

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,
BENGALURU**

Dated : 28th January, 2015

- | | |
|-------------------------------|----------|
| 1. Sri M.R. Sreenivasa Murthy | Chairman |
| 2. Sri H.D. Arun Kumar | Member |
| 3. Sri D.B. Manival Raju | Member |

OP No.24/2014

BETWEEN:

Saisudhir Energy (Chitradurga) Private Ltd.,
No.401, G.P. Elite, 8-2-283/4,
Road No.14, Banjara Hills,
Hyderabd – 500 034.

..

PETITIONER

[Represented by Shri L.M. Chidanandayya, Advocate]

AND

The Managing Director,
Chamundeshwari Electricity Supply Corporation Ltd.,
#927, New Kanthartaj Urs Road,
Saraswathiupouram,
Mysuru – 570 009.

..

RESPONDENT

[Represented by M/s. Justlaw, Advocates]

ORDERS

- 1) This is as a Petition filed by the Petitioner under Section 86(1)(f) of the Electricity Act, 2003. In substance, the Petitioner has sought for the following reliefs :

- (a) To extend the scheduled Commissioning Date of the Project of the Petitioner by six months, from the date of commissioning of the 220 kV lines between Birenhalli – Thallak and Hiriyr – Gowribidanur, by the Karnataka Power Transmission Corporation Limited (KPTCL);
 - (b) To direct the Respondent not to appropriate any portion of the Performance Security furnished by the Petitioner;
 - (c) To direct the Respondent to abide by the tariff of Rs.8.49 per KWhr agreed in the Power Purchase Agreement (PPA) dated 30.8.2012;
 - (d) To pass such other orders as may be deemed fit in the facts and circumstances of the case.
- 2) The material facts, as made out in the Petition, for the disposal of this Petition may be stated as follows :
- (a) The Petitioner is a 'Special Purpose Vehicle' (SPV), promoted and incorporated by one M/s. Saisudhir Energy Limited, which was a selected bidder for development of 10 MW capacity of Solar PV Project at Thallak village, Challakere Taluk, Chitradurga District in Karnataka. The Petitioner and the Respondent have executed the PPA dated 30.8.2012 (ANNEXURE – A), incorporating the necessary terms and conditions. The

- Petitioner had also furnished Performance Security in the form of Bank Guarantee in favour of the Respondent for an amount of Rs.24.90 Crores.
- (b) The PPA stipulates that the date of execution of the PPA is the Effective Date and the respective rights and obligations of the parties under the PPA shall be subject to the satisfaction in full of the Conditions Precedent specified in Article 4 of the PPA by the Petitioner within 240 days from the Effective Date (i.e., before the end of March, 2013), and further that the scheduled Commissioning Date of the Project shall be achieved on or before 28.1.2014, and that the term of the PPA shall be twenty five years from the Commercial Operation Date (COD).
- (c) On the request of the Petitioner, the Respondent, vide letter dated 17.5.2013, granted extension of time up to 26.8.2013 for achieving Conditions Precedent, and up to 26.5.2014 for achieving Commercial Operation. Accordingly, the parties also entered into a Supplemental PPA dated on 28.5.2013, incorporating the extended date for fulfilling the Condition Precedent and for achieving the Commercial Operation.
- (d) The KPTCL granted the provisional evacuation approval to the Petitioner, vide letter dated 6.2.2014 (ANNEXURE – C), with the condition that evacuation of power and synchronization approvals for the Project would be sanctioned only after commissioning of the 220 kV lines between Birenhalli – Thallak and Hiriyur – Gowribidanur. This evacuation approval

contains the terms and conditions to be fulfilled by the Petitioner. The Petitioner obtained approval dated 19.2.2014 (ANNEXURE – D) from Deputy Commissioner, Chitradurga District, under Section 109(A) of the Karnataka Land Reforms Act, for purchase of agricultural land for development of its Solar PV Project at Thallak village.

- (e) Subsequently, on the request of the Petitioner, vide letter dated 5.4.2014 (ANNEXURE – F), the Respondent once again granted extension of time for achieving the Commercial Operation up to 27.9.2014, vide letter dated 17.5.2014 (ANNEXURE – G). In the request letter (ANNEXURE – F), the Petitioner had pointed out the numerous difficulties faced by it in obtaining different approvals and had also pointed out that the evacuation of power was possible only after the construction of the 220 kV transmission line by the KPTCL. While communicating its consent for extension of time, vide ANNEXURE – G, the Respondent has stated therein as follows :

“XXX

XXX

XXX

A) *Request of extension of time for Scheduled Commissioning Date can be considered up to 27.09.2014 only.*

B) *As per Article 12.2 of the PPA, since KERC has revised the tariff for Solar PV Projects with effect from 01.04.2013, vide order No.S/03/1 dated 10.1.2013 s Rs.8.40/- per kWh, the Developer will be entitled to receive the Tariff of Rs.2.39 (Rupees Two and Paise Thirty Nine only) per kWh (Rs.8.40 – Rs.6.01 discount offered) of energy supplied to CESC*

Mysore in accordance with the terms of the Agreement during the period between COD and the Expiry Date.

- C) Chief Engineer (Elec), P&C, KPTCL, Bangalore vide letter No.CEE(P&C)/SEE(Plg)/EE(PSS)/KCO-93/55111/F-639/2320-32 has issued evacuation approval subject to condition that "Evacuation of power & synchronization approvals for this project will be sanctioned / approved only after commissioning of the 220 kV lines between Birehalli – Thallak & Hiriur – Gowribidanur". The Developer shall not hold CESC Mysore responsible for loss in generation due to delay in synchronizing the Project with the KPTCL grid under any circumstance.

Supplementary Agreement has to be executed incorporating the above facts and the same shall be got approved by KERC.

A line in reply is awaited in proceeding with the matter early.

XXX

XXX

XXX"

- (f) Being aggrieved by the claim of the Respondent, as made in ANNEXURE - G, that due to delay in achieving the Commercial Operation, the tariff for the energy would be Rs.2.39 per KWhr, as per Article 12.2 of the PPA, the Petitioner requested to retain the earlier tariff of Rs.8.49 per KWhr, as agreed in Article 12.1 of the PPA, as the delay was not attributable to it, but it was due to the non-commissioning of the 220 kV transmission line by the KPTCL. The Respondent stuck to its stand taken in letter dated 17.5.2014 (ANNEXURE-G). The Petitioner, apprehending invocation of the Performance Security furnished by it by the Respondent, has filed the present Petition before this Commission on 10.7.2014.

- 3) On Notice, the Respondent appeared through its counsel and filed its Statement of Objections on 9.10.2014. The gist of the Respondent's objections is as follows :

The terms of a Contract entered into by parties on their own volition cannot be altered by any Court or Commission. It is contended that the claim made by the Respondent, in ANNEXURE – G, for reduced tariff of Rs.2.39 per KWhr is as per the terms of the PPA and that the Petitioner was not diligent in setting up the Project, and in fact, the Petitioner had not made any progress in establishing the Solar PV Project, and the Petitioner was simply blaming the KPTCL for non-commissioning of the 220 kV transmission line, and that the extension of time for achieving Commercial Operation by the Petitioner, granted by the Respondent up to 27.9.2014, was subject to acceptance of the reduced tariff by the Petitioner. It is further contended that under Articles 4.4 and 5.8 of the PPA, the Performance Security could be invoked by the Respondent, in the event of any delay in achieving the Conditions Precedent by the Petitioner and also the delay in commencement of supply of power to the Respondent.

- 4) We have heard the oral submissions made by the learned counsel for both the parties, who have reiterated the respective contentions made in their pleadings. We have also perused the respective pleadings and documents produced by the parties in the case.

- 5) The following issues would arise for our consideration in the facts and circumstances of the present case :
- (1) Whether the PPA dated 30.8.2012 (ANNEXURE – A) becomes enforceable by either of the parties in the event of non-commissioning of the 220 kV lines between Birehalli – Thallak and Hiriyur – Gowribidanur by the KPTCL?
 - (2) If answer to the above issue No.(1) is in the negative, what direction or order in this regard should be issued by the Commission?
 - (3) Whether the Respondent is entitled to appropriate the Performance Security, or any portion of it, in the present case?
 - (4) Whether, as a consequence of the delay in commissioning of the Project beyond the scheduled Commissioning Date, the re-fixation of tariff, as contended by the Respondent, is legally permissible?
 - (5) What Order?
- 6) After considering the submissions of the parties and also the pleadings and documents on record, our findings on the above issues are as follows:

7) **ISSUE Nos.(1) and (2) :**

- (a) For the sake of convenience, Issue Nos.(1) and (2) are considered together.
- (b) It is not in dispute that the KPTCL could not complete the commissioning of the 220 kV transmission lines between Birenhalli – Thallak and Hiriyur – Gowribidanur, for reasons beyond its control. The letter dated 4.8.2014 of the KPTCL (produced as ANNEXURE - AA by the Petitioner on 21.8.2014), indicates that the 220 kV transmission lines would be commissioned soon after the completion of work in some locations where the Right Of Way (ROW) issues were persisting, and after getting approval from the Forest Department. The letter dated 19.8.2014 of KPTCL, marked as ANNEXURE – A1, produced along with the Rejoinder dated 28.11.2014 of the Petitioner, indicates that the estimated date for commissioning of the 220 kV lines between Birenhalli – Thallak and Hiriyur – Gowribidanur, in all probability, might be by the end of August, 2015. This letter also discloses that more than 50% of the work in this regard has been completed and the balance work is in progress.
- (c) It cannot be disputed that the commissioning of the 220 kV lines between Birenhalli – Thallak and Hiriyur – Gowribidanur by the KPTCL, is an absolute necessity for injecting the power from the Project of the Petitioner, and for evacuating the power by the Respondent. Therefore, the contract (PPA)

entered into between the parties is in the nature of a contingent contract, depending upon the commissioning of the 220 kV lines. However, in the PPA, the parties have not specified any term regarding the consequences of non-happening of the commissioning of the 220 kV lines within a specified time-limit. It can therefore be implied that the parties expected that the commissioning of the 220 kV lines would take place within a reasonable time.

(d) The PPA was executed on 30.8.2012. It provides that the Conditions Precedent should be satisfied on or before 240 days from the date of execution of the PPA, and that the COD of the Project should be on or before 28.1.2014. As already noted above, the Respondent, for the first time, extended time for fulfilling the Conditions Precedent on or before 26.8.2013 and for achieving the COD of the Project on or before 26.5.2014, on the ground that the 220 kV lines had not yet been commissioned by the KPTCL. Subsequently, on the request of the Petitioner, as the 220 kV line was not ready till then, the Respondent again extended the time for achieving the COD up to 27.9.2014, but without specifying any time-limit for achieving the Conditions Precedent.

(e) The commissioning of the Project would become impossible, unless the 220 kV lines are commissioned by the KPTCL. If the 220 kV lines are not commissioned within a reasonable time, the contract is to be treated as *void* for a supervening impossibility and the parties are discharged from

performing the contract. What should be the 'reasonable time' to wait for completion of the 220 kV lines, could be determined in a better way by the parties, after due deliberations. The learned authors, Pollack & Mulla in the Commentary on 'The Indian Contract and Specific Relief Acts', 14th Edition, at Page-886, have discussed the provision of law pertaining to the circumstances under which the contract cannot be discharged, despite there being a supervening impossibility, as follows :

"No Discharge Despite Impossibility

A contract would not be discharged by impossibility, even though the supervening event makes performance impossible or unlawful if:

- (i) The contract is absolute in terms and can be held to cover the frustrating event;*
- (ii) The contract makes full and complete provision for a given contingency;*
- (iii) It can be reasonably supposed to be within the contemplation of the parties to the contract at the time they made the contract;*
- (iv) Where the event is such that any of the parties could foresee or could have foreseen with reasonable diligence;*
- (v) If only a portion of the contract becomes impossible or difficult to perform;*
- (vi) If despite the supervening events, the object and purpose of the contract is not rendered useless, and the contract can be performed substantially in accordance with the original intention of the parties, though not literally in accordance with the language of the agreement."*

Considering the above principles, we are of the view that in the present case, the PPA between parties is not yet frustrated, and if they so desire, they can mutually negotiate for altered terms for completion of the Project by the Petitioner, and for considering the termination of the PPA, as a last resort. The procedure for termination of the PPA, as stated in Articles 16.3 and 16.4, also leads to the above conclusion.

- (f) The PPA does not become enforceable by the Respondent, if the Petitioner is able to establish the defence of *force majeure* events for non-fulfilment of the Conditions Precedent and the delay in commissioning of the Project within the specified time. The non-commissioning of the 220 kV lines by the KPTCL is a *force majeure* event, giving rise to an excuse to the Petitioner for non-performance of the terms of the agreement. It is found that the Respondent has extended the time for commissioning of the Project in September, 2014, on the ground that the KPTCL had not yet commissioned the 220 kV lines. The said event of *force majeure* is still continuing. Article 5.7.3 of the PPA provides as under:

"In the case of extension due to reasons specified in Article 5.7.1(b) and (c), and if such force majeure event continues even after a maximum period of 3 (three) months, any of the parties may choose to terminate the agreement as per the provisions of Article 16."

Therefore, the Respondent may consider to terminate the PPA under Article 16 of the PPA, by taking into consideration the relevant circumstances.

(g) For the above reasons, Issue No.(1) is answered in the negative and issue No.(2) is answered, by holding that a direction as above be issued to the Respondent.

8) **ISSUE No.(3) :**

(a) As noted supra, the performance of the contract becomes impossible if the 220 kV lines are not commissioned by the KPTCL. In that event, there is no question of the Petitioner satisfying the Conditions Precedent specified in Article 4.2 of the PPA or achieving the scheduled Commissioning Date and commencing the supply of power to the Respondent. For this reason, the Respondent is not entitled to appropriate any portion of the Performance Security furnished by the Petitioner.

(b) We may now examine as to when the Respondent is entitled to appropriate the Performance Security as damages for failure on the part of the Petitioner to meet the Conditions precedent or the commencement of supply of power within the prescribed time-limit. Article 4.4(b) of the PPA, which provides for appropriation of Performance Security as damages, states that upon occurrence of a Developer Default

(Petitioner's Default) or failure to meet the Conditions Precedent by the Petitioner, the Performance Security can be appropriated by the Respondent. Article 4.3 provides for extent of damages that can be recovered by the Respondent for the delay by the Petitioner in fulfilling any or all of the Conditions Precedent stated in Article 4.2. It states that the Developer (Petitioner) shall pay to the Respondent damages in an amount calculated at the rate of 0.2% of the Performance Security for each day's delay, until the fulfillment of such Conditions Precedent, subject to a maximum period of thirty days.

(c) Further, Article 5.8 provides for the extent of damages that can be recovered by the Respondent from the Petitioner, for the delay in commencement of supply of power to the Respondent. It provides that the damages for the delay could be claimed as below :

- (i) For the delay up to one month, an amount equivalent to 20% of the Performance Security;
- (ii) For the delay of more than one month and up to two months, an amount equivalent to 40% of the Performance Security;
- (iii) For the delay of more than two months and up to three months, an amount equivalent to 100% of the Performance Security.

Article 5.8.2. of the PPA provides that if the commencement of supply of power is delayed beyond three months, the Developer (Petitioner) shall

pay Liquidated Damages at the rate of Rs.50,000/- per MW per day of delay, and such payment shall be in advance, on a week-to-week basis, for the period of delay. Article 5.8.3 provides that if the delay is beyond 24 months from the date of the PPA, the Respondent can terminate the Contract.

- (d) Article 4.1 of the PPA provides that the respective rights and obligations of the parties under this agreement shall be subject to the satisfaction in full of the Conditions Precedent specified in that clause by the Developer (Petitioner) within 240 days from the date of the PPA, unless such completion is affected by any *force majeure* event, or if any of the activities is specifically waived in writing by the Respondent. In other words, the respective rights and obligations of the parties under this PPA would arise only upon the fulfillment of the Conditions Precedent by the Petitioner. If the Conditions Precedent are not fulfilled by the Petitioner, the question of enforcement of the other rights and obligations of the parties does not arise. Therefore, we are of the view that the Respondent can enforce the Liquidated Damages for delay in commencement of supply of power to it by the Petitioner, only if there is fulfilment of the Conditions Precedent by the Petitioner. The non-fulfilment of the Conditions Precedent within the stipulated time attracts damages to a maximum period of thirty days, at the rate of 0.2% of the Performance Security for each day's delay.

- (e) In the present case, we have found that the performance of the contract has become impossible, as the 220 kV lines are not yet commissioned by the KPTCL. The Respondent has not specifically pleaded as to which of the other Conditions Precedent have not been fulfilled by the Petitioner within the prescribed time-limit, which authorizes the Respondent to invoke the Performance Security furnished by the Petitioner. We have also found that, not obtaining an effective evacuation approval by the Petitioner from the KPTCL was for reasons beyond the control of the Petitioner.
- (f) This issue can also be examined from the angle of the relief available to the Petitioner on account of *force majeure* events. The defence of *force majeure* events is available in respect of the non-fulfilment of the Conditions Precedent and the delay in commissioning of the Project within the specified time. The Petitioner has contended that both these events could not be achieved, as the KPTCL had not yet commissioned the 220 kV lines. We are of the opinion that non-commissioning of the 220 kV lines by the KPTCL is a *force majeure* event, giving rise to an excuse to the Petitioner for the above-mentioned non-performances. 'Force Majeure' is defined as any event or circumstance or combination of events, which wholly or partly prevents or unavoidably delays an affected party in the performance of its obligations under the Agreement, subject to certain exceptions. Admittedly, the case of the Petitioner does not fall

under any of the exceptions mentioned in the said Article. Therefore, issue No.(3) is answered in the negative.

9) **ISSUE No.(4) :**

- (a) The Respondent has contended that, as a consequence of delay in commissioning of the Project by the Petitioner, as per Article 12.2 of the PPA, the Petitioner would be entitled to receive the tariff of Rs.2.39 per KWhr. Articles 12.1 and 12.2 of the PPA thus:

"12.1 The Developer shall be entitled to receive the Tariff of Rs.8.49 (Rupees Eight and Paise Forty Nin only) per KWh of energy supplied by it to CESC, Mysore in accordance with the terms of this Agreement during the period between COD and the Expiry Date.

12.2 Provided further that if as a consequence of delay in commissioning of the Project beyond the Scheduled Commissioning Date, subject to Article 4, there is a change in KERC Applicable Tariff, the changed Applicable Tariff for the project shall be the lower of the following:

(i) Tariff at in Clause 1.1 above.

(ii) KERC Applicable Tariff as on the Commercial Operation Date less discount offered and considered in Claus 12.1 above."

- In the letter dated 17.5.2014 (ANNEXURE – G), the Respondent, relying on Article 12.2 of the PPA, has demanded the Petitioner to execute a Supplemental Agreement with the reduced rate of tariff of Rs.2.39 per KWhr. We note that Article 12.2 of the PPA would apply, subject to Article 4.1. If for any reason, the date for achieving the Conditions Precedent is extended, the scheduled Commissioning Date would also automatically get extended. This is made clear in Article 5.7.4 of the PPA. Therefore, the Respondent, while extending the scheduled Commissioning Date, could not have claimed that there was delay in commissioning of the Project beyond the original scheduled Commissioning Date agreed under the PPA. Hence, the Respondent could not have relied upon Article 12.2 of the PPA, while extending the time of the scheduled Commissioning Date, for claiming the reduced tariff of Rs.2.39 per KWhr.
- (b) The claim of the Respondent for the reduced tariff at the rate of Rs.2.39 per KWhr for Solar energy is also not tenable, as the Petitioner would be put to extreme hardship and the Project would become economically unviable, resulting in the closure of the Project
- (c) At the time of entering into the PPA, the generic tariff fixed by this Commission for Solar energy was Rs.14.50 per KWhr. Out of this, the Respondent had offered Rs.6.01 per KWhr as the discount during the bidding process, which took place prior to signing of the PPA. There has

- been a steady decline in the Capital Cost to be incurred for the Solar Energy Projects, and therefore, this Commission has determined a generic tariff of Rs.8.40 per KWhr for Solar energy, by its Order dated 10.10.2013. This sharp decrease of tariff from Rs.14.50 KWhr to Rs.8.40 per KWhr could not have been expected by the Petitioner, and thereby the Petitioner could not have anticipated such a lower tariff while consenting to the provisions under Article 12.2 of the PPA.
- (d) The Commission has the exclusive jurisdiction to decide the reasonableness of the rate of tariff. The mere fact that the PPA contains such a term and the Commission had earlier approved the PPA, does not prevent the Commission from holding that the tariff of Rs.2.39 per KWhr for Solar energy, which is less than one third of the prevailing generic tariff determined by the Commission, is unconscionable.
- (e) The purpose of introduction of Article 12.2 in the PPA is to safeguard the interest of the Respondent, in the event the rate of tariff decreases due to delay in achieving the Commercial Operation of the Project. Therefore, in the event of the PPA being continued, the parties are to be directed to re-negotiate the tariff to be applied consequent to the delay in achieving the Commercial Operation of the Project, keeping in view the rates for Solar energy that might have been discovered in the recent bidding process for Solar energy by the Respondent or any other Electricity Supply

Company in the State. For the above reasons, issue No.(4) is answered in the negative, subject to the above observations.

10) **ISSUE No.(5) :**

It is seen that during the pendency of these proceedings, the Respondent has appropriated the Performance Security, furnished by the Petitioner by way of Bank Guarantees, on the ground that there was delay in fulfillment of the Conditions Precedent and also there was delay in commencement of supply of electricity from the Project. However, we have found that the Respondent was not legally entitled to appropriate the Performance Security. For the foregoing reasons, we pass the following :

ORDER

- (1) The Respondent shall restore the Performance Security, furnished by the Petitioner by way of Bank Guarantees, from the respective dates of their appropriation by the Respondent, at its cost, within four weeks from the date of this Order.
- (2) The Respondent may consider extending the time for fulfillment of the Conditions Precedent and achievement of the Commercial Operation, or terminating the PPA dated 30.8.2012 (ANNEXURE – A) under Article 5.7.3 thereof, as it deems fit in the circumstances.
- (3) (a) The re-fixation of tariff at the rate of Rs.2.39 per KWhr, demanded by the Respondent is not valid.

- (b) In the event of the PPA being continued, the parties shall hold negotiations to arrive at the revised tariff to be paid to the Petitioner due to the delay that would occur in achieving the Commercial Operation of the Project, keeping in view the rates for Solar energy that might have been discovered in the recent bidding process for Solar energy in the State.

Sd/-

(M.R. SREENIVASA MURTHY)
CHAIRMAN

Sd/-

(H.D. ARUN KUMAR)
MEMBER

Sd/-

(D.B. MANIVAL RAJU)
MEMBER