

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

**Dated : 22<sup>nd</sup> November, 2018**

**Present:**

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

**O.P. No. 200/2017**

**BETWEEN:**

Athense Energy Pvt. Ltd.,  
No.35/2, Park Manor,  
Park Road, Tasker Town,  
Bengaluru-560051.

.. **PETITIONER**

*[Represented by Navayana Law Offices, Advocates]*

**AND:**

Mangalore Electricity Supply Company Limited,  
Represented by its Managing Director,  
MESCOM Bhavana,  
Kavoor Cross Road, Bejai  
Mangaluru – 575004.

.. **RESPONDENT**

*[Respondent represented by Shri Shahbaaz Husain, Advocate]*

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**ORDERS**

- 1) The Petitioner has filed this Petition, under Section 62 read with Sections 64 and 86(1)(f) of the Electricity Act, 2003, in effect, praying to:

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- (a) Approve the extension of time, granted by the Respondent, vide letter dated 20.02.2017 for commissioning its project;
- (b) Direct the Respondent to make payment for the delivered energy under the Power Purchase Agreement (PPA) dated 15.07.2015 and the Supplemental agreement dated 03.11.2016 at the rate of Rs.8.40 per unit, from the commercial operation date of the Petitioner's Project, for the entire term of the PPA; and,
- (c) Pass such other and incidental Orders, including an Order as to costs, as may be deemed appropriate under the facts and circumstances of the case.
- 2) The facts of the case, as submitted by the Petitioner, may be summed up, as follows:
- (a) The Karnataka Renewable Energy Development Limited (KREDL), a nodal agency of the Government of Karnataka, for facilitating the development of renewable energy in the State of Karnataka, invited applications, online, on 9<sup>th</sup> October, 2014 for allotment of the Solar Power Projects under the land owning farmers' category, under Segment-1 Category-1 of the Solar Policy of the Government of Karnataka, and in compliance of the Government Order bearing No.EN 62 VSC 2014, Bangalore, dated 26.8.2014. After evaluation of the applications received, the proposal of, Shri H P Cheluvvaraju, an applicant, for development of a 1 MW Solar Power Plant at Chennammanagathihalli Village, Challakere Taluk, Chitradurga District, was accepted. The KREDL issued a letter of allotment dated

16.03.2015 and instructed him [Solar Project Developer (SPD)] to execute a Power Purchase Agreement (PPA) with the Respondent (MESCOM).

- (b) A PPA was executed between the Respondent (MESCOM) and the SPD, on 15.07.2015, to which the Commission accorded approval on 27.08.2015. As per the PPA, the Project had to be commissioned by 15.1.2017.
- (c) As per Article 12.11(i) of the PPA, a Special Purpose Vehicle (SPV) (Petitioner) was created, to implement the Project. A Supplemental PPA (SPPA) dated 03.11.2016 was entered into, between the Petitioner and the Respondent (MESCOM), which is pending approval of the Commission.
- (d) The Respondent (MESCOM), vide letter dated 29.02.2017, considering the *Force Majeure* and other circumstances of the Petitioner, approved extension of time by 6 months to commission the Project.
- (e) On 15.04.2017, the SPD requested the Deputy Commissioner, Chitradurga, for conversion of land.
- (f) The Provisional Interconnection Approval was granted and the Petitioner commissioned the Project on 27.04.2017.
- (g) The Petitioner supplied power and raised invoices at Rs.8.40 per unit, but the Respondent failed to make payments.

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- 3) The grounds urged by the Petitioner, in support of its prayers, may be summarized, as follows:
- (a) The Petitioner has commissioned the Project, within the extended period, agreed to by the Respondent (MESCOM) and, therefore, there is no delay in commissioning the Project.
  - (b) The PPA provides for extension of the SCOD for completion of the Project and the same cannot be interfered with, in this case, as it is the hurdles faced in implementing the project, beyond the control of the Petitioner. The Respondent (MESCOM), considering the representation of the Petitioner, provided for a reasonable period of extension to commission the Project as provided in the PPA.
  - (c) The Petitioner is entitled to the tariff of Rs.8.40 per unit, as mentioned in the PPA. The Commission has passed three Generic Tariff Orders, dated 10.10.2013, 30.07.2015 and 12.04.2017, in respect of the Solar Power Projects. In the Tariff Order dated 30.07.2015 (passed, in modification of an earlier Tariff Orders), it is clearly held that, in respect of the Projects that are commissioned during the period from 01.09.2015 to 31.03.2018 for which, the PPAs have been entered into and submitted to the Commission prior to 01.09.2015 for approval, the tariff as per the said Agreements, shall be applicable. The Tariff Order dated 12.04.2017, has been made applicable to only the new grid connected Solar Power Projects, entering into PPAs on or after 01.04.2017, but before 01.04.2018 and also those

which are commissioned during the period, from 01.04.2017 to 31.03.2018, for which PPAs have not been entered into, prior to 01.04.2017. Hence, these Tariff Orders do not revise the tariff of the Petitioner's Project. Consequently, the Petitioner is entitled to the tariff of Rs.8.40 per unit, as agreed to, under the PPA.

- (d) The Petitioner has commissioned the Project, within the time period permitted by the Respondent (MESCOM). In view of this mutual agreement, there is no scope for the unilateral downward revision of the tariff, as effected by the Respondent (MESCOM). The Project of the Petitioner has experienced several hurdles, which can be termed as *Force Majeure* Events, within the meaning of the Article 8 of the PPA, and this has been adequately represented before the Respondent (MESCOM) by the Petitioner. The pleas of the Petitioner have been considered and accepted. The entire basis for the grant of extension has been, the due consideration of the representation of the Petitioner.
- (e) The extension of time was granted, as per Article 2.5.6 of the PPA. As a result of such extension, the Scheduled Commissioning Date and the Expiry Date newly determined, shall be deemed to be Scheduled Commissioning Date for the purposes of the PPA. Having commissioned the Project, within the COD agreed under the PPA, the Petitioner is entitled to the tariff, as agreed under the PPA. The Respondent (MESCOM) is not entitled to the Liquidated Damages, without adjudication by this Commission.

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- (f) The extension of time, granted by Respondent by letter dated 29.02.2017, does not mention about altering the tariff and specifically clarifies that all other terms and conditions of the PPA remains unaltered. Hence, the Petitioner is entitled for Tariff agreed to in the PPA at Rs.8.40 per unit.
- 4) Upon issuance of Notice, the Respondent (MESCOM) appeared through the counsel. The Respondent (MESCOM), has filed the Statement of Objections.
- 5) The objections of the Respondent (MESCOM) may be stated, as follows:
- (a) The Petitioner could not commission the Project, within the time specified in the PPA and requested for extension of time. As several requests for extension of the SCD were received from the Solar 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 to dispose of the requests of the farmers / developers. Accordingly, a Committee was constituted by the Respondent (MESCOM), to consider the requests for the extension of time, sought for by the 1 to 3 MW Solar Generators, under the land owning farmers' category.
- (b) The Petitioner furnished the documents to the said Committee, for consideration of the request for extension of time. As per the same, the

following information was gathered pertaining to the various reasons assigned for the delayed execution of the Project:

*KPTCL Evacuation Approval(Regular):*

|                                   |   |            |
|-----------------------------------|---|------------|
| Date of submission of application | : | 05.02.2016 |
| Date of approval                  | : | 23.09.2016 |
| Delay in getting approval         | : | 7 months   |

- (c) The Committee, after detailed discussions and scrutiny of the documents, opined that, the approval may be accorded for the extension of the SCOD up to six months, considering Article 2.5 of the PPA, as there is a delay in the issuance of approvals by the various Government entities. On 29.02.2017, the Respondent (MESCO), in its letter addressed to the Petitioner, informed about the extension of time, by six months, for achieving the SCOD.
- (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 the Solar Generators and informed them not to allow any extension of time, beyond the SCOD, as per the original PPA, without obtaining prior opinion of the Commission. Further, vide letter dated 05.04.2017, the ESCOMs were directed by the Commission to advise all the land owning Solar Project Developers/SPVs, to approach the Commission and seek approval of the extension of time. In furtherance to the same, the Petitioner has filed this Petition.
- (e) The Government, in the letter dated 25.04.2017 addressed to the Commission, has recommended the approvals accorded in respect of

extension of the COD by the Respondent (MESCOM), for six months from the date of SCOD, as per Articles 2.5 and 8 of the PPA.

- (f) In respect of extension of the Project duration of the already awarded Solar Power Projects, the Ministry of New and Renewable Energy has issued letter No.30/106/2014-15/NSM dated 28.07.2017, addressed to the Principal Secretaries (Power/Energy) of the State Governments, as stated below:

*“Ministry has 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 a 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.”*

- (g) Therefore, the Respondent (MESCOM) has prayed to accord directions in the present Petition, in the interest of justice.
- 6) We have heard the learned counsel for the parties and perused the material placed on record.



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- 7) The following issues arise for our consideration:
- (1) Whether this Commission has jurisdiction, to call upon the Petitioner to prove the *Force Majeure* Events, relied upon by it, by filing a Petition, urging the relevant grounds and producing proper evidence, for the scrutiny of the Commission, inspite of the Respondent admitting or not denying the occurrence of such *Force Majeure* Events?
  - (2) Whether the Petitioner has made out a case for deferment or extension of the Scheduled Commissioning Date of its Plant?
  - (3) What should be the tariff for the Project, for the term of the PPA?
  - (4) What Order?
- 8) After considering the submissions made by the learned counsel for the parties and the pleadings and other material placed on record, our findings on the above Issues are, as follows:
- 9) **ISSUE No.1:** *Whether this Commission has jurisdiction, to call upon the Petitioner to prove the Force Majeure Events, relied upon by it, by filing a Petition, urging the relevant grounds and producing proper evidence, for the scrutiny of the Commission, inspite of the Respondent admitting or not denying the occurrence of such Force Majeure Events?*
- (a) We have passed a reasoned Order and given our findings on the above Issue, in OP No.65/2017 and held that this Commission has the exclusive jurisdiction to consider the validity of the extension of time, when it affects the tariff payable to a generating company, ultimately passed on to

consumers. The same reasoning and findings would apply to this case also.

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

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

(a) We note that, under the Article 2.5 of the PPA, extension of time for commissioning the Project can be granted, if the SPD is prevented from performing its obligations, due to the ESCOM's 'Event of Default' or the *Force Majeure* Events. The *Force Majeure* Events and the requirement of issuing a written Notice, are mentioned in Article 8.3 of the PPA. Under Article 8 of the PPA, it is also necessary to prove that, the *Force Majeure* Events were 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 under the PPA.

(b) The PPA is dated 15.07.2015. The Conditions Precedent had to be achieved within 365 days, from the date of signing the PPA and the Project had to be commissioned within 18 months from the date of signing the PPA. The achievement of the Conditions Precedent would include, obtaining of all the approvals by the SPD.

(c) The SPD applied for the conversion of land on 15.04.2017, almost two years from the date of the PPA. It is not known when the conversion order was

passed by the Deputy Commissioner, Chitradurga. No explanation is given for this delay, on the part of the SPD, in applying for the conversion of land. In fact, there is no averment, at all, in the Petition, on this aspect. Had the Petitioner applied for the conversion of land earlier, the approval could have been obtained within the period of 365 days, stipulated in the PPA. Hence, we are unable to accept that, there was a delay in granting of the approval for the conversion of land. In fact, there is a delay on the part of the SPD, in applying for the conversion.

- (d) The SPD applied for the evacuation approval on 05.02.2016 (as mentioned in the letter dated 27.10.2016, Annexure P-4 and the Statement of Objections filed by the Respondent). This application is made after 7 months from the date of the PPA. No explanation is given for this delay, on the part of the Petitioner. The evacuation approval was granted on 23.09.2016, as per the letter dated 27.10.2016 and the Statement of Objections. The evacuation approval was granted in about 7 months' time. The Petitioner has neither produced the evacuation approval nor stated as to when it paid the processing charges or took such other relevant measures required on its part, to show its diligence in the matter. It can be easily inferred that had the SPD applied for evacuation approval immediately after the execution of the PPA, it would have helped in early commissioning of the Project.

- (e) From the above, we note that, the Petitioner's allegations of delay in granting evacuation approval which resulted in consequent delay in commissioning of the project cannot be accepted.
- (f) We note that, it is a settled law that, the *Force Majeure* clause in the PPA has to be strictly interpreted. No notice, as contemplated under the clause, is stated to have been issued by the Petitioner to the Respondent describing the particulars of any *Force Majeure* Event, as soon as practicable, after its occurrence. Further, the reasons quoted by the Petitioner, do not fall under the Events of *Force Majeure*. mentioned in the PPA, as held in the preceding paragraphs. Hence, we hold that the Petitioner is not entitled to the extension of time, as provided in the clauses of the PPA. The Respondent (MESCOM) should have considered these aspects, before granting the extension of time to the Petitioner.
- (g) Therefore, we answer Issue No. (2), in the negative.
- 10) **ISSUE No.(3):** *What should be the tariff for the Project, for the term of the PPA?*
- (a) Article 5.1 of the PPA reads, as follows:

***"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) It is the Petitioner's case that, the Tariff Orders dated 30.07.2015 and 12.04.2017, are not applicable to the Project, as it has been commissioned within the extended period of commissioning, granted by the Respondent (MESCOM). It is the submission of the Petitioner that the Respondent (MESCOM) has granted extension of time by 6 months, after considering the *Force Majeure* Events, as provided in the PPA and hence, the tariff of Rs.8.40 per unit, should not be altered. It is also stated by the Petitioner that, the Respondent (MESCOM), while granting extension of time, vide letter dated 20.02.2017, had not mentioned about altering the tariff and had stated that all other terms of the PPA remain unaltered.
- (c) The Project is commissioned on 27.04.2017. The Generic Tariff Order dated 12.04.2017, is applicable for the Projects, commissioned during the period, from 01.04.2017 to 31.3.2018. The PPA provides that, the tariff, as on the date of commercial operation, would be applicable for the Project. If it is commissioned beyond the Scheduled Commissioning Date.

- (d) The Hon'ble Supreme Court, in Civil Appeal No.1220 of 2015 (*Gujarat Urja Vikas Nigam Limited VS EMCO Limited and another*), decided on 02.02.2016, has held, as follows:

*"31. Apart from that both the respondent No.2 and the appellate tribunal failed to notice and the Respondent conveniently ignored one crucial condition of the PPA contained in the last sentence of para 5.2 of the PPA:*

*'In case, commissioning of solar Power Project is delayed beyond 31<sup>st</sup> December 2011, GUVNL shall pay the tariff as determined by Hon'ble GERC for Solar Projects effective on the date of commissioning of solar power project or above mentioned tariff, **whichever is lower.**'*

*The said stipulation clearly envisaged a situation where notwithstanding the contract between the parties (the PPA), there is a possibility of the first Respondent not being able to commence the generation of electricity within the "control period" stipulated in the 1<sup>st</sup> tariff order. It is also visualised that for the subsequent control period, the tariffs payable to projects/ power producers (similarly situated as the first Respondent) could be different. In recognition of the said two factors, the PPA clearly stipulated that in such a situation, the Respondent would be entitled only for lower of the two tariffs...."*

- (e) Further, in the decision of the Hon'ble Appellate Tribunal for Electricity, in Appeal No.221/2016 and others, dated 07.05.2018 (*Savitha Oil Technologies Ltd vs KERC & another*), it has been held that, the tariff, as on the COD, is applicable for a Project and the tariff should not be linked to the date of signing or approval of the PPA. The relevant portions of the judgment are extracted below:

*“xi. Further, it is a settled practice under the Section 62 of the Act that tariff determination process under various regulations for a new project begins from the COD of the said project as per extant regulations of the control period where COD of the project takes place. Subsequently, the tariff of such project is adjusted based on regulations/orders of the subsequent control period and it is not linked to the date of signing/approval of the PPA. If the PPA is approved at a later date or in other control period, the tariff is applicable from the COD date as per prevalent regulation at that time.*

.....

*xiv. In the present case too after carefully considering the provisions of the Act, 2004 Regulations, 2005 Order, 2009 Order, earlier judgement of this Tribunal and keeping in view the interest of the consumers it would be correct to draw a conclusion that the tariff applicable to the Appellants' WPPs would be as per the 2005 Order during which COD of the WPP has happened. The same corollary is applicable to other WPPs having COD is in some other control period.”*

- (f) The ratio of the above judgments of the Hon'ble Supreme Court and of the Hon'ble Appellate Tribunal for Electricity, is applicable to the Petitioner's case also. Hence, we hold that, the Petitioner's Plant is entitled to a tariff of Rs.4.36 per unit, for the term of the PPA, as per the Generic Tariff Order dated 12.04.2017, prevalent on the date of commissioning of the Project.
- (g) We note here that, the Petitioner (SPV) took the risk of implementation of the Project, 16 months after the execution of the PPA, with barely 2 months left for its commissioning, as agreed to in the PPA and could not do it, for

certain reasons and events, which we have held to be not falling under the *Force Majeure* clause of the PPA.

- (h) We have held that, the Petitioner is not entitled to the extension of time to commission the Project. Thus, for not complying with the timelines for Conditions Precedent and commissioning of the Project, as mentioned in the PPA, the Petitioner is also required to pay damages for such delay, as per the Articles 2.2 and 2.5.7 of the PPA. The Hon'ble Supreme Court, in its judgment dated 05.04.2018, in Civil Appeal No.3600 of 2018 (*M.P. Power Management Company Ltd Vs. Renew Clean Energy Pvt.Ltd., and another*), has held that, for delay in achieving the Conditions Precedent and commissioning the Project, the Generating Company is liable to pay damages, as stipulated in the PPA.
- (j) Therefore, we answer Issue No.(3), as above.

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

For the foregoing reasons, we pass the following:

**ORDER**

- (a) It is declared that the Petitioner is not entitled to any of the reliefs, sought for, in the Petition;
- (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;



- (c) The Petitioner is also liable to pay damages, as provided under Articles 2.2 and 2.5.7 of the PPA; and,
- (d) The office shall process any pending supplemental PPA for approval of the Commission.

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

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

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