

No.: N/301/17

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

Dated : 18th January, 2018

Present:

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

OP No. 144/2017

BETWEEN:

M/s Alles Solar Private Limited,
No.549, 12th Cross, Ideal Homes,
Raja Rajeshwari Nagar,
Bengaluru – 560 098.

..

PETITIONER

[Represented by Shri Gangadhar S M, Advocate]

AND:

1) Bangalore Electricity Supply Company Limited,
Corporate Office, K.R. Circle,
Bengaluru – 580 001.

2) Chief Electrical Inspector to Government,
Nirmana Bhavan, 2nd Floor, P.B. No.5148,
Dr. Rajkumar Road, Rajajinagar,
Bengaluru – 560 010.

3) Karnataka Power Transmission Corporation Limited,
Cauvery Bhavan, K.G. Road,
Bengaluru – 560 001.

..

RESPONDENTS

[Respondents-1 and 3 represented by Shri Shahbaaz Husain, Advocate]

ORDERS

- 1) This Petition is filed under Section 86(1)(f) of the Electricity Act, 2003 praying to direct the 1st Respondent to make payment at the tariff of Rs.8.40 per unit for the energy generated and supplied from the Petitioner's 1 MW Solar project as agreed in the Power Purchase Agreement (PPA) dated 04.07.2015 and SPPA dated 02.09.2016, for the entire term of the PPA.

- 2) The submissions made in the Petition, in support of the prayer, may be summarised as follows:
 - (a) Pursuant to the Solar Policy issued by the Government, the Nodal Agency, Karnataka Renewable Energy Development Limited (KREDL) invited online applications on 09.10.2014 from the eligible individual agricultural land owning farmers to become Solar Power Project Developers (SPDs). After evaluation of the applications received, the KREDL accepted the application of Smt. Devubai (SPD) and issued letter of Allotment dated 17.03.2015 instructing her to execute the Power Purchase Agreement (PPA) with the 1st Respondent. The SPD planned to develop a solar power project of 1 MW capacity at Sy.No.11, Anumanahalli Village, Kutgal Hobli, Ramanagara Taluk, Ramanagara District.

- (b) On 04.07.2015, a PPA was signed between the 1st Respondent and the SPD with the tariff of Rs.8.40 per unit. The plant had to be commissioned before 03.01.2017. The PPA was approved by the Commission, vide letter dated 01.09.2015.
- (c) On 01.11.2015, the SPD requested the 1st Respondent to provide an estimate for power transmission line and other necessary requirements. The SPD applied to the 3rd Respondent on 16.11.2015 for evacuation approval. The 3rd Respondent communicated Tentative Evacuation Approval on 22.06.2016, a revised tentative evacuation approval on 26.09.2016 and, the regular evacuation scheme on 13.10.2016. Though request was made to the 3rd Respondent for sparing the bay land at Jalamangala Sub- Station for lease on 23.06.2016, the Petitioner was informed to pay the lease amount on 24.12.2016 and on the lease amount being paid on 29.12.2016, the sparing of bay land was confirmed only on 11.01.2017.
- (d) The SPD applied on 04.01.2016 to the Deputy Commissioner (DC), Ramanagara District, for conversion of the agricultural land and the conversion Order was issued by the DC on 25.04.2016.
- (e) The Petitioner approached Karnataka Bank Limited, for financial assistance and the said Bank sanctioned a Term Loan of Rs.5 Crore on 12.07.2016 by estimating the Project Cost as Rs.701.97 Lakhs.

- (f) As per Article 2.1 of the PPA, all the statutory clearances were obtained and submitted to the 1st Respondent, by the SPD's letter dated 14.07.2016.
- (g) The SPD, at this stage, formed an SPV (the Petitioner) to implement the Solar Project and the Petitioner SPV executed a SPPA dated 02.09.2016 with the 1st Respondent. The Commission approved the SPPA, vide letter dated 07.10.2016.
- (h) Though the PPA was signed on 04.07.2015, the Commission gave its approval on 01.09.2015 and the copy of the PPA was handed over to the SPD a week later, leading to a delay of two months. There was a delay of about four months in issuing the land conversion Order. The delay was about eleven months for granting evacuation approval. The delay was six months for sparing the bay land for lease. The delay in giving the final estimate for transmission line was thirteen months. 23 to 27 days' time was taken for approval of the Switch Gear and Metering Cubicle.
- (i) Owing to the above reasons, which were not within the control of the Petitioner, the Project could not be completed in time and the Petitioner was compelled to seek extension of six months' time for Commercial Operation Date (COD) of the Plant by letters dated 09.12.2016 and 31.12.2016 and as per the 1st Respondent's format, on 09.01.2017. The 1st Respondent, vide

letter dated 03.02.2017, extended the COD by six months, i.e., till 03.07.2017. But, vide its letter dated 31.03.2017, the 1st Respondent informed that the extension of time granted for COD is subject to the condition that "*the tariff applicable, if any, is subject to Hon'ble KERC / GoK approval*". Further, vide letter dated 15.04.2017, 1st Respondent, informed the Petitioner, it has to approach the KERC, seeking approval for any extension of the COD, which is not proper. The Solar Power Plant was successfully commissioned on 23.06.2017.

- (j) The 1st Respondent cannot reduce the tariff of Rs.8.40 per unit, as agreed to under the PPA and the SPPA, without there being any delay on the part of the Petitioner and as per Article 2.1 of the PPA, all the statutory clearances were obtained and submitted to Respondent No.1 on 14.07.2016, well within the time-frame fixed.
 - (k) The Petitioner having availed the term loan from the Bank and other loans for implementation of the Project at the prevailing interest rates and bound by the terms and conditions at the time of sanction of loan during July 2016, cannot be made to suffer, for no fault of it, in implementing the Project.
- 3) Upon issuance of Notice, Respondent No.1 appeared through its learned counsel and filed its Objections, which may be summed up as follows:

(a) As the Petitioner was unable to execute the Project in a timely manner, it sought from Respondent No.1, the extension of time for commissioning the Project by six months under the *force majeure* conditions. As several requests for extension of scheduled commissioning date were received from the Solar Power developers, the Government of Karnataka issued an Order dated 24.11.2016, directing all the Electricity Supply Companies (ESCOMs) to constitute a 3-member Committee to consider and dispose of the request of farmers / developers. The Committee constituted by Respondent No.1 in its meeting held on 23.01.2017 considered the Petitioner's request.

(b) As per the documents furnished by the Petitioner to the Committee, the following were the reasons assigned for the delayed execution of the project:

(1) *Land Conversion:*

- | | | | |
|-------|---------------------------|---|------------------|
| (i) | Date of Submission | : | 04.01.2016 |
| (ii) | Date of Conversion | : | 25.04.2016. |
| (iii) | Delay in getting approval | : | Nearly 3 months. |

(2) *KPTCL Evacuation Approval (Regular):*

- | | | | |
|-------|---------------------------|---|-------------|
| (i) | Date of submission | : | 16.11.2015. |
| (ii) | Date of approval | : | 13.10.2016. |
| (iii) | Delay in getting approval | : | 11 months. |

(c) The Committee, opined that, approval may be accorded for extension of Scheduled Commercial Operation Date (SCOD) upto six months, considering Article 2.5 of the PPA, as there was a delay in the issuance of approvals by

various Government entities. Accordingly, Respondent No.1 informed the Petitioner on 03.02.2017 about the extension of time by six months for achieving scheduled commercial operation.

- (d) The subject was placed before the 81st Meeting of the Board of Directors of the 1st Respondent (BESCOM) held on 09.02.2017, for evaluation / disposal of the requests of land owing farmers / SPVs for extension of time for achieving COD, and directions were sought from the Government regarding extension of the SCOD.
- (e) The Commission, vide letter dated 16.03.2017, informed all the ESCOMs not to allow any extension of time beyond the Scheduled Date of Commissioning, if any, as per the original PPA, without obtaining prior opinion of the Commission. Further, the Commission vide letter 05.04.2017, directed the ESCOMs to advise all Solar developers / SPVs, to approach the Commission and seek approval of the extension of time.
- (f) The Government of Karnataka vide letter dated 25.04.2017, requested the Commission to consider approving the extension of the COD of the Solar Power Projects of the land owning farmers.
- (h) In respect of extension of the Project duration of already awarded Solar Power Projects, the Ministry of New and Renewable Energy (Government of

India) have issued a letter bearing No.30/106/2014-15/ NSM dated 28.07.2017, addressed to the Principal Secretaries (Power / Energy) of State Governments, which is stated below:

“Ministry had requested not to give time extension if all the obligations are fulfilled by the concerned State Government Authorities / PSUs etc in a project. However, if there are delays of any kind on the part of State Government Authorities / PSUs like land allotment, transmission / evacuation facilities, connectivity permission or force majeure, the competent authority in the State / SECI / NTPC etc may consider providing extension of the time duration strictly as per the Contractual Agreement.

It is also to be clarified that if in project equipment / materials have been purchased / ordered and substantial advances paid as per original completion date, and there is a delay on part of the State organizations regarding land, transmission or any such reasons, the extension of the project may be allowed.”

- (j) With the above submissions, Respondent No.1 has requested the Commission to issue appropriate directions in the case.
- 4) Respondent No.2 remained absent even after service of Notice. Respondent No.3, though appeared through an Advocate, has not filed any pleadings or submitted arguments.
- 5) We have heard the learned counsel for the parties and perused the material on record.

- 6) The following issues would arise for our consideration:
- (1) Whether the Petitioner has made out a case for deferment / extension of the Scheduled Commissioning Date of its Plant?
 - (2) Whether the grant of extension of six months' time for the Scheduled Date of Commissioning of the Petitioner's plant by Respondent No.1 can be subject to legal scrutiny by the Commission and whether Respondent No.1 is right in granting such extension?
 - (3) What should be the tariff for the Project for the term of the PPA?
 - (4) What Order?
- 7) After considering the submissions made by the learned counsel for the parties and other material placed on record, our findings on the above issues are as follows:
- 8) As Issues Nos. (1) to (3) are interconnected, we deal with these issues together.

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

ISSUE No.(2): *Whether the grant of extension of six months' time for the Scheduled Date of Commissioning of the Petitioner's plant by Respondent No.1 can be subject to legal scrutiny by the Commission and whether Respondent No.1 is right in granting such extension?*

ISSUE No. (3): *What should be the tariff for the Project for the term of the PPA?*

- (a) It would be useful to extract the relevant Articles of the PPA that are necessary for examining the issues involved in this case.

“2.1 Conditions Precedent:

The obligations of BESCO and the SPD under this Agreement are conditional upon the occurrence of the following in full within 365 days from the effective date.

2.1.1 (i) *The SPD shall obtain all permits, clearances and approvals (whether statutory or otherwise) as required to execute and operate the Project (hereinafter referred to as “Approvals”):*

(ii) The Conditions Precedent required to be satisfied by the SPD shall be deemed to have been fulfilled when the SPD shall submit:

(a) The DPR to BESCO and achieve financial closure and provide a certificate to BESCO from the lead banker to this effect;

(b) All Consents, Clearances and Permits required for supply of power to BESCO as per the terms of this Agreement; and

(c) Power evacuation approval from Karnataka Power Transmission Company Limited or BESCO, as the case may be.

2.1.2 *SPD shall make all reasonable endeavours to satisfy the Conditions Precedent within the time stipulated and BESCO shall provide to the SPD all the reasonable cooperation as may be required to the SPD for satisfying the Conditions Precedent.*

2.1.3 *The SPD shall notify BESCO in writing at least once a month on the progress made in satisfying the Conditions Precedent. The date, on which the SPD fulfills any of the*

Conditions Precedent pursuant to Clause 2.1.1, it shall promptly notify BESCOM of the same."

"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 BESCOM Event of Default; or
- (b) Force Majeure Events affecting BESCOM; 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 BESCOM through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the SPD or BESCOM, or till such time such Event of Default is rectified by BESCOM.

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.

2.5.6 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."

"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 ...ESCOM 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;"

"5.1 Tariff Payable:

The SPD shall be entitled to receive the tariff of Rs.8.40 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) We note that under the Article 2.5 of the PPA, extension of time for commissioning the Project can be granted, if the SPD (now replaced by the Petitioner) is prevented from performing its obligations due to the BESCO's 'Event of Default' or *Force Majeure* events affecting the SPD. Also, Article 8.3 of the PPA, while defining the *Force Majeure* events, specifies that the non-performing party should give a written Notice to the other party so as to be entitled for excuse of its obligations and further, subject to the condition that *Force Majeure* event was 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 or the SPD, in any manner, was negligent in performing its obligations or meeting milestone dates under the PPA.
- (c) The Petitioner contends that, the delay in handing over approved copy of the PPA is one of the causes for the delay in implementing the Project. We note that the recitals in the PPA would reveal that, the copies of the signed PPA were delivered to the parties on 04.07.2015. A signed copy of the PPA would be sufficient to proceed with the implementation of the Project. The Petitioner has not mentioned the authority or institution which refused the application of the SPD for loans, approval, etc., required for Project implementation for want of approved copy of the PPA. We also note that the Petitioner has not stated the non-receipt of the approved copy of the PPA as one of the reasons for delay in project implementation while seeking

extension of the Scheduled Commissioning Date from Respondent No.1. Thus, we are unable to accept this as a reason for causing delay in the commissioning of the Project.

- (d) We note that the SPD applied for conversion of land on 04.01.2016, i.e. six months after executing the PPA and that this delay is not explained by the Petitioner. We also note that after payment of land conversion charges by the SPD on 21.04.2016, the land conversion Order was passed by the Deputy Commissioner, Ramanagara District on 25.04.2016, within a reasonable period of less than four months from the date of application, considering that the SPD does not appear to have made any efforts to expedite the process of such approval, as the details of such efforts have not been disclosed by the Petitioner. Hence, we are unable to accept the Petitioner's claim that, there was a delay in granting of the approval for conversion of land. In fact, there is a delay on the part of the SPD in applying for the conversion of land, which is likely to have led to delay in the Project implementation.
- (e) The SPD applied to Respondent No.3 for evacuation approval on 16.11.2015, more than four months after executing the PPA. This delay is not explained. The tentative evacuation approval granted on 22.06.2016, was revised on 26.09.2016. The Petitioner has not given the details of any steps taken by the SPD in expediting the process of grant of evacuation approval. It would appear that the project implementation was taken up seriously only after the

Petitioner was assigned the project by the SPD leading to grant of regular evacuation approval on 13.10.2016. There being a delay of four months by the SPD in applying for evacuation approval, the Petitioner cannot now claim that there is a delay in getting evacuation approval and, therefore, it is entitled for extension of the date of commissioning of its Plant.

- (f) We note that the SPD informed Respondent No.1, in its letter dated 02.07.2016 (mentioned as '14.7.2016' in the Petition), that all the consents and clearances were obtained, EPC vendors identified, line estimate prepared, work of levelling the land started and that the Project would be commissioned within the next couple of weeks. While, it is also stated that, the loan approval letter from the Karnataka Bank is submitted with the letter, the credit sanction intimation of the Bank at ANNEXURE-P11 is dated 12.7.2016, indicating that Financial Closure was not achieved within 365 days, as required under Article 2.1 of the PPA.
- (g) The Petitioner claims that the approval of MCVCB Switchgear and 11 kV HT Metering Cubicle has taken 23 to 27 days, causing delay in implementation of the Project. This pleading, however, is not substantiated by producing the relevant documents and furnishing the details of the efforts made by the Petitioner to get it granted without delay. Hence, we are unable to accept that there has been a delay in grant of approval of switchgear and cubicle,

making the Petitioner entitled for extension of the time specified for commissioning the Petitioner's Plant.

- (h) It is now a settled law that the *Force Majeure* clause in the PPA has to be strictly interpreted. Admittedly no notice, as contemplated under the clause, was issued by the Petitioner to Respondent No.1. The grounds adduced by the Petitioner to support its claim for extension of time specified for commissioning its plant do not fall under the events of *Force Majeure*, mentioned in the PPA. Hence, we hold that the Petitioner is not entitled for extension of time of commissioning its plant, as provided in the clauses of the PPA.
- (i) The delay in commissioning of the Petitioner's Plant, within the specified date, has an impact on the tariff applicable on the supply of power from the Plant to Respondent No.1. It is now a settled law that this Commission has the exclusive jurisdiction to determine the tariff for supply of electricity to a Distribution Licensee and it has to regulate the electricity purchase and the procurement process of the Distribution Licensees, including the price at which the electricity shall be procured from different agencies through PPAs. Therefore, even in the absence of a specific term in the PPA, the extension of time granted by Respondent No.1, which alters the tariff payable for supply of power by the Petitioner, requires the approval of PPA. As discussed earlier the extension of time for commissioning of the plant granted by Respondent

No.1, which entitles the Petitioner to a higher tariff is not justified and cannot be approved. We note that any payment of higher tariff would result in higher tariff to the consumers and, thereby, affect public interest.

- (j) We may note here that the tariff agreed in the PPA was Rs.8.40 per unit, which was the generic tariff fixed by the Commission, in Order dated 10.10.2013, based on the then capital cost required for setting up Solar plants. This tariff was revised in the Commission's Order dated 30.07.2015 to Rs.6.51 per unit and further the tariff of Rs.6.51 per unit was revised to Rs.4.36 per unit, in the Commission's Order dated 12.04.2017, considering the substantial reduction in Capital Cost involved in setting up Solar Plants, from time to time. Admittedly, the Petitioner was sanctioned financial assistance in July, 2016 and would not have to incur higher capital cost as reckoned in the Generic Tariff Orders dated 10.10.2013 and 30.07.2015. Further, the Petitioner was well aware of the limited time available to it for completing the Project and that the SPD was not diligent in taking effective steps in implementation of the project, when it decided to take over the project from the SPD.
- (k) Thus, we are of the considered opinion that the Petitioner is entitled to receive the varied tariff of Rs.4.36 as fixed by the Commission in its Order dated 12.4.2017, as applicable on the date of commercial Operation of the Petitioner's project, as per Article 5.1 of the PPA.

(l) Therefore, we answer Issue Nos.(1), (2) and (3), as above.

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

For the foregoing reasons, we pass the following:

ORDER

- (a) The Petition is dismissed and the Petitioner is not entitled to any of the reliefs sought;
- (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; and,
- (c) The Petitioner is also liable to pay Liquidated Damages, as provided under Articles 2.2 and 2.5.7 of the PPA.

Sd/-

(M.K. SHANKARALINGE GOWDA)
CHAIRMAN

Sd/-

(H.D. ARUN KUMAR)
MEMBER

Sd/-

(D.B. MANIVAL RAJU)
MEMBER