

No. N/82/2020

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

Dated: 30.12.2021

Present

Shri Shambhu Dayal Meena	: Chairman
Shri H.M. Manjunatha	: Member
Shri M.D. Ravi	: Member

OP No.35/2020

BETWEEN:

M/s Mayfair Renewable Energy (I) Private Limited,
A Company Registered under the
Companies Act, 1956/2013,
Having its Registered Office
At 2898/2, 1st Floor, Ward No.5,
Bus Stand road,
Shiggaon,
Haveri Dsitric-581 205.
(Represented by its Authorised Signatory)

.....PETITIONER.

(Represented by Ms. Poonam Patil, Advocate)

AND:

Hubli Electricity Supply Company Limited,
A Company incorporated
under the Companies Act, 1956
having its Registered Office at
Nava Nagar, P.B. Road,
Hubli-560 025.
[Represented by its Managing Director)

....RESPONDENT.

(Represented by Ms. Sahana Devanathan,
Senior Associate, Advocate,
for M/s Indus Law Advocates)

ORDERS

1. The petitioner has filed the petition under Section 86 (1) (f) of the Electricity Act, 2003, praying for the following reliefs to:

- a) Direct the Respondent to forthwith open a monthly unconditional revolving and irrevocable letter of credit in favour of the Petitioner Company in compliance with clause 13.6.1 of the Power Purchase Agreement dated 31.05.2016;
- b) Direct the Respondent to reimburse the cost of penalty to be levied on the Petitioner by their Bankers as per letter dated 30.11.2019 vide Annexure-K; and
- c) Pass such other and further reliefs as this Hon'ble Court deems fit in the facts and circumstances of the case, in the interest of justice and equity.

2. The facts relevant for the disposal of the present case may be stated as follows:

- a) The petitioner and the respondent entered into the PPA dated 31.05.2016 (Annexure-C) for sale of energy to the respondent as per the terms and conditions stated therein.
- b) As a measure of Payment Security Mechanism the respondent was required to furnish Letter of Credit (LC) as provided in Article 13.6 of the PPA, before the commissioning of the Solar Power Project.
- c) The petitioner has stated that in spite of intimation and reminders to open LC, the respondent failed to open it within the time stipulated. The

petitioner has also stated that the Respondent has failed to pay the tariff invoices within the due dates.

d) The petitioner approached its bank for Review/Renewal of Credit Facilities, accordingly, the Union Bank of India by its letter dated 30.11.2019 (Annexure – K) sanctioned the Review/Renewal of the Credit Facilities. As per the said renewal of credit facilities the petitioner was required to furnish Primary and Collateral Securities to the Financier – Bank within March 2020, in default the petitioner would be liable to pay 1% penal interest on the entire outstanding amount for delay in creation/perfection of securities.

e) The LC to be opened by the respondent in favour of petitioner as per Article 13.6 of the PPA, was also required to be furnished to the Financier - Bank as Collateral Security in terms of sanction letter for Review/Renewal of Credit Facilities (Annexure – K).

f) Therefore, the petitioner has filed the present petition before this Commission on 10.09.2020 praying for the above reliefs.

3. The Respondent appeared through counsel and filed memo dated 25.03.2021, requesting to dispose of the petition for the reasons stated in the memo.

a) It is stated that the Respondent has already opened Letter of Credit issued on 11.12.2020 by State Bank of India in favour of the petitioner. That fact is intimated to the petitioner by the State Bank of India, Hubli

Branch. The copy of Letter of Credit is produced along with the memo as document No 1.

b) Regarding the claim to reimburse the cost of penalty to be imposed on the petitioner, it is stated that the petitioner has not produced any evidence for having imposed the levy of penalty by the financier – Bank. Thereby that prayer does not survive.

c) For the above reasons the Respondent has requested to dismiss the petition.

4. The learned counsel for the petitioner filed memo dated 02.04.2021 producing copy of the letter dated 30.03.2021 written by petitioner to the General Manager of the Respondent, stating that certain corrections or amendments to the Letter of Credit were required and unless those corrections or amendments were effected the Letter of Credit in question could not be considered as valid document of Letter of Credit. The learned counsel for the petitioner further filed another memo dated 05.04.2021 producing copy of the letter dated 03.04.2021 issued by Union Bank of India to the petitioner showing the details of penal interest charged for the years 2018-19 to 2020-21 totally amounting to Rs.1,69,40,812.15, towards non perfection of securities by the petitioner.

5. The respondent opposed the correctness and validity of the letters dated 30.03.2021 and 03.04.2021 filed by the petitioner along with memos as noted above and filed common statement of objections dated 23.08.2021.

6. The petitioner filed three documents with memo dated 14.09.2021 in support of its contention that the LC dated 11.12.2020 issue by State Bank of India in favour of petitioner, requires corrections or amendments.

7. We have heard the learned counsel for the parties and perused the records. The following issues arise for our determination from the rival contentions of the parties.

Issue No.1: Whether the Letter of Credit (LC) in question dated 11.12.2020 requires any corrections or amendments?

Issue No.2: Whether the petitioner proves that the penal interest of Rs.1,69,40,812.15 imposed against it as per the letter dated 03.04.2021 of the Union Bank of India, Chennai, is towards the non-perfection of security caused due to delay in opening of the LC by the respondent?

Issue No.3: What Order?

8. After considering the rival contentions of the learned counsel for the parties and on perusal of the records, our findings on the above issues are as follows:

9. Issue No.1: Whether the Letter of Credit (LC) in question dated 11.12.2020 requires any corrections or amendments?

a) The contentions urged by the petitioner are as follows:

(i) The petitioner has contended that in the LC issued on 11.12.2020 in its favour, the column "Advising Bank" is incorrectly described as "State Bank of India, SME Branch, VIR Annexe CTS No.365/1B 2, Ward No.1, Near Sarvodaya Circle, Kusugal Road, Keshwapur, Hubli", and it should have been described as "Union Bank of India, Chennai-IFB,

No.9, Riaz Garden, Kodambakkam, Chennai". This Union Bank of India, IFB Branch, Chennai, is the bank in which the respondent (HESCOM) has been remitting the monthly tariff invoices.

(ii) The petitioner has further contended that the opening advise should be sent by inter-bank confirmatory communication Structured Financial Messaging System (SFMC) through bank to Union Bank of India IFB Branch, Chennai.

(iii) The petitioner has also further contended to furnish the particulars for the basis of the amount of the LC.

b) The respondent in reply stated that the LC is required to be opened at the Union Bank of India, IFB Branch, Chennai, as contended by the petitioner, is not a condition prescribed under the PPA, therefore, that contention is untenable.

c) On considering the rival contentions, we are of the considered opinion that the beneficiary has to be comfortable with the place of "Advising Bank", in a LC. Article 13.6 of the PPA providing for opening of LC states that the respondent (HESCOM) through a scheduled bank at Hubli (identified place) shall open a LC in favour of the petitioner – developer with such other terms & conditions stated therein. Further it also provides that the respondent (HESCOM) shall cause the scheduled bank issuing the LC to intimate the petitioner - developer in writing regarding establishing of such irrevocable LC. However, the said Article is silent as to the specification of "Advising Bank" to be inserted in the LC. In the present

case, the respondent (HESCOM) approached the State Bank of India, Commercial Branch, Hubli, for issuance of LC. The Advising Bank is shown as State Bank of India, SME Branch, VIR Annexe CTS No.365/1B 2, Ward No.1, Near Sarvodaya Circle, Kusugal Road, Keshwapur, Hubli. The respondent (HESCOM) should have asked the choice of the petitioner before proposing the place of 'Advising Bank' to be inserted in LC.

- d) We can presume that the intimation to Union Bank of India, IFB Branch, Chennai, regarding opening of LC would be communicated by the Issuing Bank complying SFMS. Therefore, a direction to that effect is not necessary.
- e) Article 13.6.2 of the PPA provides guidelines for arriving the amount for which LC should be opened. In the present case the LC is opened for Rs.1,13,20,000. It is not shown that the amount so arrived is incorrect.
- f) For the above reasons, we hold that a correction/modification of the 'Advising Bank' to be inserted in the LC as noted above may be directed to the respondent (HESCOM). Issue No.1 is held accordingly.
10. Issue No.2: Whether the petitioner proves that the penal interest of Rs.1,69,40,812.15 imposed against it as per the letter dated 03.04.2021 of the Union Bank of India, Chennai, is towards the non-perfection of security caused due to delay in opening of the LC by the respondent?
- a) The respondent (HESCOM) was required to open the LC in favour of the petitioner not later than one month before the commencement

of supply. The project has been commissioned on 28.03.2018 as per Commissioning Certificate Annexure-F. However, the respondent (HESCOM) opened the LC dated 11.12.2020 subsequent to filing of the present petitioner. One cannot deny that there was inordinate delay in opening the LC by the respondent (HESCOM). The terms of the PPA do not provide for any monetary compensation for the delay in opening the LC.

b) The Sanction Letter for Review/Renewal of Credit Facilities dated 30.11.2019 (Annexure-K) issued by Union Bank of India, Chennai, addressed to the petitioner states that the review/renewal of the loan account was approved with the terms & conditions stated in the said letter. It is shown in this letter that the different nature of loan amounts and interest/commission etc., were re-scheduled, subject to providing the primary and collateral securities as follows:

Primary Security:

- *Exclusive charge on the entire project assets (fixed movable and immovable assets including project land) both present and future.*
- *Exclusive charge on all project documents, titles, insurance policies of the project.*
- *Exclusive charge on the hypothecation of entire current assets of the project both present and future.*
- *Exclusive charge on the project TRA/ Escrow account.*

Collateral Security:

- *Pledge of 30% of the shares / equity (5400 numbers) held in the company by M/s. OPG Power Generation*

Private Limited and non-disposal undertaking for the balance shareholding. Additionally, we have negative lien or another 30% shares of the Company held by the promoters.

- *Charge on standby LC (BG) to be provided by the DISCOM (GESCOM) to the company for payment security.*

The said letter further states regarding the terms of other approvals as follows:

Other Approvals:

- *Further extension of timeline for creation/perfection of securities from 01.07.2019 to 31.12.2019 and waiver of 1% penal interest for delay in creation/perfection of securities up to from 01.07.2019 to 31.12.2019.*
- *Permission for granting 6 months' time i.e. up to March 2020 for furnishing SBLC/LG as payment security from GESCOM.*

Personal/Corporate Guarantee:

- *Corporate Guarantee of M/s OPG Power Generation Private Limited to be continued.*

Some of the material terms and conditions stated in this letter, relevant in this case may be noted as follows:

- *If the securities are not created and perfected by 31.12.2019, company to pay 1% penal interest for the entire loan amount.*
- *Company to pay charges @ 1.20% p.a. for extension of usance period at the time of extension.*
- *Company to submit SBLC/LG on or before March 2020 which has to be given by the HESCOM as payment security.*

- *Company to submit original Sale Deeds and other related documents for creation of equitable mortgage on project land immediately.*
- xxxxxxxxxxxxxxxx
- xxxxxxxxxxxxxxxx
- xxxxxxxxxxxxxxxx
- xxxxxxxxxxxxxxxx
- *Non-compliance of any of the sanction terms and conditions will attract Penal Interest of 1.00% p.a. for each till such time the terms are complied with subject to maximum of 2.00% p.a.*
- *All other existing terms and conditions of previous sanction/renewal shall continue.”*

c) The perusal of the above terms and conditions stated in the letter dated 30.11.2019 (Annexure-K) would show that apart from creating charge on the LC to be furnished by the respondent (HESCOM), the petitioner had not yet complied with creating charge on the project lands by producing original sale deeds and had not complied with certain other terms and conditions regarding furnishing of primary and collateral securities.

d) The averments in the petition regarding imposition of penal interest would lead to an inference that the penal interest was being imposed by the lender bank only for non-creation of the charge on the LC to be provided by the respondent (HESCOM). The petitioner does not say in the petition that it had complied with furnishing of all primary and collateral securities except creating charge on the LC to be furnished, which led to imposition of penal interest.

- e) Had the imposition of penal interest that would accrue as on the date of filing the petition, was due to the reason of non-creation of charge on LC to be opened, the petitioner would have quantified the penal interest and would have sought for the relief of recovery of the said amount. However, the petitioner has not taken such steps which would lead to an inference that the penal interest imposed if any was due to non-creation of charge on LC to be opened alone. In the subsequent pleadings also the petitioner has not placed any such material to establish that non-creation of charge on LC to be opened alone was the reason for imposition of penal interest, if any.
- f) Even assuming that there was such a claim by the lender-Union Bank of India as against the petitioner towards penal interest for non-creation of charge on LC as there was delay in opening the LC alone, the question is whether the respondent would be liable to reimburse the same. The liability of the respondent for payment of compensation for loss or damage caused by breach of any term of the contract is governed by the provisions stated in Section 73 of the Indian Contract Act, 1872. The relevant portion of the said Section reads as follows:

OF THE CONSEQUENCES OF BREACH OF CONTRACT

73. Compensation for loss or damage caused by breach of contract.- *When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or*

which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract. _____

Explanation - In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

- g) The delay in opening the LC by the respondent (HESCOM) is the breach of one of the terms of PPA entered between parties. The purpose of opening the LC is to ensure prompt payment of tariff invoices within the due dates. The Article 13.4 of the PPA provides for payment of late payment surcharge at the rate of 1.25% per month on the outstanding amount on tariff invoices, beyond the due date. The damages or compensation payable for delay in opening the LC is to be estimated taking into consideration the expenses incurred for recovery of the outstanding amount on the tariff invoices.
- h) The loss or damage which naturally arose in the usual course of things from such breach or which the parties knew, when they made the contract, to be likely to result from the breach of it, can only be recovered. Such compensation cannot be given for any remote and indirect loss or damage sustained by reason of the breach. Applying the above principles stated in Section 73 of the Indian Contract Act, 1872, it is clear that the respondent cannot be held liable for

reimbursement of the amount claimed by the lender-Union Bank of India as against the petitioner. In the present case the quantum of penal interest becoming due, due to delay in opening the LC by the respondent (HESCOM), cannot be considered as the loss or damage which naturally arose in the usual course of things from breach of the term of the contract by the respondent. At the time of entering into PPA, it was not made known to the respondent that the petitioner would agree for such term with its lender and the respondent would be made liable for delay in opening the LC. Therefore, we hold that even if there was a claim by the lender against the petitioner for penal interest, the respondent (HESCOM), cannot be made liable to pay or reimburse the same to the petitioner, as per the principles stated in Section 73 of the Indian Contract Act, 1872.

i) For the above reasons, we hold Issue No.2 in negative.

11. Issue No.3: What Order?

For the foregoing reasons, we pass the following:

ORDER

The petition is partly allowed holding that:

- a) the respondent (HESCOM) shall get the correction/ modification of the column 'Advising Bank' in the LC dated 11.12.2020 by inserting 'Union Bank of India, Chennai-IFB, No.9, Riaz Garden, Kodambakkam, Chennai,' in place of 'State Bank of India, SME Branch VIR Annexe CTS No.365/1B 2, Ward No.1, Near Sarvodaya Circle, Kusugal Road, Keshwapur, Hubli.'

b) the respondent (HESCOM) is not liable to reimburse the penal interest if any, imposed by the Financier-Union Bank of India, on the petitioner.

sd/-
(SHAMBHU DAYAL MEENA)
Chairman

sd/-
(H.M. MANJUNATHA)
Member

sd/-
(M.D. RAVI)
Member