

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

Dated : 7th August, 2018

Present:

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

OP No.159/2017

BETWEEN:

M/s. Chirasthaayee Saurya Ltd.,
Plot No. 78, Electronic City,
Hosur Road,
Bengaluru – 560 100.

.. **PETITIONER**

[Represented by Smt. Poonam Patil, Advocate]

AND:

- 1) Bangalore Electricity Supply Company Limited,
Corporate Office,
K.R. Circle,
Bengaluru – 560 001.
- 2) The Karnataka Renewable Energy Development Limited,
No. 39, 'Shanthigruha'
Bharath Scouts & Guides Building,
Palace Road,
Bengaluru – 560 001.

.. **RESPONDENTS**

*[Respondent-1 represented by Shri Shahbaaz Husain, Advocate,
Respondent-2 represented by Shri Rakshit Jois Y.P., Advocate]*

ORDERS

1) This petition is filed under section 86(1)(f) of the Electricity Act, 2003, praying to;

- (a) Hold and declare that, the Scheduled Commercial Operation Date (SCOD) stands extended to the period corresponding to the time taken for issuance of the PPA (167 days) and consequently, declare that, the Commercial Operation Date (COD) shall be achieved within 167 days from the Effective Date i.e., COD to be on 23.03.2018;
- (b) Direct the 1st Respondent to enter into a Supplementary Power Purchase Agreement with the Petitioner, immediately, with the SCOD as 23.03.2018;
- (c) Hold and declare that, the time to complete the Conditions Precedent by the Petitioner shall be concurrent to the SCOD i.e., 23.03.2018;
- (d) Set aside the Demand Notice bearing No.GM(Ele)/PP/BESCOM/DGM-1/BC-39/F-9113, dated 24.07.2017, issued by the 1st Respondent, with respect to payment of Liquidated Damages;
- (e) Pass suitable directions, restraining the Respondents from imposing any penalty / damages, under Article 4 of the PPA, including, but not limited to, invoking the Bank Guarantees furnished by the Petitioner under Article 4.4 of the PPA; and,
- (f) Pass any such further Order(s), as this Commission may deem fit and proper, in the facts and circumstances of the case, as stated above.

As discussed later, the Petitioner, at the time of final arguments, has pressed only the prayer (c) with the date as "28.09.2017" instead of "23.03.2018".

2) The facts of the case, as submitted by the Petitioner, may be summed up, as follows:

(a) The Petitioner is a 100 % owned subsidiary and Special Purpose Vehicle (SPV) of Tata Power Solar Systems Limited (parent company), incorporated under the Companies Act, 2013. The Government of Karnataka had resolved to undertake development of 1200 MW of Solar Power Plants in Karnataka, to be implemented in sixty Taluks, through private sector participation. In pursuance of the same, the 2nd Respondent invited proposals, by its 'Request for Proposal (RfP)' dated 30.11.2015, containing the terms and conditions for selection of bidders in respect of the proposed projects. The RfP also contained a draft PPA in Volume-I.

(b) The parent company had placed a bid for setting up of three Projects in the State and the same was accepted by the 2nd Respondent. One of the bids was to establish 10 MW capacity Solar Power Plant at Bidar Rural Taluk. The 2nd Respondent issued a Letter of Award (LoA) and Allotment Letter dated 31.3.2016 to the parent company, which acknowledged the same on 07.04.2016.

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- (c) As per Clause 3.4.7 of the RfP, the developers were required to execute Power Purchase Agreements (PPAs) with the Electricity Supply Companies (ESCOMs) within thirty days from the date of receipt of the LoA. However, on account of technical difficulties faced by the developers in respect of creation of SPVs and other issues, the time for execution of the PPAs was extended by the 2nd Respondent by thirty more days, from the date of receipt of the LoA, by the Addendum dated 11.04.2016. On the request of the developers, the time for execution of the PPAs was further extended by eight more working days from 25.05.2016 to 03.06.2016.
- (d) The parent company entered into a PPA with the 1st Respondent on 03.06.2016. The Effective Date, as per Article 3.1 of the PPA, is the date of concurrence from the Commission to the PPA.
- (e) The 2nd Respondent unilaterally issued an Official Memorandum dated 27.05.2016, under which the COD for the Project was stipulated to be achieved within twelve months from 25.05.2016.
- (f) The 1st Respondent sent the PPA to the Commission for approval and the Commission communicated its approval on 07.10.2016, with a direction to carry out certain corrections / modifications, and consequently to execute a Supplemental PPA (SPPA), incorporating the said corrections / modifications.

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- (g) The parent company had approached the Commission with a prayer to hold and declare that, the Effective Date is from the date of the approval of the PPA by the Commission, as mentioned in the Articles 3.1, 8.5 and 21.1 of the PPA. The Commission allowed the said Petition and declared the Effective Date as '*the date of approval of the PPA by the KERC*' and the parties were directed to carry out the necessary corrections in the PPAs.
- (h) In compliance with the terms of the RfP, the Petitioner was promoted and incorporated as SPV, to develop the Project and a SPPA was entered into on 21.07.2017.
- (j) Pursuant to the grant of approval by the KERC to the PPA on 07.10.2016, the 1st Respondent requested the parent company to execute the SPPA, in accordance with the modifications mentioned by the KERC vide its letter dated 07.10.2016. The parent company signed the SPPA on 02.03.2017, subject to the result of the Petition filed before the Commission, regarding the change in the Effective Date.
- (k) The PPA, though signed on 03.06.2016, was made available to the Petitioner only on 23.03.2017, after the execution of the SPPA on 02.03.2017. There was a delay of 167 days (from 07.10.2016, the date of approval of the PPA by the KERC, till 23.03.2017, the date of making the signed copy of the PPA available to the parent company by the 1st Respondent). The Petitioner had, during the interregnum followed with

the 1st Respondent to send the copy of the PPA. A written communication dated 22.03.2017 was addressed, requesting the Respondents to make the PPA available, bringing to the notice of the Respondents that, without the PPA, the Petitioner was not in a position to go ahead with many Project-related activities, like registration with the MNRE for excise duty exemption, obtaining regular execution approval, loan disbursement from the bankers, land registration, etc. Without the PPA in its name, the Petitioner could not go ahead with the MNRE registration and the land registration. The Petitioner addressed several communications to the Respondents dated 31.3.2017, 6.4.2017, 25.4.2017, 27.5.2017, 5.6.2017 and 27.5.2017, but the SPPA in the name of the Petitioner was signed only on 21.7.2017.

- (l) The Petitioner had applied for evacuation approval on 28.6.2016, but the same was issued by the KPTCL on 03.08.2017, after a delay of more than 13 months, due to non-availability of the PPA.

- (m) Owing to the delay in handing over the PPA and the delay in issuing evacuation approval, the Petitioner was prevented from fulfilling the Conditions Precedent, within the time-frame stipulated in the PPA. Except for the compliance relating to regular evacuation approval, land conversion approval and financial closure, the Petitioner had achieved all other Conditions Precedent, within the stipulated time of 8 months from the Effective Date.

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- (n) The Petitioner informed the 1st Respondent about the said status of achievement of the Conditions Precedent, by communication dated 21.07.2017 and sought for extension of time to fulfil the Conditions Precedent clause, in its entirety. The 1st Respondent issued a Demand Notice on 24.7.2017 requiring the Petitioner to pay the Liquidated Damages, as per Article 4.3 of the PPA, for failure to achieve Conditions Precedent within eight months of Effective Date. The Petitioner replied to the same on 29.07.2017, bringing to the notice of the 1st Respondent the reasons for non-fulfilment of the Conditions Precedent as per the terms of the PPA. The Petitioner also addressed a communication to the 1st Respondent on 16.09.2017, seeking extension of the SCOD, but received no response. Hence, this Petition came to be filed.
- 3) The grounds urged by the Petitioner, in support of its prayers, may be summed up, as follows:
- (a) The delay caused by the 1st Respondent in making the PPA available to the Petitioner and delay in issuance of the evacuation approval has resulted in huge adverse impact on the Petitioner.
- (b) The Hon'ble Appellate Tribunal for Electricity (ATE), in Appeal No.123/2012, in the case of *Gujarat Urja Vikas Nigam Limited Vs GERC and others*, has upheld the following findings of the GERC:

'The events during the time period elapsed in obtaining statutory / government clearances from the governmental instrumentalities towards land and water sources are force majeure events'.

In the said case, based on the findings, the Scheduled Commissioning Date was extended by nineteen months. The event in the present case also being the delay in getting evacuation approval, and also delay in providing the Petitioner with PPA falling under the events mentioned in Articles 14.3.1 and 14.3.1(e) of the PPA, the Petitioner is also entitled for extension of the COD.

- (c) The MNRE has issued a communication to all the State Governments, directing the competent State authorities to consider the case of extension of the time, if there are delays of any kind on the part of the State Government Authorities / PSUs, like land allotment, transmission / evacuation facilities, connectivity permission or *Force Majeure*.
- 4) Upon issuance of notice, the Respondents appeared through their Counsel and filed Statement of Objections. The contentions of the 1st Respondent may be stated, as follows:
 - (a) The delay in the Project implementation is primarily attributable to the negligent acts of the Petitioner.

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- (b) Based on the request of the developers to extend the time to enter into the PPAs, the 2nd Respondent extended the time twice, to enter into the PPAs and granted more than 60 days to enter into the PPAs. The parent company entered into a PPA on 03.06.2016, by availing the complete benefit of the extension of time.
- (c) The Commission, vide letter dated 07.10.2016, accorded approval for the PPA, subject to the corrections / modifications being incorporated in the PPA. In respect of 'Effective Date', it was stated that the PPA shall come into effect from 25.05.2016. The parent company had stated that an SPV was formed, but had not produced any documents to this effect. Hence, it could be safely deduced that the parent company did not set up any SPV as on 07.10.2016. The SPPA was executed on 01.03.2017, stating the Effective Date as 25.05.2016. The parent company had signed the SPPA and agreed to the same. The parent company had no complaint with regard to the Effective Date and any issues raised now, regarding the delay, is an afterthought, as a copy of the letter dated 07.10.2016, directing necessary modifications and execution of the SPPA, was also sent to the parent company.
- (d) The parent company had approached the Commission, vide RP No.1/2017, to change the 'Effective Date' as the date of approval of the PPA by the KERC, as against 25.05.2016 indicated in the letter dated 07.10.2016. The Commission partly allowed the RP and made the Effective Date as the date of approval of the PPA i.e., 07.10.2016.

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- (e) The 1st Respondent issued a letter dated 20.10.2016 to the parent company to execute the SPPA. However, the SPPA was signed only on 01.03.2017 and this lapse of time can never be attributed to the Respondent. Since the PPA was interlinked with the SPPA, both were handed over to the parent company on 25.03.2017. The event of the parent company not approaching the 1st Respondent to sign the SPPA, can never be termed as a *Force Majeure* Event. The *Force Majeure* clause cannot be made applicable to events within the control of the parent company. The Petitioner, as a legal entity, was formed as SPV only on 08.07.2017.
- (f) The parent company applied for evacuation approval on 28.06.2016 and it was well within its knowledge that providing the PPA is *sine-qua-non* for obtaining the evacuation approval. Despite the 1st Respondent's letter calling upon to sign the SPPA on 20.10.2016, the Petitioner signed it only on 01.03.2017. The Petitioner has taken more than four months to approach the 1st Respondent to sign the SPPA and such delay is solely attributable to the negligent acts of the Petitioner.
- (g) The Petitioner, vide Article 14.5 of the PPA, is required to issue a Notice of any *Force Majeure* Event, not later than seven days or within the reasonable time, as soon as the Petitioner receives such information.
- (h) As per Article 4 of the PPA, Conditions Precedent have to be fulfilled within eight months from the Effective Date. As the Effective Date is revised as

the Commission's approval date, i.e., 07.10.2016, the Conditions Precedent had to be fulfilled by the Petitioner within 06.06.2017 (8 months from 07.10.2016). As the Petitioner had not fulfilled the Conditions Precedent within the prescribed time, as per the terms of the PPA, a Notice was issued by the 1st Respondent for recovery of the Liquidated Damages and the same is proper.

- (j) The 1st Respondent has, therefore, prayed for dismissal of the Petition.
- 5) The 2nd Respondent, in the Statement of Objections, has stated that, it is not a necessary party to the Petition and has sought for dismissal of the Petition, as against it.
- 6) The Petitioner, in the Written Submissions, filed on 17.04.2018, has stated that, the plant was commissioned on 28.09.2017, within the twelve months from the Effective Date and therefore, the prayer for extension of time to commission the Project, does not survive. That, during the pendency of the Petition, the 1st Respondent has deducted Rs.6 lakhs, towards damages for delay in achieving the Conditions Precedent and hence, the related prayer is rendered nugatory. That, the only prayer, which survives, is a declaration that, the time for achieving the Conditions Precedent shall be concurrent to the SCOD and therefore, the time should be extended till 28.09.2017, to achieve the Conditions Precedent. That, if such an extension of time is given, the Petitioner is entitled to reimbursement of the amount deducted towards the damages.

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- 7) We have heard the learned counsel for the parties and perused the records. The following Issues would arise for our consideration:
- (1) Whether the Petitioner is entitled to the extension of time, to achieve the Conditions Precedent till the SCOD, on grounds of *Force Majeure* Events?
 - (2) What Order?
- 8) After considering the submissions made by the parties and perusing the pleadings and documents placed on record, our findings on the above issues are as follows:
- 9) **ISSUE No.(1):** *Whether the Petitioner is entitled to the extension of time, to achieve the Conditions Precedent till the SCOD, on grounds of Force Majeure Events?*
- (a) Article 4 of the PPA, executed between the parent company and the 1st Respondent (BESCOM), provides for Conditions Precedent, that had to be achieved within 8 months from the 'Effective Date' unless such completion is affected by any *Force Majeure* Event or if any of the activities is specifically waived off, in writing, by the 1st Respondent (BESCOM). The 'Effective Date' is the date of approval of the PPA by the Commission, and the PPA was approved by the Commission on 07.10.2016, and communicated in the letter dated 07.10.2016. The time for achieving the Conditions Precedent was, on or before 06.06.2017. According to the Petitioner, all the Conditions Precedent, except land related approvals and evacuation approval, were obtained within the

specified time. That, the land related approvals and evacuation approval could not be obtained within time, as the PPA was not made available to the Petitioner by the 1st Respondent, till 23.3.2017. We note that, the PPA was entered into between the parties (the parent company and the 1st Respondent) on 03.06.2016, for sale of power from the 10 MW Solar Power Plant, which had to be established within 12 months from the Effective Date. The PPA was sent to the Commission for approval and it was approved on 07.10.2016 with certain modifications to the PPA. It was also mentioned in the letter dated 07.10.2016, communicating the Commission's approval, that the parties have to enter into a SPPA, incorporating the modifications, at the earliest. The Commission had also sought for clarifications on the formation of the SPV by the parent-company and the documents relating to the SPV. One of the modifications suggested, relating to Effective Date, was withdrawn in the Order dated 19.05.2017 in RP No.1/2017.

- (b) It is alleged by the Petitioner that, there is a delay of 167 days from the date of approval of the PPA, i.e., 07.10.2016, to the date of handing over a copy of the PPA i.e., 22.03.2017. It is also alleged that, there was delay in signing of the SPPA in the name of the SPV by the 1st Respondent. We note that, it is admitted by the Petitioner in paragraph 12 of the Petition that, pursuant to the grant of approval by the Commission to the PPA, the 1st Respondent requested the parent company to execute the SPPA, in accordance with the directions in the letter dated 07.10.2016. It is also stated that, the parent company signed the SPPA on 02.03.2017, subject

to the result of the Petition filed before the Commission. We note that, as the modifications suggested by the Commission during approval of the PPA, would vary certain clauses of the PPA, it was necessary to execute the SPPA at the earliest. A copy of the letter dated 07.10.2016 was sent to the parent company. The 1st Respondent, in the Statement of Objections, has stated that, it had issued a letter dated 20.10.2016 to the parent-company requesting to execute the SPPA. It is contended by the 1st Respondent that, the SPPA was signed on 01.03.2017, as the Petitioner delayed the same and that such act of the Petitioner cannot be termed as '*Force Majeure*'.

- (c) Article 14 of the PPA relates to *Force Majeure*. Article 14.4.1(f) reads, as follows:

“14.4 Force majeure exclusions:

14.4.1

.....

(f) Non performance caused by, or connected with, the Affected party's:

(i). Negligent or intentional acts, errors or omissions;

.....

.....”

- (d) The delay of 167 days, between 07.10.2016 and 01.03.2017, in signing the SPPA is not explained by the Petitioner. Therefore, we feel that, the act of the parent company in delaying the execution of the SPPA, falls under the above clause of *Force Majeure* exclusions.

- (e) It is alleged by the Petitioner in paragraph 13 of the Petition, that the PPA dated 03.06.2016 was made available to it on 23.03.2017, despite addressing written communications. Only the communication, dated 22.03.2017, is produced in support of this allegation. Admittedly, the PPA was given on 23.03.2017, immediately after the request. Had the SPPA been entered into by the parent company immediately after 07.10.2016, the other approvals, like land conversion and evacuation approvals, would have been granted within the time of eight months, specified for achieving the Conditions Precedent.
- (f) It is alleged by the Petitioner that, the execution of the SPPA in the name of the SPV was delayed by the 1st Respondent and ultimately, executed on 21.07.2017, despite several requests of the Petitioner. The 1st Respondent has contended that, the formation of the SPV was delayed by the parent company and the SPV was formed on 08.07.2017, vide MoU (ANNEXURE-G to the Petition). That, thereafter, on 21.07.2017, the second SPPA was entered into in the name of the SPV. The Petitioner has produced a copy of the Certificate of Incorporation dated 14.06.2016, to say that the SPV was incorporated on 14.06.2016. We note that, without the assignment of the rights and obligations, arising out of the PPA dated 03.06.2016, by the parent company to the SPV (i.e., the Petitioner), which was done through an Agreement (ANNEXURE-G) only on 08.07.2017, though the SPV was incorporated on 14.06.2016, the SPPA could not be executed by the 1st Respondent, assigning the rights and liabilities of the earlier PPA to the SPV. The delay in the assignment of the PPA to the SPV

is attributable to the Petitioner and the parent company and, without any justifiable explanation to say that such delay was not attributable to the Petitioner/parent company, the time taken in signing of the second SPPA in the SPV's name by the 1st Respondent, cannot be construed to be a *Force Majeure* Event.

- (g) It is also contended by the 1st Respondent that, the parent company failed to issue a Notice of the *Force Majeure* Event, as required under Article 14.5 of the PPA. This is not countered by the Petitioner.
- (h) The Hon'ble Supreme Court, in the case of *MP Power Management Company Ltd vs Renew Clean Energy Pvt Ltd and another*, reported in (2018) 6 SCC 157, has held that, the generating company is liable to pay damages for the delayed performance of the PPA. In this case, we find that, the Petitioner / parent company was responsible for the delay in the execution of the first SPPA and assignment of the PPA dated 03.06.2016 to the SPV, and there is no default on the part of 1st Respondent.
- (j) For the foregoing reasons, we answer Issue No.(1), in the negative.

10) **ISSUE No.(2):** *What Order?*

For the foregoing reasons, we pass the following:

ORDER

The Petition is dismissed. The levy of damages by the 1st Respondent (BESCOM), as per the terms of the PPA, is upheld.

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

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

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