintained consistent herewith by the HESCOM at any and all times during the Term of the Agreement. Such Letter of Credit shall be in form and substance acceptable to both Parties and shall be issued by any Scheduled Bank and be provided on the basis that:

I) In the event a monthly Invoice or any other amount due and payable by HESCOM pursuant to the terms of this Agreement is not paid in full by HESCOM 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 presentation of such monthly Invoice or other invoice or claim for such other amount by the Company on the due date there for 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 payments payable by the HESCOM based on the average of the annual generation.

IV) The HESCOM shall replenish the LC to bring it to the original amount within 30 days in case of any valid draw down.

V) The Company shall allow a rebate of 1.8.% of the monthly Invoice amount or actual expenditure/charges for the learned Counsel for the account incurred, whichever is higher, and the same

shall be deducted from the monthly Invoice payable to the Company.

VI) The Letter of Credit shall be renewed and/or replaced by the HESCOM not less than 60 days prior to its expiration.”

36. So, according to Article 6.5, the HESCOM (R-2) shall establish the Letter of Credit in favour of the generator and make it operational 30 days prior to the Commercial Operation date of the Project. If the payment is not made after receipt of monthly invoice by the HESCOM, R2 then the generator, the Appellant has got a right by invoking the Letter of Credit for payment in full of the unpaid monthly invoice or part of unpaid amount. The amount of Letter of Credit shall be equal to one month's projected payment. The HESCOM,R2 shall replenish the Letter of Credit to bring it to the original amount within 30 days in case of any valid draw down, when the generator used the Letter of Credit earlier for the non payment of monthly invoice. So, this provision would make it clear that it mandates HESCOM, R2 to establish and maintain the Letter of Credit even before the Commercial Operation Date. Thus, Article 6.1 to 6.5 provides for the compliance of the various conditions imposed upon the Distribution Licensee, HESCOM,R-2 after receipt of supply of power from the generator.

37. We shall now refer to the relevant Articles which deal with the consequences in the event of the failure to comply with these

conditions. Article 9.2 and 9.3 would deal with those events. Article 9.2 provides the event of default. Article 9.2.2 provides the event of default on the part of HESCOM,R-2.

38. Let us now refer to the Article 9.2.2 provided in Article 9.2, which is as follows:-

“9.2 Events of Default:

9.2.1 Company’s Default:.....

9.2.2 HESCOM Default:

The occurrence of any of the following at any time during the Term of this Agreement shall constitute an Event of Default by Corporation:

1. Failure or refusal by HESCOM to perform its financial and other material obligations under this Agreement.

2. In the event of any payment default by the HESCOM for a continuous period of three months, the Company shall be permitted to sell Electricity to third parties by entering into a wheeling & banking Agreement with the HESCOM for which it shall pay transmission and other charges to the HESCOM at the rates applicable from time to time and as approved by the Commission.”

39. The above Article has defined what is the event of default by the HESCOM,R2 and provided that if the HESCOM,R2 has not paid the amount on receipt of invoice for continuous period of three months, then the generator, the Appellant will be

permitted to sell electricity to third parties after making payment towards transmission charges to HESCOM.

40. Let us now refer to the Article which deals with the termination. Article 9.3. deals with the Termination, which is as follows:-

“9.3. Termination:

9.3.1. Termination for Company’s Default:....

9.3.2 Termination for HESCOM’s Default:

Upon the occurrence of an event of default as set out in sub- Article 9.2.2, above, Company may deliver a Default Notice to the HESCOM in writing which shall specify in reasonable details the Event of Default giving rise to the default notice, and calling upon the HESCOM to remedy the same.

At the expiry of 30(thirty) days from the delivery of this 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 HESCOM. Company may terminate this Agreement by delivering such a Termination Notice to HESCOM 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.

Where a Default Notice has been issued with respect to an Event of Default, which requires the co-operation of both Company and HESCOM, to remedy, Company shall render all reasonable co-operations to enable the event of Default to be remedied.”

41. In this Article a procedure is contemplated for termination of the PPA by the Appellant on HESCOM's(R2) default. As per Article 9.3.2 in the event of default committed by the HESCOM for non payment of the invoice amount as set out in Article 9.2.2, the generator, the Appellant may deliver a default notice containing the details of the events of the default and calling upon the HESCOM to remedy the same within 30 days. If those defaults have not been remedied within the time frame, then the generator Appellant may deliver a termination notice to the HESCOM,R2 by terminating the PPA and intimate the same to the State Commission. Upon the delivery of termination notice on the HESCOM(R2), the PPA will stand terminated and the generator will stand discharged of its obligations.
42. In the light of above Articles, we shall now see as to whether the termination notice had been issued by the Appellant in accordance with the procedure contemplated under these Articles to make it valid.
43. In the present case, as indicated above, the Appellant entered into a PPA with HESCOM on 01.2.2007 for sale of power to be generated from its Project. The Project was admittedly commissioned on 4.8.2010. From then onwards, the Appellant supplied power to HESCOM, R-2 and submitted invoice for the

power supplied as per the terms of PPA as referred to in Article 6.1 of the PPA.

44. There is no dispute in the fact that the supply of power had begun after Commercial Operation Date namely on 4.8.2010 and the invoices had been submitted by the Appellant to the HESCOM at the rate prescribed under Article 5.1 of the PPA as per supply. It is also not in dispute that after receipt of the invoices for the supply of power from August to December, 2010, the HESCOM did not make the payment of the amounts within 15 days from the date of receipt of tariff invoices in accordance with the Article 6.2. Similarly, it cannot be disputed that the Letter of Credit was not established in time.
45. As such, the HESCOM, R-2 has to be construed to have committed default under Article 9.2.2 in view of the non payment of the invoice amount for a continuous period of 3 months and in view of the failure to establish the Letter of Credit as provided under Article 6.5 in favour of the Appellant within 30 days even prior to the Commercial Operation Date i.e. on 4.8.2010.
46. At this stage, the HESCOM (R2) by communication dated 22.9.2010 had asked the Appellant to furnish certain documents to enable it to process the bills submitted by the Appellant to the HESCOM, R-2.

47. According to the Appellant, though these documents were already in possession of the HESCOM, R-2 and they were not essential for processing the bills, the Appellant had sent all those documents sought for by the HESCOM along with covering letter dated 25.10.2010 in order to avoid further delay in making payment.
48. According to the HESCOM (R2), the delay in payment was caused due to the fact that certain documents which were sought for by the HESCOM, R-2 were not submitted by the Appellant. We are unable to appreciate this plea made by the HESCOM, R-2 putting the entire blame on the Appellant for the alleged non supply of the documents for the following reasons:-
- i) When the documents were sought for, for processing the bills by the communication dated 22.9.2010, the Appellant without any delay sent all those documents sought for on 25.10.2010 which was received by the HESCOM (R2) on 30.10.2010. This cannot be disputed. Thereafter, there was no further demand by HESCOM(R2) for the further documents from the Appellant for processing the bills of the Appellant. This also cannot be disputed.

ii) In fact, the HESCOM(R2) never pleaded before the State Commission with reference to the details of the documents that were sought for which were said to be not submitted. The State Commission also did not refer to the details of those documents which were asked for and nor submitted.

iii) When the Appellant has pleaded that as per the demand made by HESCOM, the Appellant had sent all the documents on 25.10.2010, which were received by the HESCOM, R-2 on 30.10.2010, it is the responsibility of the HESCOM to establish as to what are all those documents which have not been furnished to the HESCOM, R2. Admittedly, the HESCOM (R-2) has not demonstrated this.

iv) As mentioned above, there is no material to show that HESCOM(R2) have ever sought for further documents from the Appellant after receipt of the documents sent by the Appellant on 25.10.2010.

49. In view of the above reasonings, there is no basis for the above plea made by the HESCOM.

50. It is now noticed that the HESCOM made payment to the tune of Rs. 3.6. crores on 25.6.2011 immediately after the Appellant

filed petition before the state Commission seeking for declaration in O.P.No.28 of 2011 on 24.6.2011. So, between 30.10.2010, the date of receipt of documents and 24.6.2011, the date of the Petition filed by the Appellant, no communication was sent to the appellant asking for further documents to process the bills.

51. It is now noticed that even without getting those so-called documents from the Appellant, the HESCOM,R-2 made payment to the Appellant, the moment it came to know that the Appellant filed a petition on 24.6.2011 before the State Commission. How it was possible now ? This would show that the failure to pay the amount after getting the default notice was not connected to the so-called non supply of documents by the Appellant. Thus, it is evident that the HESCOM, R-2 without trying to cure or remedy the defaults contained in the default notice, had sent a reply on 18.3.2011 raising irrelevant contentions without replying to the charges levelled against it by the Appellant through its default notice dated 03.2.2011.
52. Let us now see the relevant portion of the default notice dated 03.2.2011 issued under Article 9.3.2.(1) of the PPA, which is as under:-

“Thus, we wish to bring in the defaults committed by HESCOM Limited to your notice as follows:-

1. *Letter of Credit (hereinafter called as (“LC”) is the most payment security mechanism for the power purchase transaction. In fact, as per regulation 35 of the KERC(Power Purchase from Renewable Sources of Energy by Distribution Licensees) Regulations, 2004 HESCOM Limited is obligated to provide adequate payment security mechanism for purchases from renewable sources of energy Thus not opening of LC, HESCOM Limited is not only guilty of an Event of Default but also is liable for violation of regulations by KERC.*

2. *In this regard, we are enclosing the copies of unpaid bills along with joint metering statements as Annexure 1 (Collectively) and hereby certify that the same have not been paid by HESCOM Limited within the respective due date of payment and till date.*

3. *Furthermore, the ever since the Commercial Operation Date (CoD) of Project HESCOM Limited has not acted upon the payment terms PPA in so far no payment has been made for the delivered energy for the Invoices the total principal amount outstanding as of today is Rs 3, 58, 36,416 (Rupees three crores fifty eight lakhs thirty six thousand four hundred and sixteen only) more fully described as per the table below:*

Year	2010	Units Billed	Bill Amount (Rs)	Invoice receipt Dated (by HESCOM)	Payment due date	Payment made by HESCO M
Month						
August		18,78,360	52,59,408	02.09.2010	17.09.2010	Nil
September		27,00,060	75,60,168	03.11.2010	18.11.2010	Nil

October	36,80,820	1,03,06,296	03.11.2010	18.11.2010	Nil
November	35,24,400	98,68,320	02.12.2010	17.12.2010	Nil
December	10,15,080	28,42,224	02.01.2011	17.01.2011	Nil
Total		3,58,36,416			

4. Thus, there has been a payment default for a continuous period of three months as per Article 9.2.2 of the PPA and accordingly entitled to sell power to third parties.

5. further, even in respect of the Invoices periodically submitted for the delivered energy from August, 2010, HESCOM Limited Has not paid late payment charges as per Article 6.3 Non-payment of interest at the rate of SBI Medium Term lending rates is an Event of Default as per Article 9.2.2 of the PPA.

6. Through this Default Notice, HESCOM Limited is hereby called upon to remedy the Event of Default within thirty (30) days by:

A. Opening a Letter of Credit in terms of the PPA and the Hon'ble KERC's Regulations cited supra.

B. Pay the defaulted bills amounted to Rs 3,58,36,416 (Rupees three crores fifty eight lakhs thirty six thousand four hundred and sixteen only) along with interest calculated @

14.50% per annum for the delayed payments as the late payment charges in full to our Company.

If any of the above events of Default are not remedied in full within thirty days after receipt of this Notice, we shall be constrained to issue a termination Notice.

This notice is issued without prejudice to our stand against the validity of the PPA and our rights under the PPA till it are declared as null & void”.

53. The reading of the above default notice categorically points out 3 aspects, which are as follows:-

i) There has been a payment default for a continuous period of three months as per Article 9.2.2 of the PPA. No payment had been made from August to December, 2010 and the accrued arrears came to the tune of about Rs.3, 58, 36,416 as detailed in the notice.

ii) From August, 2010 the HESCOM (R2) had not paid late payment charges as per Article 6.3 of the PPA which was an event of default under Article 9.2.2.

iii) The Letter of Credit had not been opened as per Article 6.5 of the PPA in time. As such, the HESCOM is guilty of causing the Events of Default. The Appellant through its default notice called upon the HESCOM, R-2 to remedy these events of default in full within 30 days or else the Appellant would be constrained to issue

termination notice. This was received by the HESCOM,R-2 on 19.2.2011 and in response, it merely sent the reply on 18.3.2011 without curing the defaults pointed out in the default notice.

54. Let us now refer to the said reply dated 18.3.2011:

"In response to your default notice dated 03.02.2011 which was received on 19.2.2011, I am directed to convey following reply on behalf of HESCOM.

- 1. Documents required to process the bills were submitted by you vide letter No. JEPL/HESCOM/B-29/10-11 dtd. 25.10.2010 because there was delay in taking reading by the concerned TL & SS division as explained in your letter dtd. 8.10.2010 for which HESCOM is not responsible.*
- 2. On verification of the documents you have been informed that details of CT'S noted in the reports of Chief Electrical Inspectorate and those noted in pre commissioning test reports are different and CEI (GOK) was requested to furnish the corrected reports through this office letter dtd. 23.12.2010 (Copy to you) for which no compliance received from Chief Electrical Inspector (GOK). Hence, HESCOM has not made any "Default" in processing & Making payments of bills.*
- 3. Due to in- adequate cash flow problem HESCOM has not opened L.C. Account to any of NCE projects coming under its area. This fact is already brought to the notice of GOK & KERC stating that HESCOM well consider the opening of L.C. Account as soon as its financial position improves.*

4. *Since processing of bills was delayed due to submission of proper documents from your end the question of making interest on delayed payment does not arise. As such HESCOM is not Committed any "Default" as Stated in your notice.*
5. *Further process of termination of PPA requires consent of both the parties involved and any dispute is to be settled through negotiation as per article 9.3.2 of PPA. Hence you are here by requested to co-operate with HESCOM and negotiate with HESCOM to settle the issues in your letter".*

55. This reply dated 18.3.2011 does not show that the HESCOM (R-2) had taken steps to cure the event of defaults pointed out in the default notice. On the other hand, the HESCOM (R-2) simply stated in the reply that it was not responsible for the delay. In fact, HESCOM, R-2 had admitted in its reply that it did not open the LC account due to the financial problem and stated that it would consider opening the LC as soon as financial position improved. This letter did not indicate that they have taken steps to cure the defaults. Similarly, there were no details in the reply to establish that the defaults pointed out by the Appellant in the Defect Notice are not actual defaults. That apart, it admitted in its reply that it did not open the Letter of Credit account as per the terms of PPA due to financial problem.

56. Only on noticing the attitude of the HESCOM, R-2 that they were not in a mood to cure the defaults despite the receipt of the supply of power and invoices periodically, the Appellant was

constrained to issue termination notice on 05.4.2011 mentioning the detailed reasons for issuing such a termination notice.

57. Let us now refer to the relevant portion of the termination notice.

The same is as follows:-

“HESCOM has acknowledged to have received the Default Notice served by the Company on 19th February,2011, vide reply lettered under reference No.HESCOM/GM(T)EE(PTC) Jasper Energy/23059-60/2010-11/ dated 18 March 2011.*

Though, HESCOM has acknowledged that payment for the Power Supply bills for the Power supplied to HESCOM since 2 September,2010 was not made, HESCOM has not even made any attempt to pay the bills due for over 3 months. Not only for 3 months, HESCOM has defaulted in making payment for the Power supplied from September, 2010 to February, 2011, that is for a continuous period of 6 months. As per the statements made by HESCOM in their reply letter, it is clear that HESCOM is not able to perform its financial obligations under the PPA. There is nothing wanted from the Company and there is no action/cooperation sought from the Company for HESCOM to perform its obligations. In fact, HESCOM has clearly agreed that it not in a position to open the Letter of Credit, which is required to be opened by HESCOM as per terms of the PPA, due to its financial position. Thus, HESCOM failed in its Financial Obligations and Defaulted in Payments, thus calling for termination of the PPA.

Though, HESCOM mentioned casually that there was delay in submitting the documents by the Company and the documents sought were submitted only on 25th October, 2010, we wish to state that ALL THE DOCUMENTS

SOUGHT FOR BY HESCOM WERE ALREADY AVAILABLE WITH HESCOM or not relevant for making payment for the power supplied. HESCOM is either a direct party to all the documents sought for or it is in the know of it. Hence, there was no reason for seeking those documents again. Letter for submission of documents was sent only to buy time. Even if we consider that some documents sought were not available with HESCOM, five(5) months have elapsed after receipt of those documents. Hence, it is a clear deliberate default and due to HESCOM's inability to pay is the only reason for not paying the dues.

Company can't wait for over 6 months even without any hope for receiving the amounts any time in near future and when there is no hope for the Company that HESCOM will be able to pay the power supply bills in future and hence, the Company can't supply power to HESCOM. The Company has spent over Rs.53 Crores on the Power Project and it has to meet its financial obligations with the Banks(Lenders) and Employees. The Shareholders can't infuse funds for ever and fund the power supplies to HESCOM. Therefore, the PPA is ought to be terminated and the Company hereby serves the Notice of Termination under clause 9.3.2 and other applicable terms of the PPA and applicable legal provisions of Law.

In fact, the Company has considered the PPA terminated automatically on the grounds of FRUSTRATION OF CONTRACT and other provisions of the PPA which made it automatically terminated. Though, Hon'ble Karnataka Regulatory Commission held that the PPA is valid and the Company is seeking review of the Orders of the Hon'ble Commission, the Company is serving this notice without prejudice to its rights under applicable provisions of Law to pursue available legal remedies.

We will approach you with our request for entering into “Wheeling & Banking” Agreement with you as per provisions of clause 9.2.2.(2) of the PPA in due course of time.

Therefore, you are requested to take note of TERMINATION OF THE POWER PURCHASE AGREEMENT dated 1 February, 2007 between HESCOM and the Company with immediate effect.”

58. The detailed reasons which have been mentioned in the termination notice , would clearly show the circumstances under which the termination notice was issued. These are as follows:

(I) Immediately after the commercial commissioning of the Project on 4.8.2010, the Appellant had supplied the power and submitted the invoices for the power supplied as per the terms under Article 6.1. Despite the receipt of the invoices, the HESCOM,R-2 did not make the payment under Article 6.2 for a continuous period of three months.

(II) It had neither paid invoice amount under Article 6.2 nor paid the late payment under Article 6.3. In addition, the Letter of Credit has also not been opened under Article 6.5 which mandates the HESCOM, R-2 to establish in favour of the Appellant even before the Commercial Operation date of the Power Plant.

(III) In view the above, the Appellant issued default notice on 03.2.2011 under Article 9.3.2 giving 30 days

time to cure the defaults. But even after expiry of 30 days the HESCOM,R-2 did not cure the defaults. Therefore, under Article 9.3.2 the Appellant sent termination notice dated 15.4.2011.

59. Even after receipt of termination notice, there was no step taken on the part of the HESCOM, R-2 to cure the defaults by informing the Appellant about those steps and requesting the Appellant not to approach the State Commission for further action.
60. In view of the above, the Appellant after informing the State Commission about the termination as provided under Article 9.3.2 had filed the petition for declaration. So, the contention of the HESCOM (R-2) it was constrained to delay the payment because of the alleged non furnishing of the documents by the Appellant or the plea that payment of invoice amount had been made after filing the Petition during the present proceedings before the State Commission, in our view, would not absolve the HESCOM from the responsibility to cure the defaults committed by the HESCOM (R-2) within the time frame.
61. Under those circumstances, **we hold that the termination notice had been issued by the Appellant in accordance with the procedure contemplated in the PPA to the HESCOM, R-2 and the same is perfectly legal and valid.**

62. Thus, the **first point is answered in favour of the Appellant.**
63. Let us now deal with the **Second Issue.**
64. The Second Issue would relate to the finding that the issue “ as to the non payment of dues raised” in the present proceedings was not raised by the Appellant in the earlier proceedings in O.P.No.22 of 2010. The question relating to this issue, as quoted earlier is as follows: **“Whether the issue in O.P.No.22/2010 filed by the Appellant earlier questioning the validity of PPA, is relevant to the issue in the present proceedings for deciding the validity of the termination notice?”**
65. As per the impugned order, the State Commission has concluded that after the disposal of O.P.No.22 of 2010, the payment for the entire period from Septmber,2010 to Jan.2011 became due by 3.2.2011 and it is doubtful whether the Appellant can base the notice of termination of defaults in payment relating to the period during the pendency of the proceedings in O.P.No.22 of 2010 without raising the issue in that proceedings. This finding in our view is utterly wrong.
66. The issue in O.P. No. 22 of 2010 is entirely different from the issue in the present proceedings in O.P.No.28 of 2011. O.P.No.22 of 2010 was filed by the Appellant even before the commissioning the project seeking for the declaration that PPA

becomes null and void in view of the non compliance of the conditions precedent, by the HESCOM, R-2. That is not the issue in the present proceedings. The issue in the present proceedings is that as per the PPA, the supply of power had been made by the Appellant to the HESCOM, R-2 after Commercial Operation Date and for the said supply, the invoice bills had been issued to the HESCOM,R-2 but there was a default, which had not been cured in spite of default notice and in that situation, termination notice was issued.

67. The question before the State Commission in the present case i.e. in OP No.28 of 2011 is **as to whether termination notice is valid or not**. This is not the issue in O.P.No.22 of 2010. Let us first see the prayer made in O.P.No.22 of 2010.

PRAYER

WHEREFORE, it is most respectfully prayed that this Hon'ble Commission may be pleased to

- A. Declare that Power Purchase Agreement dated 01st February, 2007 executed between Petitioner and the First Respondent produced herein as ANNEXURE P-7 HAS BEEN RENDERED NULL AND VOID AUTOMATICALLY;*
- B. Direct the Fourth Respondent to grant approval for Wheeling and Banking;*
- C. Direct the First and Second Respondents to execute a Wheeling and Banking Agreement with the Petitioner in the format approved by this Hon'ble Commission;*

D. Grant the cost of this Petitioner;

E. Pass any other Order/s in the interest of justice and equity;

68. Thus, it is clear that O.P.No.22 of 2010 filed by the Appellant would relate to the prayer for declaration that PPA dated 01.2.2007 has become null and void. Let us now see , the prayer in O.P.No.28 of 2011 which is as follows:-

PRAYER

Wherefore it is prayed that this Hon'ble Commission be pleased to:

- a. Declare that the PPA dated 01.02.2007 between the Petitioner and the 2nd Respondent, stands terminated;*
- b. Direct the Respondents to grant approval to the Petitioner to seel electricity to the third parties;*
- c. Direct the Respondents No.1 and 2 to execute a wheeling and banking agreement with the Petitioner;*
- d. Direct the Respondents to pay the Petitioner a sum of Rs.3,60,26,760(Rupees Three Crores Sixty Lakhs Twenty Six Thousand Seven Hundred and Sixty) being the amount due and payable for electricity supplied from August 2010 onwards;*
- e. Direct the Respondents to pay the Petitioner a sum of Rs.25,30,313(Rupees Twenty Five Lakhs Thirty Thousand Three Hundred and Thirteen) towards the interest amount due and payable for delayed payments towards tariff invoices and also additional interest calculated a the rates prescribed under the PPA till the date of payment.*

f. Pass such other order/s as this Hon'ble Commission deems fit in the circumstances of the case.

69. Thus, the main prayer in the O.P.No.28 of 2011 would relate to the declaration of the fact that PPA between the generator and distribution licensee stood terminated on the issue of termination notice and for consequential directions.
70. The comparison of these prayers made in these Petitions would make it evident that those prayers are completely different from each other.
71. The default in payment and non payment despite the issuance of default notice in this case has afforded a fresh cause of action for the Appellant for termination the PPA and such termination is not at all impacted by the pendency of O.P.No.22 of 2010 which was filed prior to Commercial Operation Date.
72. As a matter of fact, the PPA prescribes the special procedure to be followed before issuing termination notice. Without complying with the same the Appellant could not approach the State Commission for declaration on the ground of non payment. In fact, the observation made by the State Commission in the impugned order that even before the disposal of O.P.No.22 of 2010, the payment for the entire period from September,2010 to Jan.2011 became due only by 03.2.2011 and as such the default

notice issued is contrary to the Article 6.2 of the PPA is totally wrong.

73. As indicated above, the issue in O.P.No.22 of 2010 filed for declaring the PPA being invalid are totally different and distinct from the present proceedings. Therefore, the observation made by the State Commission that the non mentioning about non payment by the HESCOM in the earlier proceedings is not at all relevant and germane for determining the validity of the notice of termination of the PPA. This constitutes an entirely distinct and different cause of action.
74. In view of the above, the reasoning of the State Commission for doubting the validity of the notice of termination on the ground that events of default relating to the period during the pendency of O.P.No.22 of 2010 were not brought to the notice of the State Commission is totally unwarranted as the default in payment and non payment after receipt of default notice has created fresh cause of action for the Appellant for terminating the PPA in the present proceedings.
75. As mentioned above, the PPA prescribes the particular procedure to be followed for its termination and without complying with the said procedure, the Appellant is not entitled to approach the State Commission and inform about non payment of invoice amount that too in the different proceedings

which relates to the different issue. In the said proceedings, validity of the PPA was questioned in view of non compliance of the condition precedent even before the Commercial Operation of the Project. But in this case the validity of the termination notice which had been issued after Commercial Operation Date and after the disposal of earlier proceedings as per the procedure contemplated in the PPA is the issue now.

76. How could the Appellant bring to the notice of the State Commission about non payment of the amount towards invoices and ask for cancellation of PPA without observing the procedure before issuing the termination notice?
77. Even if these defaults had been brought to the notice of the State Commission in the earlier proceedings, the State Commission could not go into the said details of default to decide the issue in the other proceedings to give a declaration that PPA between the parties became null and void, which was sought for in that proceedings before the Commercial Operation of the project. In short, the disposal of O.P.No.22 of 2010 would not prevent the right of the Appellant to take recourse under various Articles in the PPA for issuing default notice and then the termination notice when the defaults have not been cured in time.

78. In view of the above discussions, we hold that the reasonings given by the State Commission in finding that these defaults must have been brought to the notice of the State Commission for deciding about the validity of the PPA is unsound and invalid.
79. Thus, **this point is also decided in favour of the Appellant.**
80. Third question relates to the failure of the Appellant to resort to the Dispute Resolution Mechanism under Article 10 of the PPA. The question is this **“Whether the State Commission is right in holding that issuance of termination notice straightaway without taking recourse to mutual negotiations as per Article 10 of the PPA?”**
81. The State Commission while referring to the above question held that it should not be open to the parties to straightaway terminate the contract without following Dispute Resolution Mechanism under Article 10 of the PPA and thereby concluded that notice of termination dated 5.4.2011 is unsustainable.
82. In justifying the impugned order, the learned Counsel for the HESCOM, R-2 would submit that all the disputes between the parties arising out of the PPA to be first tried to be settled through mutual negotiations and only when it has failed, then the dispute is required to be referred to the State Commission for

resolution as per the PPA and since the said procedure had not been followed, the termination notice cannot be sustained.

83. Let us now refer to the finding of the State Commission on this issue. Relevant portion of the finding is as follows:

“11. Even assuming that disputes arose on account of non-payment or non-opening of Letter of Credit, the Petitioner cannot straightaway proceed to terminate the PPA without following the Dispute resolution Mechanism provided in the PPA. In Article 10 of the PPA, parties have Specifically agreed to settle the disputes first through mutual Negotiations, promptly, equitably and in good faith and only in case of non-resolution of the disputes within 90(ninety) days. The same shall be referred to the Commission for adjudication. In fact, Respondent No.2 has, in his reply dated 18.3.2011 to the Notice given by the Petitioner, pointed out this clause to the Petitioner. From the Notice of Termination dated 5.4.2011 issued by the petitioner, it is clear that the Petitioner, without following the procedure provided under Article 10 of the PPA, has straightaway resorted to termination of the PPA, which makes the termination itself invalid”.

84. Under the Article 10 of the PPA, if both the parties have agreed to settle the dispute first through mutual negotiations and only in case of non resolution of the dispute within 90 days, the same shall be referred to the State Commission for adjudication.

85. The State Commission has held that HESCOM, R-2 in its reply dated 18.3.2011 to the termination notice dated 3.2.2011 given

by the petitioner pointed out that the Article 10 of PPA provides for approaching the Dispute Resolution Mechanism and that therefore, the petitioner had to first approach the said mechanism, before termination but the petitioner without following the procedure under Article 10 of the PPA has straightaway resorted to termination and therefore, the termination becomes invalid.

86. So, we shall now see as to whether the Article 10 of PPA would apply to the present case and also as to whether the HESCOM , R-2, in its reply dated 18.3.2011 reminded the Appellant by pointing out the Article 10 of PPA i.e. to refer to the Dispute Resolution Mechanism first before termination.

87. Let us now refer to Article 10 of PPA.

Article 10

DISPUTE RESOLUTION

10.1 All disputes or differences between the parties arising out of or in connection with this Agreement shall be first tried to be settled through mutual negotiation.

10.2 The Parties here to agree to attempt to resolve all disputes arising here under promptly, equitably and in good faith through mutual negotiations.

10.3 Each party shall designate in writing and communicate to the other party its own representative who shall be authorized to resolve any dispute arising under this Agreement in an adequate manner and,

unless otherwise expressly provided herein, to exercise the authority of the Parties here to make decisions by mutual agreement.

10.4 If the designated representatives are unable to resolve a dispute under this Agreement within thirty days after such dispute arises, such dispute shall be referred to higher authorities designated by each of the Parties for resolution of the dispute.

10.5 In the event that such differences or disputes between the Parties are not settled through mutual negotiations within, Ninety (90) days after such dispute arises, then it shall be referred to the Commission for dispute resolution in accordance with the provision in the Electricity Act 2003.

88. The above Article refers to the following procedure:

“All the disputes or differences between the parties arising out of PPA shall be first tried to be settled through mutual negotiations. When the parties agreed to attempt to resolve their disputes through mutual negotiations, each party shall have its own designated representative who is to resolve the disputes. If the dispute is not resolved within 30 days then the said dispute or difference shall be referred to higher authority authorised/designated by each of the parties for resolution of the disputes. When the said dispute has not been resolved by the higher authority within 90 days, then such disputes shall be referred to the State Commission for Dispute Resolution”.

89. We shall now see as to whether Article 10 relating to Dispute Resolution Mechanism, would apply to the present case.
90. On a careful perusal of the Article 10 of the PPA, it is clear that the term “dispute or difference” referred to in the said Article would not apply to the present case where the default notice had been issued as per Article 9.3.2 of PPA. Under Article 9.2, when there is the event of default like failure to make payment continuously for a period of 3 months, failure to pay the interest for the delayed payment and failure to open the Letter of Credit within the specified period, then the generating company would be entitled to issue default notice to the HESCOM giving full details of the events of default and to call upon the HESCOM, R-2 to remedy the same within 30 days. As per Article 9.3.2 if the defaults have not been cured or remedied in time, the generating company would be entitled to issue termination notice.
91. In this case, on noticing the defaults for the non payment of invoice amount for continuous period of 3 months etc, the Appellant , the generating company sent a default notice on 03.2.2011 as required under Article 9.3.2 of PPA bringing to the notice of the HESCOM of the defaults being (1) failure to open the Letter of Credit, (2) failure to pay the invoice amount within the prescribed time and (3) failure to pay the interest on delayed payments. Since those defaults have not been completely cured

within 30 days from the date of delivery of default notice to the HESCOM(R-2), the generating company(the Appellant) becomes entitled to terminate the PPA by delivering a termination notice to HESCOM, R-2 and intimate the same to the State Commission.

92. In this case, the default notice was issued on 03.2.2011, which was received by the HESCOM,R2 on 19.2.2011. Instead of curing those defaults, the HESCOM,R2 issued a reply dated 18.3.2011 raising various irrelevant contentions. Once, the generating company, the Appellant, as per Article 9.3.2 issued a default notice, it is for the HESCOM,R2 to cure those defaults within 30 days or else, the HESCOM,R2 would be entitled to approach the generating company either for extension of time or for settlement among themselves.
93. Thus, when the prescribed recourse had been resorted to by the Appellant under Article 9.3.2 of PPA by sending the default notice, the HESCOM,R2 shall cure those defaults within 30 days unless the parties agreed or otherwise. If they were not cured, the generating company, the Appellant would be entitled to terminate the PPA by sending a termination notice to the HESCOM, R-2.
94. As per Article 9.3.2. upon the delivery of termination notice, Power Purchase Agreement shall stand terminated and the

generating company shall stand discharged of its obligations. It also provides that when the default notice has been issued with respect to an event of default to the HESCOM,R-2, then the HESCOM,R-2, before issuance of termination notice would try to cure those defaults and in that event, the generating company shall render all reasonable cooperation to enable the event of default to be remedied.

95. Thus, the facts of the present case would clearly indicate that Article 9.3.2 alone would be applicable to the present case and not Article 10 of PPA. **Hence, the reasoning given by the State Commission that without recourse to redressal process under Article 10, the Appellant could not proceed with the termination notice , is palpably wrong.**

96. The State Commission has ignored the fact that there was no dispute between the parties which needed resolution to recourse under Article 10 of the PPA. If HESCOM felt that there was a dispute over the facts and details given in default notice then the HESCOM,R-2 would be required to resort to resolution by recourse to Article 10. This was not done. The Article 10 which prescribes different procedure and contemplates recourse to settlement of dispute before approaching the State Commission and the procedure for proceeding with termination procedure provided under Article 9 is entirely different from Article 10. In

other words, the procedure under Article 9 is independent of and not subordinate to Article 10 in any manner.

97. The State Commission has failed to consider the aspect that the rights of the party to terminate the contract after issuance of default notice which was ultimately not cured are distinct from their right to seek remedy through the process of dispute resolution. If both the parties agreed to Dispute Resolution then the right of the parties to invoke Article 10 would be available to both the parties. In the absence of agreement by both the parties to approach the dispute resolution mechanism, the right of the generating company to issue a termination notice after waiting for 30 days within which the defaults have not been cured, cannot be curtailed on the pretext of Article 10.
98. Therefore, in our view, Article 10 would not be applicable to the present case and Article 9.3.2 would alone be applicable to the present facts of the case.
99. Let us now refer to the observations made by the State Commission in the impugned order referring to the reply made by HESCOM to the default notice.

“11. Even assuming that disputes arose an account of non-payment or non- opening of Letter of Credit, the Petitioner cannot straightaway proceed to terminate the PPA without following the Dispute resolution Mechanism provided in the PPA. In Article 10 of the PPA, parties

have Specifically agreed to settle the disputes first through mutual Negotiations, promptly, equitably and in good faith and only in case of non-resolution of the disputes within 90(ninety) days. The same shall be referred to the Commission for adjudication. In fact, Respondent No.2 has, in his reply dated 18.3.2011 to the Notice given by the Petitioner, pointed out this clause to the Petitioner. From the Notice of Termination dated 5.4.2011 issued by the petitioner, it is clear that the Petitioner, without following the procedure provided under Article 10 of the PPA, has straightaway resorted to termination of the PPA, which makes the termination itself invalid".

100. According to this observation made by the State Commission, the HESCOM, R-2 in its reply dated 18.3.2011 to the default notice to the Petitioner pointed out the Article 10 for Dispute Resolution Mechanism and despite that the petitioner has resorted to termination notice. Now, we shall see whether in the reply dated 18.3.2011 sent by the HESCOM, it really asked the Appellant to have the recourse for the Dispute Resolution Mechanism under Article 10. The reply dated 18.3.2011 given by the HESCOM to the Appellant is as under:-

"5. Further process of termination of PPA requires consent of both the parties involved and any dispute is to be settled through negotiation as per article 9.3.2 of PPA. Hence you are here by requested to co-operate with HESCOM and negotiate with HESCOM to settle the issues in your letter."

101. This statement made by the HESCOM in the reply does not refer to the Article 10 of the PPA as pointed out by the State Commission. On the other hand, it is clear that the HESCOM itself pointed out that only Article 9.3.2 of the PPA would apply for settlement among themselves. Article 9.3.2 is as follows:

9.3.2 Termination for HESCOM's Default:

Upon the occurrence of an event of default as set out in sub- Article 9.2.2 above, Company may deliver a Default Notice to the HESCOM in writing which shall specify in reasonable details the Event of Default giving rise to the default notice, and calling upon the HESCOM to remedy the same.

At the expiry of 30(thirty) days from the delivery of this 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 HESCOM. Company may terminate this Agreement by delivering such a Termination Notice to HESCOM 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.

Where a Default Notice has been issued with respect to an Event of Default, which requires the co-operation of both Company and HESCOM, to remedy, Company shall render all reasonable co-operations to enable the event of Default to be remedied.”

102. So, this shows that the Respondent neither resorted to Dispute Resolution Mechanism on receipt of the default notice nor took

any steps to cure the defaults and nor asked the generating company to give some more time for curing those defaults. On going through the reply dated 18.3.2011 it is clear that they have not cured those defaults and on the other hand, the HESCOM tried to put the blame on the Appellant, the generating company for non furnishing some of the documents of which no particulars were given.

103. Even though the plea of the Respondent was that those things could be settled between themselves under Article 9.3.2, there were no steps taken thereafter by the HESCOM to settle the matter by curing those defaults till the Petition was filed by the Appellant before the State Commission on 24.6.2011.

104. As mentioned above, Article 10 contemplates recourse to settlement of dispute before approaching the State Commission and not proceeding with termination of PPA. Further, there is no “dispute” requiring recourse to Dispute Resolution Mechanism as contemplated under Article 10 of the PPA for the following reasons:-

- i) There cannot be any dispute about the non payment of invoice amount, non payment of interest for the delayed payment and non opening of Letter of Credit before 30 days of commencement of operations or clear

obligation cost on HESCOM under the relevant provisions of PPA.

ii) There is no dispute about the quantum of power received by the HESCOM,R-2.

iii) There is also no dispute about the tariff rate claimed in the tariff invoice.

iv) The HESCOM never disputed with reference to the payment to be made as per the invoices.

105. As indicated above, if HESCOM felt that there was a dispute which requires resolution by the recourse under Article 10, the HESCOM should have taken such recourse but this recourse had not been taken by the HESCOM.

106. This issue has to be viewed from yet another angle. There is a provision in PPA providing some procedure to be followed when there is a genuine dispute. Article 6.4. is relevant which is as follows:-

“6.4. Disputes:

In the event of a dispute as to the amount of any Monthly invoice, HESCOM shall notify the Company of the amount in dispute and HESCOM shall pay the Company the total Monthly invoice including the disputed amount. The Parties shall discuss within a week from the date on which HESCOM notifies the Company of the amount in

dispute and try and settle the amicably. If the dispute is not settled during such discussion then the payment made by HESCOM shall be considered as a payment under protest. Upon resolution of the dispute, in case the Company is subsequently found to have overcharged then it shall return the overcharged amount with an interest of BSI medium term Lending rate per annum for the period it retained the additional amount...”

107. So, this Article would clearly indicate if any such dispute is raised, the HESCOM shall inform the generating company, the Appellant of the amount in dispute and both the parties shall discuss that issue within a week from the date of which HESCOM sends information to the generating company about the amount in dispute and try to settle the dispute amicably **after making entire payment including the disputed amount to the company.**

108. So, this Article would make it clear that even if there is a dispute with regard to the quantum of the amount, this must have been raised by the HESCOM before settling the issues among themselves and even if such a dispute is raised, the HESCOM shall pay the entire amount to the generating company. In this case, the HESCOM, R-2 neither raised dispute regarding the amount nor paid the entire amount to the company within the time prescribed under Article 6.4. According to this provision, even assuming that there is a dispute, the HESCOM should have complied with the conditions caused upon the

HESCOM as per Article 6.4 and then tried to settle the dispute amicably. This was not done by the HESCOM.

109. Hence, we are of the view that the **State Commission could not dismiss the petition merely because of the fact that the Appellant has not resorted to Dispute Resolution Mechanism which would not apply to the present case. Consequently, we hold that the reasoning given by the State Commission that without recourse to redressal mechanism the Appellant could not proceed with termination notice is patently wrong.**

110. **Summary of the findings:-**

(a) The termination notice dated 5.4.2011 issued by the Appellant to the Respondent is in accordance with the procedure contemplated in the PPA and is legally valid.

(b) In OP No.22 of 2010 filed by the Appellant earlier regarding declaration of the PPA as being null and void was filed before the commissioning of the power plant and related to validity of the PPA for non completion of condition procedure even before the commercial operation date of the project. The disposal of OP 22 of 2010 in earlier Petition would not

prevent the right of the Appellant to take recourse by initiating the present proceedings under various articles of the PPA for issuing default notice and termination notice when the defaults have not been cured.

(c) Article 10 of the PPA relating to dispute resolution was not relevant to the issue as there was no dispute with regard to the invoices raised by the Appellant for supply of energy to the Respondent. Thus, the reasoning given by the State Commission that without recourse to redressal process under Article 10, the Appellant could not proceed with the termination notice is wrong.

111. In view of the above findings, we hold that the termination notice issued in this case is valid. The impugned order is set aside. Consequently, the Appellant is entitled for Open Access. Accordingly, the State Commission is directed to pass the consequential orders in terms of our above findings.

112. Thus, the Appeal is allowed. However, there is no order as to costs.

(RakeshNath)
Technical Member

(Justice M. KarpagaVinayagam)
Chairperson

Dated: 30th April, 2013

√REPORTABLE/~~NON-REPORTABLE~~