

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

Dated : 14th November, 2017

Present:

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

OP No. 82/2017

BETWEEN:

Venkat Energy and Power Private Limited,
No. 40, 14 A Main, 15 A Cross,
Sector 4, HSR Layout,
Bengaluru – 560 102.

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PETITIONER

[Represented by Sri Gautam S Bharadwaj, Advocate]

AND:

- 1) Bangalore Electricity Supply Company Limited,
BESCOM Corporate Office, K R circle,
Bengaluru- 560001.
- 2) Chief Electrical Inspector to Government,
Nirman Bhavan, 2nd Floor,
P.B. No.5148,
Dr Rajkumar Road, Rajajinagar,
Bengaluru – 560010.
- 3) Karnataka Power Transmission Corporation Ltd.,
Cauvery Bhavan, K G Road,
Bengaluru -560009.

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RESPONDENTS

*[Respondents 1 and 3 represented by Justlaw, Advocates,
Respondent 2 remained absent]*

ORDERS

- 1) This petition is filed by the Petitioner under Section 86 (1) (f) of the Electricity Act, 2003 praying to,
 - (a) direct 1st Respondent to make payment at the tariff of Rs.8.40 as agreed under the PPA for the entire term of the PPA;
 - (b) direct 1st Respondent to pay at the agreed tariff of Rs.8.40 per unit for energy generated and supplied to the 1st Respondent from the Petitioner's 3 MW Solar Project during the entire term of the PPA; and,
 - (c) pass such other Order/s to meet the ends of justice and equity including an Order as to costs.

- 2) The submissions made by the Petitioner in the Petition in support of its prayer may be summed as follows:
 - (a) The Karnataka Renewable Energy Development (KREDL) invited online applications on 09.10 2014 from eligible land owning farmer Solar Power Developers (SPDs). After evaluation of the applications received, the Committee accepted the application of Smt. Latha V Naik (SPD) for allotment of solar project and a letter of allotment was issued on 30.03.2015 to her.

- (b) The SPD planned to develop the project with a gross and net capacity of 3 MW at Sy.No.96, Talavatti Village, Aimangala Hobli, Hiriyur Taluk, Chitradurga District, Karnataka State and desired to sell electricity generated in the said project to the 1st Respondent, which agreed to purchase it.
- (c) On 26.06.2015, a Power Purchase Agreement (PPA) was signed between the 1st Respondent and the SPD, which was approved by the Commission vide its letter dated 25.08.2015. As per the PPA, the plant had to be commissioned within 18 months from 26.06.2015, i.e., on or before 25.12.2016 and the agreed tariff was Rs.8.40 per unit.
- (d) The SPD, later formed a Special Purpose Vehicle (SPV) to implement the solar project and the SPV, the Petitioner in this case became the assignee of the said solar project and all the rights, responsibilities, obligations and liabilities of the SPD under the PPA dated 26.06.2015 became binding on its assignee, the Petitioner. A Supplemental PPA dated 22.02.2016 was entered into between the 1st Respondent and the Petitioner and the Commission gave its approval to this Supplemental PPA vide letter dated 15.03.2016.
- (e) In view of the various difficulties faced in the project execution, like demonetisation, delay in achieving financial closure with KSFC

and payment by the financier, ROW issues, etc., the Petitioner, despite its best efforts, could not commission the project before the scheduled commissioning date of 25.12.2016.

- (f) The 3rd respondent had held pre-commissioning tests at 11/66KV, Sub-Station, Aimangala, Hiriyr on 22.12.2016 and issued a Test Report.
- (g) The Petitioner had approached the 2nd Respondent on 04.11.2016 for approval of the electrical drawings for the plant and the 2nd respondent visited the plant, but approved the drawings on 26.12.2016, though the Petitioner was ready to commission the plant on 25.12.2016 which was a Sunday and also a national holiday on account of Christmas.
- (h) The 3rd Respondent had given the provisional interconnection approval on 26.12.2016 for synchronization of the power plant to the 11/66 kV grid.
- (j) The Petitioner approached the officials of 2nd and 3rd Respondents for the synchronization of 11kV line to the grid but the authorities found that the breaker was faulty and thereby the interconnection to the grid was not possible on 26.12.2016. The Petitioner approached the 1st Respondent on 27.12.2016 and

submitted a request letter to instruct the authorities to commission the 3 MW solar plant. As per the instructions of 1st Respondent, the plant was successfully commissioned on 21.01.2017.

- (k) The Petitioner commenced generating power from the solar plant and supplied power to the 1st Respondent during the months of January, February and March, 2017 and received payments at the agreed tariff of Rs.8.40 per unit.
 - (l) When the Petitioner submitted the bill for the month of April, 2017, the 1st Respondent withheld the payment and issued a letter on 09.05 2017, informing the Petitioner to approach the Commission seeking its approval for extension of the date of commissioning of the project with all relevant grounds and documents.
- 3) On issuance of Notice to the Respondents, the Respondent No.1 and No.3 entered appearance through their Counsel. The Respondent No.1 filed Objections, contending that:
- (a) On 26.12.2016, the Respondent No.2 accorded approval for the electrical drawings furnished by the Petitioner and that on 26.12.2016 Provisional interconnection approval was given by the Respondent No.3. That on 17.01.2017, the Petitioner addressed a letter to the Respondent No.1, requesting for permission to

commission the plant. That the Petitioner also indicated its willingness to abide by the decision of the Committee established by the Respondent No.1, to consider the request for extension of time for commissioning of the solar plants.

- (b) Thereafter, the Respondent No.1 issued a letter dated 21.01.2017 according tentative approval to the Petitioner for extension of the scheduled commissioning date, from 25.12.2016 to 31.01.2017, subject to decision of this Commission. That the Petitioner was also informed that a provisional tariff of Rs.6.51 per unit would be paid.
- (c) As several requests for the extension of the scheduled commissioning date were received from solar project developers under farmers' category, the Government of Karnataka issued an Order dated 24.11.2016, directing all the ESCOMs to constitute a three-member Committee to consider and decide such requests. That in furtherance to the said direction, a Committee was constituted by the Respondent No.1 to consider such requests. That the said Committee held a meeting on 23.01.2017 wherein the causes for the delayed achievement of the scheduled commercial operation were considered in respect of 11 generators including the Petitioner and a decision was taken to accord extension of 6 months from the scheduled commissioning date.

- (d) On 16.03.2017, the Commission addressed a letter to all the ESCOMs of the State, in the matter of extension of time granted to solar generators and informed them not to allow any extension of time beyond the scheduled commissioning date as per the original PPA without obtaining prior opinion of the Commission. That further, vide letter dated 05.04.2017, the ESCOMs were directed by the Commission to advise all land owner solar developers/SPVs to approach the Commission and seek for approval of the extension of time.
- (e) The delay in completing the project within the time frame indicated in the PPA, can in no manner be attributed to the Respondent No.1. That the Respondent No.1 denies the Petitioner's averment that the Petitioner was unable to execute the project in a timely manner due to demonetization, delay of payment by financiers, ROW problems, etc.
- (f) The onus of obtaining all necessary approvals was on the Petitioner. That, however, the Petitioner was unable to do so. That in view of the delayed execution of the project in terms of Article 5.1 of the PPA, the Petitioner would only be entitled to a tariff of Rs.6.51 per unit, in terms of the Commission's Order dated

30.07.2015 although for the months of January to March, 2017 payments were made at the rate of Rs.8.40 per unit.

- (g) Article 5.1 of the PPA clearly states that in the event of delay in commissioning of the project beyond the Scheduled Commissioning Date and during such period there is variation in the KERC Tariff, then the applicable tariff for the project would be the lower of the rate mentioned in the PPA. That, hence, the petitioner is entitled to a tariff of Rs.6.51 per unit and not Rs.8.40 per unit as claimed and, therefore, the petition be dismissed.
- 4) The counsel for Respondent No.3 submitted that, as no reliefs have been sought against Respondent No.3, it is not filing any objections.
- 5) Subsequently, vide Memo dated 14.9.2017, the Respondent No.1 has withdrawn the objections filed by it.
- 6) We have heard the Counsel for the Petitioner and perused the material placed on record. The following Issues would arise for our consideration:
- (1) Whether the extension of time of six months granted by the Respondent No.1 (BESCOM) to the Petitioner for achieving the commercial operation of the Petitioner's Project, can be subjected to legal scrutiny by this Commission?

- (2) Whether the Petitioner has made out a case for deferment/ extension of the Scheduled Commissioning Date of its plant?
- (3) What Order?
- 7) After considering the submissions made by the counsel for the parties and their pleadings and other material placed on record, our findings on the above issues are as follows. We note that, when facts can be made out from the Petition and the correspondences between the parties, the withdrawal of Objections filed by the Respondent will have no bearing on the case.
- 8) **ISSUE No.(1)** : *Whether the extension of time of six months granted by the Respondent No.1 (BESCOM) to the Petitioner for achieving the commercial operation of the Petitioner's Project, can be subjected to legal scrutiny by this Commission?*
- (a) Article 2.5 of the PPA does not specifically stipulate that, any extension of time granted by the BESCOM should be got approved by the Commission. However, Article 2.51 of the PPA stipulates the grounds on which alone the time could be extended for achieving the commercial operation. Article 5.1 of the PPA provides for reduction of tariff as a consequence of delay in the commissioning of the Project beyond the Scheduled Commissioning Date, subject to certain terms and conditions stated therein. Whenever an event affects the quantum of tariff applicable for supply of energy to the Distribution Licensees, we are of

the considered opinion that the same should be scrutinized and approved by the Commission. It is now a settled law that this Commission has the exclusive jurisdiction to determine the tariff for supply of electricity by a Generating Company 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, we hold that, even in the absence of a specific term in the PPA, an event affecting or altering the tariff already approved in the PPA should be got approved by this Commission. The BESCO has also specifically intimated the Petitioner, in its tentative approval dated 21.01.2017, that its decision of according extension of time is subject to approval of the Commission, though this condition is not repeated in its subsequent communication dated 03.02.2017.

(b) Therefore, we answer Issue No.(1) in the affirmative.

9) **ISSUE No.2:** *Whether the Petitioner has made out a case for deferment / extension of the Scheduled Commissioning Date of its plant?*

(a) As per Article 1.1(xxviii) of the PPA executed by the Petitioner with the Respondent No.1, the Scheduled Commissioning Date of the Petitioner's plant is 18 months from 26.06.2015, which is the date of signing of the PPA by the parties and thereby the effective date as per Article 1.1 (xii).

(b) Article 2.5 of the PPA provides for 'Extension of time', which reads thus:

"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.*

2.5.4 *In case of extension due to reasons specified in Article 2.5.1(b) and (c), and if such Force Majeure Event continues even after a maximum period of 3(three) months, any of the Parties may choose to terminate the Agreement as per the provisions of Article 9.*

2.5.5 *If the Parties have not agreed, within 30 (thirty) days after the affected Party's performance has ceased to be affected by the relevant circumstance, on the time period by which the Scheduled Commissioning Date or the Expiry Date should be deferred by, any Party may*

raise the Dispute to be resolved in accordance with Article 10.

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."*

(c) Article 8.3 of the PPA defines 'Force Majeure Events', which reads thus:

"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 BESCO 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;*

- (v) *In no event shall a Force Majeure Event excuse the obligations of a Party that are required to be completely performed prior to the occurrence of a Force Majeure Event."*

(d) Article 2.1 of the PPA defines 'Conditions Precedent', which reads thus:

"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 BESCO of the same."*

- (e) It is the case of the Petitioner that the plant was ready for commissioning on 25.12.2016, which was a Sunday and also a General Holiday on account of Christmas and that on the very next day i.e. on 26.12.2016, the plant could not be commissioned owing to breaker failure, which has to be considered as a force majeure event under clause 8.3 a) (x) of the PPA. That there was only one day's delay that too because of reasons not of the Petitioner. The Petitioner has relied on the judgment in the case of Mohd. Ayub vs State of Uttar Pradesh and others, reported in (2009) 17 SCC 70 to contend that under Section 10 of the General Clauses Act, 1897, when the time prescribed to perform an act ends on a holiday and it is done on the immediate next working day, it is treated as done within the time due.
- (f) The Petitioner also contends that, the Respondent No.1, in its letter dated 27.12.2016, has admitted that because of the failure of breaker, the Petitioner's plant could not be commissioned on 26.12.2016. The Petitioner also contends that there was an 'emergency event', as defined in Article 1.1 (xiv) of the PPA, due to failure of breaker affecting commissioning of the plant in time. That if the month referred to in the

PPA is taken as a calendar month, the Petitioner had time till the end of December, 2016 to commission the plant. It is also contended that the Petitioner was entitled for extension of time for commissioning the plant as per Article 2.5, because of the 'Force Majeure event' and that as per Article 4.2, the Respondent No.1 was required to support, cooperate with and facilitate the Petitioner in commissioning the project and also act reasonably while exercising its discretionary power under the PPA.

- (g) We note that Clause 2.1.1 of the PPA provides that the SPD shall obtain all permits, clearances and approvals, statutory or otherwise, as required to execute and operate the project. The Petitioner contends that the project was ready for commissioning on 25.12.2016 but commissioning could not be done as it was a general holiday. We note that the safety approval by the Respondent No.2 and interconnection approval by Respondent No.3, were given on 26.12.2016, in the absence of which the plant could not have been commissioned.
- (h) Admittedly, the Petitioner was aware that the plant had to be commissioned within 25.12.2016, i.e., within 18 months from the date of execution of the PPA and also that the inspection of the plant for being declared as having met the safety standards was to be carried out by the Respondent No.2 and interconnection approval had to be given by Respondent No.3 for the plant to be commissioned. It is the case of the Petitioner that the pre-commissioning test of the breaker of the plant was

conducted in time on 22.12.2016 and that failure of breaker was a force majeure event envisaged in the PPA. We note that as per the relevant clauses of the PPA, the 'fault of the breaker' is neither a Force Majeure event nor an 'emergency event'. We also note that the 'fault of breaker' occurred on 26.12.2016, which was a day later than the scheduled commissioning date of 25.12.2016. We are of the considered opinion that the decision of the Hon'ble Supreme Court in the case of Mohd. Ayub – Vs- State of Uttar Pradesh and others reported in (2009) 17 SCC 70 is not applicable to the Petitioner's case, because the act of submission of an application, which was not performed was the centre of dispute in that case, is not the same as the commissioning of the solar plant as in the Petitioner's case. The Petitioner had committed itself under a contract to complete the implementation of its project within 18 months and is bound to perform its obligation, failing which it has to suffer the consequence of such non-performance.

- (j) Admittedly, the Petitioner had made an application for grant of Safety Approval, to the Respondent No.2 on 4.11.2016 and the necessary fee was paid on 12.12.2016. The Safety Approval was granted on 26.12.2016. We hold that there was no inordinate delay in grant of Safety Approval as we note that the Petitioner furnished additional documents after submission of its application and the process of grant of approval involved initial inspection and detailed verification of documents. As noted earlier, the fault of breaker cannot be treated as a force majeure

event as described in the PPA. In any case the Petitioner's plant was not ready for commissioning on 25.12.2016 in the absence of safety approval and interconnection approval. The evacuation approval was granted on late evening of 26.12.2016 after initial inspection and detailed verification of documents as statedly it could be granted only after the grant of safety approval from the Respondent No.2. It is the obligation of the Petitioner under the PPA to obtain all clearances and approvals within the prescribed time. Thus, we do not find any merit in the Petitioner's contention that the plant was ready to be commissioned within 25.12.2016 but could not do so because of that day being a holiday. We note that, when sufficient time is provided in the PPA for performance of the events involved in the implementation of the project, a prudent developer is expected to take timely action to complete the project within such time and not wait till the last day. We do not find any merit in the contention that as the PPA envisaged commissioning of the project within 18 months from the date of execution of the PPA, the project could be commissioned before the end of December, 2016. We also note that the definition of 'emergency', provided in the PPA is for the purpose of Article 3.3, which deals with post-commissioning operation of the solar plant upon occurrence of an 'emergency' in the evacuation system, does not apply to any event prior to the commissioning of the plant.

(k) The Respondent No.1 has granted the Petitioner, six months' time extension for the scheduled commissioning date under Articles 2.5 and 8, based on the decision taken by the 'Committee', which has stated that there are delays in getting approvals for land conversion, evacuation approval from the Respondent No.3 and bay extension, as also delay in delivery of breaker. The Petitioner or the Respondent No.1 or the 'Committee' have not indicated the time lines prescribed under any law or rules or guidelines or circulars or even normal institutional practices, for grant of such approvals/delivery of material in support of the claim that there has been delay in respect of these items of work affecting timely commissioning of the project. The Petitioner has not indicated the time it reckoned for each of such items in the total 18 months available to it for commissioning the project. When relief is sought on the ground of delay, the occurrence of such delay should be established based on relevant binding provisions or documents. We may, here, note that the land owning farmer, the SPD, after executing the PPA with the Respondent No.1, chose to form a SPV (the Petitioner) in February, 2016 and assign the project to the SPV. The impact of such belated formation of the SPV and the assignment of the project to such SPV on timely commissioning of the project has been conveniently not explained by the Petitioner. The Petitioner while admitting that it could not achieve financial closure within 365 days from the effective date and undertaking to pay damages for such delay cannot take a contrary stand, in respect of delay in commissioning the project, when such delay is not on account

of any force majeure event as provided under the PPA. We also note that by the time the Petitioner achieved financial closure, which enabled it to incur capital cost, the Commission had revised the generic tariff on 30.07.2015 considering the substantial reduction in the capital cost of setting up solar power plants after the determination of the generic tariff for such plants on 10.10.2013 at Rs.8.40 per unit, adopted in the PPA. The Petitioner, who would have thus incurred lower capital cost than what was reckoned in the Generic Tariff Order dated 10.10.2013, is not justified in claiming a higher tariff for a plant, which was not commissioned within the time stipulated in the PPA and the act of making the Petitioner entitled for such higher tariff by grant of extension of time for commissioning the project, by the Respondent No.1, cannot be approved.

(l) In view of the above discussions, we answer Issue No.(2) in the negative.

10) **ISSUE No.3:** *What order?*

For the foregoing reasons, we pass the following:

ORDER

(i) The Petition is dismissed and the Petitioner is not entitled to any of the reliefs sought;

- (ii) The six months' time extension for the scheduled commissioning date of the Petitioner's project, granted by the Respondent No.1 vide its letter dated 03.02.2017, is set aside;
- (iii) The Petitioner is entitled to a tariff of Rs.6.51 (Rupees Six and Paise Fifty One) 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 30.07.2015, for the term of the PPA, as per Article 5.1 of the PPA; and,
- (iv) The Petitioner is also liable for liquidated damages as provided under Article 2.5.7 of the PPA.

Sd/-

(M.K. SHANKARALINGE GOWDA)
CHAIRMAN

Sd/-

(H.D. ARUN KUMAR)
MEMBER

Sd/-

(D.B. MANIVAL RAJU)
MEMBER