

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION
No. 16 C-1, Miller Tank Bed Area, Vasanth Nagar, Bengaluru- 560 052

Dated : 20th November, 2018

Present:

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

OP No.101/2017

BETWEEN:

Smt. H. Kamalakshi,
W/o B Venkatesh Prasad,
F.No. 009, Hrudaya Enclave,
Shankar Colony,
S N Pet, Ballari-585103.

.. **PETITIONER**

[Represented by Smt. Poonam Patil, Advocate]

AND:

Gulbarga Electricity Supply Company Limited,
Corporate Office,
Station Road,
Kalaburagi – 585 101.

.. **RESPONDENT**

[Respondent represented by Shri Shahbaaz Husain, Advocate]

ORDERS

- 1) This petition is filed under section 86(1)(f) of the Electricity Act, 2003
in effect, praying to:

-
- (a) uphold the extension of time granted by the Respondent, vide Annexure-N, and consequently, grant approval to the SPPA dated 24.03.2017;
 - (b) hold and declare that the Petitioner is entitled to tariff of Rs.8.40 per unit, as per the PPA dated 13.07.2015; and
 - (c) grant such other further reliefs, as this Commission may deem fit and proper, on the facts and in the circumstances of the case, in the interest of justice.

The Petitioner, later, filed an amended Petition, adding the following prayer:

'To declare that the Petitioner is entitled to extension of time to commission the plant, till the actual date of commissioning i.e., 28.07.2017'.

- 2) The facts of the case, as submitted in the Petition may be summed up, as follows:
 - (a) The Karnataka Renewable Energy Development Limited (KREDL), a nodal agency of the Government of Karnataka, for facilitating the development of renewable energy in the State of Karnataka, invited applications, online on 9th October, 2014, for allotment of the Solar Power Projects under the land owning farmers' category, under Segment-1 Category-1 of the Solar Policy of the Government of Karnataka, and in compliance of the Government Order bearing No.EN 62 VSC 2014, Bangalore, dated 26.8.2014. After evaluation of the applications received, the proposal of

the Petitioner, for development of a 1 MW Solar Power Plant at Tambralli Village, Ballari Taluk and District, was accepted. The KREDL issued a Letter of Allotment dated 16.03.2015 and instructed her to execute a Power Purchase Agreement (PPA) with the Respondent (GESCOM). As per the Letter of Award, the Project had to be completed within 18 months from the date of signing the PPA. As per the Government Order, the Solar Power Developers (SPDs) had to submit the land documents and pay fee within 60 days of the allotment. The Government, on 11.05.2015, extended the said period of 18 months by another 60 days.

- (b) A PPA was executed, between the Respondent (GESCOM) and the Petitioner on 13.07.2015. The PPA was approved by the Commission on 27.08.2015.
- (c) The Petitioner applied for conversion of land before the Deputy Commissioner, Ballari, on 9.12.2015 and the Conversion Order was passed on 30.7.2016, after 6 months.
- (d) The Petitioner got conducted a survey, for laying the 11 kV transmission line, and obtained the Tentative Evacuation Scheme on 06.09.2016.
- (e) The Petitioner obtained the term loan from the KSFC on 07.11.2016 and began placing orders for equipment, and spent Rs.157 lakhs on execution of the Project. However, due to demonetisation, the Petitioner could not mobilise funds and procure the equipment.

-
- (f) The Petitioner, by letter dated 22.12.2016, sought for extension of time till 13.07.2017, to commission the Project. The Respondent granted approval to the extension of time by the Order dated 20.3.2017. The parties entered into a Supplemental PPA (SPPA) on 24.03.2017, to this effect. Thereafter, the Petitioner placed Purchase Orders, for several equipment and sought Excise Duty exemption.
- (g) When the SPPA dated 24.03.2017 was sent to the Commission for approval, the Commission directed the Petitioner to file a Petition, seeking approval for the extension of the commissioning date.
- (h) The Respondent (GESCOM), vide the letter dated 28.04.2017, requested the Petitioner to file a Petition before the Commission, for approval of such extension. Hence, this Petition was filed on 16.06.2017.
- (i) On 13.07.2017, the revised SCOD, the Petitioner was ready to commission the Project, but the Engineers noticed the damage in the insulator and the plant could not be commissioned. This was a *Force Majeure* Event, as per Article 8.3 (vi) of the PPA. The Project was commissioned on 28.07.2017.
- 3) The grounds urged by the Petitioner, in support of its prayers, may be summarized, as follows:

-
- (a) The Solar Policy had the objective of promoting solar power for environmental benefits and the farmers' scheme was envisaged to involve and benefit the farmers of the State.
- (b) The Petitioner had made all efforts to commission the Project, within the extended period, but due to delay in grant of the Land Conversion Order and procurement of material owing to demonetization, she could not do so. The Respondent, considering the difficulties faced by the Petitioner, granted extension of time to commission the Project, after the Committee's decision.
- (c) The Project of the Petitioner has experienced several hurdles, which can be termed as the *Force Majeure* Events, within the meaning of the Article 8 of the PPA, and this has been adequately represented before the Respondent (GESCOM) by the Petitioner. The pleas of the Petitioner have been considered and accepted. The entire basis for the grant of extension has been, the due consideration of the representation of the Petitioner. Further, the Petitioner has spent Rs.7 Crores on the Project. Therefore, considering these aspects, the Commission ought to approve the extension of time granted by the Respondent, at the tariff of Rs.8.40 per unit.
- 4) Upon issuance of Notice, the Respondent appeared through the counsel. The Respondent (GESCOM), has filed the Statement of Objections.

-
- 5) The objections of the Respondent (GESCOM) may be stated, as follows:
- (a) The Petitioner's contention that, the delay in commissioning of the Project is on account of the delay in grant of permissions by the authorities, cannot be accepted as the delay is primarily on account of the negligible acts of the Petitioner. The Petitioner made no efforts to implement the Project from 13.07.2015 (the date of PPA) to 09.12.2015 (date of application for conversion of land to the Deputy Commissioner). As per Article 2.1 of the PPA, it was the obligation of the Petitioner to obtain all the approvals and fulfil the conditions precedent, within 365 days from the date of the PPA. The Conversion Order was passed in about 7 months, from the date of application. Had the Petitioner applied for conversion in time, the delay could have been avoided. Hence, the delay, in grant of the Land Conversion Order, is not a *Force majeure* Event.
- (b) The demonetisation decision was effective from 08.11.2016, more than one year after the execution of the PPA, and the effect was for a short period. Hence, it cannot be a reason for the delay in completion of the Project.
- (c) Considering the request of the Petitioner for extension of time to commission the Project, the Respondent granted the same. However, it was made clear that, the extension of time was granted, subject to application of Article 2.5.1 (c), read with Article 2.5.7 of the PPA. Hence, the Petitioner cannot take shelter under the *Force Majeure* clause and has

to make good the damages suffered by the Respondent for delay in commencement of supply of power.

- (d) Article 5.1 of the PPA provides that in case of extension of time, the revised tariff or the agreed tariff, whichever is lower shall be applicable. The Commission's generic tariff order dated 12.04.2017 would be applicable to the Petitioner. The Respondent, while granting extension of time has informed that the tariff will be in line with Article 5.1 and that the Respondent would follow the Commission's order. The Petitioner has executed SPPA on 24.03.2017, which also mentions the aforesaid aspect.
- (e) The Respondent has prayed for dismissal of the Petition, insofar as it relates to the tariff, sought by the Petitioner.
- 6) We have heard the learned counsel for the parties and perused the material placed on record. The following issues would arise, for our consideration:
- (1) Whether this Commission has jurisdiction, to call upon the Petitioners to prove the *Force Majeure* Events, relied upon by them, by filing a Petition, urging the relevant grounds and producing proper evidence, for the scrutiny of the Commission, in spite of the Respondent admitting or not denying the occurrence of such *Force Majeure* Events?
 - (2) Whether the Petitioner has made out a case for deferment or extension of the Scheduled Commissioning Date of its Plant?
 - (3) What should be the tariff for the Project, for the term of the PPA?
 - (4) What Order?

-
- 7) **ISSUE No.(1):** *Whether this Commission has jurisdiction, to call upon the Petitioners to prove the Force Majeure Events, relied upon by them, by filing a Petition, urging the relevant grounds and producing proper evidence, for the scrutiny of the Commission, in spite of the Respondent admitting or not denying the occurrence of such Force Majeure Events?*
- (a) We have passed a reasoned Order and given our findings on the above Issue, in OP No.65/2017 and held that, this Commission has the exclusive jurisdiction to consider the validity of the extension of time, when it affects the tariff payable to a generating company, ultimately passed on to consumers. The same reasoning and findings would apply to this case also.
- (b) Therefore, we answer issue No.(1), in the affirmative.
- 8) **ISSUE No.(2):** *Whether the Petitioner has made out a case for deferment or extension of the Scheduled Commissioning Date of its Plant?*
- (a) We note that, under the Article 2.5 of the PPA, extension of time for commissioning the Project can be granted, if the SPD is prevented from performing its obligations, due to the ESCOM's 'Event of Default' or the Force Majeure Events. The Force Majeure Events and the requirement of issuing a written Notice, are mentioned in Article 8.3 of the PPA. Under Article 8 of the PPA, it is also necessary to prove that, the Force Majeure Events were not caused by the non-performing party's negligent or intentional acts, errors or omissions. In this backdrop, we need to examine, if the Petitioner (SPD), in any manner, was negligent in performing its obligations under the PPA.

-
- (b) The PPA is dated 13.07.2015. The Conditions Precedent had to be achieved within 365 days, from the date of signing the PPA and the Project had to be commissioned, within 18 months from the date of signing the PPA. The achievement of the Conditions Precedent would include, obtaining of all the approvals by the SPD.
- (c) The Petitioner applied for the conversion of land on 09.12.2015, after 5 months from the date of the PPA. The conversion charges were paid on 14.10.2016 and the conversion Order was passed on 30.7.2016, after payment of charges on 20.7.2016 by the Petitioner. The conversion Order is passed, in about 10 days' time, from the date of payment of charges, which is reasonable. The Petitioner has alleged that there is a delay of 6 months, in granting the conversion order. As rightly submitted by the Respondent, no explanation is given for the delay, on the part of the Petitioner, in applying for the conversion of land. Had the Petitioner applied for the conversion of land earlier, the approval could have been obtained within the period of 365 days, stipulated in the PPA. Hence, we are unable to accept the contention of the Petitioner that, there was a delay in granting of the approval for the conversion of land. In fact, there is a delay on the part of the SPD, in applying for the conversion.
- (d) It is noted that, the allegation of the Petitioner that demonetisation affected the progress of the project implementation is not substantiated. The Respondent has contended that the effect of demonetisation was only for a short period, as compared to the time of 18 months to

commission the project. We accept the contention of the Respondent and hold that demonetisation cannot be considered as a *Force Majeure* Event, as per the terms of the PPA.

- (e) The Petitioner's plea for approving the extension of time granted, on the ground that her fertile agricultural land has been converted into non-agricultural use only, for the purpose of the current Project, is untenable as the Scheme envisages productive use of the agricultural lands, which are not fertile.
- (f) We note, it is a settled law that, the *Force Majeure* clause in the PPA has to be strictly interpreted. No notice, as contemplated under the clause, is stated to have been issued by the Petitioner, to the Respondent, describing the particulars of any *Force Majeure* Event, as soon as practicable, after its occurrence. Further, the reasons quoted by the Petitioner, do not fall under the Events of *Force Majeure*, mentioned in the PPA, as held in the preceding paragraphs. Hence, we hold that, the Petitioner is not entitled to the extension of time, as provided in the clauses of the PPA.
- (g) Therefore, we answer Issue No.(2), in the negative.
- 9) **ISSUE No.(3):** *What should be the tariff for the Project, for the term of the PPA?*
- (a) Article 5.1 of the PPA reads, as follows:

"5.1 Tariff Payable:

The SPD shall be entitled to receive the tariff of Rs8.40 per kWh based on the KERC tariff order S/03/1 dated 10.10.2013 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.8.40/- per kWh*
- ii. Varied tariff applicable as on the date of commercial operation."*

(b) It is the submission of the Petitioner that, the Respondent (GESCOM) has granted extension of time by 6 months, after considering the *Force Majeure* Events, as provided in the PPA and hence, the tariff of Rs.8.40 per unit, should not be altered. The Respondent has relied on Article 5.1 of the PPA and submitted that the revised tariff, as per order dated 12.4.2017 is applicable. It is also contended that, the Respondent (GESCOM), while granting extension of time, had clearly indicated revision of the tariff under Article 5.1 of the PPA.

(c) The Project is commissioned on 28.07.2017, statedly after about 15 days from the revised SCOD (i.e.,13.07.2017 which we have found to be not proper). The Petitioner has submitted that due to damage of insulator, the Project, though ready on 13.07.2017 could not be commissioned. We have already held that the Scheduled Commissioning Date could not be extended beyond 12.01.2017. The Generic Tariff Order dated 12.04.2017,

is applicable for the Projects, commissioned during the period, from 01.04.2017 to 31.03.2018. The PPA provides that, the tariff, as on the date of commercial operation, would be applicable for the Project, if not commissioned within the scheduled commissioning date.

- (d) The Hon'ble Supreme Court, in Civil Appeal No.1220 of 2015 (*Gujarat Urja Vikas Nigam Limited VS EMCO Limited and another*), decided on 02.02.2016, has held, as follows:

“31. Apart from that both the respondent No.2 and the appellate tribunal failed to notice and the 1st Respondent conveniently ignored one crucial condition of the PPA contained in the last sentence of para 5.2 of the PPA:

*‘In case, commissioning of solar Power Project is delayed beyond 31st December 2011, GUVNL shall pay the tariff as determined by Hon'ble GERC for Solar Projects effective on the date of commissioning of solar power project or above mentioned tariff, **whichever is lower.**’*

The said stipulation clearly envisaged a situation where notwithstanding the contract between the parties (the PPA), there is a possibility of the first Respondent not being able to commence the generation of electricity within the “control period” stipulated in the 1st tariff order. It is also visualised that for the subsequent control period, the tariffs payable to projects/ power producers (similarly situated as the first Respondent) could be different. In recognition of the said two factors, the PPA clearly stipulated that in such a situation, the 1st Respondent would be entitled only for lower of the two tariffs....”

- (e) The ratio of the above judgment of the Hon'ble Supreme Court is applicable to the Petitioner's case also. Hence, we hold that, the

Petitioner's Plant is entitled to a tariff of Rs.4.36 per unit, for the term of the PPA, as per the Generic Tariff Order dated 12.04.2017, prevalent on the date of commissioning of the Project.

- (f) We note here that, the Petitioner took effective steps for implementation of the Project, almost 16 months after the execution of the PPA and could not complete it, for certain reasons and events, which we have held to be not falling under the *Force Majeure* clause of the PPA. Much of the capital cost is incurred during the period from November, 2016 to July, 2017, as can be made out from the documents produced. Therefore, the Petitioner is not entitled to the tariff of Rs.8.40 per unit, agreed in the PPA.
- (g) We have held that, the Petitioner is not entitled to the extension of time to commission the Project, under force majeure clauses of the PPA. Thus, for not complying with the timelines for Conditions Precedent and commissioning of the Project, as mentioned in the PPA, the Petitioner is also required to pay damages for such delay, as per the Articles 2.2 and 2.5.7 of the PPA. The Hon'ble Supreme Court, in its judgment dated 05.04.2018, in Civil Appeal No.3600 of 2018 (*M.P. Power Management Company Ltd Vs. Renew Clean Energy Pvt. Ltd., and another*), has held that, for delay in achieving the Conditions Precedent and commissioning the Project, the Generating Company is liable to pay damages, as stipulated in the PPA.
- (h) Therefore, we answer Issue No. (3), as above.

10) **ISSUE No. (4):** *What Order?*

For the foregoing reasons, we pass the following:

ORDER

- (a) It is declared that the Petitioner is not entitled to any of the reliefs, sought for, in the Petition;
- (b) The Petitioner is entitled to a tariff of Rs.4.36 (Rupees four and Paise thirty-six) only per unit, the varied tariff, as applicable on the date of commissioning of the Petitioner's plant, as fixed by the Commission in the Order dated 12.04.2017, for the term of the PPA, as per Article 5.1 of the PPA;
- (c) The Petitioner is also liable to pay damages, as provided under Articles 2.2 and 2.5.7 of the PPA; and,
- (d) The office is directed to process the SPPA dated 24.03.2017, for approval of the Commission.

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

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

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