

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

Dated : 29th November, 2018

Present:

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

OP No. 138 /2017

BETWEEN :

Jindal Aluminium Ltd.,
Represented by its Authorised signatory
Mr.Rajesh Kumar Soni,
Jindalnagar,Tumkur Road,
Bengaluru - 560 073.

... **PETITIONER**

[Represented by Shri S.V. Bhat, Advocate]

AND :

Bangalore Electricity Supply Company Limited,
Represented by its Managing Director,
Corporate Office,
K.R Circle,
Bengaluru - 560 001.

.. **RESPONDENT**

[Represented by Justlaw Advocates]

ORDERS

- 1) This Petition is filed, under Section 86(1) (f) of the Electricity Act, 2003 in effect, praying to:
 - (a) Direct the Respondent to pay Rs.16,99,764.48 for the additional energy generated and delivered to the Grid during the period 2015-16 and 2016-17 at the rate of Rs.4.11 per unit; or in alternative,

Direct the Respondent to give credit of 4,13,568 units in lieu of the payment to be made for the additional energy delivered to the Grid during the period 2015-16 and 2016-17 for the captive consumption of the Petitioner;

- (b) Direct the Respondent to execute Supplemental Agreement incorporating an additional term, in respect of the additional energy in the PPA; and,
 - (c) Direct the Respondent to pay the cost of the Petition and grant such other reliefs deemed fit.
- 2) The facts of the case and the grounds urged by the Petitioner, as submitted in the Petition, may be summed up, as follows:
- (a) The Petitioner developed 10 MW solar photo voltaic project at Kalamarahalli village, Challakere Taluk, Chitradurga District after applying for it and being selected by the Karnataka Renewable Energy Development Limited. The Petitioner and Respondent entered into a Power Purchase Agreement (PPA), in respect of the solar project on 27.07.2012 for a period of 20 years.
 - (b) Article 5.6.1 of the said PPA provides that the BESCO at any time during a contract year shall not be obliged to purchase any additional energy from the Developer beyond 18.396 million kWh (MU).

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- (c) The Petitioner had been generating power over the years and receiving payment from the Respondent, in terms of the PPA. The Petitioner started exporting the energy generated from 04.10.2015 and the same was recorded in the meter at the project site. Here itself, we note that the plant is commissioned on 05.06.2013 and hence, 04.10.2015 could be the date of export of additional energy.
- (d) The Petitioner for the year 2015-16 generated and transmitted into the grid of the Respondent 1,86,76,224 units (2,80,224 units in excess). The Petitioner has raised the invoices for the said additional energy, demanding a sum of Rs.1,44,85,284.00 from the Respondent, at the rate of Rs.8.25 per unit. Similarly, for the year 2016-17 the Petitioner exported 1,89,29,344 units, (1,33,344 units in excess) and raised the invoice for Rs.1,44,80,540.00.
- (e) For 2015-16 the Respondent issued 'B form' accounting the energy, but deducted Rs.23,11,848.00, at the rate of Rs.8.25 per unit for 2,80,244 units of additional energy. For 2016-17, the Respondent did not pay for the additional energy of 1,33,344 units generated/supplied.
- (f) The Petitioner by letters dated 18.05.2016 and 22.02.2017 demanded the Respondent to pay for the additional energy of 2,80,244 units supplied by it, at the rate of Rs.4.11 per unit, for the year 2015-16 and also raised a supplementary invoice, for the additional energy generated and supplied for the year 2016-17, vide letter dated 12.05.2017. The Petitioner also demanded execution of a supplementary agreement, incorporating the

additional term in the PPA for the additional energy. The Respondent has received the said letters without any demur.

- (g) It is beyond the control of the Petitioner to assure and/or produce specified quantity of energy/power, and hence, there cannot be any ceiling with regard to minimum and/or maximum energy. Hence, clause 5.6.1 of the PPA insofar as it relates to production of minimum and maximum quantity of energy and also payment of compensation is arbitrary and unreasonable. Though production of energy, in excess, is not regarded as the breach of the contract, under clause 5.6.1 of the PPA, the Respondent is not obliged to purchase the same. The Respondent cannot deny payment for the additional energy supplied by the Petitioner. There is no prohibition in the PPA, for the upward revision of the Capacity Utilisation Factor (CUF). The technology used by the Petitioner is Polycrystalline Solar Panels, which was within the knowledge of the Respondent at the time of entering into PPA.
- (h) The following are the details of the additional energy generated and received by the Respondent:

Additional Energy generated for the year
2015-16 is 2,80,224 units. The amount payable
at Rs.4.11 per unit works out to : Rs.11,51,720.64

Additional energy generated for the year
2016-17 is 1,33,344 units. The amount payable
At Rs.4.11 per unit works out to : Rs.5,48,043.84
Rs.16,99,764.48

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- (j) Apart from being liable to pay the said amount, the Respondent is also liable to enter into a Supplemental Agreement for the additional energy generated. As, the Respondent has not shown any inclination in executing the Supplemental Agreement or paying for the additional energy generated, the Petitioner has filed this Petition.
- 3) After issuance of Notice, the Respondent appeared through its counsel and filed Objections, which may be stated as follows:
- (a) As per Article 5.6.1 of the PPA, the Respondent is not obliged to purchase energy beyond 18.396 MU generated from the Petitioner's plant.
- (b) The Petitioner has generated and injected energy in terms of the PPA, except in the years 2015-16 and 2016-17. As per Article 12 of the PPA the tariff agreed between the parties is Rs.8.25 per unit for the contracted capacity.
- (c) The Petitioner is not entitled to payment for the additional energy injected beyond the contracted capacity as stipulated in Article 5.6.1 of the PPA. Article 5.6.1 of the PPA clearly states that the Respondent has no obligation to pay for the additional energy injected by the Petitioner beyond the contracted capacity of 18.396 MU. The PPA has been executed by parties willingly and the Petitioner was well aware of the terms of the PPA which capped the energy to be purchased by the Respondent. It is a settled law that, Courts have to give effect to the

intention of the parties. The said clause indicates that it was never the intention of the parties to inject/purchase any energy in excess of 18.396 MU. Hence, it is not open for the Petitioner to contend that the said Article in the PPA is arbitrary or unreasonable.

- (d) The Respondent is barred in law from purchasing power in the absence of any contract. Admittedly, the contract pertains to purchase of a maximum of 18.396 MU of energy. The PPA has also been approved by the Commission on 04.03.2013. Hence, the claim for a direction for payment of energy which is not contracted is unsustainable.
- (e) The Respondent is not in need of the additional solar energy injected by the Petitioner. Hence, the claim for payment is untenable.
- (f) As per Article 21.1 of the PPA, the CUF shall have the same meaning as provided in the CERC (Terms and conditions for tariff determination from renewable energy source) Regulations, 2009. The CERC Regulation provide for the capacity utilisation factor at 19% i.e., 16.64 MU. The PPA incorporates tariff at Rs.8.25 per unit considering the CUF at 19%. However, the PPA allows payment at Rs.8.25 per unit, for additional energy of 1.756 MU. As the PPA itself fixes a maximum ceiling on purchase, the averment that the additional energy generated, on account of surplus availability of solar energy should also be purchased, is untenable.

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- (g) The Petitioner's claim to permit it to utilise the additional energy for captive consumption, is an afterthought. The question of captively utilising the energy would only arise if the Petitioner satisfies the conditions stipulated in Rule 3 of the Electricity Rules, 2005. Had the Petitioner intended to generate and utilise the energy generated captively, it should have ensured compliance with all applicable law and rules.
- (h) The question of executing a supplemental agreement would only arise when there is '*consensus as idem*' between the parties. In the present case, the Respondent is not desirous of purchasing the additional energy injected by the Petitioner. The question of directing the parties to execute an agreement when one party is unwilling, would not arise.
- 4) We have heard the learned counsel for both parties and perused the records. The learned counsel for the Petitioner, during arguments, relied on the order of the Commission dated 02.02.2017 in OP No.78/2016, while the learned counsel for the Respondent disputed its applicability in the present case.
- 5) The following issues would arise, for our consideration:
- (1) Whether the Commission can compel the Respondent to purchase the additional energy, generated by the Petitioner's Plant, beyond the contracted capacity mentioned in the PPA?
 - (2) What Order?

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- 6) 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:
- 7) **Issue No.(1):** *Whether the Commission can compel the Respondent to purchase the additional energy, generated by the Petitioner's plant, beyond the contracted capacity mentioned in the PPA?*
- (a) It is the case of the Petitioner that, as solar power generation is dependent on nature and is not in its control, there cannot be any floor / ceiling with regard to minimum and/or maximum energy to be supplied by the solar plant and hence, Article 5.6.1 of the PPA in so far as it relates to production of minimum and maximum quantity of energy and also payment of compensation is arbitrary and unreasonable. It is also pleaded that the Respondent cannot deny payment for the additional energy supplied by the Petitioner, as there is no prohibition in the PPA for upward revision of the capacity utilisation factor (CUF), if the technology used by the Petitioner generates more power by virtue of its efficiency.
- (b) On the other hand, it is contended by the Respondent that the PPA specifically imposes a cap on the contracted capacity and hence, the Respondent cannot be directed to purchase any additional energy generated by the plant, when the same is not required by the Respondent.

- (c) The Petitioner has relied on the Order of the Commission in OP No.78/2016 in support of its claim for payment for the additional energy supplied. The Respondent has argued that the said case does not apply as the Respondent had offered to purchase the additional energy in that case at APPC rate, but in this case, it does not want the additional energy. We accept the contention of the Respondent. Although the terms of the PPA in both cases provide for a ceiling limit of energy to be purchased by the ESCOM, the marked difference is that the Respondent had, in OP No.78/2016, offered to purchase the additional energy, whereas, in this case, it has specifically stated that the additional energy is not required. It was based on the offer of the Respondent that the Commission fixed a tariff in OP No.78/2016 for the additional energy.
- (d) Articles 5.5 and 5.6 of the PPA are relevant to deal with the dispute in this case. Article 5.5 provides that the BESCO has to purchase all the power supplied at the delivery point corresponding to the Contracted Capacity. Article 5.6 of the PPA provides that, the ESCOM during the contract year shall not be obliged to purchase any additional energy from the developer beyond 18.396 Mus. There is no provision in the PPA for purchase of all the power generated by the plant if panels of superior technology are used. The definition of CUF in the PPA, stipulates that it shall be, as per the CERC Regulations. The CERC Regulations of 2012 provide for CUF of 19%. It is the submission of the Respondent that, whereas CUF at 19% is considered in this case while arriving at the maximum contracted capacity, an additional energy of 1.756 MU is

provided. Having entered into a PPA with certain specific terms, the Petitioner cannot now contend that the terms are arbitrary or unreasonable.

- (e) In this case, as against in OP No.78/2016, we note that the Respondent is unwilling to purchase the additional energy. When a certain upper limit is specified in the PPA, the Commission cannot direct or compel the Respondent to procure more than such limit. It is only if the parties agree, that the Commission can fix a rate / tariff for any power supplied beyond the specified limit. The Petitioner could have anticipated in advance, during the respective years, that it would be generating more than the limit fixed and could have sought permission for sale of the additional power to third parties. The Petitioner had not even sought prior consent of the Respondent for injection of additional energy. The terms of the PPA do not cast any duty on the Respondent to specifically intimate the Petitioner not to inject any power beyond the contracted quantum.
- (f) Therefore, we consider that, such injection of additional energy cannot be permitted, let alone compensated.
- (g) For the above reasons, we answer Issue No.(1), in the negative.
- 8) **Issue No.(2):** *What Order?*
- (a) As we have held that the Petitioner is not entitled to inject additional energy, beyond the contracted capacity, the question of paying for the same or giving credit, does not arise.

(b) For the foregoing reasons, we pass the following:

ORDER

The Petition is dismissed.

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

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

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