



Chhattisgarh State Electricity Regulatory Commission

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In the matter of termination of PPA with CSEB and grant of inter-State short-term open access.

Petition No.22 of 2009 (M)

M/s KVK Bio-Energy Pvt. Ltd.
Hyderabad

.... Petitioner

V/s

1. Chhattisgarh State Power Distribution Company Ltd.
(Successor company of Chhattisgarh State Electricity Board i.e. CSEB), Raipur

2. The State Load Despatch Centre (SLDC)
Khedamara, Bhilai

3. The Chhattisgarh State Renewable Energy Development Agency (CREDA), Raipur

.... Respondents

Present: Manoj Dey, Chairman
B.K. Sharma, Member

ORDER

(Passed on 18.05.2010)

M/s KVK Bio-Energy Pvt. Ltd. (petitioner, for short) filed this petition against the Chhattisgarh State Power Distribution Company (CSPDCL, for short) by making SLDC and CREDA also as respondents for termination of power purchase agreement (PPA, for short) executed by petitioner with CSEB and grant of inter-State short-term open access (STOA, for short). The history of the case is the petitioner signed a PPA on dated 16.09.03 for supply of power from their proposed biomass-based 20MW power generating plant to CSEB (predecessor of the respondent). Subsequently, a supplementary PPA dated 11.06.04 was executed for change of name of the generator

and location of the power plant. The petitioner installed 15MW biomass-based power generating plant at Amartal village, Janjgir-Champa District, and executed another PPA on 16.10.06 for supply of 13.5 MW of firm power to CSEB round-the-clock for a period of 10 years which shall remain in force till 2014-15, and started supplying power accordingly. Subsequently, the petitioner also entered into a PPA with the Power Trading Corporation of India Ltd. (PTC, for short) on 30.07.08 for supply of 13MW power for period of 5 years from 01.08.08 (extendable further by mutual consent) from the same 15MW power generating plant. The petitioner then approached SLDC for obtaining concurrence for 13MW inter-State STOA. Since, no concurrence was given by the SLDC they approached CSEB for termination of existing PPA and to sign separate PPA to sale peak power to CSEB and off-peak power under inter-State STOA, but CSEB not responded. Thus, the petitioner filed this petition with request; (a) to pass an order for terminating both the power purchase agreements dated 16.09.03 and 16.10.06 signed between the petitioner and the respondent, and (b) to direct SLDC to grant inter-State STOA for transmission of 13MW of power to Power Trading Corporation from the said 15MW power plant.

It is stated by the petitioner that there is an acute shortage in availability of rice-husk (primary fuel of the power plant) which has resulted in tremendous increase in its price. The high price of the rice-husk resulted in low plant load factor (PLF, for short) and they are not in a position to run the plant at the level of 70% PLF, so as to make them eligible to claim full tariff of the power so generated. It is further stated in the petition that they would like to sell power to third parties by availing inter-State STOA as the tariff is reasonably better in other State which could be viable in running their plant by selling power so generated to the third parties. It is further pleaded that the SLDC has not given concurrence for grant of STOA stating that STOA can not be granted till the validity of agreement dated 16.10.06.

2. During the course of hearing, the petitioner requested for amendment in the petition and to change the prayer. The request of the petitioner was accepted by the Commission and accordingly the petition was amended by the petitioner on dated 16.03.10. In amended petition, the petitioner has requested to pass an order for modification/amendment of PPA dated 16.10.06 executed between erstwhile CSEB and the petitioner, so as to allow the petitioner to sell power to CSPDCL during peak hours and to the third

parties/electricity traders during non-peak hours by availing inter-State STOA as and when the petitioner is able to find such third party buyer or electricity traders. The petitioner has made a reference of the order of the Hon'ble Appellate Tribunal for Electricity (ATE, for short) (reported in 2007 ELR (APTEL) 711) in the case of Chhattisgarh Biomass Energy Developers Association Vs Chhattisgarh State Electricity Regulatory Commission and others where Hon'ble ATE has observed that where the agreements between the distribution licensees and generating company utilizing renewable source of energy are one sided and are not in consonance with the MNES guidelines or policy guidelines and the terms thereof, do not promote generation of electricity from renewable source of energy, it is bounden duty of the Appropriate Commission to invoke the provisions of section 86 (1)(e) to issue appropriate directions with a view to promote generation of electricity from renewable source of energy. The petitioner has also referred the case of Rethwik Energy Systems Ltd. Vs Transmission Corporation of Andhra Pradesh and others (reported in 2008 ELR (APTEL) 237) wherein, the Hon'ble ATE, has drawn a line of distinction whereby the State Commission is empowered to reopen the contract only for the promotion and encouragement of renewable source of energy under section 86 (1)(e) of the Electricity Act, 2003 (the Act, for short). Petitioner further referred order of the CERC dated 14.07.09 in the matter of Devanagera Sugar Company Ltd Vs. Karnataka Power Transmission Corporation, Bangalore, wherein reference of para 16 of the order dated 03.12.07 of CERC have been quoted which states that "the Commission in its order dated 03.12.07 had observed that the ground for rejection of open access application could be the absence of surplus transmission capacity and to no other reason. "It is further stated that para 6(b) and (c) of CERC Regulations dated 20.05.09 states "while processing application for concurrence or no objection or prior standing clearance as the case may be the SLDC shall verify the following namely; (i) existence of infrastructure necessary for time block-wise energy metering and accounting in accordance with the provisions of the Grid Code in force, and (ii) availability of surplus transmission capacity in the State network."

3. The respondent SLDC in its reply has submitted that M/s KVK Bio Energy Pvt. Ltd. applied for SLDC's concurrence for inter-State STOA for 13MW vide their application dated 18.03.09 received on 25.03.09. In the application, it is mentioned that they have signed a PPA with erstwhile CSEB on 16.10.06 for 13.5 MW and validity of

agreement is upto 31.03.2015. The application was thus rejected vide SLDC's letter dated 28.03.09.

4. The respondent CSPDCL in their submission have stated that in the modified petition the petitioner now desires the modification in PPA in place of its termination. The section 86 (1) (b) of the Act confers the authority to the State Commission to regulate the electricity purchase and procurement process of distribution licensee through agreements for purchase of power for distribution and supply within the State. It is further pleaded that the State Commission, thus, have the jurisdiction to decide the terms and conditions of agreement for procurement of power by the distribution licensee of the State for distribution of electricity to the consumers within the State. Once after exercising such power when the State Commission finalizes the terms and conditions for purchase of power by a distribution licensee from a particular source and the licensee enters into the PPA with the supplier entity, may be a generator or trader, the State Commission has no jurisdiction to adjudicate upon the dispute regarding the terms of contract. The Civil Courts only have the jurisdiction to adjudicate under the Contract Act. The Electricity Act has no nexus to interfere with the provision of Contract Act and each contract has to be governed by the Contract Act only. The respondent CSPDCL has further stated that whether modification or termination of a concluded contract is concerned, the State Commission has no jurisdiction to adjudicate upon and thus the prayer of the petitioner is liable to be rejected. The respondent CSPDCL also submitted a copy of legal opinion of the Advocate General of Chhattisgarh in the matter of PPA with KVK Bio-Energy Ltd. (Petitioner) with respondent CSPDCL which states that "all the PPA's dated 16.04.03, 11.06.04 and 16.10.06 are in consonance and inclined in favour of CSEB, the said PPA cannot be rescinded by KVK till its due execution and termination date except under circumstances mentioned therein. The reason of recession and raw-materials becoming expensive for the production of electricity, as taken for termination of PPA by KVK may loosely fall under the purview of "Doctrine of Frustration" as provided under section 56 of Indian Contract Act, which however is a matter of proof by the KVK.

5. We have gone through the pleadings of the petitioner and the respondents in length and have observed that the petitioner has prayed initially to terminate the PPA executed between the petitioner and CSPDCL for power supply from petitioner's biomass-based power generating plant, and subsequently amended the petition and

requested for modification in the said PPA to allow the petitioner to sell off-peak power to third parties under inter-State STOA and balance peak power to the CSPDCL. The ground under which this petition has been filed is the excessive increase in cost of the biomass, which is the primary fuel for their power plant. The petitioner also referred the orders of Hon'ble ATE reported in 2007 ELR (APTEL) 711 and 2008 ELR (APTEL) 237, as per which the Appropriate Commission needs to invoke the provisions of section 86 (1)(e) of the Act where the agreement between the biomass-based power generator and the distribution licensee are one sided and are not in consonance with the MNES guidelines or policy guidelines. Here, we would like to mention that it is true that there has been excessive increase in price of the biomass in the State which is the basic fuel for biomass-based power generating plant. The Chhattisgarh Biomass Energy Developers Association on this ground filed a petition No. 25 of 2009 (T) before this Commission to revise the tariff for power supply by the biomass-based power generating plants to the distribution licensee w.e.f. 01.04.09. The Commission took note of it and issued an interim order on dated 22.09.09 to enhance the energy charge provisionally for the energy supplied to the distribution licensee by the biomass-based power generating plants to provide them interim relief as such the processing of the case and issue of final order would take time. Considering all the aspects put before the Commission, the final order on petition No. 25 of 2009 (T) for increase in energy charge for the power supplied by biomass-based power generating plant to CSPDCL has been issued on dated 15.04.2010 for the year 2009-10 and subsequent years up to 2014-15. Thus, the Commission has already taken appropriate action under provision of section 86 (1)(e) of the Electricity Act, which is related to the promotion of generation of electricity from renewable source of energy.

The petitioner also referred to CERC's order dated 14.07.09 and stated that as per this order the SLDC at the time of processing application for concurrence for no objection or prior standing clearance shall verify the existence of infrastructure necessary for time block-wise energy metering and accounting in accordance with the provisions of Grid Code in force, and the availability of surplus transmission capacity in the State network only. It is further pleaded that in the said order there is no condition for considering the existing PPA between the power generating plant with beneficiary including distribution licensee and therefore, the SLDC should have

accorded concurrence to the petitioner for open access despite having PPA by them with distribution company.

The petitioner neither in petition nor during its pleadings referred any clause of the executed PPA between the petitioner and the CSPDCL which may be in contravention of any provision of the Act, rules and regulations thereon or against with MNRE guidelines or its policy and terms thereof. We have gone through the order dated 14.07.09 of CERC and observed that views expressed therein is based on without adjudicating upon the question of continued existence of PPA, as such the matter of PPA between the generator and licensee falls within the domain of State Commission. Since this petition is related with the existence of PPA, we feel that this petition has no relevancy with the case related to order dated 14.07.09 of CERC as such in that case the PPA has not been taken into consideration as stated above. Moreover, as per provision in section 32 (2)(a) of the Act, "the State Load Despatch Centre shall be responsible for optimum scheduling and despatch of electricity within a State, in accordance with the contracts entered into with the licensees or the generating companies operating in the State. Thus, with reference to provision in section 32 (2)(a) of the Act the SLDC cannot ignore the existence of the valid contract between the generating company and the licensee in relation to its functions which also includes to issue concurrence for open access.

6. The Distribution licensee as per its universal obligation in order to ensure proper and regular supply to its consumer, assess its requirement of the power, obtain approval from the Commission and preferably contracts for the long-term power purchase with the power generating plants. In case of reduction in the quantum of availability of the long-term power, the licensee have to meet out the requirement from the short-term procurement of power at higher cost which will result higher rate for supply to the consumer. There are 17 Nos. biomass-based power generating plants supplying power to CSPDCL and all are required to procure biomass from open market at increased price and thus are passing through similar situation. Commission is therefore of the view that permitting inter-State STOA is not the appropriate solution to come out of such situation. Here in this case, the petitioner has been supplying power since last 4 years under duly executed contract with open eyes and open mind and at this stage signed another PPA with third party for supply of same power for which valid PPA with respondent already exists. This action of petitioner is unwarranted. We thus do not find any justification in request of the petitioner to accord permission to sell power outside

the State when the Commission has already considered the request of Chhattisgarh Biomass Developers Association and has revised the rate of energy charge of the power supplied by the biomass-based power generating plant to the CSPDCL for the year 2009-10 and onwards. However, as directed by Hon'ble Tribunal, the petitioner will be entitled to apply to Commission for fixing of tariff for its generating plant in case petitioner feels that the tariff fixed by the Commission is less than what can legitimately be determined under the Act and the Regulation.

The petition is therefore dismissed.

sd/-
Member

sd/-
Chairman