

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION

No. 16 C-1, Miller Tank Bed Area, Vasanth Nagar, Bengaluru- 560 052

Dated : 23rd July, 2019

Present:

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

OP No.94/2018

BETWEEN:

Halo Energie Challaki Private Limited,
No.301, 3rd Floor,
Niharika Jubilee One,
Road No1, Jubilee Hills,
Hyderabad.

.. **PETITIONER**

[Represented by Navayana Law Offices, Advocates]

AND:

Bangalore Electricity Supply Company Limited,
K.R. Circle,
Bengaluru – 560 001.

.. **RESPONDENT**

[Represented by Just Law, Advocates]

OP No.95/2018

BETWEEN:

Halo Energie Chitradurga Private Limited,
No.301, 3rd Floor,
Niharika Jubilee One,
Road No1, Jubilee Hills,
Hyderabad.

.. **PETITIONER**

[Represented by Navayana Law Offices, Advocates]

AND:

Bangalore Electricity Supply Company Limited,
K.R. Circle,
Bengaluru – 560 001.

.. **RESPONDENT**

[Represented by Just Law, Advocates]

OP No.96/2018**BETWEEN:**

Halo Energie Chitranayaki Limited,
H.No.6-3-1219/21,
Street No.3, Sarada Mansion,
Uma Nagar, Begumpet,
Hyderabad.

.. **PETITIONER**

[Represented by Navayana Law Offices, Advocates]

AND:

Bangalore Electricity Supply Company Limited,
K.R. Circle,
Bengaluru – 560 001.

.. **RESPONDENT**

[Represented by Just Law, Advocates]

COMMON ORDER

- 1) The above Petitions are filed by the Petitioners against the common Respondent-Bangalore Electricity Supply Company Limited (BESCOM). As common questions of law and facts are involved in these three cases, this Common Order is being passed.
- 2) These three Petitions are filed under Section 86(1)(f) of the Electricity Act, 2003, praying, in substance:

- (a) to direct the Respondent to make payment towards the excess generation of energy, over and above the ceiling limit, injected into the Grid, as specified in Article 3.5 of the Power Purchase Agreement (PPA) dated 02.07.2015, at the APPC rate, prevalent during the relevant Financial Year; and,
- (b) to pass such other and incidental orders, as may be deemed appropriate under the facts and circumstances of the case.
- 3) The quantum of energy generated, over and above the ceiling limit and injected into the Grid, by the end of the Financial Year, i.e., 31.03.2017, in these cases, are as follows:

| <u>OP No.</u> | | <u>Units</u> |
|---------------|----|--------------|
| 94/2018 | .. | 1,74,040 |
| 95/2018 | .. | 1,42,500 |
| 96/2018 | .. | 1,57,530 |

- 4) In all these Petitions, the documents produced by the Petitioners are similar and they are marked with the same Annexure numbers. The contents of these documents are also similar.
- 5) The material facts, required for disposal of these Petitions, may be stated as follows:
- (a) For the sake of convenience, we may note the facts stated in OP No.94/2018.
- (b) The Petitioner is a Generating Company, which owns and operates a Solar Power Project of 2 MW capacity in Chitradurga District. One Shri T. Lakshmana Reddy [Solar Power Developer (SPD)], who was selected for

development of a 2 MW Solar Power Project, had executed a PPA dated 02.07.2015 (ANNEXURE-P1) with the Respondent, agreeing to supply the Solar power, as per the terms and conditions stated therein. The Petitioner-Company was formed as a Special Purpose Vehicle (SPV), by the SPD, in terms of Article 12.11 of the PPA. Accordingly, the rights and liabilities of the SPD were assigned to the SPV. Thereafter, a Supplemental PPA (SPPA) dated 09.12.2016 was executed between the parties concerned, incorporating the creation of the SPV and the assignment of the rights and liabilities under the PPA to the SPV. The Solar Power Project of the Petitioner was commissioned on 26.12.2016 and thereafter, the power was being injected into the Grid.

(c) The relevant portion of Article 3.5 of the PPA reads thus:

*“3.5 **Maximum generation:** The SPD is allowed maximum CUF of 19% (1.664 MU/MW/annum) in case of fixed axis without tracking and up to 24% (2.10 MU/MW/annum) with tracking. Excess energy pumped into the grid will be treated by BESCO as inadvertent. ...”*

(d) At the end of the Financial Year, i.e., 31.03.2017, the quantum of excess generation of energy, over and above the ceiling limit, injected into the Grid, was 1,74,040 units. As already noted, the quantum of excess generation in the other two cases, at the end of the Financial Year, i.e., 31.03.2017, was 1,42,500 units and 1,57,530 units, respectively. The Respondent did not pay any amount towards the quantum of excess generation, as noted above, out of the Invoices raised for the energy injected into the Grid, for the month of March, 2017. In the Petition, the Petitioner has claimed for the quantum of excess energy injected into the

Grid, at the prevailing APPC rate, for the relevant Financial Year, but not at the rate of Rs.8.40 per unit, as provided in the PPA, for supply of energy.

- (e) The main ground urged by the Petitioner is that, it should be compensated for the quantum of excess energy injected into the Grid, at the APPC rate, on the principles adopted in OP No.78/2016, decided on 02.02.2017 by this Commission.
- 6) After issuance of Notice, the Respondent appeared through its counsel and filed the Statement of Objections, which may be stated as follows:
- (a) As per Article 3.5 of the PPA, the maximum generation allowed for a year is 1.664 MU/MW/annum at 19% CUF for fixed axis. This clause also specifies that the excess energy injected will be treated as 'inadvertent'. During the period from 26.12.2016 to 31.03.2017, the Petitioner has injected 1,74,040 units of excess energy and hence, Rs.14,61,936/- has not been admitted. The Respondent has informed that, it is not liable to pay for the excess energy, vide letter dated 16.05.2017.
- (b) 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 1.664 MU/MW/annum. Hence, the contention of the Petitioner that, it is entitled for payment for additional energy, is untenable.

-
- (c) The Respondent, a public utility, is barred in law from purchasing power, in the absence of any contract. Admittedly, the contract pertains to purchase of a maximum of 1.664 MU of energy. Hence, the claim for a direction for payment of energy, which is not contemplated in the PPA, is unsustainable.
- (d) The Respondent is not in need of the additional Solar energy, injected by the Petitioner. The question of executing a SPPA would only arise, when there is '*consensus ad 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.
- (e) In OP No.78/2016, the Respondent had offered to purchase the additional energy at the APPC, but in this case, does not want the additional energy, as it is surplus in Solar energy. Considering the willingness of the Respondent, the Order was passed in OP No.78/2016. The Commission can only fix tariff for purchase of energy, if the parties agree. The Commission had passed the Order in OP No.138/2017 on 29.11.2018, holding that, the Commission can fix tariff for any power supplied beyond the quantum mentioned in the PPA, only if the parties agree to buy / sell such excess power. Further, the Petitioner had not sought permission to inject the excess energy. Hence, the claim for payment is untenable.
- (f) The respondent has prayed for dismissal of the Petition.

-
- 7) The Petitioner has filed the Rejoinder, as follows:
- (a) The Respondent has not produced any Board Resolution or authorization to support the authority of Mr. M. Shivaprakash, to sign the verifying the Affidavit, attached to the Statement of Objections filed by the Respondent. The said person is not authorized to depose in the case and file the Statement of Objections. On this ground alone, the Statement of Objections is liable to be rejected and the defence of the Respondent is liable to be struck down.
- (b) As per the applicable Regulations of the Commission, the Statement of Objections has to be filed within 21 days from the date of filing of the Petition. Admittedly, the Petition was filed on 15.11.2018 and no Statement of Objections was filed within the statutorily stipulated time line. Hence, the Respondent has no authority to file the present Statement of Objections. Therefore, the same may be rejected.
- (c) The PPA provides that, the energy supplied beyond the stipulated CUF of 19% will be treated by the BESCO as 'inadvertent'. The legal and the dictionary meaning of the term 'inadvertent' is unintentional, but it does not mean that, there is no commercial value for the energy supplied and this is not even the Respondent's case. Incorporation of the term 'inadvertent' in the PPA is itself an evidence, that the parties contemplated and left open the possibility of energy being supplied beyond the CUF. The Respondent in O.P.No.78/2016 has agreed to buy the energy supplied, above the stipulated CUF, at the APPC rates. Hence, the Petitioner is entitled to its claim under the present Petition. Further, the

PPA does not indicate the intention of the parties, not to purchase the excess energy. If that was so, it would have been clearly spelt out in the PPA. The conscious use of the term 'inadvertent' goes to show that, the energy delivered beyond the CUF, at worst, is not eligible for PPA rates. The term 'Delivered Energy' is defined to mean, the electricity actually fed and measured at the Delivery Point in a Billing Period. This means that, during a Billing Period, the Respondent is liable to purchase the entire Delivered Energy and not discriminate the same as 'advertent' or 'inadvertent'.

- (d) The Respondent is a Public Utility. Hence, it cannot discriminate between the two similarly situated Projects. When the Respondent can volunteer to purchase the excess energy from a Solar Project in O.P.No.78/2016, it cannot refuse to buy the same from the Petitioner. There was an initial refusal to purchase the excess energy in OP No.78/2016. However, in OP No.78/2016, the Respondent pleaded, in its Statement of Objections, that it is prepared to buy the energy at APPC rates. Hence, the refusal to treat this Petitioner, at par, is nothing but a hostile discrimination. The Respondent is inconsistent with its conduct and response. In one breath, it says that PPA does not stipulate purchase of excess energy at APPC rates and in the same breath, it says it is not in need of additional Solar energy, injected by the Petitioner. The so-called 'excess energy' is 'Delivered Energy' under the PPA. Hence, the Respondent cannot contend that, it is not in need of it.

-
- (e) The facts in issue and the questions of law in OP No.78/2016 and the present case are identical. As in the present case, in O.P.No.78/2016, too, the Petitioner therein had not sought for the prior approval before injection. The PPA does not contemplate any prior approval, because under the PPA the Respondent has agreed to allow the Petitioner to operate the Project as a 'must run' Generating Station, subject to constraints. When the 'must run' status is granted, it is the duty of the Respondent to off-take all electricity generated and pay for the same. The Petitioner does not insist on the tariff, agreed to under the PPA, for the excess energy, but is seeking parity with other Projects, which have been paid the APPC.
- (f) As per Section 70 of the Contract Act, 1872, there cannot be free receipt of energy in a commercial contract. The energy delivered by the Petitioner has been consumed by the Respondent, in the same way as the energy generated by the Petitioner in O.P No.78/2016. When the energy supplied by the Petitioner has been sold by the Respondent to its consumers and revenue has been realized, it has to pay to the Petitioner at least at the APPC rate.
- 8) The facts in the other two connected Petitions are also similar, except to the extent, as noted above. The Petitioners in the other two cases have adopted the Rejoinder filed in OP No.94/2018.
- 9) We have heard the learned counsel for both parties and perused the records. The learned counsel for the Petitioner has relied on the Order of

this Commission dated 02.02.2017 in OP No.78/2016, while the learned counsel for the Respondent has relied on the Order dated 29.11.2018 in OP No.138/2017.

- 10) The following Issues would arise, for our consideration:
 - (1) Whether the preliminary objections, raised by the Petitioners in the Rejoinder, are maintainable?
 - (2) Whether the Petitioners are entitled to any price / compensation for the quantum of excess generation of energy, over and above the ceiling limit, injected into the Grid, for the Financial Year ending 31.03.2017?
 - (3) If Issue No.(2) above is held in the affirmative, at what rate?
 - (4) What Order?
- 11) 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:
- 12) **ISSUE No.(1):** *Whether the preliminary objections, raised by the Petitioners in the Rejoinder, are maintainable?*
 - a) The Petitioners have raised preliminary objections in the Rejoinder, stating that:
 - (i) one Shri Shivaprakash, who has signed the Verifying Affidavit attached to the Objections filed by the Respondent, was not the authorized person, to depose in the cases on behalf of the Respondent and that no Board resolution or authorization, authorizing the said person to sign the Verifying Affidavit on behalf

of the Respondent, was filed and, therefore, the Statement of Objections was liable to be rejected; and,

- (ii) the Statement of Objections filed, was not within 21 days from the date of filing of the Petitions, as required in the applicable Regulations of this Commission for filing the Statement of Objections.
- (b) These preliminary objections were not raised, before the cases were taken up for final hearing. All such preliminary objections are to be raised prior to the final hearing. Even otherwise, the Officer, who has filed the verifying Affidavit, being an In-charge General Manager, Power Purchase Section of the Respondent, could be considered to be a Competent Officer to swear to the Affidavit on behalf of the Respondent, even in the absence of a Board resolution or specific authorization to depose in the cases. The Statement of Objections filed by the Respondent was received by this Commission, which amounted to condoning the delay in filing the said objections. Therefore, we reject the above preliminary objections raised by the Petitioners.
- 13) **ISSUE No.(2):** *Whether the Petitioners are entitled to any price / compensation for the quantum of excess generation of energy, over and above the ceiling limit, injected into the Grid, for the Financial Year ending 31.03.2017?*
- (a) The learned counsel for the Petitioners does not dispute the restriction imposed against the SPD, to inject the excess energy beyond the maximum allowable generation and to claim tariff at the rate of Rs.8.40

per unit for the excess energy, so injected. It is admitted that, the Solar Panels fixed are without tracking, therefore, the maximum CUF allowed was 19% (1.664 MU/MW/annum). It is also not in dispute that, the quantum of the excess energy, as noted above, has been injected into the Grid. The learned counsel for the Petitioner submitted that, the excess energy injected into the Grid is to be treated as 'inadvertent' injection and there is no specific bar in the PPA to pay some amount for such energy, though not at the tariff agreed to in the PPA. In support of such contention, the following points are urged:

- (i) that, the Respondent is under an obligation under Article 4.2(a) of the PPA to allow the SPD to operate the Project as a 'must run' Generating Station, subject to system constraints. Further that, none of the Articles in the PPA would specifically bar payment of any amount for the 'inadvertent' injection of energy;
- (ii) that, the Respondent had volunteered to purchase energy from the Solar Power Project in OP No.78/2016, decided by this Commission, therefore, on parity, the Respondent is bound to compensate the Petitioner for the quantum of 'inadvertent' injection of energy; and,
- (iii) that, on the principles of Section 70 of the Indian Contract Act, 1872, the Petitioner is entitled to claim compensation from the Respondent for the quantum of 'inadvertent' injection of energy.

- (b) The learned counsel for the Respondent has refuted all the above points urged by the learned counsel for the Petitioners.
- (c) After considering the material on record, our findings on the above points are as follows:

(i) *Regarding Point No.(i):*

Article 4.2(b) of the PPA states that, subject to system constraints, the Respondent is obliged to off-take and purchase electricity generated by the SPD at the 'Delivery Point', as per Article 3.5 of the PPA. This would clearly show that, the Respondent is not under an obligation to purchase the power, in excess of the maximum generation allowed. Therefore, a 'must run' status, given to the SPD, should be restricted to the maximum generation allowed under Article 3.5 of the PPA. Therefore, the 'must run' status provided does not authorize the SPD to inject energy in excess of the allowable maximum generation.

Article 5.1 of the PPA provides that, the SPD shall be entitled to receive the tariff of Rs.8.40 per unit, in respect of the Solar Power Project, in terms of this Agreement. Therefore, when the other terms indicate restriction for injection of energy beyond the allowable maximum generation, there cannot be a claim by the SPD for the 'inadvertent' injection.

'Inadvertent' injection of power means, the injection of power without any authority under law. Therefore, it cannot be inferred that, the injection of 'inadvertent' energy should be compensated, suitably. Therefore, we answer Point No.(i) against the Petitioners.

(ii) *Regarding Point No.(ii):*

The facts and the terms of the PPA in OP No.78/2016 are not comparable with the facts and the terms of the PPA in the present cases. In the PPA concerned in OP No.78/2016, an option was provided to the Purchaser, to purchase the energy in excess of the maximum ceiling limit. In that case, the Purchaser had expressed its willingness to purchase the excess energy, but at a lower tariff than the one fixed in the PPA. In view of those facts, this Commission had allowed certain tariff for the energy injected beyond the maximum permissible limit. The Respondent has relied upon the decision rendered by this Commission in OP No.138/2017, wherein the Purchaser refused to purchase the excess energy beyond the allowable maximum generation. Therefore, in that case, this Commission disallowed the claim for compensation for the excess energy injected. Hence, on parity, the Petitioners in the present cases cannot claim any compensation from the Respondent. Therefore, we answer Point No.(ii) against the Petitioners.

(iii) *Regarding Point No.(iii) :*

This Commission has examined the applicability of the principles stated in Section 70 of the Indian Contract Act, for the 'inadvertent' injection of power into the Grid, in OP No.32/2014, in the case of *Lalpur Wind Energy Private Limited -Vs- KPTCL and others*, decided by this Commission on 26.11.2015, and has held in that case that, no compensation could be allowed for the 'inadvertent' injection of power into the Grid, on the basis of Section 70 of the Indian Contract Act. We are of the considered

opinion that, there is no reason for this Commission to differ from the view taken by this Commission in the said case. Therefore, we answer Point No.(iii) against the Petitioners.

(d) The PPA in question provided a tariff of Rs.8.40 per unit for the Delivered Energy. It was a known fact, at that point of time, that the Capital Cost for the Solar Power Projects was being reduced, considerably, from time to time. Therefore, it was intended to restrict the unauthorized addition to the capacity of the Project, at the Project site. The Distribution Licensee would plan the purchase of energy, considering the requirement of energy in its area of distribution. Therefore, purchase of any excess energy, over and above the agreed quantum, would affect its planning and finance. Therefore, it is usual that the PPA contains a term regarding the allowable maximum generation of energy, that could be injected into the Grid. The generator should take precaution to divert the excess energy generated, if any, to a third party sale. If the generator fails to take such a step, it cannot claim compensation from the Purchaser.

(e) For the above reasons, we answer Issue No.(2), in the negative.

14) **ISSUE No.(3):** *If Issue No.(2) above is held in the affirmative, at what rate?*

(a) As we have answered Issue No.(2), in the negative, Issue No.(3) does not survive for consideration.

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

For the foregoing reasons, we pass the following:

ORDER

- (1) All the three Petitions are hereby dismissed. The Petitioners are not entitled to any of the reliefs, sought for, in these Petitions; and,
- (2) The original Order shall be kept in OP No.94/2018 and copies, thereof, in OP Nos.95/2018 and 96/2018.

Sd/-
(SHAMBHU DAYAL MEENA)
CHAIRMAN

Sd/-
(H.M. MANJUNATHA)
MEMBER

Sd/-
(M.D. RAVI)
MEMBER