

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION

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

Dated : 4th December, 2018

Present:

Shri M.K. Shankaralinge Gowda .. Chairman
Shri H.D. Arun Kumar .. Member
Shri D.B. Manival Raju .. Member

R P No.04 /2017

BETWEEN:

Dr. Smitha Murthy,
W/o Dr. T.R. Srinivas Murthy,
Thadi Village, ID Halli Hobli,
Madhugiri Taluk,
Tumkur District.

.. **PETITIONER**

[Represented by Tapasya Law Chambers, Advocates]

AND:

- 1) The Executive Engineer, Elec.,
C, O&M Division,
Bangalore Electricity Supply Company Limited,
Madhugiri,
Tumkur District – 572 132.
- 2) Bangalore Electricity Supply Company Limited,
Represented by its Managing Director,
Corporate Office,
K.R.Circle,
Bengaluru – 560 001.

.. **RESPONDENTS**

[Respondents represented by Justlaw, Advocates]

ORDERS

- 1) This review Petition is filed under Section 94(1) (f) of the Electricity Act, 2003 seeking review of the Commission's Order bearing No. KERC/S/F-3/Vol.336/16-17 dated 20.10.2016 and permit the Petitioner to commission her SRTPV project at a tariff of Rs.9.56 as stipulated in the PPA dated 21.12.2015.

- 2) The Petitioner had executed a PPA dated 21.12.2015 with the 1st Respondent in respect of a 1 MW SRTPV project proposed to be set up on the existing rooftop of the building belonging to her at Thadi village, Madhugiri taluk. The Commission while approving such PPA, had erroneously allowed one year for installation and commissioning of the SRTPV plant, instead of six months as was allowable in such cases. The Commission proposed to rectify the error by revising the allowed commissioning period to six months from one year and issued a notice dated 29.08.2016 to the Petitioner and the Respondents to show cause against the proposed revision. The parties had not responded to such notice and the Commission vide order dated 20.10.2016, which is sought to be reviewed in this petition, had confirmed the proposed revision. Thereby, the Petitioner was allowed six months to install and commission the SRTPV plant on the existing roof top and in case, the Petitioner completed the project after the approved six months, it was declared that she would be entitled to the tariff as determined in the Commission's Order dated 02.05.2016 (as against the tariff as per the earlier Commission's Order dated 10.10.2013).

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- 3) The grounds urged by the Petitioner in support for the prayer for review of the Order dated 20.10.2016, may be stated, as follows:
- (a) The Petitioner intended to construct a Poultry farm, labour quarters and godown in the land belonging to her and the construction of Labour Quarters and godown was completed during November,2015. When the Petitioner was in the midst of further construction of building, after coming to know about the Solar Policy 2014-21, issued by the State Government, she submitted an application for installation of 1000 kwp Grid connected Solar Roof Top PV (SRTPV) Generation system on net metering basis, to the BESCO. A Power Purchase Agreement (PPA) dated 21.12.2015 was entered into with the tariff at Rs.9.56 per kwh. The Commission granted approval on 28.01.2016, to the PPA, while stating that the SRTPV System shall be designed, engineered, constructed, commissioned and operated by the seller (Petitioner) or any other person by 21.12.2016. However, the said approval was served on the Petitioner during the end of May, 2016. Therefore, the approval/commencement certificate from BESCO was issued to the Petitioner on 16.06.2016.
- (b) Based on the said approvals, the Petitioner had scheduled completion of the project work within the time stipulated by the Commission. The Petitioner managed to arrange funds to the tune of Rs.3.25 crores through a loan from Saraswat Bank Limited at the rate of 13% interest p.a. for the purpose of

construction of building. That apart more than seven to eight crore rupees were incurred for installation of Solar Module, etc.

- (c) The Petitioner entered into a Collaboration Agreement with one Life Care Group, for the purpose of installation of the said system. Several modifications to the structure suggested by the experts were carried out in order to suit the requirement for generating adequate solar power from the system, which took about 2 months entailing additional costs to the tune of Rs.83 lakh.
- (d) The Petitioner after receiving the Order dated 20.10.2016, submitted a letter, seeking revocation of such order and also sought for personal hearing in the matter. The Petitioner was informed vide Commission's letter dated 30.11.2016, to file a review Petition/appeal under the provisions of the Electricity Act, 2003.
- (e) The Petitioner had completed the work of installation of the System and the same was ready for commissioning as on 16.12.2016. The Petitioner had also submitted the completion report to the 1st Respondent along with the completion certificate issued by the system installer.
- (f) The Order dated 20.10.2016 has to be reviewed, since the same is contrary to the approvals issued by the concerned Authorities and was passed when the Petitioner was almost on the verge of completing the project. The Petitioner was not given opportunity of being heard before passing the above Order

dated 20.10.2016, and the notice dated 29.08.2016 was not served on the Petitioner.

- (g) The Petitioner has made huge investment based on the PPA and approval granted by the Commission and the approval of the BESCO, which was issued as late as June, 2016. The Petitioner could not have commenced the installation work without the approval issued by BESCO. Even though the same was issued during June, 2016, she has completed the work of installation of the System and the same was ready for commissioning as on 16.12.2016. As the work has been completed within the time stipulated by the Commission under the Approval dated 28.01.2016, the Petitioner is eligible for the tariff at the rate of Rs.9.56/- per kwh.
- (h) Even if it is assumed that the project had to be completed within six months, the Petitioner has completed the same within six months from the date of approval by BESCO i.e., on 16.06.2016 and submitted the completion report 16.12.2016, exactly 6 months from the approved date.
- (i) The contract or the time for completion of work cannot be altered unilaterally in the absence of the necessary parties to the contract. No prejudice would be caused to the State Government or to the Commission if the Order dated 20.10.2016 is reviewed.

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- 4) On Issuance of notice, the Respondents appeared through their Counsel and filed objections, which may be stated as follows:
- (a) The time frame ordinarily approved by the Commission for SRTPV project is 180 days from date of signing of PPA. Even as per the guidelines of the 1st Respondent which is in public domain, for SRTPV applicants having existing buildings, the time prescribed for completion of the project and commissioning is 180 days. The Petitioner despite being aware of this, failed to bring to the notice of the Commission the error and she ought not to be permitted to take advantage of this error. Perpetuating the said error will lead to discrimination among the various individuals and entities who are similarly placed as the Petitioner. The time period of 6 months for commissioning has been fixed after taking into reckoning all aspects of the matter. The 1st Respondent on conducting a study found that for establishment and commissioning of a SRTPV plant on an existing building or on rooftops, more than 6 month's time is not required. Hence, the request for retaining 12 months for commissioning of the plant is untenable.
- (b) As per the Generic Tariff Order dated 10.10.2013, the PPAs, executed under such Order, are eligible for Rs.9.56/-, provided the SRTPV plants are commissioned within 6 months. The Petitioner cannot be permitted to avail the benefit of higher tariff, as she has not adhered to the prescribed time frame for commissioning of the plant. The Commission had in its communication dated 27.09.2016 directed (ESCOMS) *"to ensure completion*

and commissioning of SRTPV projects on existing roofs within period so as to be eligible for the tariff Rs.9.56 per unit agreed to in the PPA executed. If there is delay in commissioning of the project within six months, the consumer concerned would be eligible for the revised tariff as per Commission's Order dated 2nd May, 2016."

- (c) The Order dated 02.05.2016 specifies that all SRTPV plants with existing buildings whose PPA have been executed as per the tariff order dated 10.10.2013 and are commissioned within six months, would be eligible for the tariff mentioned in their PPA. Further, for those SRTPV plants which are commissioned beyond six months, the Tariff Order dated 02.05.2016 is made applicable.
- (d) The 2nd Respondent had brought to the notice of the Commission, the error of granting 12 months time for commissioning of SRTPV plants, vide its letter dated 15.06.2016, which was sent as soon as the error was noticed by the Respondent. However, even though the Petitioner was aware of the guidelines prescribing 180 days time for commissioning, she failed to seek any clarification in that regard.
- (e) Further, the Petitioner had sought for sanction of additional HT power supply and the Respondents carried out the work of drawing the line up to the Petitioner's installation, but the Petitioner failed to pay the requisite additional deposit for such additional load.

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- (f) The cost of setting up a solar plant has come down drastically over the last few years. The rate provided in the PPA applied for the relevant period of 6 months. Thereafter only the revised tariff can be applied. It is settled law that the Commission has the power to re-determine tariff even in respect of existing and subsisting PPA. Therefore, even if the period provided for commissioning of the plant is continued to be 12 months, the tariff is to be determined as per the other terms of the PPA.
- (g) The Petitioner's averments regarding cost of investment, financial assistance taken, collaboration agreement entered, suggestions made by experts and time taken to implement them, are not relevant. The Petitioner's averment that she had completed the works and was ready to commission the project on 16.12.2016 is denied. The project completion certificate, submitted by the Petitioner was incomplete as the Petitioner had not obtained the inspection report of the Chief Electrical Inspector, as required in the Guidelines.
- (h) The Commission had given the Petitioner and Respondent, 7 days' time to respond to the Notice issued by it, before issue of the order dated 20.10.2016. The Petitioner however chose not to reply to the same. No further opportunity of hearing is required to be given. The Petitioner's averment that no show cause notice was issued to the Petitioner nor was any notification issued in view of which the Order impugned deserves to be reviewed, is untenable. Further averment of the Petition that the impugned order cannot override the generic order dated 10.10.2013 is untenable. The Commission has in its Order

dated 02.05.2016 clearly stated that any SRTPV units which are not commissioned within 180 days will be entitled to the tariff of Rs.5.67/- only. The Petitioner's averments that the time for completion of the project can only be reckoned from the date on which it received approval from the Respondent to complete the work is denied. There has been no delay on the part of the Respondents as alleged.

- 5) The submission of the Petitioner in her rejoinder to the Statement of objections filed by the Respondents may be summed up as follows:
 - (a) The Respondents ought not to have issued the Approval at Annexure-C in pursuance of the approval issued by the Commission at Annexure – B, since the so-called error was within the knowledge of the Respondents. Without seeking any clarifications in this regard, the Respondent authority issued the approval at Annexure – C by which the commissioning date was fixed and affirmed. Based on the said approval, the Petitioner carried out the installation work. The Petitioner should not be penalized for the error committed by the authorities, when the project is in the advanced stage, since the same will prejudice the right of the Petitioner.
 - (b) The Respondents' contention regarding the study report finding that six months' time is sufficient for commissioning of the SRTPV plant on existing plant is baseless and as it is not placed on record, it cannot be relied upon and made applicable to the Petitioner's case.

- (c) The Order dated 10.10.2013 does not specify that the SRTPV projects need to be completed within 6 months. If it was so, then the same ought to have been incorporated in the PPA and in the absence of the same, such contention cannot be raised to deprive the Petitioner of her right to avail the tariff fixed under the PPA. The Petitioner and the Respondents have subjected themselves to the terms and conditions of the PPA in pursuance of the tariff Order dated 10.10.2013 for the control period of five years beginning from 01.04.2013 to 31.03.2018, and therefore the tariff fixed for such control period and the PPA executed pursuant thereto should not be altered unilaterally, as it would be detrimental to the Petitioner's interest and have an adverse impact on the project's financial arrangements. Any revision of time and tariff granted to the Petitioner under the PPA and approval at Annexure-C would be without jurisdiction.
- (d) The communication dated 27.9.2016 of the Commission is not applicable to the Petitioner's case, as it was not communicated to the Petitioner. In the said notice there is no clarity as to when the six months would commence, whether it is from the date of signing the PPA or from the date of receipt of the approval of PPA by the Petitioner. Hence, any action based on the said notice against the Petitioner would be unjust and perverse. The Petitioner's case is a special case, where the installation of work was completed as on 16.12.2016 in all respects and all the requisite approvals were obtained and submitted to BESCO as on 21.12.2016, as substantiated by the documents produced by the Petitioner.

- (e) The averments that, the Respondent brought to the notice of the Commission, the error of granting 12 months for commissioning of SRTPV Plants, vide its letter dated 15.06.2016 and that, the same was sent as soon as the error was noticed by the Respondent, even though the Petitioner being aware of the guidelines prescribing 180 days for commissioning, failed to seek for any clarification in that regard, is unjust and a misleading statement. The approval at Annexure-C was issued subsequent to the letter dated 15.06.2016 and the Respondent had the option to issue the approval at Annexure-C after obtaining the clarifications from the Commission. However, it was issued without obtaining the necessary clarifications, and communicated to the Petitioner, based on which, the Petitioner made arrangements of the project work. The Commission vested with the powers for removal of difficulties ought to have initiated the appropriate proceedings to rectify and clarify the said error by providing both the parties a reasonable opportunity of being heard before passing the order under review instead of confirming the notice dated 29.08.2016 unilaterally. Absence of response by the parties to the notice issued by the Commission, does not mean that they have no say in the matter. As the Commission order dated 20.10.2016 does not cause any hardship to the Respondents, it needs to be reviewed as the Petitioner is the only party affected by it.
- (f) Despite completion of the project within the due date, the BESCO Authority did not commission the system and kept on prolonging the same for no fault of the Petitioner. The payments and deposits towards the work done by the

Respondent pertaining to additional HT Line was made vide Demand Draft dated 21.12.2016, immediately upon the receipt of the estimation given by the first Respondent.

- (g) The Respondent's averment that, the cost of setting up solar plant has come down drastically over the last few years, are denied as false. Based on the advice of the solar experts and approval at Annexure-C, the Petitioner modified the roof of the premises and made it more conducive to firmly install the panels on the rooftop of the premises at additional cost to ensure optimum generation of power. The cost for setting up of the Solar System at the premises of the Petitioner is way higher than the actual capital cost referred in the different tariff orders.
- (h) When the PPA was approved and communicated to the parties it becomes a concluded contract and cannot be altered unilaterally unless it is expressly agreed between the parties to the contract. The Petitioner completed the installation work within 180 days from the date of the approval at Annexure-C being communicated to her, but the system was not commissioned within the due date mentioned, due to:
- (i) BESCO insisting on the Petitioner to take temporary connection for construction of poultry farm;

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- (ii) BESCO, thereafter insisting on dismantling of the 11 kV line previously erected by it and a fresh line to be laid by the Petitioner on self-execution basis;
- (iii) Time taken by BESCO authorities in accepting only on 19.01.2017, the Petitioner's request to collect the cost incurred by BESCO for dismantling the line instead of its removal and releasing, and the inspection report, accepting the quality of the material of extended 11 kV line erected by the Petitioner being submitted only on 13.03.2017;
- (iv) Delay in obtaining fresh CEIG safety approval on 22.03.2017 only for the extended 11 kV line at the insistence of the 1st Respondent despite CEIG safety approval on 21.12.2016 on inspection of the installation work, after which the plant was commissioned on 10.04.2017 following pre-commissioning test on 06.04.2017; and,
- (v) Absence of proactive measures and delay by BESCO in connecting the SRTPV system to the grid, despite completion of work within due date.
- 6) We have heard the learned counsel for the Parties in the present Review Petition and also perused the pleadings and other material placed on record.

7) It is not in dispute that the Petitioner on 15.12.2015 applied to BESCO for permission to install and commission 1 MW capacity SRTPV plant on net-metering basis under the BESCO's SRTPV system scheme pursuant to the State Government's Solar Policy 2014-21, paid the required application fee of Rs.2000/- as specified in the BESCO's Consumer Guidelines for availing the scheme on 18.12.2015 and entered into a PPA with BESCO on 21.12.2015. The application and PPA would clearly indicate that the Petitioner was an existing consumer of BESCO and the SRTPV system was to be installed on existing rooftop. The underlying objective of the SRTPV scheme was to encourage installation and commissioning of the SRTPV system by consumers on idle roof tops of the existing buildings within a short time, so that there is rapid addition to the solar generation capacity in the State. Accordingly, the 'Consumer Guidelines' specified that the installation and commissioning of SRTPV system was to be completed within 180 days, as it would be installed on existing rooftop. (BESCO subsequently on 23.12.2015 allowed even new consumers with buildings under construction to also apply under the SRTPV scheme with a time period of 1 year to install and commission the SRTPV system). All applicants including the Petitioner were bound by the terms and conditions applicable to the SRTPV scheme specified not only in the PPA, but also in the Consumer Guidelines and other general circulars/instructions issued by the BESCO. As per the Consumer Guidelines, all approvals and pre-commissioning tests should precede the execution of PPA and thereby the completion/commissioning of the plant could not be beyond 180 days from the date of the PPA. Any

communication or approval issued by a subordinate officer would not modify the provisions of the scheme and would not be binding on BESCO. Thus, there is no apparent error in the Commission's order dated 20.10.2016 clarifying that the Petitioner was entitled only for 180 days from the date of execution of the PPA to install and commission the 1 MW SRTPV plant so as to be eligible for the tariff of Rs.9.56 agreed to in the PPA dated 21.12.2015.

- 8) Similarly, it is not in dispute that the Commission's generic tariff Order dated 02.05.2016 in respect of SRTPV plants is made applicable to those SRTPV plants with PPAs executed at the tariff determined in the tariff order dated 10.10.2013, but which could not be commissioned within the stipulated time period. The recital of the PPA dated 21.12.2015, contemplates applicability of the Commission's orders later to 10.10.2013 also. Admittedly, the Petitioner had not completed the installation of the SRTPV plant on 16.12.2016, the day taken to be the end of 180 days' time period by the Petitioner, despite her Work Completion Report as the mandatory CEIG safety approval was not obtained. The Petitioner's claim that the plant's completion and commissioning were delayed for reasons not attributable to the Petitioner cannot be raised in a review petition, especially when the only issue involved in the case is whether the Petitioner is entitled for 180 days' time to install and commission the SRTPV plant so as to be eligible for the tariff agreed in the PPA. It is now well settled that the Commission has exclusive jurisdiction in the matter of determination of tariff payable by a distribution licensee to a generator and has the mandate to safeguard the interest of consumers who

finally pay the tariff, by ensuring that any action or inaction of a distribution licensee does not result in payment of a tariff to a generator higher than what is rightly payable as per the relevant agreements and orders. We also note that as per the Petitioner's own admission she took effective steps to implement the SRTPV project only after the issue of the Order dated 02.05.2016, in which the Commission determined the generic tariff for SRTPV projects based on the prevalent capital cost and other relevant parameters.

- 9) We note that the contents of the application requesting for installation of the SRTPV plant and the documents produced with the application would show that the intended SRTPV plant had to be commissioned on the existing building. It is not the case of the Petitioner that, similarly placed consumers have been given 12 (twelve) months' time for commissioning their plants. Thus, we are in agreement with the Respondent's contention that, the Petitioner's claim for longer time for commissioning the plant would lead to disparity on this issue between similarly placed consumers.

- 10) We note that, it is a well-established principle that, a party cannot be allowed to take advantage of the mistake of the Court. Further, because of the mistake of the Commission, the tariff gets affected and the consumers' interest comes in and public interest gets affected. In such cases, the Petitioner is not entitled to contend that, the mistake of the Commission misled her and that, otherwise she would have commissioned the Project within 6 (six) months. The pleadings of the Petitioner would show that on the

principles of estoppel she cannot be put to disadvantageous position by reducing the period for commissioning the SRTPV plant. Though the Petitioner has stated in the Review petition that she has incurred huge amount more than the capital cost estimated in different generic tariff orders, there is no reliable evidence to prove the same. Therefore, the Petitioner has failed to prove that she was put in a disadvantageous position.

- 11) The Review petition is for recalling the Order dated 20.10.2016. In the present proceedings the averments of the Petitioner that she was prevented from commissioning the project within 1 year from the date of PPA, due to the fault and inaction on the part of the Respondents are not relevant. Admittedly, the SRTPV plant was commissioned on 10.4.2017, beyond the period of 1 year from the date of PPA. The justification for the delay cannot be an issue for decision in the Review petition. Therefore, the Petitioner's plant is entitled to only the reduced tariff of Rs.5.20 per unit.
- 12) For the foregoing reasons, we pass the following:

ORDER

The Review Petition is dismissed.

Sd/-
(M.K. SHANKARALINGE GOWDA)
CHAIRMAN

Sd/-
(H.D. ARUN KUMAR)
MEMBER

Sd/-
(D.B. MANIVAL RAJU)
MEMBER