

No.N/60/2020

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

Dated: 20.08.2020

Present

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

OP No. 22/2020

BETWEEN:

M/s Tepsol Photovoltaic Power
Ventures Private Limited,
A Company incorporated under the
Companies Act, 2013, having its
Registered Office at: 8-2-610/68/1,2,3,
5th Floor, Accord Blu,
Road No. 10, Banjara Hills,
HYDERABAD-500 034.

... PETITIONER

[Represented by Sri Sridhar Prabhu, Advocate]

AND:

Bangalore Electricity Supply Company Limited,
A Company incorporated under the
Companies Act, 1956
having its Registered Office
at K.R. Circle,
BENGALURU-560 001.

..... RESPONDENT

(Represented by its Managing Director)

ORDERS ON MAINTAINABILITY OF THE PETITION

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

- a) Call for records; and upon perusal of the same be pleased to;
- b) Declare that the COVID-19 and its effects that have led to disruption in the supply chain, engineering, procurement, construction of the Petitioner's Projects, the lockdown declared by the Government of India and Government of Karnataka and consequent non-availability of labour, intermittent functioning of Government offices, non-availability of the functionary officials, non-functioning of the Sub-Registrar offices, non-operation of public and material transports, non-operation of supplier's offices, factories and manufacturing facilities resulted into disruption and allied events thereby, constitute 'Force Majeure' events under the Power Purchase Agreements (PPAs) dated 31.01.2019 executed between the Respondent and Petitioner;
- c) Declare and direct that notwithstanding any Article in the PPA, the rights and obligations of the Parties shall stand revised to the extent granted herein by this Commission and timelines are amended accordingly for the purpose of interpretation of the PPA, including but not limited to Articles 5, 12 and 16 of the PPA;

- d) Declare and direct the Respondent that in the event the pandemic continues to spread and unforeseen circumstances arise, lockdown, restrictions or any events hindering the discharge of the obligations under the PPA by the Petitioner, such corresponding period of disruption owing to the COVID-19 and its allied events shall be considered as a 'Force Majeure' event and such period shall accordingly be further extended in the PPA: and
- e) Pass such other and incidental orders as may be deemed appropriate under the facts and circumstances of the case.
2. a) On presentation of the petition and going through the relevant facts stated in the petition, the Commission thought it fit to hear regarding maintainability of the petition in view of the provisions contained in the Article 5.7 of the PPAs regarding 'Extension of Time'. Accordingly, the date for hearing on maintainability of the petition was fixed on 14.07.2020, through Video Conferencing.
- b) Accordingly on 14.07.2020, the learned Counsel for the Petitioner submitted his arguments on the maintainability of the petition. He mainly relied upon Annexure-P47, the letter dated 27.05.2020 written by the General Manager (Ele), Power Purchase, BESCO, Corporate Office, Bengaluru – the Respondent BESCO, contending that the Respondent has through this letter requested the Petitioner to file a petition before this Commission for the appropriate reliefs as per Article 5.7 of PPAs dated 31.01.2019, thereby

this petition is filed. The other contention urged by the learned Counsel for the Petitioner, relates to the merit of the claim for extension of time on the ground of continuation of the present COVID-19 pandemic as the 'Force Majeure' event. Further, he submitted on merit the Petitioner has a strong case. Therefore, he submitted that the petition may be admitted and the notice may be issued to the Respondent to proceed further for the disposal of the case.

3. The material facts required for the disposal of the present controversy involved in this case, may be stated as follows:

a) 'TEP Solar India Mauritius', the single business entity, is the successful bidder for establishing 20 MW Solar Power Plants in each of the four taluks in different districts of Karnataka State, pursuant to the Tender Notification No.KREDL/07/SG/RPO/100MW (05 Taluks) F-533 (B)/2018-19 dated 11.10.2018. The KREDL issued four Letters of Award and Allotment Letters (LoAs) each dated 10.12.2018 (Annexure-P1 collectively) for implementation of 20 MW Solar Photovoltaic Power Projects in each of the taluks stated in the LoAs. As per the terms of RfP TEP Solar India Mauritius incorporated the Petitioner as SPV for developing the said Solar Photovoltaic Power Projects.

b) The Petitioner entered into four PPAs each dated 31.01.2019 with the Respondent for the development of Solar Power Projects as per the terms & conditions stated in the PPAs. It may be noted that the terms & conditions

of all the PPAs are exactly similar. In the present petition, the Petitioner has prayed for extension of time for commissioning the Solar Power Projects relating to three PPAs of Gajendragad & Mundargi taluks of Gadag district and Gurmatkal taluk of Yadgir district. All these three PPAs (Annexure-P2 collectively) were approved by this Commission on 25.03.2019 and the same was communicated vide letters dated 28.03.2019 (Annexure-P3 collectively) to the Respondent and copy marked to the Petitioner. The 'Effective Date' is defined as the date of getting concurrence from KERC on the PPA. The definition of Scheduled Commissioning Date provides that the Solar Power Project should be commissioned within eighteen months from the 'Effective Date'. Article 4.1 provides that Conditions Precedent are to be fulfilled prior to Commercial Operation Date (COD). Therefore, the Solar Power Projects are to be commissioned on or before 24.09.2020. Admittedly, the Solar Power Projects involved in this case are not yet commissioned. The Petitioner has filed the present petition for the declaration that the whole period covering the continuation of COVID-19 pandemic as 'Force Majeure' event. The declaration of such event has the effect of extension of period for commissioning the Solar Power Project for the period covered under COVID-19 Pandemic. In essence, the present petition is for an extension of period beyond Scheduled Commissioning Date for commissioning the Solar Power Project. One has to find out the real nature of the petition and the prayer made in it, considering the averments made in the petition, as a whole.

c) For the purpose of deciding the maintainability of the petition, Article 5.7 of the PPA is relevant, which provides the terms & conditions for allowing extension of time. The said Article 5.7 reads as follows:

“5.7 Extension of Time

5.7.1 - *In the event that the Developer is prevented from achieving the progress in fulfilling the Conditions Precedent within the time stipulated in the PPA, BESCO may grant extension of time, not more than 4 (four) months for fulfilling the Conditions Precedent. Such extension of time by BESCO shall not affect the commissioning of the Project within the Scheduled Commissioning Date.*

In the event that the Developer is prevented from commissioning of the Project within the time stipulated in the PPA due to:

- a) any BESCO Event of Default; or*
- b) Force Majeure Events affecting BESCO; or*
- c) Force Majeure Events affecting the Developer,*

The Developer shall commission the Project and thereafter may file a Petition before KERC, seeking approval for condoning the delay in commissioning the Project urging any of the grounds mentioned in (a), (b), (c) above. Such petition shall be deemed to be a dispute under Article 18.3.

5.7.2 - *After hearing the Parties and considering the merits of the grounds urged, KERC may condone the delay in commissioning of the Project on any of the grounds stated by the Developer.*

5.7.3 - *In case KERC condones the delay, the Scheduled Commissioning Date and the expiry date shall be deemed to be extended by the period for which the delay is condoned by KERC.*

5.7.4 – *In the event that the Developer is prevented from achieving the progress in fulfilling the Conditions Precedent or commissioning the Project for the reasons specified in the Article 5.7.1 (a), (b), (c) and if such events continue even after a maximum period of 4 (four) months, any of the Parties may terminate the agreement as per the provisions of Article 16".*

d)Article 14 deals with 'Force Majeure' regarding its Definition; Force Majeure Exclusions; Notification of Force Majeure Event; Duty to Perform and Duty to Mitigate; and Available Relief for a Force Majeure Event.

4. The following Points arise for our consideration:

Point No 1: Whether the Petitioner has proved that the cause of action for filing the present petition had arisen as on the date of presenting the petition before this Commission?

Point No 2: What order?

5. After considering the submissions of the learned Advocate for the Petitioner and the material on record, our findings on the above Points are as follows:

6. Point No 1: Whether the Petitioner has proved that the cause of action for filing the present petition had arisen as on the date of presenting the petition before this Commission?

a) Article 5.7.1 consists of two parts. The 1st part relates to the extension of time to be granted by BESCO in the event of the Developer is prevented from

achieving the progress in fulfilling the Conditions Precedent within the stipulated time. The 2nd part relates to the extension of time to be granted by the Commission, on presenting a petition after commissioning of the project, for condoning the delay in commissioning of the project urging any of the grounds mentioned in (a), (b) and (c) of the said Article. Therefore, the plain reading of the 2nd part of Article 5.7.1 of the PPA goes to show that in the event, the Developer is prevented from commissioning the project within the stipulated time, it has to file the petition only after commissioning the project. The Commission notes that the projects are not yet commissioned as per the averments made in the petition. Therefore, the case was posted for hearing the Petitioner regarding maintainability of the petition.

- b) The learned Counsel relied upon the letter dated 27.05.2020 (Annexure-P47), written by Respondent (BESCOM) to contend that as per the said communication of the Respondent, the Petitioner has filed the present petition. We may note the last paragraph of Annexure-P47, which reads thus:

“In this regard it is once again requested to file a petition before Hon’ble KERC as per PPA Article 7.5 (5.7.1 to 5.7.4):
Extensions of Time”

- c) We have perused the said letter, wherein BESCOM has informed the Petitioner that as per PPA clause 5.7 (5.7.1 to 5.7.4), if the developer is prevented from commissioning of the project within the time stipulated in the

PPA, the developer shall commission the project and thereafter may file a petition before the Commission, seeking approval for condonation of delay in commissioning of the project. We note that the Respondent has only communicated the legal position as envisaged under the Article 5.7.1 of the PPA. Therefore, we see no force in the argument of the learned Advocate for the Petitioner that this petition is filed on the directions of the Respondent, as the contents of the letter issued by the Respondent only clarifies the position of law stated in the Article 5.7.1 of the PPA.

- d) Any petition filed before the Commission should disclose the cause of action as well as when such cause of action has arisen for presenting the petition. In the absence of any cause of action, the petition is not maintainable and it is to be rejected, as premature.
- e) The term of the PPA contained in the 2nd part of Article 5.7.1 clearly states that a petition can be presented before KERC only after commissioning of the Solar Power Project, urging the grounds available seeking the condonation of delay in commissioning the project. It is not the case of the Petitioner that such a term in the PPA is void or voidable. We have given our consideration for the said term contained in the PPA restricting the right of the Petitioner to file the petition for condonation of delay in commissioning of the project on the ground of Force Majeure event. In our considered opinion, such a term is valid and legal and not void or voidable. In this regard, we may refer Section 23 of the Indian Contract Act, 1872, which reads as follows:

“Section 23. What considerations and objects are lawful, and what not. – The Consideration or object of an agreement is lawful, unless –

It is forbidden by law; or

Is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent; or

Involves or implies injury to the person or property of another; or the court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.”

Any of the above grounds stated in Section 23 are not made out in the petition. Therefore, the Petitioner can file the present petition only after commissioning the Solar Power Project.

- f) The learned Counsel for the Petitioner relied upon the merits of the case. Even assuming that the Petitioner has a strong case for grant of relief on the ground of 'COVID-19 Pandemic' as a Force Majeure event for extension of time for commissioning the Project beyond the Scheduled Commissioning Date, this cannot be treated as a ground for bypassing the restriction imposed in the 2nd part of Article 5.7.1. of the PPA. Therefore, we need not and cannot go into the merits of the case at this stage.
- g) For the above reasons, we hold Point No.1 in negative.

7. Point No 2: What order?

For the above said reason, we are of the opinion that the petition filed by the Petitioner on 25.06.2020 before this Commission is not maintainable as it is premature to consider the prayers sought for in this petition and it is liable to be rejected. However, the Petitioner is at liberty to approach this Commission after commissioning the Solar Power Project for condonation of delay, if required. Hence, we proceed to pass the following:

ORDER

The petition is rejected as the cause of action for filing the present petition had not arisen as on the date of presenting the petition before this Commission.

sd/-
(SHAMBHU DAYAL MEENA)
Chairman

sd/-
(H.M. MANJUNATHA)
Member

sd/-
(M.D. RAVI)
Member