

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,
BENGALURU**

Dated : 19th December, 2017

Present:

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

OP No. 106/2017

BETWEEN:

Vistaara Power Kurtakoti Private Ltd.,
No.16, MSR Enclave, 1st Floor,
Above Bajaj Showroom,
Opp. Allied Blenders Distillers,
Near Nagasandra Metro,
Bengaluru – 560 073

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PETITIONER

[Represented by Sri S.V. Bhat & Sri. B.T. Girish, Advocates]

AND:

Hubli Electricity Supply Company Ltd.,
Corporate Office, P.B Road,
Navanagar, Hubballi – 580 025

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RESPONDENT

[Respondent held ex-parte vide Order dated 26.09.2017]

ORDERS

- 1) The Petitioner has filed this petition under Section 86(1)(f) of the Electricity Act, 2003, praying to extend the time prescribed in Article 4.1 of the PPA dated 26.10.2015 by three months, i.e., from 25.04.2017 to 25.7.2017 for

commissioning the 2 MW Solar Power Project of the Petitioner and grant such other and further reliefs, as are just.

2) The submissions made by the Petitioner in the Petition and in its subsequent application in support of its prayer, may be summarized as follows:

(a) Pursuant to the online applications called by KREDL, following the issuance of Solar Policy by the State Government, for allotting Solar Projects under land owning farmers' category, Shri Mohanagouda H. Adappagoudra, Hulkoti Post, Taluk & District Gadag applied for grant of permission to establish Solar Project of capacity of 2 MW in Survey No.827/1A+1B+2B+4C+2D/2, Kurtakoti Village, Gadag Taluk. Sanction was accorded vide communication dated 28.08.2015 with various conditions. One of the conditions was that, the Solar Project shall be completed within 18 months from the date of the Power Purchase Agreement (PPA). It was also specified that, the sanction would be subject to the result of the Writ Petition No.48047/2014, pending before the Hon'ble High Court of Karnataka, and the tariff fixed by this Commission.

(b) A PPA was executed between Shri Mohangouda H. Adappagoudra – the Solar Project Developer (SPD) and the Respondent on 26.10.2015. The Project had to be completed within 25.4.2017. As per Article 12.11 of the PPA, the SPD entered into a Memorandum of Understanding with the

Petitioner, expressly assigning the entire rights and obligations arising under the PPA, which was consented between the Respondent and a Supplemental PPA (SPPA) was executed by the Respondent and the Petitioner on 22.09.2016, recognising the Petitioner as the assignee of the said Solar Power project. The SPPA was approved by this Commission on 14.10.2016.

- (c) Pursuant to the said SPPA, the Petitioner undertook implementation of the Project incurring huge expenditure of more than Rs.11 Crores, by availing financial facility. The Petitioner applied for loan on 22.10.2016 with the Bank of Baroda, which provisionally sanctioned a loan of Rs.8.80 Crores and as the said bank did not release the loan, the Petitioner was forced to seek loan from the Bank of India, that sanctioned it on 17.03.2017. The Petitioner had placed the orders for importing solar panels from China on 27.12.2016, and for transformers and other equipment on 06.02.2017 and 07.03.2017, but due to delay in processing of its loan papers by the financial institution, the Petitioner could not receive the materials and equipment in time. Further, due to the indefinite strike called by the South India Motor Transport Association from 30.03.2017, the freight forwarder could not lift the material received from China and was forced to ask the supplier to ship the consignment to Mumbai Port. However, due to non-availability of vessel, the shipment was delayed by 15 days and could start it only on 18.04.2017 and the delivery was made on 10.05.2017. There was also a delay in delivery of the MEI breaker and also that of the cables, due to the

indefinite strike by the transporters. Because of these reasons, the Project could not be commissioned within the stipulated time.

- (d) The Petitioner requested the Respondent, vide letter dated 22.04.2017 along with several documents, seeking extension of time to commission the Project. The Respondent, by letter dated 03.05.2017 directed the Petitioner to approach the Commission, seeking approval of the extension of the commissioning date.
 - (e) We note here itself that, the project was commissioned on 22.07.2017.
- 3) Despite issuance of Notice, the Respondent failed to appear and also no pleadings are filed on behalf of the Respondent.
 - 4) We have heard the Counsel for the Petitioner and perused the records.
 - 5) The following issues would arise for our consideration:
 - (1) Whether the Petitioner has made out a case for extension of the Scheduled Commissioning Date of its Plant?
 - (2) Whether this Commission can examine such a request of the Petitioner and grant approval?
 - (3) What Order?

6) After considering submissions made by the Counsel for the Petitioner and other material placed on record, our finding on the above issues are as follows:

7) **ISSUE No.(1):** *Whether the Petitioner has made out a case for extension of the Scheduled Commissioning Date of its Plant?*

ISSUE No.(2): *Whether this Commission can examine such a request of the Petitioner and grant approval?*

(a) As the above two issues are interconnected, we proceed to deal with them together. We also note that, the Commission had passed an Order dated 28.07.2016 in OP No.37/2015 filed by Shri Mohangouda H.Adappagoudra, the SPD, seeking a direction, among others, to the Respondent in the present Petition to execute a PPA in respect of the same Project, as involved in the present Petition, with a tariff of Rs.8.40 per unit, holding that he is not entitled to the tariff of Rs.8.40 per unit, as the PPA was executed after 01.09.2015. We also note that, the said Order is challenged by the said Petitioner in the Hon'ble High Court of Karnataka in WP No.100471/2017. We are of the considered opinion that, the pendency of the Writ Petition is not an impediment to decide the case on hand, as the prayers made and the Petitioner in the present Petition are different.

(b) As per Article 1.1 (xxi) of the PPA, the Scheduled Commissioning Date of the Petitioner's Plant is 18 months from 26.10.2015, which is the date of signing of the PPA by the parties and, thereby, the Effective Date as per

Article 1.1 (xiv). Even as per Article 4.1 (c), the SPD is required to achieve scheduled date of completion and commercial operation within 18 months from the effective date.

(c) Article 2.5 of the PPA provides for 'Extension of time', which reads thus:

"2.5 Extensions of Time

2.5.1 *In the event that the SPD is prevented from performing its obligations under Clause 4.1 by the Scheduled Commissioning Date due to:*

- (a) Any HESCOM Event of Default; or*
- (b) Force Majeure Events affecting HESCOM; or*
- (c) Force Majeure Events affecting the SPD,*

2.5.2 *The Scheduled Commissioning Date and the Expiry Date shall be deferred, subject to the reasons and limits prescribed in Clause 2.5.1 and Clause 2.5.3 for a reasonable period but not less than 'day for day' basis, to permit the SPD or HESCOM through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the SPD or HESCOM, or till such time such Event of Default is rectified by HESCOM.*

2.5.3 *In case of extension occurring due to reasons specified in clause 2.5.1(a), any of the dates specified therein can be extended, subject to the condition that the Scheduled Commissioning Date would not be extended by more than 6(six) months.*

2.5.4 *In case of extension due to reasons specified in Article 2.5.1(b) and (c), and if such Force Majeure Event continues even after a maximum period of 3 (three) months, any of the Parties may choose to terminate the Agreement as per the provisions of Article 9.*

2.5.5 *If the Parties have not agreed, within 30 (thirty) days after the affected Party's performance has ceased to be affected by the relevant circumstance,*

on the time period by which the Scheduled Commissioning Date or the Expiry Date should be deferred by, any Party may raise the Dispute to be resolved in accordance with Article 10.

2.5.6 As a result of such extension, the Scheduled Commissioning Date and the Expiry Date newly determined date shall be deemed to be the Scheduled Commissioning Date and the Expiry Date for the purposes of this Agreement."

(d) Article 8.3 of the PPA defines 'Force Majeure Events', which reads thus:

"8.3 Force Majeure Events:

(a) Neither Party shall be responsible or liable for or deemed in breach hereof because of any delay or failure in the performance of its obligations hereunder (except for obligations to pay money due prior to occurrence of Force Majeure events under this Agreement) or failure to meet milestone dates due to any event or circumstance (a "Force Majeure Event") beyond the reasonable control of the Party affected by such delay or failure, including the occurrence of any of the following:

- (i) Acts of God;
- (ii) Typhoons, floods, lightning, cyclone, hurricane, drought, famine, epidemic, plague or other natural calamities;
- (iii) Strikes, work stoppages, work slowdowns or other labour dispute which affects a Party's ability to perform under this Agreement;
- (iv) Acts of war (whether declared or undeclared), invasion or civil unrest;
- (v) Any requirement, action or omission to act pursuant to any judgment or order of any court or judicial authority in India (provided such

requirement, action or omission to act is not due to the breach by the SPD or HESCOM of any Law or any of their respective obligations under this Agreement);

- (vi) Inability despite complying with all legal requirements to obtain, renew or maintain required licenses or Legal Approvals;*
- (vii) Fire, Earthquakes, explosions, accidents, landslides;*
- (viii) Expropriation and/or compulsory acquisition of the Project in whole or in part;*
- (ix) Chemical or radioactive contamination or ionizing radiation; or*
- (x) Damage to or breakdown of transmission facilities of either Party;*

(b) The availability of the above item (a) to excuse a Party's obligations under this Agreement due to a Force Majeure Event shall be subject to the following limitations and restrictions:

- (i) The non-performing Party gives the other Party written notice describing the particulars of the Force Majeure Event as soon as practicable after its occurrence;*
- (ii) The suspension of performance is of no greater scope and of no longer duration than is required by the Force Majeure Event.*
- (iii) The non-performing Party is able to resume performance of its obligations under this Agreement, it shall give the other Party written notice to that effect;*
- (iv) The Force Majeure Event was not caused by the non-performing Party's negligent or*

intentional acts, errors or omissions, or by its negligence/failure to comply with any material Law, or by any material breach or default under this Agreement;

(v) *In no event shall a Force Majeure Event excuse the obligations of a Party that are required to be completely performed prior to the occurrence of a Force Majeure Event."*

(e) Article 5.1 of the PPA provides for the tariff payable to the SPD, which reads thus:

" 5.1 Tariff Payable:

The SPD shall be entitled to receive the tariff of Rs.6.51 (Rupees Six and Paise Fifty one only) per kWh based on the KERC tariff Order S/03/1 dated 30th July, 2015 in respect of SPD's Solar PV projects in terms of this agreement for the period between COD and the Expiry Date. However, subject to clause 2.5, if there is a delay in commissioning of the project beyond the Scheduled Commissioning Date and during such period there is a variation in the KERC Tariff, then the applicable Tariff for the projects shall be the lower of the following:

- i. Rs.6.51 per kWh*
- ii. Varied tariff applicable as on the date of commercial operation."*

(f) A perusal of the terms of the PPA reveals that, for commissioning of the Project, 18 months' time is provided and for achieving the Conditions Precedent, 12 months are provided from the date of the PPA. Further, the SPD was entitled to the tariff mentioned in the PPA, if its Project was commissioned within the said period of 18 months. The PPA was signed

on 26.10.2015 and the SPPA was entered into between the parties on 22.09.2016, after the formation of the SPV, the Petitioner in the case. We note that, when sufficient time is provided in the PPA for performance of each the events/activities involved in the implementation of the project, a prudent developer is expected to take timely action to complete the Project within such time. Admittedly, all the works and activities relating to the Project implementation were initiated only after the Petitioner entered into the SPPA on 22.09.2016. Except for formation of the SPV and transferring the rights of the Project to the SPV, it appears that, no concrete steps were taken by the SPD (the PPA holder) to implement the Project, after signing the PPA on 26.10.2015. We note that, the land owning farmer, the SPD, almost a year after executing the PPA with the Respondent, chose to form a SPV (the Petitioner) and assigned the Project to the SPV. The impact of such belated formation of the SPV and the assignment of the Project to such SPV, on timely commissioning of the Project, has not been explained by the Petitioner. From 22.09.2016, only a period of about 7 months remained for the scheduled commissioning date. A major portion of the time stipulated (almost a year) for establishing the Project was lost, as the SPD was not diligent and sincere in implementing the Project and such inaction resulting, ultimately, in any delayed implementation of the Project, is attributable solely to the SPD.

- (g) The Petitioner has pleaded that, the delay in sanctioning of the loan by the Banks, truckers' strike and delay in supply of equipment are the

causes for the delay in commissioning the Project and that these events have to be construed as *force majeure* events. As per Article 2.1 of the PPA, the Conditions Precedent including financial closure have to be achieved by the SPD, in full, within 365 days from the date of execution of the PPA and intimation has to be given to this effect to the Respondent. Admittedly, as per the documents produced by the Petitioner in the Affidavit filed by its learned Counsel on 26.09.2017, the Petitioner applied to the Bank of Baroda for loan on 22.10.2016, almost a year after the execution of the PPA. However, within four days thereafter, on 26.10.2016, the Petitioner applied to the Bank of India for loan. We are unable to accept the Petitioner's explanation for this as being the delay in release of funds by the Bank of Baroda, which had provisionally sanctioned loan, because the said Bank informed the Petitioner in its letter dated 23.12.2016 about the 'Provisional Sanction' of financial assistance (term loan and OD) to it and asked it to furnish certain documents. It is not known, as to why the Petitioner did not pursue the matter with the bank by furnishing the documents sought. The Bank of India sanctioned the loan to the Petitioner on 17.03.2017. While the Petitioner pleads that, the said Bank took a long time to sanction the credit facilities, the Petitioner has not produced the copies of any further correspondence, to and from the bank, and also has not disclosed the efforts made by it for the early sanction. Therefore, it is safe to infer that, as in the case of the Bank of Baroda, the Bank of India had asked the Petitioner to furnish certain documents, which the Petitioner failed to furnish in time. Thus we note that the Petitioner has not

achieved the financial closure within 365 days, as required by Article 2.1 of the PPA. From the events narrated earlier, it is clear that, the delay in achieving financial closure, one of the Conditions Precedent, within the stipulated time are for reasons and events, which cannot be classified as *Force Majeure* events as defined in the PPA.

- (h) The Petitioner states that, it had placed an order, for solar panels on 27.12.2016 and for transformer on 06.02.2017 and 07.03.2017. That, due to delay in sanction of the loan and strike of the transporters, their delivery was delayed, and hence, this has to be treated as a *force majeure* event. We found that, the delay in sanctioning of the loan is attributable only to the Petitioner, and note that, the transporters' strike was for only for a short period of 9 days, from 30.03.2017 to 07.04.2017, a negligible period in 18 months available for commissioning the Project. We note that, whereas the *Force Majeure* clause in the PPA requires the Petitioner to issue Notice to the Respondent, as soon as practicable after the occurrence of a *Force Majeure* event, the Petitioner has not done so. We also note that, in the letter dated 22.04.2017, produced as ANNEXURE-G to the Petition, addressed by the Petitioner to the Respondent seeking extension of time by 45 days to commission the Project, among other things, it is stated that, the MEI breaker ordered has not been delivered till 22.04.2017. The supplier's 'Proforma Invoice' dated 13.04.2017, produced as part of ANNEXURE-G at Page-99 of the Petition, would indicate that the supplier requested for payment to enable him to deliver the breaker ordered and it could be inferred that,

non-payment to the supplier could be one of the causes for delay in its delivery. Be that as it may, we are of the considered opinion that, none of these events fall under the *Force Majeure* clause of the PPA. It is now a settled law that, the *Force majeure* clause in the PPA has to be strictly interpreted. Hence, we hold that the Petitioner is not entitled for any extension of the Scheduled Commissioning Date of its plant.

- (j) During his oral submission, the learned counsel for Petitioner has taken the alternative argument that, the 'Effective Date' of the PPA is 14.12.2015, when the common seal was affixed to the PPA. We are unable to accept such argument, as it is not supported by any term in the PPA, which provides for adopting such date as the 'Effective Date'. In any case, it is not shown how the non-affixture of the common seal to the PPA prevented or hindered the timely implementation of the Project.
- (k) Article 5.1 of the PPA extracted earlier, provides for reduction of tariff, as a consequence of delay in commissioning of the Solar Power Project beyond the Scheduled Commissioning Date, subject to certain terms and conditions stated therein. This is in view of the fact that, this Commission periodically determines the generic tariff for supply of electricity generated from various sources to the Distribution Licensees, based on among other parameters, mainly Capital Cost of the generating plant. Such generic tariff is made available for a period, normally longer than a year called as 'Control Period', during which the generating plants get implemented and commissioned at the normative

Capital Cost adopted in the generic Tariff Order, generally after execution of a PPA with a Distribution Licensee. Such a PPA also has a clause stipulating the time, within which the power supply should commence, so that the Distribution Licensee can plan further supply to its consumers. The time stipulated for completion of the Project takes into account the time ordinarily required to complete various pre-commissioning activities, which, in respect of megawatt scale Solar Power Plants, is taken as between 12 months to 18 months. Any delay or failure in commencement of power supply within the agreed date would disrupt the operation of the Distribution Licensees like the Respondent, which could also result in their power procurement from alternative expensive sources, leading to higher retail tariff to the consumers or short supply leading to revenue loss to them, and even to imposition of penalties for not meeting the Renewable Purchase Obligation fixed by this Commission. The Capital Cost of Solar Power Plants has been coming down very rapidly in the recent years, because of the advancement in technology and production efficiency as well as economies of scale in the backdrop of largescale solar capacity addition across the globe. Thus, the generic tariff for megawatt scale Solar Power Plants, which was fixed at Rs.14.50 per unit in the Commission's Order dated 13.07.2010, has been successively reduced to: (i) Rs.8.40 per unit in the Commission's Order dated 10.10.2013; (ii) Rs.6.51 per unit in the Commission's Order dated 30.07.2015; and (iii) Rs.4.36 in the Commission's Order dated 12.04.2017.

- (l) We note that, the Petitioner took the risk of implementation of the Project after almost a year after execution of the PPA, with barely six months left for its commissioning as agreed in the PPA, and could not do it for certain reasons and events, which we have held to be not falling under the *Force Majeure* clause in the PPA, that could have entitled the Petitioner to seek extension of the commissioning date agreed in the PPA. It is safe to infer that, the normative capital cost of Solar Plants, when the Petitioner took effective steps to procure capital equipment for its Project, was lower than the normative cost of solar plants assumed in the generic tariff Orders dated 10.10.2013 and 30.07.2015. Thus, the Petitioner is not entitled to the tariff originally agreed in the PPA at Rs.6.51 per unit, when admittedly the Plant was not commissioned within the stipulated time and it is entitled only for the revised tariff as on the date of commissioning of the Plant as per clause 5.1 of the PPA. Admittedly, in the present case, the generic tariff for Solar Power Plants that was agreed in the PPA, was revised much before the plant was ready for commissioning.
- (m) It is now a well settled law that, the Commission has the exclusive jurisdiction to determine the tariff for supply of electricity by a generating company to a Distribution Licensee and to regulate the electricity purchase and the procurement process of the Distribution Licensees, including the price at which electricity shall be procured from different agencies through PPAs. The absence of the Respondent in the proceedings relating to the Petition filed in this case indicates that, the

Respondent does not deny the Petitioner's grounds for seeking extension of the commissioning date. As any such extension of the commissioning date has an impact on the tariff payable to the Petitioner, we are of the considered opinion that, the Commission is required to examine the correctness of the Petitioner's request for extension of the time for commissioning its plant, even in the absence of the Respondent contesting the case or in the absence of a provision in the PPA for such legal scrutiny by the Commission. It needs to be ensured that consumer's interest and, thereby, public interest is not allowed to be affected by payment of a tariff higher than what is due to the generating company because of any action or inaction of the Respondent-Distribution Licensee. Admittedly, the Petitioner's Project is commissioned on 22.07.2017 and, therefore, it is entitled to a tariff of Rs.4.36 per unit as determined in the Commission's Generic Tariff Order dated 12.04.2017, as per Article 5.1 of the PPA.

(n) We, therefore answer Issue Nos.(1) and (2), accordingly.

8) **ISSUE No.(3):** *What Order?*

For the foregoing reasons, we pass the following:

ORDER

(a) The Petition is dismissed; and,

- (b) The Petitioner is entitled to the reduced tariff of Rs.4.36 (Rupees Four and Paise Thirty Six) only per unit, as fixed by the Commission in the Order dated 12.4.2017, for the term of the PPA, as per Article 5.1 of the PPA.

Sd/-

(M.K. SHANKARALINGE GOWDA)
CHAIRMAN

Sd/-

(H.D. ARUN KUMAR)
MEMBER

Sd/-

(D.B. MANIVAL RAJU)
MEMBER