

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION

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

Dated : 28th May, 2019

Present:

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

OP No.08/2018

BETWEEN :

Shri B.N. Chandrappa
S/o P. Narasimhaiah,
Aged about 61 years
Bhaktharahalli Village,
Hosur Post, Gauribidanur Taluk,
Chikkaballapur District.

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PETITIONER

[Represented by Smt.Poonam Patil, Advocate]

AND :

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

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RESPONDENT

[Represented by Just Law, Advocates]

ORDERS

- 1) This Petition is filed under Section 86(1)(f) of the Electricity Act, 2003,
praying to:

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- (a) hold and declare that the Petitioner is entitled to a tariff of Rs.9.56/kwh for the energy supplied to the Respondent as per Clause 6.1(a) of the Power Purchase Agreement (PPA) dated 23.09.2015; and,
- (b) grant such other and further reliefs as deemed fit in the facts and circumstances of the case, in the interest of justice.
- 2) The facts of the case are as follows:
- (a) The Petitioner has installed a 1 MW Solar Roof Top Photo Voltaic (SRTPV) Power Plant, on the roof top of his poultry farm at Sy.No.119 of Bhaktharahalli Village, Hosur Hobli, Gowribidanur Taluk in Chikkaballapur District, after obtaining approval dated 18.09.2015 from the Respondent. The time limit to complete the Project was within 180 days from the date of said approval. A PPA was signed between the parties on 23.09.2015. The tariff fixed under the PPA is Rs.9.56 per kwh and the Commission approved the PPA on 17.12.2015. The approval of the PPA was communicated to the Petitioner by the Respondent under a communication dated 02.01.2016.
- (b) After the approval of the PPA, the Petitioner approached Corporation Bank, Bengaluru on 08.02.2016 for sanction of loan to fund the Project. The Bank raised several queries on 20.02.2016, which were addressed by the Petitioner on 24.02.2016.

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- (c) The Respondent issued a Circular dated 17.11.2015, providing for extension of time to all the Developers to install the SRTPV Plants, by payment of Re-registration fees. As per the said Circular, the Petitioner was entitled for extension of time by 12 months. The Petitioner sought for extension of time, as per the Circular and the Respondent granted the extension for a period of 12 months from 23.03.2016.
- (d) The Petitioner approached the Canara Bank, Bengaluru, for financial assistance as Corporation Bank failed to process the loan after keeping the Petitioner waiting for more than six months. On 16.08.2016, the Canara Bank sanctioned a loan of Rs.526 Lakhs.
- (e) The Solar PV Panels, totally amounting to Rs.3,80,02,280/-, were procured, vide Invoice dated 01.07.2016 and the Petitioner completed the installation of the SRTPV plant by the first week of September, 2016, which is evidenced by the Work Completion Certificate dated 06.09.2016 issued by the contractor of the Petitioner.
- (f) The Petitioner continuously followed up with the Respondent to get the Work Order for HT line from September, 2016, but the Respondent, for no reason, withheld the same. The Petitioner addressed a communication dated 19.12.2016, requesting the Respondent to issue the work order for HT line connection. As the Petitioner did not get any response from the Respondent, he approached the Hon'ble High Court of Karnataka, by filing Writ Petition No.3244/2017, seeking a direction to the Respondent to issue the Work Order. The Hon'ble High Court, vide order dated 08.06.2017

permitted the Petitioner to give a fresh representation to the Respondent and also directed the Respondent to consider the representation, within four weeks.

(g) Accordingly, the Petitioner gave a representation enclosing all the documents to the Respondent on 15.06.2017. On 07.07.2017 the Respondent communicated to the Petitioner that the extension of time granted on 23.03.2016 for a period of 12 months was invalid and due to delay in commissioning the plant, the Petitioner was liable for a reduced tariff of Rs.5.20 per unit as against Rs.9.56, as agreed to under the PPA. The Respondent invited the Petitioner to sign a Supplementary PPA with the new tariff. The Petitioner replied on 12.07.2017 to the Respondent, stating that he would sign the Supplementary PPA, reserving liberty to approach the Commission in respect of the applicable tariff. Accordingly, the Petitioner and the Respondent signed a Supplementary PPA on 25.11.2017. The SRTPV Plant was commissioned on 30.12.2017. Aggrieved by the acts of the Respondent in reducing the tariff, this Petition is filed.

3) The grounds urged by the Petitioner are:

(a) The action of the Respondent in levying reduced tariff is contrary to the terms of the PPA and the extension of time of 12 months was granted by the Respondent to commission the plant.

(b) The Petitioner had completed installation of the plant in September, 2016, but the Respondent did not issue Work Order for HT line connection, for almost 10 months, which resulted in the delay in commissioning of the

Project. Therefore, the Respondent cannot compel the Petitioner to accept lower tariff than that fixed under the PPA.

(c) The Respondent granted extension of time to the Petitioner on 23.03.2016. On 07.07.2017, after a period of about 15 months, for the first time, the Respondent declared that, the Petitioner was not entitled for the tariff fixed under the PPA. The Petitioner had, by then, made huge investments and installed the plant. Had the Respondent not granted extension of time, or even after granting extension of time, informed the Petitioner about cancelling the said extension well in advance, the Petitioner would not have gone ahead and invested crores of money.

(d) The Respondent granted extension of time to commission the Project to the Petitioner on 23.03.2016, for a period of 12 months from the said date. The Petitioner was ready for commissioning the Plant on 06.09.2016, well within the extended period of time. Therefore, the Petitioner is not liable to reduction in tariff. The Respondent has referred to a communication dated 27.09.2016 of the Commission, under which reduced tariff is contemplated to be levied to the Plants that are commissioned beyond time. The said communication, issued subsequent to the extension of time granted by the Respondent and subsequent to the Petitioner completing the installation of the Project, cannot be made applicable, retrospectively.

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- (e) If the tariff of Rs.5.20 is upheld, the same would result in the Petitioner incurring a loss of Rs.50.52 Lakhs per year. In such an event, the Petitioner would be forced to shut down his Plant.
- (f) The PPA was signed by the parties on 23.09.2015. But, the Respondent sent the same for approval to the Commission only on 10.12.2015. The approval by the Commission was intimated to the Petitioner under the communication dated 02.01.2016. It was only after receiving the communication with regard to approval of PPA, that the Petitioner could start the process of obtaining financial assistance, because no financial institution would consider granting loan, without there being a PPA approved by the Commission. Therefore, delay in obtaining financial approval by the Petitioner is solely on account of the Respondent getting the approval of this Commission, belatedly.
- (g) The Hon'ble Appellate Tribunal has in the case of *Gujarat Urja Vikas Nigam Limited -V- GERC and Ors.*, in Appeal No.123/2012, has upheld the following finding 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."

The event in the present case also being the delay from the Respondent in getting approval from the Commission and issuing the Work Order for the HT line, the Petitioner is entitled for extension of time.

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- 4) Upon issuance of Notice, the Respondent entered appearance through the Counsel and filed Objections, as follows:
- (a) The Petitioner was required to commission his plant on or before 17.03.2016 within 180 days from the date of Approval. The Petitioner could not commission the project within time. Therefore, the Petitioner requested the Respondent to grant extension of time to commission the Plant. The Respondent, vide letter dated 23.03.2016, has extended the time for commissioning of the Petitioner's plant by 12 months, as per the Circular dated 17.11.2015.
- (b) The Commission in the Generic Tariff Order dated 02.05.2016 has clearly stated that, no further extension ought to be given for SRTPV Plant owners, who have not commissioned their plant within 180 days and have executed the PPA, as per the Tariff Order dated 10.10.2013, at the tariff of Rs.9.56 per unit. Hence, on 18.05.2016, the Respondent withdrew its Circular dated 17.11.2015, granting extension of time to commission the plants. Thereafter, the Commission, vide letter dated 27.09.2016 directed the Respondent, not to grant any extension of time for commissioning of such SRTPV plants. The Petitioner, vide letters dated 19.12.2016 and 28.04.2017, had requested the Respondent to commission the Plant, in view of the completion of work of installation of the Plant.
- (c) After disposal of WP No.3244/2017 on 07.07.2017, the Respondent has communicated to the Petitioner that, he is required to execute a Supplemental PPA incorporating the revised tariff as per the Generic Tariff

Order dated 02.05.2016, as he had not commissioned the SRTPV Plant within 180 days.

- (d) The time frame, ordinarily approved by the Commission for installing SRTPV Project, is 180 days from the date of signing of the PPA. Even as per the guidelines of the Respondent, for SRTPV applicants having existing buildings, the time prescribed is 180 days, i.e., 6 months. The said Guidelines of the Respondent is in public domain and known to all. In spite of the Petitioner having knowledge about the same, he has failed to commission the Plant within the stipulated timeframe. The Commission has clearly specified that the PPAs executed, as per the Tariff Order dated 10.10.2013, are eligible for a tariff of Rs.9.56 per unit, provided the SRTPV Plants are commissioned within 180 days. In the present case, the Petitioner cannot be permitted to avail of the benefit of higher tariff, without adhering to the prescribed time frame for commissioning of the Plant.
- (e) For the SRTPV Plants, which have been commissioned beyond six months, the Tariff Order dated 02.05.2016 has been made applicable. As the Petitioner failed to commission the Plant within the stipulated timeframe, the Supplemental PPA (SPPA) was executed, in terms of Generic Tariff Order dated 02.05.2016. The Petitioner having voluntarily executed the SPPA, cannot now wriggle out of a valid contract.
- (f) The averment that, the Petitioner had completed the installation of work by September 2016, is denied. The fact that, the Petitioner has received

approval of the Chief Electrical Inspector only on 28.12.2017, proves that, the Petitioner has failed to complete the work related to the installation of the SRTPV Plant within 180 days.

- (g) The averment that, the Respondent withheld the Petitioner's Work Order for no reason, is denied. The Petitioner requested for issuance of the Work Order, much later after the Scheduled Commissioning Date. The Petitioner has admitted that, it had completed the work related to the installation of the SRTPV Plant, only in September, 2016. Therefore, the averment that, the Petitioner could not commission the Plant within the time frame, on account of non-issuance of Work Order by the Respondent, is denied.
- (h) The extension of time, granted to the Petitioner, was withdrawn, vide Official Memorandum dated 18.05.2016. Therefore, the Petitioner is not entitled for any extension of time to complete the Project.
- (i) The averment that, the delay in obtaining the financial assistance was solely on account of delay in getting approval of the PPA by the Respondent, is denied. The Petitioner has admitted that, he first approached the Bank, seeking loan on 08.02.2016, although the PPA was approved by the Commission on 10.12.2015. The petitioner has not explained why there was a delay in seeking the financial assistance, even after the approval of the PPA by the Commission. This shows that, the Petitioner was not diligent in executing his project.
- (j) The Respondent has prayed for dismissal of the Petition, in the interest of justice.

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- 5) The Petitioner has filed the Rejoinder, reiterating the contentions urged in the Petition.
- 6) We have heard the learned counsel for both the sides and perused the records. The following Issues would arise for our consideration:
- (1) Whether the Petitioner is entitled to the tariff, mentioned in the PPA dated 23.09.2015, despite commissioning the SRTPV plant beyond the period of 180 days?
- (2) What Order?
- 7) **ISSUE No.(1):** *Whether the Petitioner is entitled to the tariff, mentioned in the PPA dated 23.09.2015, despite commissioning the SRTPV plant beyond the period of 180 days?*
- (a) The Petitioner has contended that, the delay in communication of the approval of the PPA has caused delay in sanctioning of loan, and the delay in issuance of Work Order for the HT line by the Respondent has caused the delay in commissioning the Plant; that, pursuant to the Circular of the respondent 17.11.2015, the extension of time of 12 months was granted on 23.03.2016 for commissioning the Plant and the withdrawal of the Circular on 18.05.2016 cannot be made to operate, retrospectively, to apply to the petitioner. During the arguments, the Advocate for the Petitioner relied on the decision of the Hon'ble Supreme Court in the case of *State of Kerala & others Vs Kurian Abraham (P) Ltd & another*, reported in (2008) 3 SCC 582, to contend that, the Circular dated 17.11.2015 had a binding effect on the acts done, when it was in operation.

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- (b) It is the case of the Petitioner that, the Plant was completed and was ready for commissioning on 06.09.2016, but the Work Order for the HT line was withheld by the Respondent. The petitioner has produced the communication dated 19.12.2016, requesting to issue the Work Order for the HT line.
- (c) We note that, as per the Guidelines relating to the SRTPV Scheme, made available to all the consumers, for the SRTPV applicants, having existing buildings, the time stipulated for completion of the Projects is 180 days, which would be intimated to the applicants in Format 5 or Format 6. Admittedly, the Petitioner had made the application for installation of the SRTPV Plant, under the said Scheme.
- (d) We note that, the approval in Format-5 for installing the SRTPV Plant was given by the Respondent on 18.09.2015, mentioning that, the Plant had to be commissioned within 180 days. Therefore, the Petitioner ought to have completed the Plant, within 17.03.2016. The Work Completion Report dated 06.09.2016, indicates erection of the Solar modules. The other works, relating to interconnection, were yet to be completed. Therefore, it cannot be accepted that, the SRTPV Plant was ready, in all respects, for commissioning. We note that, the request for issuance of the Work Order for the HT line, was made during December, 2016, after the Scheduled Commissioning Date. Hence, it is not proper for the Petitioner to allege that, the delay in granting the Work Order by the Respondent, delayed the Project and this has to be treated as a *Force Majeure* Event. Had the Petitioner completed the Project within 17.03.2016 (180 days) and had the

Respondent delayed issuing of the Work Order, it could have been a *Force Majeure* Event.

- (e) With regard to the contention of the Petitioner that, the Respondent granted the extension of time to commission the Project, pursuant to the Circular dated 17.11.2015, and the reliance placed on the decision of the Hon'ble Supreme Court, in the case of *State of Kerala & others Vs Kurian Abraham (P) Ltd & another*, reported in (2008) 3 SCC 582, that the circular had a binding effect on the acts done during its subsistence, we note that, the Respondent had no power to issue such Circular, providing for extension of time for commissioning the Projects, either in the Solar Policy of the State or the Guidelines issued by the Respondent. Any such extension of time has a bearing on the tariff, ultimately payable by the consumers. In the above-mentioned case decided by the Hon'ble Supreme Court, the Board had power to issue Circular under Section 3(1A)(c) of the Kerala General Sales Tax Act, 1963, whereas in the case on hand, the Respondent had no power to issue the Circular. Hence, the said decision does not apply. Even if the extension of time granted is assumed to be valid, the tariff applicable for the delayed commissioning of the Project would have to be determined by the Commission. The Solar Policy 2014-2021 of the State, provides that, the Tariff Orders issued by the Commission, from time to time, will be applicable to the Projects. So also, the PPA dated 23.09.2015 provides that, the tariff, as per the Order dated 10.10.2013, or as amended from time to time, will be applicable to the Project. The time period within which a Plant has to be commissioned and

the tariff applicable to a Project, are to be fixed/determined by the Commission alone, under section 86(1)(b) of the Electricity Act, 2003, as held by the Hon'ble High Court of Karnataka in the Order dated 17.07.2017 in WP No. 41854/2016 (*S.A. Prasanna Kumar Vs Government of Karnataka & others*). Therefore, the contention of the Petitioner that, it is entitled to the tariff of Rs.9.56 per unit, is not acceptable.

- (f) The other reason for the delay in commissioning of the Project, alleged by the Petitioner, is delay in the disbursement of loan by the Bank, due to delay in communication of approval of the PPA. This cannot be accepted, as a copy of the letter dated 17.12.2015, communicating the approval of the PPA, was sent by the Commission to the Petitioner. The Petitioner could have taken immediate action for sanction of the loan. The delay of about 2 months, in approaching the Bank, is not explained. The loan was not sanctioned by Corporation Bank and subsequently on 16.08.2016, the Petitioner was sanctioned loan from the Canara Bank. This has not affected the Project implementation, as admittedly, the Panels were procured, vide invoice dated 01.07.2016.
- (g) We further note that, contrary to the Petitioner's claim that the Plant was ready for commissioning in September, 2016, the safety approval was granted by the CEIG on 28.12.2017 and this is not denied by the Petitioner. After the CEIG granted safety approval, the plant was commissioned on 30.12.2017. The Work Completion Certificate should have been submitted to the Respondent, along with approval of safety standards of the Plant from the CEIG. This has not been done. The Work Completion Report

dated 06.09.2016 is addressed to the Petitioner by the contractor and is not in the format, as per the Guidelines. Thus, we do not find any merit in the Petitioner's contention that, the plant was ready to be commissioned within the scheduled time, but could not be commissioned because of the fault of the Respondent.

- (h) In the PPA executed in this case, a tariff of Rs.9.56 per unit was agreed to be paid for the power injected by the Petitioner's SRTPV Plant, on net metering basis, in terms of the Commission's Generic Tariff Order dated 10.10.2013. Such tariff was available to the Petitioner, subject to commissioning of the Project within six months. In the meanwhile, the Commission, in its Generic Tariff Order dated 02.05.2016, issued in supersession of the Generic Tariff Order dated 10.10.2013, taking into consideration the relevant factors, mainly the declining Project Cost, revised the tariff applicable to the SRTPV Plants, which get commissioned during the period from 02.05.2016 to 31.03.2018, including all those with PPAs, executed prior to 01.05.2016 but not commissioned within the stipulated period. The Petitioner having commissioned the Plant on 30.12.2017, i.e., after 02.05.2016 is entitled for a tariff of Rs.5.20 per unit in terms of the Commission's Order dated 02.05.2016.
- (i) The Petitioner has produced the Invoice dated 01.07.2016, to show that the cost of the Solar Panels for the Plant is Rs.3.8 Crores. It is alleged that, if the tariff is reduced to Rs.5.20 per unit, the Petitioner would suffer a loss. We note that, the Project Cost, considered by the Commission in the Generic Tariff Order dated 10.10.2013, determining tariff at Rs.9.56 per unit,

was Rs.9 Crores per MW and whereas the Project Cost considered in the Generic Tariff Order dated 02.05.2016, determining tariff at Rs.5.20 per unit, was Rs.5.5 Crores per MW. The cost of Panels would be about 55-60% of the total Project Cost. The remaining 40-45% would be the cost of other required equipment / installation cost. Going by this analogy, the Project Cost, incurred by the Petitioner, would be close to Rs.5.5 Crores per MW and would not, in any manner, be close to Rs.9 Crores per MW. Therefore, even if the cost incurred is considered, the Petitioner would not be entitled to the tariff of Rs.9.56 per unit, but would be entitled to Rs.5.20 per unit.

(j) Therefore, we answer Issue No.(1), in the negative.

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

For the foregoing reasons, we pass the following.

ORDER

The Petition is dismissed. The Petitioner is entitled for a tariff of Rs.5.20 (Rupees Five and Paise Twenty) only per unit, as per the Supplemental PPA dated 25.11.2017.

Sd/-
(SHAMBHU DAYAL MEENA)
CHAIRMAN

Sd/-
(H.M. MANJUNATHA)
MEMBER

Sd/-
(M.D. RAVI)
MEMBER