



**TELANGANA STATE ELECTRICITY REGULATORY COMMISSION HYDERABAD.
5th Floor, Singareni Bhavan Lakdikapul Hyderabad 500004**

O. P. No. 27 of 2018

Dated 14.12.2018

Present

Sri. Ismail Ali Khan, Chairman

Between:

M/s. Mytrah Aakash Power Private Limited

Regd. Office: 8001, 8th Floor, Q-city, S.No.109,

Nanakramguda, Gachibowli, Hyderabad – 500 032.

... Petitioner.

AND

1. Southern Power Distribution Company of Telangana Limited,
Corporate Office: 6-1-50, Mint Compound,
Hyderabad – 500063.

2. Northern Power Distribution Company of Telangana Limited,
H.No. 2-5-31-2, Corporate Office, Vidyut Bhavan,
Nakkalagutta, Hanamkonda, Warangal-506001.

3. Special Chief Secretary, Energy Department,
Government of Telangana, Telangana Secretariat,
Khairatabad, Hyderabad.

...Respondents.

This petition came up for hearing on 26.05.2018, 21.07.2018, 03.08.2018, 22.09.2018, 06.10.2018, 27.10.2018, 09.11.2018, 17.11.2018 and 24.11.2018. Ms. Mazag Andrabi, Advocate and Sri Varun Kapur, Advocate representing Sri. Challa Gunaranjan, Advocate for the petitioner appeared on 26.05.2018, Sri. Hemanth Sahai, Senior Counsel along with Ms. Mazag Andrabi, Advocate and Sri. Varun

Kapur, Advocate representing Sri. Challa Gunaranjan, Advocate for the petitioner appeared on 21-07-2018, 03-08-2018 & 27.10 .2018. Sri. Hemanth Sahai, Senior Counsel along with Ms. Puja Priyadarshini, Advocate and Ms. Himangini Mehta, Advocate representing Sri. Challa Gunaranjan, Advocate for the petitioner on 22.09.2018, Sri Hemanth Sahai, Senior Counsel along with Ms. Mazag Andrabi, Advocate and Sri. B. Shiva Kumar, Legal Counsel of the company appeared on 06.10.2018 Ms. Mazag Andrabi, Advocate and Sri. Varun Kapur, Advocate representing Sri. Challa Gunaranjan, Advocate for the petitioner appeared on 09.11.2018. Sri. Hemanth Sahai, Senior Counsel along with Ms. Molshree Bhatnagar, Advocate and Sri. Varun Kapur, Advocate representing Sri. Challa Gunaranjan, Advocate for the petitioner appeared on 17.11.2018 & 24.11.2018. Sri. Y. Rama Rao, standing counsel for the respondents along with Ms. Pravalika, Advocate appeared on all dates of hearing. The petition having stood over for consideration to this day, the Commission passed the following:

ORDER

This petition is filed under 86(1) (f) and 86 (1) (k) of the Electricity Act, 2003 r/w Article 9.2 of the PPA seeking extension of SCOD by 426 days with the following material averments:

(i) The TSSPDCL on behalf of TSDISCOMS floated tender for procurement of 2000 MW solar power through e-procurement platform as per the directions of the Energy Department, GoTS, Hyderabad. In the tender process, the petitioner was a successful bidder through open competitive bidding to setup the solar photovoltaic power project of 50 MW capacity at K.M.Palli, Nalgonda District, Telangana for sale to DISCOM. Thereafter, a Power Purchase Agreement (PPA) was executed on 23.02.2016 between the petitioner and the respondent no.1. As per the PPA, the petitioner was to make solar photovoltaic power project operational within 15 months from the date of PPA.

(ii) During the year, 2016 the Government of the State of Telangana initiated re-organisation of the districts and formation of new districts and there was uncertainty in the offices of the revenue authorities regarding jurisdiction of

villages, Mandals etc. This has slowed down the pace of site mobilisation. Further, there was change of circle rates, causing land owners to re-negotiate / renege on land sale agreements, shifting of revenue records, non-availability of contiguous land parcels because the land owners were unwilling to sell their lands for development of projects also caused delay. Sada Bainamas caused delay since the owners had these documents without any registered documents which needed regularisation.

(iii) The second major cause for delay is demonetization of high value currency by the central government, which resulted in shortage of cash and difficulties in bank transactions. The land owners were unwilling to accept demand drafts for payment and wanted cash, encumbrances could not be cleared by the land owners for want of cash to settle the loans. Thus, the delay caused due to various factors narrated above were beyond the control of the petitioner and they could not be regulated or controlled and the petitioner suffered badly in the process.

(iv) The third major cause for delay is unprecedented and incessant rains and massive storm from June 2017 to October 2017 which caused flooding of roads and also at project site which lead to stoppage of work, idling of labour and equipment, hampering the construction work.

(v) The fourth major cause for delay is the new projects of the government like Mission Bhagiratha, Mission Kakatiya and Project Kaleshwaram impacting land acquisition. Further, the policy of the government not to allot government land for power projects also contributed to the delay relating to acquisition of land.

(vi) The fifth major cause for delay is introduction of GST which resulted in uncertainty in the tax regime which slowed down manufacturing and as well as the service industry across the country from July 2017 to September 2017 which further delayed supply of key equipment which further delayed the project.

(vii) Module suppliers reneged on orders because of various factors like increase in internal targets by the State of China for 2017, reduction in anti-dumping duty by the European Union, exponential purchases by US based IPPs which forced the developers to either agree on increased rates and

amend the LCs which resulted in increase in Capital cost or to look at alternative suppliers which resulted in further delays. Further, Customs authority in our country have been wrongly classifying SPV modules and charging taxes at 7.5% which also delayed release of SPV modules.

(viii) Article 9.2 of PPA permits delay in the COD owing to force majeure events or till such event of default is rectified whichever is earlier up to a maximum period of 12 months and therefore, the petitioner has a genuine cause for retrospectively providing extension of the SCOD. The GOTS on representation, by way of letter dated 29.06.2017, extended the SCOD of all solar power developers without any penalty up to 30.06.2017 and directed the TSDISCOMS to take further action accordingly. The Commission after examining the merits of force majeure events narrated by the petitioner accorded in-principle approval for extending SCOD up to 30.06.2017. Further, Energy department, GOTS by way of letter dated 23.08.2017, after careful consideration of the representation of the Solar Developers, extended SCOD of solar power projects up to 31.10.2017 and directed TSDISCOMS to take further action and extend SCOD. Further, the Commission by way of letter dated 11.01.2018 directed the respondents to allow synchronisation of all solar power projects which have filed completion certificates subject to giving an undertaking in the format given.

(ix) The solar power projects affected by force majeure events are being set up pursuant to a competitive bidding process and the tariff so discovered through the said competitive bidding process has been adopted by this Commission and therefore it is not open to this Commission to re-determine the tariff of the solar power projects.

(x) The petitioner is seeking acceptance of the force majeure events and extension of SCOD by 426 days.

2. The respondent No.1, through its Chief General Manager (IPC & RAC) TSSPDCL, Hyderabad filed counter-affidavit with the following material allegations:

(i) The petitioner has entered into PPA with the respondent no.1 on 23.02.2016 to set up 50 MW solar power project under competitive bidding of 2015 in group II category with interconnection point at 220/132 KV K.M. Palli

SS at 132 kV voltage level with tariff at Rs.5.5949 per unit. As per the terms of the PPA, the petitioner has to commission the project within 15 months from the effective date of signing of PPA i.e., 22.05.2017. The petitioner has synchronised the project in phases i.e., 12.5 MW on 16.03.2018 and 17.5 MW on 12.04.2018 totalling 30MW only. The balance capacity of 20MW was not synchronised to the grid.

(ii) As per Article 6 of the PPA, the petitioner has to obtain all consent, clearances and permits required for supply of power to the respondent and procure land for setting up the project at least at 4 acres per MW in the name of the petitioner within 6 months at its own cost and risk, from the date of signing of the PPA. Infact, the Districts Reorganisation in the State of Telangana and demonetisation of high value currency in the country have occurred post scheduled date (i.e., 22.08.2016) to obtain necessary approvals and to procure land for the said project and therefore, the contention of the petitioner on this aspect is not tenable. The petitioner cannot arbitrarily declare an event or circumstance a force majeure.

(iii) The reasons given by the petitioner do not satisfy the requirement of Article 9 of PPA. The events such as delay in land acquisition, difficulty regarding equipment suppliers from India and other countries do not fall under force majeure clause and the petitioner is not justified in pleading delay on this ground. The reasons cited by the petitioner are made only to avoid obligations under the PPA and to gain extension of time for SCOD on the pretext of alleged force majeure event.

(iv) As per Article 3.8.1 of PPA, the solar power developer shall give a notice in writing to SLDC and DISCOM at least 15 days before the date on which it intends to synchronise the project to the grid. The CE / Transmission / TSTRANSCO on 21.03.2017 has approved the erection of 132 KV DC / SC line from the existing 220 / 132 KV K.M. Pally SS to the proposed 50MW solar power project being set up by the petitioner for evacuation of power to 220 / 132 KV K.M. Pally SS and erection of bays at both ends and the same was completed in full shape by 24.02.2018. SE / Op / Nalgonda / TSSPDCL has submitted the work completion report vide letter dated 25.05.2018 for the proposed 12.5MW out of 50MW project with the details of erection of solar PV

modules and installation of ABT energy meters. CE / (SLDC & Telecom) vide letter dated 21.02.2018 has confirmed that the real time data of 50MW solar project connecting at 132 KV bus of 220 / 132 KV K.M. Pally SS is integrated to SLDC on 17.02.2018.

(v) It is stated that the Government of Telangana State (GoTS), Energy Department, through a letter dated 29-06-2017 gave extension for SCOD on representation up to 30.06.2017 to the solar power projects within the state, who have concluded the PPAs with TS DISCOMS without any penalty duly following the requirement under CEA and TSTRANSCO guidelines. The Commission had approved the extension of SCOD up to 30-06-2017 by its letter dated 18.08.2017 for the solar power projects of competitive bidding of the year 2015 with a condition to re-fix the tariff and also with a direction to the respondent to file a petition for amending the PPAs in respect of penalties and re-fixation of the tariff. The GOTS in its letter dated 23.08.2017 has issued extension of four additional months relating to SCOD upto 31.10.2017 to the solar power projects in the State who have participated in the bidding 2015.

(vi) The CGM (IPC & RAC) in response to undertakings furnished by the petitioner issued instructions to SE/OP/Nalgonda vide letter dated 14.03.2018 to arrange to synchronise 12.5MW of the project to the grid by duly following the departmental procedure in vogue. It was synchronised to the grid on 16.03.2018. On submission of work completion report from SE/Op/Nalgonda and report of CEIG vide letter dated 21.03.2018, the Commission gave concurrence for synchronisation. The Commission accorded concurrence vide letter dated 04.04.2018 for synchronisation of 17.5 MW. The CGM (IPC & RAC) issued instructions to SE / OP / Nalgonda vide letter dated 09.04.2018 to arrange to synchronise additional 17.5MW of the project (totalling 30 MW) to the grid by duly following the departmental procedure in vogue.

(vii) The petitioner requested vide letter dated 02.06.2018 for clearance of balance 20 MW capacity synchronisation beyond SCOD including penalties and liquidated damages duly enclosing work completion report of SE / OP / Nalgonda. Even with extension of SCOD by the Government, the project should have been completed by 30.04.2018 with penalties and liquidated

damages. In view of the delay, the petitioner is not entitled to synchronisation of 20MW of the project.

(viii) Due to the reduction in the contracted capacity by 20 MW, the agreement for the 20 MW capacity shall be terminated and penalty as per clause 10.5 of PPA shall be levied proportionate to the capacity not commissioned and penalty for the extended SCOD.

(ix) Under the aforementioned circumstances, appropriate orders as deemed fit may be passed.

3. The petitioner filed a rejoinder with the following material allegations:

(i) The force majeure events narrated by the petitioner were acknowledged by the GoTS and therefore the petitioner is entitled to extension of SCOD of the project due to delay. There was delay in acquisition of land due to districts reorganisation. Due to this reason, the petitioner could not get the lease / sale deeds to procure Acres 294 of contiguous land parcel for its project during June 2016 to September 2016 which took 111 days in acquiring land for execution of the project. In spite of repeated requests, the Tehsildars did not share the revenue records with the petitioner resulting in further delay of 42 days in acquiring the land.

(ii) The petitioner attributed delay of 111 days due to pass book circular, 42 days due to DR circular, for demonetisation 60 days, delay in route and line approval 151 days, delay in approval of CTs & PTs 161 days, 87 days due to introduction of GST, 23 days due to unprecedented and incessant rains, 30 days due to module reclassification by customs and 38 days delay due to court injunction totalling 556 days, after duly considering the overlapping events 395 days.

4. I heard the arguments of the counsel for the petitioner and counsel for the respondent.

5. The point for determination is whether the petitioner is entitled to condonation of delay for synchronisation of balance 20MW to the grid?

6. An important aspect in this case is that an interim direction dated 20.08.2018 has been passed in this O.P. directing the respondent no.1 to synchronise the balance 20MW solar power to the grid which is on record.

7. The petitioner was a successful bidder in the open competitive bidding process for setting up solar photovoltaic power project of 50 MW to be connected to 220 / 132 KV K.M. Pally SS, at 132 kV voltage level. The petitioner has entered into PPA with the respondent no.1 on 23.02.2016. As per the terms of the PPA, the petitioner has to complete the project and make it operational within 15 months from its date. The date of SCOD of 50MW as per PPA is 22.05.2017 and whereas, the actual SCOD achieved for 12.5MW was on 16.03.2018 and 17.5MW on 12.04.2018 (total 30MW).

8. The Government of Telangana (GoTS), Energy Department gave extension of SCOD upto 30.06.2017 to the solar power projects in the state, who have concluded PPAs with TSDISCOMs without any penalty by following all the technical requirements under CEA and TSTRANSCO guidelines. The Commission vide letter dated 18.08.2017 has approved in principle the proposal of the State Government for extension of SCOD upto 30.06.2017 without any penalty, after examining the merits of the matter. The respondent has admitted these facts and the proposal of the GOTS and concurrence of this Commission for the extension of SCOD upto 30-06-2017 without any penalty.

9. Further, it is to be noted that the GOTS in its letter dated 23.08.2017 has issued extension of further four additional months relating to SCOD upto 31.10.2017 to the solar power projects in the State, who have participated in the bidding 2015. It is clear from the material on record that the extension of SCOD upto 31.10.2017 is in continuation of extension of SCOD upto 30.06.2017 by GOTS and it has to be applied to the petitioner also.

10. The petitioner pleaded delay due to re-organisation of districts, the confusion in the offices of the revenue authorities, difficulty in cash flow, difficulties in procuring labour to carry out project work. The petitioner further pleaded that Sada Bainamas, land acquisition affected by demonetisation, districts re-organisation, introduction of

GST, difficulty with module suppliers contributing to delay in setting up the project. The respondent, on the other hand contended that the incidents as force majeure pleaded by the petitioner are not force majeure events and the petitioner is not entitled to such benefit and the reasons given by the petitioner for delay cannot be termed as force majeure events covered by Article 9.2 of PPA.

11. The petitioner contended that even the official response has been too slow. The petitioner submitted guaranteed technical particulars of CTs & PTs to TSTRANSCO on 06.06.2017 and TSTRANSCO approved CTs & PTs only on 13.11.2017. The petitioner further contended that in view of the ex-parte interim injunction in I.A.No.977 of 2017 in O.S.No.238 of 2017, it took 38 days to get the matter settled. These are some of the delays apart from those narrated in the petition resulting in delay in commissioning of the project. The petitioner termed these delays amounting to 426 days as force majeure events which are not within the control of the petitioner and therefore, the delay has to be condoned. The respondent asserted that it is the petitioner alone who is responsible for obtaining all permissions, permits, clearances, etc., under Article 6 of the PPA and the reasons given for treating the events as force majeure are not tenable.

12. Some incidents mentioned by the petitioner have some force to treat them as non-political events, which included labour difficulties mentioned in Article 9.1.(b) (i) of PPA as one of the force majeure events. Further, Article 9.1(a) of PPA clearly mentions that if the *“events and circumstances are not within the affected party’s reasonable control and were not reasonably foreseeable and the effects of which the affected party could not have prevented by prudent utility practices or, in the case of construction activities, by the exercise of reasonable skill and care. Any events or circumstances meeting the description of force majeure which have the same effect upon the performance of any of the solar power project set up in accordance with solar policy announced by GOTS under the competitive bidding route and which therefore materially and adversely affect the ability of the project or, as the case may be the DISCOM to perform its obligations hereunder, shall constitute force majeure with respect of the solar power developer or the DISCOM, respectively”* which clearly encompasses the reasons given by the petitioner for a part of the delay of 426 days as events termed as force majeure. The petitioner had no control or domain over the

incidents mentioned causing a part of the delay in completing the project and therefore, the said delay cannot be totally attributable to the petitioner.

13. The delay caused due to the events narrated by the petitioner and not specifically contradicted by the respondent certainly entitles the petitioner to extension of SCOD. The mere denial of events claimed by the petitioner as having caused delay in reaching the SCOD as not force majeure events by the respondents is untenable since the petitioner had no control over a part of the events. Thus, the extension of SCOD by the GOTS through letter dated 23.8.2017 of Energy department is based on reasons and the Commission concurs with the extension of SCOD upto 31.10.2017. The contention of the respondent that a part of the events narrated by the petitioner have no connection to the plea of force majeure is not tenable.

14. In view of the aforementioned reasons, the delay as pleaded by the petitioner is liable to be condoned up to 31.10.2017 based on the plea of force majeure events. The other delays pleaded by the petitioner are not force majeure events as per Article 9 of PPA as it is the responsibility of the petitioner to expedite its work relating to the project and meet the SCOD. It is clear from the material on record that as per the terms of PPA, the petitioner had to synchronise the project by 22.05.2017. The delay up to 31.10.2017 in reaching the SCOD is condoned. The delay in achieving SCOD after the extended SCOD (31.10.2017) for 12.5 MW of the project is 135 days (01.11.2017 to 16.03.2018). The delay in achieving SCOD after the extended SCOD (31.10.2017) for 17.5 MW of the project is 162 days (01.11.2017 to 12.04.2018).

15. As far as the balance 20 MW is concerned, it is clear that the petitioner requested through letter dated 30.04.2018 addressed to CGM (IPC & RAC), TSSPDCL which reached his office on 01.05.2018 informing that works for balance 20 MW have been completed and ready for synchronisation requesting for work completion report at the earliest. But the work completion report has been issued for the balance 20 MW only on 24.05.2018. Under these circumstances, and also various delays alleged by the petitioner, the request for issue of work completion report as well as intimating the readiness of the project for synchronisation vide letter dated 30.04.2018 reaching the office on 01.05.2018 has to be taken as 01.05.2018

from which date the completion of the project should be reckoned. Thus, the SCOD for the petitioner's project of the balance 20MW should be reckoned as 15.05.2018 as per Article 3.8.1 of the PPA.

16. The SCOD should have been achieved for the project as per PPA by 22.05.2017. The PPA provides for condonation of delay of up to 12 months for reaching SCOD in case of force majeure events under Article 9.2 of the PPA, which would be 21.05.2018 with penalties as per Article 10.5 of the PPA. Therefore, the PPA would be still in force by 21.05.2018. Since SCOD has been extended up to 31.10.2017 with the concurrence of the Commission, the respondent can apply Article 10.5 of the PPA for the period beyond 31.10.2017 up to 15.05.2018 to regularise the balance 20MW of the project. The issue is answered accordingly.

17. In the present case, also SCOD of 20 MW balance capacity is synchronised beyond the extended period of SCOD by the State Government and concurred by the Commission i.e., 31.10.2017. Even if we consider the plea of the respondent to consider 01.05.2018 as the date of request of the petitioner for synchronisation, the SCOD of balance 20 MW should be reckoned as 15.05.2018 as per Article 3.8.1 of the PPA with a delay of 15 days beyond the period of 6 months as per the Article 10.5 of the PPA. The petitioner is of the view that if the delay exceeds beyond the period as per Article 10.5, the petitioner could terminate the contract. An important aspect regarding termination of PPAs has been dealt with by the Hon'ble Supreme Court while upholding imposition of penalty in a decision rendered in M.P.Power Management Company Ltd vs Renew Clean Energy Pvt. Ltd and Ors. (AIR 2018 SC 3632). In Para 11, the Hon'ble Supreme Court observed as follows:

“The delay in commissioning the project appears to be due to unavoidable circumstances like resistance faced at the allotted site in Rajgarh District and subsequent change of location of the project. These circumstances, though not a Force Majeure event, time taken by respondent no.1 in change of location and construction of the plant have to be kept in view for counting the delay. Having invested huge amount in purchasing the land and development of the project at Ashok nagar district and when the project is in the final stage of commissioning, the termination of the contract is not fair.”

Para 12 of the above SC Judgement observes as follows:

“ The High Court observed that the delay in completing the project was only for sixteen days. But according to the appellant, respondent No.1 was granted time period of 210 days to complete the Conditions subsequent after which the penalty was leviable for the delay and if the delay exceeded more than nine months, the appellant could terminate the contract. According to appellant, the delay was not of sixteen days; but the said delay of sixteen days is beyond the period of nine months permissible under the PPA. In the light of our observations above, we are not inclined to go into the merits of this contention. Suffice to note that in cases of delay, Articles 2.5 and 2.6 provide for levy of penalty. As observed by the High Court, since the contract permits imposition of penalty, respondent No.1 is liable to pay penalty in terms of clause 2.5.1. of the PPA for the delay. But the action of the appellant in terminating the contract is arbitrary and was rightly set aside by the High Court”

18. This observation of the Hon'ble Supreme Court with equal vehemence applies to the present matter too. In the light of the above SC judgement, we are not inclined to go into the merits of the contention of the delay of additional 15 days beyond the period of 6 months permissible under the terms of the PPA as Article 10.5 provides for levy of penalty. Since the contract permits imposition of penalty and liquidated damages, Petitioner is liable to pay the penalty and liquidated damages in terms of Article 10.5 of the PPA. Thus, interest of justice would be met by directing the Respondent to take appropriate steps to levy penalty and liquidated damages for the entire 195 days as per the provisions of PPA.

19. In the result, the following is ordered:

(a) There is a delay of 135 days (01.11.2017 to 16.03.2018) in achieving SCOD after the extended SCOD (31.10.2017) for 12.5MW of the project. There is a delay of 162 days (01.11.2017 to 12.04.2018) in achieving SCOD after the extended SCOD (31.10.2017) for 17.5MW of the project. The Discom shall take appropriate steps under Article 10.5 of the PPA for the delay in reaching the SCOD.

(b) There is a delay of 195 days (01.11.2017 to 15.05.2018) in achieving SCOD after the extended SCOD (31.10.2017) for the balance 20MW of the project. The DISCOM shall take appropriate steps under Article 10.5 of the PPA for the delay of 195 days in reaching the SCOD for the balance 20 MW as mentioned at Para 19.

20. The petition is allowed on the same tariff as approved by the Commission. The DISCOM is directed to file a copy of the amended PPA with the revised dates of commissioning.

This order is corrected and signed on this 14th day of December, 2018.

**Sd/-
(ISMAIL ALI KHAN)
CHAIRMAN**

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