

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

Dated : 22nd November, 2018

Present:

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

O.P. Nos. 228/2017 and 229/2017

BETWEEN:

Jigajinagi Jagtap Solar Energy Private Limited,
Heritage Wine Road,
Bhutnal,
Bijapur- 586 101.

.. PETITIONER in OP No. 228/2017

[Represented by Navayana Law Offices, Advocates]

Jigajinagi Jagtap Solar Power Private Limited,
Vinod Farm,
Bhutnal,
Bijapur- 586 101.

.. PETITIONER in OP No. 229/2017

[Represented by Navayana Law Offices, Advocates]

AND:

- 1) Hubli Electricity Supply Company Limited,
Represented by its Managing Director,
P B Road,
Navanagar,
Hubballi- 580025.
- 2) The Government of Karnataka,
Department of Energy,
Represented by:
The Additional Chief Secretary to Government,
Vikasa Soudha,
Bengaluru -560 001.

- 3) Karnataka Renewable Energy Development Limited,
Represented by its Managing Director,
No.39, Shantigruha,
Bharat Scouts and Guides Building,
Palace Road,
Bengaluru - 560 001.
- 4) Karnataka Power Transmission Corporation Limited,
Represented by its Managing Director,
Cauvery Bhavan,
K.G. Road,
Bengaluru - 560 009.

.. **COMMON RESPONDENTS**

*[Respondents 1 and 4 represented by Indus Law, Advocates
Respondent 3 represented by Shri Rakshit Jois Y P, Advocate]*

COMMON ORDER

- 1) As these two Petitions involve common questions of law and facts, this common Order is being passed in the said Petitions.
- 2) The Petitioners have filed these Petitions, under Section 86(1)(f) of the Electricity Act, 2003, in effect, praying to:
 - (a) Approve their respective SPPAs dated 21.04.2017;
 - (b) Direct the Respondent-1 to make payment for the delivered energy under the Power Purchase Agreements (PPAs) dated 14.07.2015 and 13.07.2015, respectively in OP Nos. 228/2017 and 229/2017 at the rate of Rs.8.40 per unit, from the commercial operation date of the Projects, for the entire term of the PPA; and,
 - (c) Pass such other and incidental Orders, including an Order as to costs, as may be deemed appropriate under the facts and circumstances of the cases.

- 3) The facts of the cases, which are almost identical, as submitted by the Petitioners, 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 separate proposals of two applicants, Shri Ramesh C Jigajinagi and Shri Anand R Jigajinagi, for development of 3 MW Solar Power Plants each at Bhutnal Village and Arakeri village respectively, Bijapur Taluk and District, were accepted. The KREDL issued letters of allotment dated 16.03.2015 and instructed the applicants to execute PPAs with the 1st Respondent (HESCOM).
- (b) A Power Purchase Agreement (PPA) was executed between the 1st Respondent (HESCOM) and Shri Ramesh C Jigajinagi, the Solar Project Developer (SPD) in OP No.228/2017 on 14.07.2015, to which the Commission accorded approval on 31.07.2015. A PPA was executed between the 1st Respondent (HESCOM) and Shri Anand R Jigajinagi, the Solar Power Developer (SPD) in OP No. 229/2017 on 13.07.2015, to which the Commission accorded approval on 31.07.2015.

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- (c) As per Article 12.11(i) of the PPA, Special Purpose Vehicles (SPVs) (the two Petitioners) were created, to implement the Projects. The SPDs, submitting the documents regarding formation of respective SPVs, requested the 1st Respondent (HESCOM), for assignment of the Projects to the SPVs. This was consented to by the 1st Respondent. Two separate SPPAs dated 21.4.2017 were entered into, evidencing assignment of the respective projects to the SPVs.
- (d) On 12.03.2016 and 06.03.2016 respectively, the Petitioners in OP Nos.228/2017 and 229/2017 submitted applications for conversion of land to the Deputy Commissioner, Vijayapura. After receipt of necessary reports, the Deputy Commissioner granted the conversion order on 25.07.2016 in both cases. Here itself, we may note that, many of the actions/steps stated to have been taken by or events relating to the Petitioners, are in fact of the respective SPDs.
- (e) Thereafter, the Petitioners faced series of difficulties in execution of the projects and requested the 1st Respondent, vide respective letters dated 09.12.2016 for extension of time by 6 months for achieving the Commercial Operation Date (COD). The request was acceded to and time was extended by 6 months vide letters dated 04.02.2017 issued by the 1st Respondent to the Petitioners.
- (f) As per the directions of the Commission, the 1st Respondent (HESCOM), by respective letters dated 13.04.2017, requested the Petitioners to file

Petitions before the Commission, seeking approval for the extension of the commissioning date.

- (g) Both the projects were commissioned on 03.07.2017.
- 4) The grounds urged by the Petitioners, in support of the prayers, which are almost identical may be summarized, as follows:
- (a) The Petitioners have commissioned their respective Projects, within the extended period, agreed to by the 1st Respondent (HESCOM) and, therefore, there is no delay in commissioning the Project.
 - (b) The PPAs provide for extension of the SCOD, for completion of the Projects and the same cannot be interfered with, in these cases, as it is due to a natural cause or for unavoidable reasons, beyond the control of the Petitioners, and the 1st Respondent (HESCOM), based on the official reports and considering them as exceptionally special cases, provided for a reasonable period of extension, to commission the Projects. The Petitioners have commissioned the projects within the mutually agreed COD and hence, entitled to the tariff as per the PPA.
 - (c) The Petitioners are entitled to the tariff of Rs.8.40 per unit, as mentioned in the PPAs. The Commission has passed three Generic Tariff Orders, dated 10.10.2013, 30.07.2015 and 12.04.2017, in respect of the Solar Power Projects. In the Tariff Order dated 30.07.2015 (passed, in modification of

an earlier Tariff Orders), it is clearly held that, in respect of the Projects that are commissioned during the period from 01.09.2015 to 31.03.2018 for which, the PPAs have been entered into and submitted to the Commission prior to 01.09.2015 for approval, the tariff as per the said Agreements, shall be applicable. The Tariff Order dated 12.04.2017, has been made applicable to only the new grid connected Solar Power Projects, entering into PPAs on or after 01.04.2017, but before 01.04.2018 and also those which are commissioned during the period, from 01.04.2017 to 31.03.2018, for which PPAs have not been entered into, prior to 01.04.2017. Hence, these Tariff Orders do not revise the tariff of the Petitioners' Projects. Consequently, the Petitioners are entitled to the tariff of Rs.8.40 per unit, as agreed to, under the PPAs.

- (d) The Hon'ble Supreme Court, in the case of *BESCOM –Vs- Konark Power*, has held that, once the tariff has been agreed upon in the PPA, even the Regulator cannot change it. Further, the Hon'ble Supreme Court, in the case of *Gujarat Urja Vikas Nigam Ltd.,-Vs- Solar Semiconductor Power Company (India) Pvt.Ltd., and others* (Civil Appeal No.6399 of 2016, decided on 25.10.2017), has held that, once the tariff is agreed upon under the PPA, the same cannot be altered by exercising the inherent powers, as there is no inherent power vested in the Commissions, *de hors* the one conferred under the statute.
- (e) The Petitioners have commissioned the Projects, within the time period permitted by the 1st Respondent (HESCOM). In view of this mutual

agreement, there is no scope for the unilateral downward revision of the tariff, as effected by the 1st Respondent (HESCOM). The Projects of the Petitioners had experienced several hurdles, which can be termed as the *Force Majeure* Events, within the meaning of the Article 8 of the PPAs, and this has been adequately represented before the 1st Respondent (HESCOM) by the Petitioners. The pleas of the Petitioners have been considered and accepted. The entire basis for the grant of extension has been, the due consideration of the representation of the Petitioners.

- (f) The extension of time was granted, as per Article 2.5.6 of the PPAs. As a result of such extension, the Scheduled Commissioning Date and the Expiry Date newly determined, shall be deemed to be Scheduled Commissioning Date for the purposes of the Agreements. Having commissioned the Projects, within the COD agreed under the PPAs, the Petitioners are entitled to the tariff, as agreed under the PPA. The 1st Respondent (HESCOM) is not entitled to the Liquidated Damages, without adjudication by this Commission.
- (g) The extension of time, granted by 1st Respondent, does not mention about altering the tariff and specifically clarifies that all other terms and conditions of the PPA remains unaltered. Hence, the Petitioners are entitled for Tariff agreed to in the PPA at Rs.8.40 per unit.
- 5) Upon issuance of Notice, the Respondents 1, 3 and 4 appeared through their counsel. Respondent 2 remained unrepresented. The 3rd Respondent

(KREDL), has filed the Statement of Objections, stating that it is the Nodal Agency and formal party to the cases. The Respondents 1 and 4 have filed Memo to the effect that they have no Objections to the reliefs claimed by the Petitioners and would abide by the Orders to be passed in the cases.

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 Petitions, urging the relevant grounds and producing proper evidence, for the scrutiny of the Commission, in spite of the 1st Respondent admitting or not denying the occurrence of such *Force Majeure* Events?

(2) Whether the Petitioners have made out a case for deferment or extension of the Scheduled Commissioning Date of the Plants?

(3) What should be the tariff for the Projects, for the term of the PPAs?

(4) What Order?

7) After considering the submissions made by the learned counsel for the parties and the pleadings and other material placed on record, our findings on the above Issues are, as follows:

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- 8) **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 Petitions, urging the relevant grounds and producing proper evidence, for the scrutiny of the Commission, in spite of the 1st 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 these cases also.
- (b) Therefore, we answer issue No.(1), in the affirmative.
- 9) **ISSUE No.(2):** *Whether the Petitioners have made out a case for deferment or extension of the Scheduled Commissioning Date of the Plants?*
- (a) We note that, under the Article 2.5 of the PPAs, extension of time for commissioning the Projects can be granted, if the SPDs are prevented from performing their 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 PPAs. Under Article 8 of the PPAs, 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 Petitioners or the SPDs, in any manner, were negligent in performing their obligations under the PPAs.

- (b) In these two cases, the PPAs are executed on 13.07.2015 and 14.07.2015. The Conditions Precedent had to be achieved within 365 days, from the date of signing the PPAs and the Projects had to be commissioned within 18 months from the date of signing the PPAs. The achievement of the Conditions Precedent would include, obtaining of all the approvals by the SPDs.
- (c) The respective SPDs applied for the conversion of land on 12.03.2016 and 16.03.2016, nearly 8 months from the date of the PPAs. The land conversion Orders were passed on 25.07.2016. The land conversion Orders are passed, in about 4 months' time, from the date of applications, after receipt of required reports from the concerned authorities, which is reasonable. On the other hand, no explanation is given for the delay, on the part of the SPDs, in applying for the conversion of land. In fact, there is no averment, at all, in the Petition, on this aspect. Had the SPDs 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 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 SPDs, in applying for the conversion.

- (d) It is not averred as to when the SPDs/Petitioners made applications for the other approvals required under the PPAs and it cannot be made out if there was similar delay by the SPDs/Petitioners in making the applications for evacuation approval, achieving financial closure, etc.
- (e) We note that, 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 Petitioners to the Respondent describing the particulars of any *Force Majeure* Event, as soon as practicable, after its occurrence. Further, no reasons are quoted by the Petitioners, to show that they were prevented by the Events of *Force Majeure* mentioned in the PPAs in commissioning the projects within the scheduled commissioning dates. Hence, we hold that the Petitioners are not entitled to the extension of time, as provided in the relevant clauses of the PPA.
- (f) Therefore, we answer Issue No. (2), in the negative.
- 10) **ISSUE No.(3):** *What should be the tariff for the Projects, for the term of the PPAs?*
- (a) Article 5.1 of the PPAs read, 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 Petitioners' case that, the Tariff Orders dated 30.07.2015 and 12.04.2017, are not applicable to the Projects, as they have been commissioned within the extended period of commissioning, granted by the 1st Respondent (HESCOM). It is the submission of the Petitioners that the 1st Respondent (HESCOM) has granted extension of time by 6 months, after considering the *Force Majeure* Events, as provided in the PPAs and hence, the tariff of Rs.8.40 per unit, should not be altered. It is also stated by the Petitioners that, the 1st Respondent (HESCOM), while granting extension of time, vide letters dated 04.02.2017, had not mentioned about altering the tariff and had stated that all other terms of the PPAs remain unaltered.

(c) The Projects are commissioned on 03.07.2017. The Generic Tariff Order dated 12.04.2017, is applicable for the Projects, commissioned during the period, from 01.04.2017 to 31.3.2018. The PPA provides that, the tariff as on the date of commercial operation, would be applicable for the Project, if it is 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) Further, in the decision of the Hon'ble Appellate Tribunal for Electricity, in Appeal No.221/2016 and others, dated 07.05.2018 (*Savitha Oil Technologies Ltd vs KERC & another*), it has been held that, the tariff, as on the COD, is applicable for a Project and the tariff should not be linked to the date of signing or approval of the PPA. The relevant portions of the judgment are extracted below:

“xi. Further, it is a settled practice under the Section 62 of the Act that tariff determination process under various regulations for a new project begins from the COD of the said project as per extant regulations of the control period where COD of the project takes place. Subsequently, the tariff of such project is adjusted based on regulations/orders of the subsequent control period and it is not linked to the date of signing/approval of the PPA. If the PPA is approved at a later date or in other control period, the tariff is applicable from the COD date as per prevalent regulation at that time.

.....
xiv. In the present case too after carefully considering the provisions of the Act, 2004 Regulations, 2005 Order, 2009 Order, earlier judgement of this Tribunal and keeping in view the interest of the consumers it would be correct to draw a conclusion that the tariff applicable to the Appellants' WPPs would be as per the 2005 Order during which COD of the WPP has happened. The same corollary is applicable to other WPPs having COD is in some other control period.”

- (f) The ratio of the above judgments of the Hon'ble Supreme Court and of the Hon'ble Appellate Tribunal for Electricity, is applicable to the Petitioner's case also. The judgments, cited by the Petitioners, would not be applicable, as the facts and circumstances of the cases decided therein are different. Hence, we hold that, the Petitioners' Plants are entitled to the tariff of Rs.4.36 per unit, for the term of the PPAs, as per the Generic Tariff Order dated 12.04.2017, prevalent on the date of commissioning of the Projects.
- (g) We note here that, the Petitioners (SPVs) took the risk of implementation of the Project, more than a year after the execution of the PPAs, with barely 5 months left for commissioning of the projects, as agreed to in the PPAs

and could not do it, for certain reasons and events, which we have held to be not falling under the *Force Majeure* clause of the PPAs.

- (h) We have held that, the Petitioners are not entitled to the extension of time to commission the Projects. Thus, for not complying with the timelines for Conditions Precedent and commissioning of the Projects, as mentioned in the PPAs, the Petitioners are also required to pay damages for such delay, as per the Articles 2.2 and 2.5.7 of the PPAs. 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.
- (j) Therefore, we answer Issue No.(3), as above.

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

For the foregoing reasons, we pass the following:

ORDER

- (a) The Petitioners are 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 PPAs, as per Article 5.1 of the PPAs;

- (b) The Petitioners are also liable to pay damages, as provided under Articles 2.2 and 2.5.7 of the PPAs;
- (c) The office is directed to process the supplemental PPAs for approval of the Commission; and,
- (d) The petitions are disposed of, accordingly.

The original of this Order shall be kept in OP No.228/17 and a copy, thereof, in OP No.229/17.

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

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

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