

Record of Proceedings dated 20.06.2018

O. P. No. 10 of 2018

M/s. ACME Solar Power Technology Private Ltd. Vs. TSSPDCL

Petition filed seeking orders for granting extension of time for SCOD of (7) months

Sri. Hemant Sahai, Senior Counsel for the petitioner along with Ms. Puja Priyadarshini, Advocate and Sri. Y. Rama Rao, Standing Counsel for the respondent along with Ms. Pravalika, Advocate are present. The counsel for the petitioner stated that the PPA was signed on 19.02.2016. The SCOD date was 18.05.2017 as per PPA. The plant was actually synchronized on 07.02.2018. There is a delay of 7 months in commissioning the project. The petitioner has informed to the DISCOM that it is ready for synchronization on 02.12.2017 and the work completion certificate was issued on 18.12.2017.

The main reason attributable for the delay is shifting of the transmission line due to extension of a reservoir, which has been in the path of the line of the petitioner. The petitioner requested for cost estimate of transmission line in August, 2016 and submitted the route proposal in December, 2016. The approval was given in January, 2017 and consequently it paid the necessary charges. In April, 2017 the transmission licensee was informed by the irrigation department about the necessity of shifting of the transmission line due to extension of the existing lake abutting the transmission line. This was orally informed to the petitioner. It has submitted the revised plan in May, 2017 after issuing force majeure notice. Consequently the revised plan was approved in May, 2017.

The counsel for the petitioner stated that there are right of way issues in the project and the same was informed to the TSTRANSCO, which in turn requested the concerned revenue officials to ensure removal of the difficulty in laying lines. Thus, it resulted in delay of 2 ½ months from September, 2017 to November, 2017. Thereafter the Commission permitted synchronization of the project in February, 2018 and it was synchronized as stated above.

The counsel for the petitioner sought to place the argument in two fold namely the provisions of the PPA provide enough protection and allow extension of SCOD

and that there is no necessity of amendment of the PPA. The Article 9.2 of the PPA would effectively provide the relief to the petitioner in the case of delay, as the said article explains the force majeure incidents and the way same have to be applied. The petitioner has relied on the reasons that there were right of way issues, reorganization of the districts and demonetization. However, the counsel for the petitioner was clear in his thought that the demonetization cannot be quantified and therefore, it will be last reason of force majeure.

The counsel for the petitioner would endeavor to submit that in this particular case, the expansion of the existing lake has resulted in delay of the project and nothing more can be attributed to the delay as it is not within its control. The generic issues of force majeure have been accepted by the government and therefore, the office of the Chief Minister directed the concerned department to provide extension of time for SCOD till 30.06.2017. Thereafter, a letter was issued by the concerned department, however, it was issued on the penultimate day conveying the decision of the government. Thus, the government by its own conduct has accepted that there are force majeure conditions and that the same are acceptable. Based on such directions of the government, the DISCOM has acted and approached this Commission, the same was accepted by the Commission also, but with conditions.

The counsel for the petitioner stated that by its conduct the DISCOM has in-effect conceded the existence of force majeure conditions. Such acceptance has led to the DISCOM to approach the Commission for ratification of its action. The DISCOM ought to have agreed to extension of SCOD as provided in the PPA which can be extended by 12 months on a day-to-day basis. Instead of taking such a step, the DISCOM approached the Commission and obtained approval of the same. Albeit such approval came with riders.

The counsel for the petitioner stated that as the DISCOM by its conduct has accepted the reasons which was also approved by the Commission in respect of force majeure there is no necessity of amending the PPA. The other condition imposed by the Commission regarding seeking of determination of the tariff is also not appropriate for the reason that the tariff was discovered in the bidding and the same had been approved by the Commission under section 63 of the Act, 2003 contrary to the determination undertaken under section 62 of the Act, 2003.

Moreover, section 63 of the Act, 2003 starts with the words 'notwithstanding anything contained in section 62 of the Act, 2003, therefore, the Commission cannot redo the exercise having approved the same. It is not out of place to state that the Commission has other power to regulate the agreements for power procurement and the price at which it is procured, but the present situation does not call for exercise of such a power.

In the case of default or force majeure not being accepted, the DISCOM had right to terminate the agreement under Article 10 of the PPA. This option was not exercised by the DISCOM, prima facie due to the understanding that it has already accepted the directions of the government based on the very same reasoning of force majeure. The Article 6 of the PPA also cannot be invoked by the DISCOM as the delay is not relating to the said period that is 6 months from the date of signing of the PPA. For invoking the Article 6.6 of the PPA, the DISCOM has to issue notice to the petitioner contrary to Article 10 where no notice was required for termination of the agreement.

The counsel for the petitioner stated that the second extension issued by the government up to 30.10.2017 though not accepted by the Commission, is only a corollary to the first extension and cannot be seen separately. If the extension is not given, the petitioner will be mulcted with the burden of penalty and liquidated damages. To safeguard the interest of the petitioner and the investment made, the Commission may consider extending the SCOD as it sought in the petition.

The counsel for the petitioner sought to rely on the judgments rendered by the Hon'ble Supreme Court in the matter of M/s. Gujarath Urja Vikas Nigam Limited against M/s. Solar Semiconductor Power Company (India) Private Limited and another as well as Ms. G. Jayashree and others against Sri. Bhagwandas S. Patel and others. In the first case, reliance is placed on the finding that the Commission will ensure the binding nature of clauses of the PPA and endeavor for the compliance of the provisions of the Act, 2003. It is also relevant to state that the Commission cannot revisit the tariff once approved. In the other case, the finding relating to conduct of parties and the factors to be considered for such conduct have been examined in depth and therefore, the power of the Commission depends upon

the facts and the circumstances of each case, which must be exercised judiciously and not arbitrarily and capriciously.

The counsel for the respondents sought to rebut the arguments set out by the counsel for the petitioner, the timelines have been set forth in the agreement itself and deviation of the same would entail invoking of penal provisions including the termination of the agreement. It is the case of the DISCOM that the force majeure conditions sought to be relied upon by the petitioner neither constitute a force majeure situation nor fit into the definition provided in the agreement which is consensus of the parties. The counsel for the petitioner has only read part portion of the Article 9 omitting the definition which explained as to what constitutes a force majeure events. In fact, Article 6.6 is available to the DISCOM as Article 6 provides for timelines upon signing of the PPA, which have not been complied with even before the alleged force majeure conditions have arisen as stated in the petition.

The counsel for the respondents sought to emphasize the fact that the petitioner has committed default of delay in completing the project and synchronizing it with the grid. The fact that the project was commissioned beyond the SCOD is itself sufficient for the DISCOM to deny the benefit of provisions of the PPA more particularly force majeure or default. The PPA is binding document between the parties and thus, neither of the parties can deviate from the terms of the PPA.

The counsel for the respondents stated that there is no reason for accepting the force majeure conditions proposed by the petitioner as the petitioner had ample opportunity to comply with the provisions of the PPA. The representations made to the government or acting thereof on the decision of the government is of no relevancy as the government also is a party in the adjudicatory process before the Commission. In fact, the erstwhile APERC did not accept these conditions in the decisions rendered in the year 2012. The administrative action cannot and would not constitute a direction as it flows by way of letters only. The Commission has power under section 86 (1) (b) of the Act, 2003 but such power is circumscribed by the judgment of the court of law that the agreement cannot be interfered with.

The counsel for the respondents stated that any amendment or modification is required to be agreed to by the parties in writing under the provisions of the PPA

more particularly Article 12. The said article also requires obtaining the consent of the Commission for any amendment proposed to be made to the agreement as otherwise the same is not valid and enforceable by the parties. Therefore, the Commission directed the DISCOM to file a petition for amendment of the PPA as also determination of tariff as the conditions of the PPA have varied due to the proposed amendment of the PPA.

The counsel for the respondents stated that the judgment rendered by the Hon'ble Supreme Court in the matter of M/s. Gujarat Urja Vikas Nigam Limited against M/s. Solar Semiconductor Power Company (Indian) Private Limited and another is not applicable to the facts of the present case, as the said judgment had arisen out of the context of determination of the tariff and not amendment of PPA, though it may be correct to state that the Commission has inherent power in respect of the procedure but not on substantial issue.

Therefore, the Commission may consider the petition and the prayer in the light of the submissions of the respondent. The Commission may consider imposing of suitable penalty as well as liquidated damages.

The counsel for the petitioner made a fervent appeal for direction to pay part of the tariff for the time being till the Commission considers and allows extension of the SCOD as the petitioner has to pay for the bank loans etc. This is opposed by the counsel for the respondents stating that since the matter is already heard finally, the petitioner should await the decision of the Commission. While refusing such a request of the petitioner, the petition is reserved for orders.

Sd/-
Chairman

O. P. No. 11 of 2018

M/s. ACME Nizamabad Solar Energy Private Ltd. Vs. TSDISCOMs & TSTRANSCO

Petition filed seeking orders for granting extension of time for SCOD of (120) days

Sri. Hemant Sahai, Senior Counsel for the petitioner along with Ms. Puja Priyadarshini, Advocate and Sri. Y. Rama Rao, Standing Counsel for the respondents along with Ms. Pravalika, Advocate are present. The counsel for the petitioner stated that the PPA was signed on 26.02.2016. The SCOD date was

25.05.2017 as per PPA. The plant capacity of 10 MW was synchronized on 11.09.2017, another 20 MW on 13.09.2017 and finally 20 MW on 15.09.2017. There is a delay of 109 days, 111 days and 113 days respectively in commissioning the project. However, the petitioner has prayed for extension of SCOD by 120 days in all. The issues in this case are sharing of transmission tower with M/s. Devine Solar Power Private Limited, incessant rains, district reorganization and demonetization. This resulted in a delay of 120 days.

The counsel for the petitioner sought to place the argument in two fold namely the provisions of the PPA provide enough protection and allow extension of SCOD and that there is no necessity of amendment of the PPA. The Article 9.2 of the PPA would effectively provide the relief to the petitioner in the case of delay, as the said article explains the force majeure incidents and the way same have to be applied. The petitioner has relied on the reasons that there were right of way issues, reorganization of the districts and demonetization. However, the counsel for the petitioner was clear in his thought that the demonetization cannot be quantified and therefore, it will be last reason of force majeure.

The counsel for the petitioner stated that the generic issues of force majeure have been accepted by the government and therefore, the office of the Chief Minister directed the concerned department to provide extension of time for SCOD till 30.06.2017. Thereafter, a letter was issued by the concerned department, however, it was issued on the penultimate day conveying the decision of the government. Thus, the government by its own conduct has accepted that there are force majeure conditions and that the same are acceptable. Based on such directions of the government, the DISCOM has acted and approached this Commission, the same was accepted by the Commission also, but with conditions.

The counsel for the petitioner stated that by its conduct the DISCOM has in-effect conceded the existence of force majeure conditions. Such acceptance has led to the DISCOM to approach the Commission for ratification of its action. The DISCOM ought to have agreed to extension of SCOD as provided in the PPA which can be extended by 12 months on a day-to-day basis. Instead of taking such a step, the DISCOM approached the Commission and obtained approval of the same. Albeit such approval came with riders.

The counsel for the petitioner stated that as the DISCOM by its conduct has accepted the reasons which was also approved by the Commission in respect of force majeure there is no necessity of amending the PPA. The other condition imposed by the Commission regarding seeking of determination of the tariff is also not appropriate for the reason that the tariff was discovered in the bidding and the same had been approved by the Commission under section 63 of the Act, 2003 contrary to the determination undertaken under section 62 of the Act, 2003. Moreover, section 63 of the Act, 2003 starts with the words 'notwithstanding anything contained in section 62' of the Act, 2003, therefore, the Commission cannot redo the exercise having approved the same. It is not out of place to state that the Commission has other power to regulate the agreements for power procurement and the price at which it is procured, but the present situation does not call for exercise of such a power.

In the case of default or force majeure not being accepted, the DISCOM had right to terminate the agreement under Article 10 of the PPA. This option was not exercised by the DISCOM, prima facie due to the understanding that it has already accepted the directions of the government based on the very same reasoning of force majeure. The Article 6 of the PPA also cannot be invoked by the DISCOM as the delay is not relating to the said period that is 6 months from the date of signing of the PPA. For invoking the Article 6.6 of the PPA, the DISCOM has to issue notice to the petitioner contrary to Article 10 where no notice was required for termination of the agreement.

The counsel for the petitioner stated that the second extension issued by the government up to 30.10.2017 though not accepted by the Commission, is only a corollary to the first extension and cannot be seen separately. If the extension is not given, the petitioner will be mulcted with the burden of penalty and liquidated damages. To safeguard the interest of the petitioner and the investment made, the Commission may consider extending the SCOD as it sought in the petition.

The counsel for the petitioner sought to rely on the judgments rendered by the Hon'ble Supreme Court in the matter of M/s. Gujarath Urja Vikas Nigam Limited against M/s. Solar Semiconductor Power Company (India) Private Limited and

another as well as Ms. G. Jayashree and others against Sri. Bhagwandas S. Patel and others. In the first case, reliance is placed on the finding that the Commission will ensure the binding nature of clauses of the PPA and endeavor for the compliance of the provisions of the Act, 2003. It is also relevant to state that the Commission cannot revisit the tariff once approved. In the other case, the finding relating to conduct of parties and the factors to be considered for such conduct have been examined in depth and therefore, the power of the Commission depends upon the facts and the circumstances of each case, which must be exercised judiciously and not arbitrarily and capriciously.

The counsel for the respondent sought to rebut the arguments set out by the counsel for the petitioner, the timelines have been set forth in the agreement itself and deviation of the same would entail invoking of penal provisions including the termination of the agreement. It is the case of the DISCOM that the force majeure conditions sought to be relied upon by the petitioner neither constitute a force majeure situation nor fit into the definition provided in the agreement which is consensus of the parties. The counsel for the petitioner has only read part portion of the Article 9 omitting the definition which explained as to what constitutes a force majeure events. In fact, Article 6.6 is available to the DISCOM as Article 6 provides for timelines upon signing of the PPA, which have not been complied with even before the alleged force majeure conditions have arisen as stated in the petition.

The counsel for the respondents sought to emphasize the fact that the petitioner has committed default of delay in completing the project and synchronizing it with the grid. The fact that the project was commissioned beyond the SCOD is itself sufficient for the DISCOM to deny the benefit of provisions of the PPA more particularly force majeure or default. The PPA is binding document between the parties and thus, neither of the parties can deviate from the terms of the PPA.

The counsel for the respondents stated that there is no reason for accepting the force majeure conditions proposed by the petitioner as the petitioner had ample opportunity to comply with the provisions of the PPA. The representations made to the government or acting thereof on the decision of the government is of no relevancy as the government also is a party in the adjudicatory process before the Commission. In fact, the erstwhile APERC did not accept these conditions in the

decisions rendered in the year 2012. The administrative action cannot and would not constitute a direction as it flows by way of letters only. The Commission has power under section 86 (1) (b) of the Act, 2003 but such power is circumscribed by the judgment of the court of law that the agreement cannot be interfered with.

The counsel for the respondents stated that any amendment or modification is required to be agreed to by the parties in writing under the provisions of the PPA more particularly Article 12. The said article also requires obtaining the consent of the Commission for any amendment proposed to be made to the agreement as otherwise the same is not valid and enforceable by the parties. Therefore, the Commission directed the DISCOM to file a petition for amendment of the PPA as also determination of tariff as the conditions of the PPA have varied due to the proposed amendment of the PPA.

The counsel for the respondents stated that the judgment rendered by the Hon'ble Supreme Court in the matter of M/s. Gujarath Urja Vikas Nigam Limited against M/s. Solar Semiconductor Power Company (Indian) Private Limited and another is not applicable to the facts of the present case, as the said judgment had arisen out of the context of determination of the tariff and not amendment of PPA, though it may be correct to state that the Commission has inherent power in respect of the procedure but not on substantial issue.

Therefore, the Commission may consider the petition and the prayer in the light of the submissions of the respondent. The Commission may consider imposing of suitable penalty as well as liquidated damages.

The counsel for the petitioner made a fervent appeal for direction to pay part of the tariff for the time being till the Commission considers and allows extension of the SCOD as the petitioner has to pay for the bank loans etc. This is opposed by the counsel for the respondents stating that since the matter is already heard finally, the petitioner should await the decision of the Commission. While refusing such a request of the petitioner, the petition is reserved for orders.

Sd/-
Chairman

M/s. ACME Karimnagar Solar Power Private Ltd. Vs. TSDISCOMs & TSTRANSCO

Petition filed seeking orders for granting extension of time for SCOD of (5) days

Sri. Hemant Sahai, Senior Counsel for the petitioner along with Ms. Puja Priyadarshini, Advocate and Sri. Y. Rama Rao, Standing Counsel for the respondents along with Ms. Pravalika, Advocate are present. The counsel for the petitioner stated that the PPA was signed on 26.02.2016. The SCOD date was 25.02.2017 as per PPA. The plant was actually synchronized on 02.03.2017. There is a delay of 5 days in commissioning the project. The issues in this case are incessant rains, district reorganization and demonetization.

The counsel for the petitioner sought to place the argument in two fold namely the provisions of the PPA provide enough protection and allow extension of SCOD and that there is no necessity of amendment of the PPA. The Article 9.2 of the PPA would effectively provide the relief to the petitioner in the case of delay, as the said article explains the force majeure incidents and the way same have to be applied. The petitioner has relied on the reasons that there were right of way issues, reorganization of the districts and demonetization. However, the counsel for the petitioner was clear in his thought that the demonetization cannot be quantified and therefore, it will be last reason of force majeure.

The counsel for the petitioner would endeavor to submit that in this particular case, the expansion of the existing lake has resulted in delay of the project and nothing more can be attributed to the delay as it is not within its control. The generic issues of force majeure have been accepted by the government and therefore, the office of the Chief Minister directed the concerned department to provide extension of time for SCOD till 30.06.2017. Thereafter, a letter was issued by the concerned department, however, it was issued on the penultimate day conveying the decision of the government. Thus, the government by its own conduct has accepted that there are force majeure conditions and that the same are acceptable. Based on such directions of the government, the DISCOM has acted and approached this Commission, the same was accepted by the Commission also, but with conditions.

The counsel for the petitioner stated that by its conduct the DISCOM has in-effect conceded the existence of force majeure conditions. Such acceptance has led to the DISCOM to approach the Commission for ratification of its action. The DISCOM ought to have agreed to extension of SCOD as provided in the PPA which can be extended by 12 months on a day-to-day basis. Instead of taking such a step, the DISCOM approached the Commission and obtained approval of the same. Albeit such approval came with riders.

The counsel for the petitioner stated that as the DISCOM by its conduct has accepted the reasons which was also approved by the Commission in respect of force majeure there is no necessity of amending the PPA. The other condition imposed by the Commission regarding seeking of determination of the tariff is also not appropriate for the reason that the tariff was discovered in the bidding and the same had been approved by the Commission under section 63 of the Act, 2003 contrary to the determination undertaken under section 62 of the Act, 2003. Moreover, section 63 of the Act, 2003 starts with the words 'notwithstanding anything contained in section 62' of the Act, 2003, therefore, the Commission cannot redo the exercise having approved the same. It is not out of place to state that the Commission has other power to regulate the agreements for power procurement and the price at which it is procured, but the present situation does not call for exercise of such a power.

In the case of default or force majeure not being accepted, the DISCOM had right to terminate the agreement under Article 10 of the PPA. This option was not exercised by the DISCOM, prima facie due to the understanding that it has already accepted the directions of the government based on the very same reasoning of force majeure. The Article 6 of the PPA also cannot be invoked by the DISCOM as the delay is not relating to the said period that is 6 months from the date of signing of the PPA. For invoking the Article 6.6 of the PPA, the DISCOM has to issue notice to the petitioner contrary to Article 10 where no notice was required for termination of the agreement.

The counsel for the petitioner stated that the second extension issued by the government up to 30.10.2017 though not accepted by the Commission, is only a corollary to the first extension and cannot be seen separately. If the extension is not

given, the petitioner will be mulcted with the burden of penalty and liquidated damages. To safeguard the interest of the petitioner and the investment made, the Commission may consider extending the SCOD as it sought in the petition.

The counsel for the petitioner sought to rely on the judgments rendered by the Hon'ble Supreme Court in the matter of M/s. Gujarath Urja Vikas Nigam Limited against M/s. Solar Semiconductor Power Company (India) Private Limited and another as well as Ms. G. Jayashree and others against Sri. Bhagwandas S. Patel and others. In the first case, reliance is placed on the finding that the Commission will ensure the binding nature of clauses of the PPA and endeavor for the compliance of the provisions of the Act, 2003. It is also relevant to state that the Commission cannot revisit the tariff once approved. In the other case, the finding relating to conduct of parties and the factors to be considered for such conduct have been examined in depth and therefore, the power of the Commission depends upon the facts and the circumstances of each case, which must be exercised judiciously and not arbitrarily and capriciously.

The counsel for the respondents sought to rebut the arguments set out by the counsel for the petitioner, the timelines have been set forth in the agreement itself and deviation of the same would entail invoking of penal provisions including the termination of the agreement. It is the case of the DISCOM that the force majeure conditions sought to be relied upon by the petitioner neither constitute a force majeure situation nor fit into the definition provided in the agreement which is consensus of the parties. The counsel for the petitioner has only read part portion of the Article 9 omitting the definition which explained as to what constitutes a force majeure events. In fact, Article 6.6 is available to the DISCOM as Article 6 provides for timelines upon signing of the PPA, which have not been complied with even before the alleged force majeure conditions have arisen as stated in the petition.

The counsel for the respondents sought to emphasize the fact that the petitioner has committed default of delay in completing the project and synchronizing it with the grid. The fact that the project was commissioned beyond the SCOD is itself sufficient for the DISCOM to deny the benefit of provisions of the PPA more particularly force majeure or default. The PPA is binding document between the parties and thus, neither of the parties can deviate from the terms of the PPA.

The counsel for the respondents stated that there is no reason for accepting the force majeure conditions proposed by the petitioner as the petitioner had ample opportunity to comply with the provisions of the PPA. The representations made to the government or acting thereof on the decision of the government is of no relevancy as the government also is a party in the adjudicatory process before the Commission. In fact, the erstwhile APERC did not accept these conditions in the decisions rendered in the year 2012. The administrative action cannot and would not constitute a direction as it flows by way of letters only. The Commission has power under section 86 (1) (b) of the Act, 2003 but such power is circumscribed by the judgment of the court of law that the agreement cannot be interfered with.

The counsel for the respondents stated that any amendment or modification is required to be agreed to by the parties in writing under the provisions of the PPA more particularly Article 12. The said article also requires obtaining the consent of the Commission for any amendment proposed to be made to the agreement as otherwise the same is not valid and enforceable by the parties. Therefore, the Commission directed the DISCOM to file a petition for amendment of the PPA as also determination of tariff as the conditions of the PPA have varied due to the proposed amendment of the PPA.

The counsel for the respondents stated that the judgment rendered by the Hon'ble Supreme Court in the matter of M/s. Gujarath Urja Vikas Nigam Limited against M/s. Solar Semiconductor Power Company (Indian) Private Limited and another is not applicable to the facts of the present case, as the said judgment had arisen out of the context of determination of the tariff and not amendment of PPA, though it may be correct to state that the Commission has inherent power in respect of the procedure but not on substantial issue.

Therefore, the Commission may consider the petition and the prayer in the light of the submissions of the respondent. The Commission may consider imposing of suitable penalty as well as liquidated damages.

The counsel for the petitioner made a fervent appeal for direction to pay part of the tariff for the time being till the Commission considers and allows extension of

the SCOD as the petitioner has to pay for the bank loans etc. This is opposed by the counsel for the respondents stating that since the matter is already heard finally, the petitioner should await the decision of the Commission. While refusing such a request of the petitioner, the petition is reserved for orders.

Sd/-
Chairman

O. P. No. 13 of 2018

M/s. ACME Medak Solar Energy Private Ltd. Vs. TSDISCOMs & TSTRANSCO

Petition filed seeking orders for granting extension of time for SCOD of (57) days

Sri. Hemant Sahai, Senior Counsel for the petitioner along with Ms. Puja Priyadarshini, Advocate and Sri. Y. Rama Rao, Standing Counsel for the respondents along with Ms. Pravalika, Advocate are present. The counsel for the petitioner stated that the PPA was signed on 19.02.2016. The SCOD date was 18.05.2017 as per PPA. The plant was actually synchronized on 14.07.2017. There is a delay of 57 days in commissioning the project.

The counsel for the petitioner stated that there are right of way issues in the project and the same was informed to the TSTRANSCO, which in turn requested the concerned revenue officials to ensure removal of the difficulty in laying lines. Thus, it resulted in delay of 60 days from April, 2017 to June, 2017. Further, it also wrote to the energy department about the right of way issue.

The counsel for the petitioner sought to place the argument in two fold namely the provisions of the PPA provide enough protection and allow extension of SCOD and that there is no necessity of amendment of the PPA. The Article 9.2 of the PPA would effectively provide the relief to the petitioner in the case of delay, as the said article explains the force majeure incidents and the way same have to be applied. The petitioner has relied on the reasons that there were right of way issues, reorganization of the districts and demonetization. However, the counsel for the petitioner was clear in his thought that the demonetization cannot be quantified and therefore, it will be last reason of force majeure.

The counsel for the petitioner would endeavor to submit that in this particular case, the expansion of the existing lake has resulted in delay of the project and nothing more can be attributed to the delay as it is not within its control. The generic issues of force majeure have been accepted by the government and therefore, the office of the Chief Minister directed the concerned department to provide extension of time for SCOD till 30.06.2017. Thereafter, a letter was issued by the concerned department, however, it was issued on the penultimate day conveying the decision of the government. Thus, the government by its own conduct has accepted that there are force majeure conditions and that the same are acceptable. Based on such directions of the government, the DISCOM has acted and approached this Commission, the same was accepted by the Commission also, but with conditions.

The counsel for the petitioner stated that by its conduct the DISCOM has in-effect conceded the existence of force majeure conditions. Such acceptance has led to the DISCOM to approach the Commission for ratification of its action. The DISCOM ought to have agreed to extension of SCOD as provided in the PPA which can be extended by 12 months on a day-to-day basis. Instead of taking such a step, the DISCOM approached the Commission and obtained approval of the same. Albeit such approval came with riders.

The counsel for the petitioner stated that as the DISCOM by its conduct has accepted the reasons which was also approved by the Commission in respect of force majeure there is no necessity of amending the PPA. The other condition imposed by the Commission regarding seeking of determination of the tariff is also not appropriate for the reason that the tariff was discovered in the bidding and the same had been approved by the Commission under section 63 of the Act, 2003 contrary to the determination undertaken under section 62 of the Act, 2003. Moreover, section 63 of the Act, 2003 starts with the words 'notwithstanding anything contained in section 62' of the Act, 2003, therefore, the Commission cannot redo the exercise having approved the same. It is not out of place to state that the Commission has other power to regulate the agreements for power procurement and the price at which it is procured, but the present situation does not call for exercise of such a power.

In the case of default or force majeure not being accepted, the DISCOM had right to terminate the agreement under Article 10 of the PPA. This option was not exercised by the DISCOM, prima facie due to the understanding that it has already accepted the directions of the government based on the very same reasoning of force majeure. The Article 6 of the PPA also cannot be invoked by the DISCOM as the delay is not relating to the said period that is 6 months from the date of signing of the PPA. For invoking the Article 6.6 of the PPA, the DISCOM has to issue notice to the petitioner contrary to Article 10 where no notice was required for termination of the agreement.

The counsel for the petitioner stated that the second extension issued by the government up to 30.10.2017 though not accepted by the Commission, is only a corollary to the first extension and cannot be seen separately. If the extension is not given, the petitioner will be mulcted with the burden of penalty and liquidated damages. To safeguard the interest of the petitioner and the investment made, the Commission may consider extending the SCOD as it sought in the petition.

The counsel for the petitioner sought to rely on the judgments rendered by the Hon'ble Supreme Court in the matter of M/s. Gujarath Urja Vikas Nigam Limited against M/s. Solar Semiconductor Power Company (India) Private Limited and another as well as Ms. G. Jayashree and others against Sri. Bhagwandas S. Patel and others. In the first case, reliance is placed on the finding that the Commission will ensure the binding nature of clauses of the PPA and endeavor for the compliance of the provisions of the Act, 2003. It is also relevant to state that the Commission cannot revisit the tariff once approved. In the other case, the finding relating to conduct of parties and the factors to be considered for such conduct have been examined in depth and therefore, the power of the Commission depends upon the facts and the circumstances of each case, which must be exercised judiciously and not arbitrarily and capriciously.

The counsel for the respondents sought to rebut the arguments set out by the counsel for the petitioner, the timelines have been set forth in the agreement itself and deviation of the same would entail invoking of penal provisions including the termination of the agreement. It is the case of the DISCOM that the force majeure conditions sought to be relied upon by the petitioner neither constitute a force

majeure situation nor fit into the definition provided in the agreement which is consensus of the parties. The counsel for the petitioner has only read part portion of the Article 9 omitting the definition which explained as to what constitutes a force majeure events. In fact, Article 6.6 is available to the DISCOM as Article 6 provides for timelines upon signing of the PPA, which have not been complied with even before the alleged force majeure conditions have arisen as stated in the petition.

The counsel for the respondents sought to emphasize the fact that the petitioner has committed default of delay in completing the project and synchronizing it with the grid. The fact that the project was commissioned beyond the SCOD is itself sufficient for the DISCOM to deny the benefit of provisions of the PPA more particularly force majeure or default. The PPA is binding document between the parties and thus, neither of the parties can deviate from the terms of the PPA.

The counsel for the respondents stated that there is no reason for accepting the force majeure conditions proposed by the petitioner as the petitioner had ample opportunity to comply with the provisions of the PPA. The representations made to the government or acting thereof on the decision of the government is of no relevancy as the government also is a party in the adjudicatory process before the Commission. In fact, the erstwhile APERC did not accept these conditions in the decisions rendered in the year 2012. The administrative action cannot and would not constitute a direction as it flows by way of letters only. The Commission has power under section 86 (1) (b) of the Act, 2003 but such power is circumscribed by the judgment of the court of law that the agreement cannot be interfered with.

The counsel for the respondents stated that any amendment or modification is required to be agreed to by the parties in writing under the provisions of the PPA more particularly Article 12. The said article also requires obtaining the consent of the Commission for any amendment proposed to be made to the agreement as otherwise the same is not valid and enforceable by the parties. Therefore, the Commission directed the DISCOM to file a petition for amendment of the PPA as also determination of tariff as the conditions of the PPA have varied due to the proposed amendment of the PPA.

The counsel for the respondents stated that the judgment rendered by the Hon'ble Supreme Court in the matter of M/s. Gujarath Urja Vikas Nigam Limited against M/s. Solar Semiconductor Power Company (Indian) Private Limited and another is not applicable to the facts of the present case, as the said judgment had arisen out of the context of determination of the tariff and not amendment of PPA, though it may be correct to state that the Commission has inherent power in respect of the procedure but not on substantial issue.

Therefore, the Commission may consider the petition and the prayer in the light of the submissions of the respondent. The Commission may consider imposing of suitable penalty as well as liquidated damages.

The counsel for the petitioner made a fervent appeal for direction to pay part of the tariff for the time being till the Commission considers and allows extension of the SCOD as the petitioner has to pay for the bank loans etc. This is opposed by the counsel for the respondents stating that since the matter is already heard finally, the petitioner should await the decision of the Commission. While refusing such a request of the petitioner, the petition is reserved for orders.

Sd/-
Chairman

O. P. No. 14 of 2018

M/s. Neemuch Solar Power Private Ltd. Vs. TSDISCOMs & TSTRANSCO

Petition filed seeking orders for granting extension of time for SCOD of (28) days

Sri. Hemant Sahai, Senior Counsel for the petitioner along with Ms. Puja Priyadarshini, Advocate and Sri. Y. Rama Rao, Standing Counsel for the respondents along with Ms. Pravalika, Advocate are present. The counsel for the petitioner stated that the PPA was signed on 26.02.2016. The SCOD date was 25.02.2017 as per PPA. The plant was actually synchronized on 25.03.2017. There is a delay of 29 days in commissioning the project. The work completion certificate was issued on 21.03.2017.

The counsel for the petitioner stated that the delay in this project is with reference to obtaining permission of the South Central Railway. At one place the route of transmission line was intercepting the railway line and that therefore it

applied for permission to lay underground line, which granted its approval on 30.01.2017. However, the same was withdrawn on 13.02.2017 saying that the petitioner is not a government entity. Then the DISCOM wrote to the railways stating that it has entered into PPA and is procuring entire power. Then only the line was laid upon being permitted. Added to this problem was the incessant rain fall for a period of one week in September 2016.

The counsel for the petitioner sought to place the argument in two fold namely the provisions of the PPA provide enough protection and allow extension of SCOD and that there is no necessity of amendment of the PPA. The Article 9.2 of the PPA would effectively provide the relief to the petitioner in the case of delay, as the said article explains the force majeure incidents and the way same have to be applied. The petitioner has relied on the reasons that there were right of way issues, reorganization of the districts and demonetization. However, the counsel for the petitioner was clear in his thought that the demonetization cannot be quantified and therefore, it will be last reason of force majeure.

The counsel for the petitioner would endeavor to submit that in this particular case, the expansion of the existing lake has resulted in delay of the project and nothing more can be attributed to the delay as it is not within its control. The generic issues of force majeure have been accepted by the government and therefore, the office of the Chief Minister directed the concerned department to provide extension of time for SCOD till 30.06.2017. Thereafter, a letter was issued by the concerned department, however, it was issued on the penultimate day conveying the decision of the government. Thus, the government by its own conduct has accepted that there are force majeure conditions and that the same are acceptable. Based on such directions of the government, the DISCOM has acted and approached this Commission, the same was accepted by the Commission also, but with conditions.

The counsel for the petitioner stated that by its conduct the DISCOM has in-effect conceded the existence of force majeure conditions. Such acceptance has led to the DISCOM to approach the Commission for ratification of its action. The DISCOM ought to have agreed to extension of SCOD as provided in the PPA which can be extended by 12 months on a day-to-day basis. Instead of taking such a step,

the DISCOM approached the Commission and obtained approval of the same. Albeit such approval came with riders.

The counsel for the petitioner stated that as the DISCOM by its conduct has accepted the reasons which was also approved by the Commission in respect of force majeure there is no necessity of amending the PPA. The other condition imposed by the Commission regarding seeking of determination of the tariff is also not appropriate for the reason that the tariff was discovered in the bidding and the same had been approved by the Commission under section 63 of the Act, 2003 contrary to the determination undertaken under section 62 of the Act, 2003. Moreover, section 63 of the Act, 2003 starts with the words 'notwithstanding anything contained in section 62' of the Act, 2003, therefore, the Commission cannot redo the exercise having approved the same. It is not out of place to state that the Commission has other power to regulate the agreements for power procurement and the price at which it is procured, but the present situation does not call for exercise of such a power.

In the case of default or force majeure not being accepted, the DISCOM had right to terminate the agreement under Article 10 of the PPA. This option was not exercised by the DISCOM, prima facie due to the understanding that it has already accepted the directions of the government based on the very same reasoning of force majeure. The Article 6 of the PPA also cannot be invoked by the DISCOM as the delay is not relating to the said period that is 6 months from the date of signing of the PPA. For invoking the Article 6.6 of the PPA, the DISCOM has to issue notice to the petitioner contrary to Article 10 where no notice was required for termination of the agreement.

The counsel for the petitioner stated that the second extension issued by the government up to 30.10.2017 though not accepted by the Commission, is only a corollary to the first extension and cannot be seen separately. If the extension is not given, the petitioner will be mulcted with the burden of penalty and liquidated damages. To safeguard the interest of the petitioner and the investment made, the Commission may consider extending the SCOD as it sought in the petition.

The counsel for the petitioner sought to rely on the judgments rendered by the Hon'ble Supreme Court in the matter of M/s. Gujarath Urja Vikas Nigam Limited against M/s. Solar Semiconductor Power Company (India) Private Limited and another as well as Ms. G. Jayashree and others against Sri. Bhagwandas S. Patel and others. In the first case, reliance is placed on the finding that the Commission will ensure the binding nature of clauses of the PPA and endeavor for the compliance of the provisions of the Act, 2003. It is also relevant to state that the Commission cannot revisit the tariff once approved. In the other case, the finding relating to conduct of parties and the factors to be considered for such conduct have been examined in depth and therefore, the power of the Commission depends upon the facts and the circumstances of each case, which must be exercised judiciously and not arbitrarily and capriciously.

The counsel for the respondents sought to rebut the arguments set out by the counsel for the petitioner, the timelines have been set forth in the agreement itself and deviation of the same would entail invoking of penal provisions including the termination of the agreement. It is the case of the DISCOM that the force majeure conditions sought to be relied upon by the petitioner neither constitute a force majeure situation nor fit into the definition provided in the agreement which is consensus of the parties. The counsel for the petitioner has only read part portion of the Article 9 omitting the definition which explained as to what constitutes a force majeure events. In fact, Article 6.6 is available to the DISCOM as Article 6 provides for timelines upon signing of the PPA, which have not been complied with even before the alleged force majeure conditions have arisen as stated in the petition.

The counsel for the respondents sought to emphasize the fact that the petitioner has committed default of delay in completing the project and synchronizing it with the grid. The fact that the project was commissioned beyond the SCOD is itself sufficient for the DISCOM to deny the benefit of provisions of the PPA more particularly force majeure or default. The PPA is binding document between the parties and thus, neither of the parties can deviate from the terms of the PPA.

The counsel for the respondents stated that there is no reason for accepting the force majeure conditions proposed by the petitioner as the petitioner had ample opportunity to comply with the provisions of the PPA. The representations made to

the government or acting thereof on the decision of the government is of no relevancy as the government also is a party in the adjudicatory process before the Commission. In fact, the erstwhile APERC did not accept these conditions in the decisions rendered in the year 2012. The administrative action cannot and would not constitute a direction as it flows by way of letters only. The Commission has power under section 86 (1) (b) of the Act, 2003 but such power is circumscribed by the judgment of the court of law that the agreement cannot be interfered with.

The counsel for the respondents stated that any amendment or modification is required to be agreed to by the parties in writing under the provisions of the PPA more particularly Article 12. The said article also requires obtaining the consent of the Commission for any amendment proposed to be made to the agreement as otherwise the same is not valid and enforceable by the parties. Therefore, the Commission directed the DISCOM to file a petition for amendment of the PPA as also determination of tariff as the conditions of the PPA have varied due to the proposed amendment of the PPA.

The counsel for the respondents stated that the judgment rendered by the Hon'ble Supreme Court in the matter of M/s. Gujarath Urja Vikas Nigam Limited against M/s. Solar Semiconductor Power Company (Indian) Private Limited and another is not applicable to the facts of the present case, as the said judgment had arisen out of the context of determination of the tariff and not amendment of PPA, though it may be correct to state that the Commission has inherent power in respect of the procedure but not on substantial issue.

Therefore, the Commission may consider the petition and the prayer in the light of the submissions of the respondent. The Commission may consider imposing of suitable penalty as well as liquidated damages.

The counsel for the petitioner made a fervent appeal for direction to pay part of the tariff for the time being till the Commission considers and allows extension of the SCOD as the petitioner has to pay for the bank loans etc. This is opposed by the counsel for the respondents stating that since the matter is already heard finally, the petitioner should await the decision of the Commission. While refusing such a request of the petitioner, the petition is reserved for orders.

Sd/-

O. P. No. 15 of 2018

M/s. ACME Narwan Solar Power Private Ltd. Vs. TSDISCOMs & TSTRANSCO

Petition filed seeking orders for granting extension of time for SCOD of (26) days

Sri. Hemant Sahai, Senior Counsel for the petitioner along with Ms. Puja Priyadarshini, Advocate and Sri. Y. Rama Rao, Standing Counsel for the respondents along with Ms. Pravalika, Advocate are present. The counsel for the petitioner stated that the PPA was signed on 26.02.2016. The SCOD date was 25.02.2017 as per PPA. The plant was actually synchronized on 24.02.2017 for 5 MW, 5 MW on 10.03.2017 and another 5 MW on 23.03.2017. There is a delay of 26 days in commissioning the project. The DISCOM insisted on demonstrating the actual generation of 5 MW and above capacity projects for allowing synchronization as also there were incessant rains for a period of one week during the execution of the project in the month of September, 2016. Thereafter, the supplier of panels sought one week time.

The counsel for the petitioner sought to place the argument in two fold namely the provisions of the PPA provide enough protection and allow extension of SCOD and that there is no necessity of amendment of the PPA. The Article 9.2 of the PPA would effectively provide the relief to the petitioner in the case of delay, as the said article explains the force majeure incidents and the way same have to be applied. The petitioner has relied on the reasons that there were right of way issues, reorganization of the districts and demonetization. However, the counsel for the petitioner was clear in his thought that the demonetization cannot be quantified and therefore, it will be last reason of force majeure.

The counsel for the petitioner would endeavor to submit that in this particular case, the expansion of the existing lake has resulted in delay of the project and nothing more can be attributed to the delay as it is not within its control. The generic issues of force majeure have been accepted by the government and therefore, the office of the Chief Minister directed the concerned department to provide extension of time for SCOD till 30.06.2017. Thereafter, a letter was issued by the concerned department, however, it was issued on the penultimate day conveying the decision of the government. Thus, the government by its own conduct has accepted that there

are force majeure conditions and that the same are acceptable. Based on such directions of the government, the DISCOM has acted and approached this Commission, the same was accepted by the Commission also, but with conditions.

The counsel for the petitioner stated that by its conduct the DISCOM has in effect conceded the existence of force majeure conditions. Such acceptance has led to the DISCOM to approach the Commission for ratification of its action. The DISCOM ought to have agreed to extension of SCOD as provided in the PPA which can be extended by 12 months on a day-to-day basis. Instead of taking such a step, the DISCOM approached the Commission and obtained approval of the same. Albeit such approval came with riders.

The counsel for the petitioner stated that as the DISCOM by its conduct has accepted the reasons which was also approved by the Commission in respect of force majeure there is no necessity of amending the PPA. The other condition imposed by the Commission regarding seeking of determination of the tariff is also not appropriate for the reason that the tariff was discovered in the bidding and the same had been approved by the Commission under section 63 of the Act, 2003 contrary to the determination undertaken under section 62 of the Act, 2003. Moreover, section 63 of the Act, 2003 starts with the words 'notwithstanding anything contained in section 62' of the Act, 2003, therefore, the Commission cannot redo the exercise having approved the same. It is not out of place to state that the Commission has other power to regulate the agreements for power procurement and the price at which it is procured, but the present situation does not call for exercise of such a power.

In the case of default or force majeure not being accepted, the DISCOM had right to terminate the agreement under Article 10 of the PPA. This option was not exercised by the DISCOM, prima facie due to the understanding that it has already accepted the directions of the government based on the very same reasoning of force majeure. The Article 6 of the PPA also cannot be invoked by the DISCOM as the delay is not relating to the said period that is 6 months from the date of signing of the PPA. For invoking the Article 6.6 of the PPA, the DISCOM has to issue notice to the petitioner contrary to Article 10 where no notice was required for termination of the agreement.

The counsel for the petitioner stated that the second extension issued by the government up to 30.10.2017 though not accepted by the Commission, is only a corollary to the first extension and cannot be seen separately. If the extension is not given, the petitioner will be mulcted with the burden of penalty and liquidated damages. To safeguard the interest of the petitioner and the investment made, the Commission may consider extending the SCOD as it sought in the petition.

The counsel for the petitioner sought to rely on the judgments rendered by the Hon'ble Supreme Court in the matter of M/s. Gujarath Urja Vikas Nigam Limited against M/s. Solar Semiconductor Power Company (India) Private Limited and another as well as Ms. G. Jayashree and others against Sri. Bhagwandas S. Patel and others. In the first case, reliance is placed on the finding that the Commission will ensure the binding nature of clauses of the PPA and endeavor for the compliance of the provisions of the Act, 2003. It is also relevant to state that the Commission cannot revisit the tariff once approved. In the other case, the finding relating to conduct of parties and the factors to be considered for such conduct have been examined in depth and therefore, the power of the Commission depends upon the facts and the circumstances of each case, which must be exercised judiciously and not arbitrarily and capriciously.

The counsel for the respondents sought to rebut the arguments set out by the counsel for the petitioner, the timelines have been set forth in the agreement itself and deviation of the same would entail invoking of penal provisions including the termination of the agreement. It is the case of the DISCOM that the force majeure conditions sought to be relied upon by the petitioner neither constitute a force majeure situation nor fit into the definition provided in the agreement which is consensus of the parties. The counsel for the petitioner has only read part portion of the Article 9 omitting the definition which explained as to what constitutes a force majeure events. In fact, Article 6.6 is available to the DISCOM as Article 6 provides for timelines upon signing of the PPA, which have not been complied with even before the alleged force majeure conditions have arisen as stated in the petition.

The counsel for the respondents sought to emphasize the fact that the petitioner has committed default of delay in completing the project and synchronizing

it with the grid. The fact that the project was commissioned beyond the SCOD is itself sufficient for the DISCOM to deny the benefit of provisions of the PPA more particularly force majeure or default. The PPA is binding document between the parties and thus, neither of the parties can deviate from the terms of the PPA.

The counsel for the respondents stated that there is no reason for accepting the force majeure conditions proposed by the petitioner as the petitioner had ample opportunity to comply with the provisions of the PPA. The representations made to the government or acting thereof on the decision of the government is of no relevancy as the government also is a party in the adjudicatory process before the Commission. In fact, the erstwhile APERC did not accept these conditions in the decisions rendered in the year 2012. The administrative action cannot and would not constitute a direction as it flows by way of letters only. The Commission has power under section 86 (1) (b) of the Act, 2003 but such power is circumscribed by the judgment of the court of law that the agreement cannot be interfered with.

The counsel for the respondents stated that any amendment or modification is required to be agreed to by the parties in writing under the provisions of the PPA more particularly Article 12. The said article also requires obtaining the consent of the Commission for any amendment proposed to be made to the agreement as otherwise the same is not valid and enforceable by the parties. Therefore, the Commission directed the DISCOM to file a petition for amendment of the PPA as also determination of tariff as the conditions of the PPA have varied due to the proposed amendment of the PPA.

The counsel for the respondents stated that the judgment rendered by the Hon'ble Supreme Court in the matter of M/s. Gujarath Urja Vikas Nigam Limited against M/s. Solar Semiconductor Power Company (Indian) Private Limited and another is not applicable to the facts of the present case, as the said judgment had arisen out of the context of determination of the tariff and not amendment of PPA, though it may be correct to state that the Commission has inherent power in respect of the procedure but not on substantial issue.

Therefore, the Commission may consider the petition and the prayer in the light of the submissions of the respondent. The Commission may consider imposing of suitable penalty as well as liquidated damages.

The counsel for the petitioner made a fervent appeal for direction to pay part of the tariff for the time being till the Commission considers and allows extension of the SCOD as the petitioner has to pay for the bank loans etc. This is opposed by the counsel for the respondents stating that since the matter is already heard finally, the petitioner should await the decision of the Commission. While refusing such a request of the petitioner, the petition is reserved for orders.

Sd/-
Chairman

O. P. No. 16 of 2018

M/s. Rewanchal Solar Power Private Ltd. Vs. TSDISCOMs & TSTRANSCO

Petition filed seeking orders for granting extension of time for SCOD of (165) days

Sri. Hemant Sahai, Senior Counsel for the petitioner along with Ms. Puja Priyadarshini, Advocate and Sri. Y. Rama Rao, Standing Counsel for the respondents along with Ms. Pravalika, Advocate are present. The counsel for the petitioner stated that the PPA was signed on 26.02.2016. The SCOD date was 25.05.2017 as per PPA. The plant was actually synchronized on 24.03.2017 without any delay in respect of 5 MW. In respect of another 5 MW, the synchronization took place on 23.06.2017 and another 5 MW on 09.08.2017. There is a delay of 165 days in all in commissioning the project.

The delay attributable to the project is in respect of district reorganization as the plant being installed, moved from the existing district to the new district of Jangaon, which was carved out by the government. The petitioner was not in a position to procure land at a stretch and 5 MW of the project capacity had to be located at a distance of one kilometer from the original site. Therefore, it had to lay a 33 KV transmission line for a distance of 1.5 K.Ms. This resulted in a delay of 230 days in all from the date of district reorganization till the land procurement. There were incessant rains for a period of one week during the month of September, 2016. The panel supplier sought a period of one week in the month of October, 2016.

The counsel for the petitioner sought to place the argument in two fold namely the provisions of the PPA provide enough protection and allow extension of SCOD and that there is no necessity of amendment of the PPA. The Article 9.2 of the PPA would effectively provide the relief to the petitioner in the case of delay, as the said article explains the force majeure incidents and the way same have to be applied. The petitioner has relied on the reasons that there were right of way issues, reorganization of the districts and demonetization. However, the counsel for the petitioner was clear in his thought that the demonetization cannot be quantified and therefore, it will be last reason of force majeure.

The counsel for the petitioner would endeavor to submit that in this particular case, the expansion of the existing lake has resulted in delay of the project and nothing more can be attributed to the delay as it is not within its control. The generic issues of force majeure have been accepted by the government and therefore, the office of the Chief Minister directed the concerned department to provide extension of time for SCOD till 30.06.2017. Thereafter, a letter was issued by the concerned department, however, it was issued on the penultimate day conveying the decision of the government. Thus, the government by its own conduct has accepted that there are force majeure conditions and that the same are acceptable. Based on such directions of the government, the DISCOM has acted and approached this Commission, the same was accepted by the Commission also, but with conditions.

The counsel for the petitioner stated that by its conduct the DISCOM has in-effect conceded the existence of force majeure conditions. Such acceptance has led to the DISCOM to approach the Commission for ratification of its action. The DISCOM ought to have agreed to extension of SCOD as provided in the PPA which can be extended by 12 months on a day-to-day basis. Instead of taking such a step, the DISCOM approached the Commission and obtained approval of the same. Albeit such approval came with riders.

The counsel for the petitioner stated that as the DISCOM by its conduct has accepted the reasons which was also approved by the Commission in respect of force majeure there is no necessity of amending the PPA. The other condition imposed by the Commission regarding seeking of determination of the tariff is also not appropriate for the reason that the tariff was discovered in the bidding and the

same had been approved by the Commission under section 63 of the Act, 2003 contrary to the determination undertaken under section 62 of the Act, 2003. Moreover, section 63 of the Act, 2003 starts with the words 'notwithstanding anything contained in section 62' of the Act, 2003, therefore, the Commission cannot redo the exercise having approved the same. It is not out of place to state that the Commission has other power to regulate the agreements for power procurement and the price at which it is procured, but the present situation does not call for exercise of such a power.

In the case of default or force majeure not being accepted, the DISCOM had right to terminate the agreement under Article 10 of the PPA. This option was not exercised by the DISCOM, prima facie due to the understanding that it has already accepted the directions of the government based on the very same reasoning of force majeure. The Article 6 of the PPA also cannot be invoked by the DISCOM as the delay is not relating to the said period that is 6 months from the date of signing of the PPA. For invoking the Article 6.6 of the PPA, the DISCOM has to issue notice to the petitioner contrary to Article 10 where no notice was required for termination of the agreement.

The counsel for the petitioner stated that the second extension issued by the government up to 30.10.2017 though not accepted by the Commission, is only a corollary to the first extension and cannot be seen separately. If the extension is not given, the petitioner will be mulcted with the burden of penalty and liquidated damages. To safeguard the interest of the petitioner and the investment made, the Commission may consider extending the SCOD as it sought in the petition.

The counsel for the petitioner sought to rely on the judgments rendered by the Hon'ble Supreme Court in the matter of M/s. Gujarath Urja Vikas Nigam Limited against M/s. Solar Semiconductor Power Company (India) Private Limited and another as well as Ms. G. Jayashree and others against Sri. Bhagwandas S. Patel and others. In the first case, reliance is placed on the finding that the Commission will ensure the binding nature of clauses of the PPA and endeavor for the compliance of the provisions of the Act, 2003. It is also relevant to state that the Commission cannot revisit the tariff once approved. In the other case, the finding relating to conduct of parties and the factors to be considered for such conduct have

been examined in depth and therefore, the power of the Commission depends upon the facts and the circumstances of each case, which must be exercised judiciously and not arbitrarily and capriciously.

The counsel for the respondents sought to rebut the arguments set out by the counsel for the petitioner, the timelines have been set forth in the agreement itself and deviation of the same would entail invoking of penal provisions including the termination of the agreement. It is the case of the DISCOM that the force majeure conditions sought to be relied upon by the petitioner neither constitute a force majeure situation nor fit into the definition provided in the agreement which is consensus of the parties. The counsel for the petitioner has only read part portion of the Article 9 omitting the definition which explained as to what constitutes a force majeure events. In fact, Article 6.6 is available to the DISCOM as Article 6 provides for timelines upon signing of the PPA, which have not been complied with even before the alleged force majeure conditions have arisen as stated in the petition.

The counsel for the respondents sought to emphasize the fact that the petitioner has committed default of delay in completing the project and synchronizing it with the grid. The fact that the project was commissioned beyond the SCOD is itself sufficient for the DISCOM to deny the benefit of provisions of the PPA more particularly force majeure or default. The PPA is binding document between the parties and thus, neither of the parties can deviate from the terms of the PPA.

The counsel for the respondents stated that there is no reason for accepting the force majeure conditions proposed by the petitioner as the petitioner had ample opportunity to comply with the provisions of the PPA. The representations made to the government or acting thereof on the decision of the government is of no relevancy as the government also is a party in the adjudicatory process before the Commission. In fact, the erstwhile APERC did not accept these conditions in the decisions rendered in the year 2012. The administrative action cannot and would not constitute a direction as it flows by way of letters only. The Commission has power under section 86 (1) (b) of the Act, 2003 but such power is circumscribed by the judgment of the court of law that the agreement cannot be interfered with.

The counsel for the respondents stated that any amendment or modification is required to be agreed to by the parties in writing under the provisions of the PPA more particularly Article 12. The said article also requires obtaining the consent of the Commission for any amendment proposed to be made to the agreement as otherwise the same is not valid and enforceable by the parties. Therefore, the Commission directed the DISCOM to file a petition for amendment of the PPA as also determination of tariff as the conditions of the PPA have varied due to the proposed amendment of the PPA.

The counsel for the respondents stated that the judgment rendered by the Hon'ble Supreme Court in the matter of M/s. Gujarath Urja Vikas Nigam Limited against M/s. Solar Semiconductor Power Company (Indian) Private Limited and another is not applicable to the facts of the present case, as the said judgment had arisen out of the context of determination of the tariff and not amendment of PPA, though it may be correct to state that the Commission has inherent power in respect of the procedure but not on substantial issue.

Therefore, the Commission may consider the petition and the prayer in the light of the submissions of the respondent. The Commission may consider imposing of suitable penalty as well as liquidated damages.

The counsel for the petitioner made a fervent appeal for direction to pay part of the tariff for the time being till the Commission considers and allows extension of the SCOD as the petitioner has to pay for the bank loans etc. This is opposed by the counsel for the respondents stating that since the matter is already heard finally, the petitioner should await the decision of the Commission. While refusing such a request of the petitioner, the petition is reserved for orders.

Sd/-
Chairman

O. P. No. 17 of 2018

M/s. ACME Ranga Reddy Solar Power Private Ltd. Vs. TSDISCOMs & TSTRANSCO
Petition filed seeking orders for granting extension of time for SCOD of (42) days

Sri. Hemant Sahai, Senior Counsel for the petitioner along with Ms. Puja Priyadarshini, Advocate and Sri. Y. Rama Rao, Standing Counsel for the

respondents along with Ms. Pravalika, Advocate are present. The counsel for the petitioner stated that the PPA was signed on 26.02.2016. The SCOD date was 25.05.2017 as per PPA. The plant was actually synchronized on 02.06.2017 with a delay of 7 days in respect of 10 MW. In respect of another 5 MW, the synchronization took place on 03.06.2017 with a delay of 8 days and another 5 MW on 06.06.2017 with a delay of 10 days. Apart from the above another 5 MW synchronized on 16.06.2017 with a delay of 21 days and the remaining 5 MW synchronized on 06.07.2017 with a delay of 42 days. There is a delay 42 days in all in commissioning the project.

The counsel for the petitioner stated that the DISCOM insisted on demonstrating the actual generation of 5 MW and above capacity project for allowing synchronization as also there were incessant rains for a period of one week during the execution of the project in the month of September, 2016. Thereafter, the supplier of panels sought one week time. The delay attributable to the project is in respect of district reorganization as the plant being installed, moved from the existing district to the new district of Rajanna Sircilla, which was carved out by the government. The petitioner was not in a position to procure land at a stretch and 25 MW of the project capacity had to be located at a distance of 5 K.Ms. from the original site. Therefore, it had to lay a 33 KV transmission line for a distance of 5 K.Ms. This resulted in a delay of 153 days in all from the date of district reorganization till the land procurement. The contractor employed for construction of the project by the petitioner raised the issue of demonetization, which added to the delay of the project.

The counsel for the petitioner sought to place the argument in two fold namely the provisions of the PPA provide enough protection and allow extension of SCOD and that there is no necessity of amendment of the PPA. The Article 9.2 of the PPA would effectively provide the relief to the petitioner in the case of delay, as the said article explains the force majeure incidents and the way same have to be applied. The petitioner has relied on the reasons that there were right of way issues, reorganization of the districts and demonetization. However, the counsel for the petitioner was clear in his thought that the demonetization cannot be quantified and therefore, it will be last reason of force majeure.

The counsel for the petitioner would endeavor to submit that in this particular case, the expansion of the existing lake has resulted in delay of the project and nothing more can be attributed to the delay as it is not within its control. The generic issues of force majeure have been accepted by the government and therefore, the office of the Chief Minister directed the concerned department to provide extension of time for SCOD till 30.06.2017. Thereafter, a letter was issued by the concerned department, however, it was issued on the penultimate day conveying the decision of the government. Thus, the government by its own conduct has accepted that there are force majeure conditions and that the same are acceptable. Based on such directions of the government, the DISCOM has acted and approached this Commission, the same was accepted by the Commission also, but with conditions.

The counsel for the petitioner stated that by its conduct the DISCOM has in-effect conceded the existence of force majeure conditions. Such acceptance has led to the DISCOM to approach the Commission for ratification of its action. The DISCOM ought to have agreed to extension of SCOD as provided in the PPA which can be extended by 12 months on a day-to-day basis. Instead of taking such a step, the DISCOM approached the Commission and obtained approval of the same. Albeit such approval came with riders.

The counsel for the petitioner stated that as the DISCOM by its conduct has accepted the reasons which was also approved by the Commission in respect of force majeure there is no necessity of amending the PPA. The other condition imposed by the Commission regarding seeking of determination of the tariff is also not appropriate for the reason that the tariff was discovered in the bidding and the same had been approved by the Commission under section 63 of the Act, 2003 contrary to the determination undertaken under section 62 of the Act, 2003. Moreover, section 63 of the Act, 2003 starts with the words 'notwithstanding anything contained in section 62' of the Act, 2003, therefore, the Commission cannot redo the exercise having approved the same. It is not out of place to state that the Commission has other power to regulate the agreements for power procurement and the price at which it is procured, but the present situation does not call for exercise of such a power.

In the case of default or force majeure not being accepted, the DISCOM had right to terminate the agreement under Article 10 of the PPA. This option was not exercised by the DISCOM, prima facie due to the understanding that it has already accepted the directions of the government based on the very same reasoning of force majeure. The Article 6 of the PPA also cannot be invoked by the DISCOM as the delay is not relating to the said period that is 6 months from the date of signing of the PPA. For invoking the Article 6.6 of the PPA, the DISCOM has to issue notice to the petitioner contrary to Article 10 where no notice was required for termination of the agreement.

The counsel for the petitioner stated that the second extension issued by the government up to 30.10.2017 though not accepted by the Commission, is only a corollary to the first extension and cannot be seen separately. If the extension is not given, the petitioner will be mulcted with the burden of penalty and liquidated damages. To safeguard the interest of the petitioner and the investment made, the Commission may consider extending the SCOD as it sought in the petition.

The counsel for the petitioner sought to rely on the judgments rendered by the Hon'ble Supreme Court in the matter of M/s. Gujarath Urja Vikas Nigam Limited against M/s. Solar Semiconductor Power Company (India) Private Limited and another as well as Ms. G. Jayashree and others against Sri. Bhagwandas S. Patel and others. In the first case, reliance is placed on the finding that the Commission will ensure the binding nature of clauses of the PPA and endeavor for the compliance of the provisions of the Act, 2003. It is also relevant to state that the Commission cannot revisit the tariff once approved. In the other case, the finding relating to conduct of parties and the factors to be considered for such conduct have been examined in depth and therefore, the power of the Commission depends upon the facts and the circumstances of each case, which must be exercised judiciously and not arbitrarily and capriciously.

The counsel for the respondents sought to rebut the arguments set out by the counsel for the petitioner, the timelines have been set forth in the agreement itself and deviation of the same would entail invoking of penal provisions including the termination of the agreement. It is the case of the DISCOM that the force majeure conditions sought to be relied upon by the petitioner neither constitute a force

majeure situation nor fit into the definition provided in the agreement which is consensus of the parties. The counsel for the petitioner has only read part portion of the Article 9 omitting the definition which explained as to what constitutes a force majeure events. In fact, Article 6.6 is available to the DISCOM as Article 6 provides for timelines upon signing of the PPA, which have not been complied with even before the alleged force majeure conditions have arisen as stated in the petition.

The counsel for the respondents sought to emphasize the fact that the petitioner has committed default of delay in completing the project and synchronizing it with the grid. The fact that the project was commissioned beyond the SCOD is itself sufficient for the DISCOM to deny the benefit of provisions of the PPA more particularly force majeure or default. The PPA is binding document between the parties and thus, neither of the parties can deviate from the terms of the PPA.

The counsel for the respondents stated that there is no reason for accepting the force majeure conditions proposed by the petitioner as the petitioner had ample opportunity to comply with the provisions of the PPA. The representations made to the government or acting thereof on the decision of the government is of no relevancy as the government also is a party in the adjudicatory process before the Commission. In fact, the erstwhile APERC did not accept these conditions in the decisions rendered in the year 2012. The administrative action cannot and would not constitute a direction as it flows by way of letters only. The Commission has power under section 86 (1) (b) of the Act, 2003 but such power is circumscribed by the judgment of the court of law that the agreement cannot be interfered with.

The counsel for the respondents stated that any amendment or modification is required to be agreed to by the parties in writing under the provisions of the PPA more particularly Article 12. The said article also requires obtaining the consent of the Commission for any amendment proposed to be made to the agreement as otherwise the same is not valid and enforceable by the parties. Therefore, the Commission directed the DISCOM to file a petition for amendment of the PPA as also determination of tariff as the conditions of the PPA have varied due to the proposed amendment of the PPA.

The counsel for the respondents stated that the judgment rendered by the Hon'ble Supreme Court in the matter of M/s. Gujarath Urja Vikas Nigam Limited against M/s. Solar Semiconductor Power Company (Indian) Private Limited and another is not applicable to the facts of the present case, as the said judgment had arisen out of the context of determination of the tariff and not amendment of PPA, though it may be correct to state that the Commission has inherent power in respect of the procedure but not on substantial issue.

Therefore, the Commission may consider the petition and the prayer in the light of the submissions of the respondent. The Commission may consider imposing of suitable penalty as well as liquidated damages.

The counsel for the petitioner made a fervent appeal for direction to pay part of the tariff for the time being till the Commission considers and allows extension of the SCOD as the petitioner has to pay for the bank loans etc. This is opposed by the counsel for the respondents stating that since the matter is already heard finally, the petitioner should await the decision of the Commission. While refusing such a request of the petitioner, the petition is reserved for orders.

Sd/-
Chairman

O. P. No. 18 of 2018

M/s. ACME Warangal Solar Power Private Ltd. Vs. TSDISCOMs & TSTRANSCO

Petition filed seeking orders for granting extension of time for SCOD of (14) days

Sri. Hemant Sahai, Senior Counsel for the petitioner along with Ms. Puja Priyadarshini, Advocate and Sri. Y. Rama Rao, Standing Counsel for the respondents along with Ms. Pravalika, Advocate are present. The counsel for the petitioner stated that the PPA was signed on 26.02.2016. The SCOD date was 25.02.2017 as per PPA. The plant was actually synchronized on 03.03.2017 for 7.5 MW with a delay of 5 days and another 7.5 MW on 11.03.2017 with a delay of 14 days. There is a delay of 14 days in commissioning the project.

The counsel for the petitioner stated that the DISCOM insisted on demonstrating the actual generation of 5 MW and above capacity project for allowing synchronization. The delay attributable to the project is in respect of district

reorganization as the plant being installed, moved from the existing district to the new district of Rajanna Sircilla, which was carved out by the government. This resulted in a delay of 14 days.

The counsel for the petitioner sought to place the argument in two fold namely the provisions of the PPA provide enough protection and allow extension of SCOD and that there is no necessity of amendment of the PPA. The Article 9.2 of the PPA would effectively provide the relief to the petitioner in the case of delay, as the said article explains the force majeure incidents and the way same have to be applied. The petitioner has relied on the reasons that there were right of way issues, reorganization of the districts and demonetization. However, the counsel for the petitioner was clear in his thought that the demonetization cannot be quantified and therefore, it will be last reason of force majeure.

The counsel for the petitioner would endeavor to submit that in this particular case, the expansion of the existing lake has resulted in delay of the project and nothing more can be attributed to the delay as it is not within its control. The generic issues of force majeure have been accepted by the government and therefore, the office of the Chief Minister directed the concerned department to provide extension of time for SCOD till 30.06.2017. Thereafter, a letter was issued by the concerned department, however, it was issued on the penultimate day conveying the decision of the government. Thus, the government by its own conduct has accepted that there are force majeure conditions and that the same are acceptable. Based on such directions of the government, the DISCOM has acted and approached this Commission, the same was accepted by the Commission also, but with conditions.

The counsel for the petitioner stated that by its conduct the DISCOM has in-effect conceded the existence of force majeure conditions. Such acceptance has led to the DISCOM to approach the Commission for ratification of its action. The DISCOM ought to have agreed to extension of SCOD as provided in the PPA which can be extended by 12 months on a day-to-day basis. Instead of taking such a step, the DISCOM approached the Commission and obtained approval of the same. Albeit such approval came with riders.

The counsel for the petitioner stated that as the DISCOM by its conduct has accepted the reasons which was also approved by the Commission in respect of force majeure there is no necessity of amending the PPA. The other condition imposed by the Commission regarding seeking of determination of the tariff is also not appropriate for the reason that the tariff was discovered in the bidding and the same had been approved by the Commission under section 63 of the Act, 2003 contrary to the determination undertaken under section 62 of the Act, 2003. Moreover, section 63 of the Act, 2003 starts with the words 'notwithstanding anything contained in section 62' of the Act, 2003, therefore, the Commission cannot redo the exercise having approved the same. It is not out of place to state that the Commission has other power to regulate the agreements for power procurement and the price at which it is procured, but the present situation does not call for exercise of such a power.

In the case of default or force majeure not being accepted, the DISCOM had right to terminate the agreement under Article 10 of the PPA. This option was not exercised by the DISCOM, prima facie due to the understanding that it has already accepted the directions of the government based on the very same reasoning of force majeure. The Article 6 of the PPA also cannot be invoked by the DISCOM as the delay is not relating to the said period that is 6 months from the date of signing of the PPA. For invoking the Article 6.6 of the PPA, the DISCOM has to issue notice to the petitioner contrary to Article 10 where no notice was required for termination of the agreement.

The counsel for the petitioner stated that the second extension issued by the government up to 30.10.2017 though not accepted by the Commission, is only a corollary to the first extension and cannot be seen separately. If the extension is not given, the petitioner will be mulcted with the burden of penalty and liquidated damages. To safeguard the interest of the petitioner and the investment made, the Commission may consider extending the SCOD as it sought in the petition.

The counsel for the petitioner sought to rely on the judgments rendered by the Hon'ble Supreme Court in the matter of M/s. Gujarath Urja Vikas Nigam Limited against M/s. Solar Semiconductor Power Company (India) Private Limited and another as well as Ms. G. Jayashree and others against Sri. Bhagwandas S. Patel

and others. In the first case, reliance is placed on the finding that the Commission will ensure the binding nature of clauses of the PPA and endeavor for the compliance of the provisions of the Act, 2003. It is also relevant to state that the Commission cannot revisit the tariff once approved. In the other case, the finding relating to conduct of parties and the factors to be considered for such conduct have been examined in depth and therefore, the power of the Commission depends upon the facts and the circumstances of each case, which must be exercised judiciously and not arbitrarily and capriciously.

The counsel for the respondents sought to rebut the arguments set out by the counsel for the petitioner, the timelines have been set forth in the agreement itself and deviation of the same would entail invoking of penal provisions including the termination of the agreement. It is the case of the DISCOM that the force majeure conditions sought to be relied upon by the petitioner neither constitute a force majeure situation nor fit into the definition provided in the agreement which is consensus of the parties. The counsel for the petitioner has only read part portion of the Article 9 omitting the definition which explained as to what constitutes a force majeure events. In fact, Article 6.6 is available to the DISCOM as Article 6 provides for timelines upon signing of the PPA, which have not been complied with even before the alleged force majeure conditions have arisen as stated in the petition.

The counsel for the respondents sought to emphasize the fact that the petitioner has committed default of delay in completing the project and synchronizing it with the grid. The fact that the project was commissioned beyond the SCOD is itself sufficient for the DISCOM to deny the benefit of provisions of the PPA more particularly force majeure or default. The PPA is binding document between the parties and thus, neither of the parties can deviate from the terms of the PPA.

The counsel for the respondents stated that there is no reason for accepting the force majeure conditions proposed by the petitioner as the petitioner had ample opportunity to comply with the provisions of the PPA. The representations made to the government or acting thereof on the decision of the government is of no relevancy as the government also is a party in the adjudicatory process before the Commission. In fact, the erstwhile APERC did not accept these conditions in the decisions rendered in the year 2012. The administrative action cannot and would not

constitute a direction as it flows by way of letters only. The Commission has power under section 86 (1) (b) of the Act, 2003 but such power is circumscribed by the judgment of the court of law that the agreement cannot be interfered with.

The counsel for the respondents stated that any amendment or modification is required to be agreed to by the parties in writing under the provisions of the PPA more particularly Article 12. The said article also requires obtaining the consent of the Commission for any amendment proposed to be made to the agreement as otherwise the same is not valid and enforceable by the parties. Therefore, the Commission directed the DISCOM to file a petition for amendment of the PPA as also determination of tariff as the conditions of the PPA have varied due to the proposed amendment of the PPA.

The counsel for the respondents stated that the judgment rendered by the Hon'ble Supreme Court in the matter of M/s. Gujarath Urja Vikas Nigam Limited against M/s. Solar Semiconductor Power Company (Indian) Private Limited and another is not applicable to the facts of the present case, as the said judgment had arisen out of the context of determination of the tariff and not amendment of PPA, though it may be correct to state that the Commission has inherent power in respect of the procedure but not on substantial issue.

Therefore, the Commission may consider the petition and the prayer in the light of the submissions of the respondent. The Commission may consider imposing of suitable penalty as well as liquidated damages.

The counsel for the petitioner made a fervent appeal for direction to pay part of the tariff for the time being till the Commission considers and allows extension of the SCOD as the petitioner has to pay for the bank loans etc. This is opposed by the counsel for the respondents stating that since the matter is already heard finally, the petitioner should await the decision of the Commission. While refusing such a request of the petitioner, the petition is reserved for orders.

Sd/-
Chairman

O. P. No. 19 of 2018

M/s. ACME Fazilka Solar Power Private Ltd. Vs. TSDISCOMs & TSTRANSCO

Petition filed seeking orders for granting extension of time for SCOD of (28) days

Sri. Hemant Sahai, Senior Counsel for the petitioner along with Ms. Puja Priyadarshini, Advocate and Sri. Y. Rama Rao, Standing Counsel for the respondents along with Ms. Pravalika, Advocate are present. The counsel for the petitioner stated that the PPA was signed on 26.02.2016. The SCOD date was 25.02.2017 as per PPA. The plant was actually synchronized on 13.03.2017 for 5 MW with a delay of 15 days and the balance of 10 MW on 25.03.2017 with a delay of 28 days. There is a delay of 28 in commissioning the project.

The counsel for the petitioner stated that the DISCOM insisted on demonstrating the actual generation of 5 MW and above capacity project for allowing synchronization as also there were incessant rains for a period of one week during the execution of the project in the month of September, 2016. Thereafter, the supplier of panels sought one week time. This resulted in a delay of 14 days.

The counsel for the petitioner sought to place the argument in two fold namely the provisions of the PPA provide enough protection and allow extension of SCOD and that there is no necessity of amendment of the PPA. The Article 9.2 of the PPA would effectively provide the relief to the petitioner in the case of delay, as the said article explains the force majeure incidents and the way same have to be applied. The petitioner has relied on the reasons that there were right of way issues, reorganization of the districts and demonetization. However, the counsel for the petitioner was clear in his thought that the demonetization cannot be quantified and therefore, it will be last reason of force majeure.

The counsel for the petitioner would endeavor to submit that in this particular case, the expansion of the existing lake has resulted in delay of the project and nothing more can be attributed to the delay as it is not within its control. The generic issues of force majeure have been accepted by the government and therefore, the office of the Chief Minister directed the concerned department to provide extension of time for SCOD till 30.06.2017. Thereafter, a letter was issued by the concerned department, however, it was issued on the penultimate day conveying the decision of the government. Thus, the government by its own conduct has accepted that there are force majeure conditions and that the same are acceptable. Based on such

directions of the government, the DISCOM has acted and approached this Commission, the same was accepted by the Commission also, but with conditions.

The counsel for the petitioner stated that by its conduct the DISCOM has in-effect conceded the existence of force majeure conditions. Such acceptance has led to the DISCOM to approach the Commission for ratification of its action. The DISCOM ought to have agreed to extension of SCOD as provided in the PPA which can be extended by 12 months on a day-to-day basis. Instead of taking such a step, the DISCOM approached the Commission and obtained approval of the same. Albeit such approval came with riders.

The counsel for the petitioner stated that as the DISCOM by its conduct has accepted the reasons which was also approved by the Commission in respect of force majeure there is no necessity of amending the PPA. The other condition imposed by the Commission regarding seeking of determination of the tariff is also not appropriate for the reason that the tariff was discovered in the bidding and the same had been approved by the Commission under section 63 of the Act, 2003 contrary to the determination undertaken under section 62 of the Act, 2003. Moreover, section 63 of the Act, 2003 starts with the words 'notwithstanding anything contained in section 62' of the Act, 2003, therefore, the Commission cannot redo the exercise having approved the same. It is not out of place to state that the Commission has other power to regulate the agreements for power procurement and the price at which it is procured, but the present situation does not call for exercise of such a power.

In the case of default or force majeure not being accepted, the DISCOM had right to terminate the agreement under Article 10 of the PPA. This option was not exercised by the DISCOM, prima facie due to the understanding that it has already accepted the directions of the government based on the very same reasoning of force majeure. The Article 6 of the PPA also cannot be invoked by the DISCOM as the delay is not relating to the said period that is 6 months from the date of signing of the PPA. For invoking the Article 6.6 of the PPA, the DISCOM has to issue notice to the petitioner contrary to Article 10 where no notice was required for termination of the agreement.

The counsel for the petitioner stated that the second extension issued by the government up to 30.10.2017 though not accepted by the Commission, is only a corollary to the first extension and cannot be seen separately. If the extension is not given, the petitioner will be mulcted with the burden of penalty and liquidated damages. To safeguard the interest of the petitioner and the investment made, the Commission may consider extending the SCOD as it sought in the petition.

The counsel for the petitioner sought to rely on the judgments rendered by the Hon'ble Supreme Court in the matter of M/s. Gujarat Urja Vikas Nigam Limited against M/s. Solar Semiconductor Power Company (India) Private Limited and another as well as Ms. G. Jayashree and others against Sri. Bhagwandas S. Patel and others. In the first case, reliance is placed on the finding that the Commission will ensure the binding nature of clauses of the PPA and endeavor for the compliance of the provisions of the Act, 2003. It is also relevant to state that the Commission cannot revisit the tariff once approved. In the other case, the finding relating to conduct of parties and the factors to be considered for such conduct have been examined in depth and therefore, the power of the Commission depends upon the facts and the circumstances of each case, which must be exercised judiciously and not arbitrarily and capriciously.

The counsel for the respondents sought to rebut the arguments set out by the counsel for the petitioner, the timelines have been set forth in the agreement itself and deviation of the same would entail invoking of penal provisions including the termination of the agreement. It is the case of the DISCOM that the force majeure conditions sought to be relied upon by the petitioner neither constitute a force majeure situation nor fit into the definition provided in the agreement which is consensus of the parties. The counsel for the petitioner has only read part portion of the Article 9 omitting the definition which explained as to what constitutes a force majeure events. In fact, Article 6.6 is available to the DISCOM as Article 6 provides for timelines upon signing of the PPA, which have not been complied with even before the alleged force majeure conditions have arisen as stated in the petition.

The counsel for the respondents sought to emphasize the fact that the petitioner has committed default of delay in completing the project and synchronizing it with the grid. The fact that the project was commissioned beyond the SCOD is

itself sufficient for the DISCOM to deny the benefit of provisions of the PPA more particularly force majeure or default. The PPA is binding document between the parties and thus, neither of the parties can deviate from the terms of the PPA.

The counsel for the respondents stated that there is no reason for accepting the force majeure conditions proposed by the petitioner as the petitioner had ample opportunity to comply with the provisions of the PPA. The representations made to the government or acting thereof on the decision of the government is of no relevancy as the government also is a party in the adjudicatory process before the Commission. In fact, the erstwhile APERC did not accept these conditions in the decisions rendered in the year 2012. The administrative action cannot and would not constitute a direction as it flows by way of letters only. The Commission has power under section 86 (1) (b) of the Act, 2003 but such power is circumscribed by the judgment of the court of law that the agreement cannot be interfered with.

The counsel for the respondents stated that any amendment or modification is required to be agreed to by the parties in writing under the provisions of the PPA more particularly Article 12. The said article also requires obtaining the consent of the Commission for any amendment proposed to be made to the agreement as otherwise the same is not valid and enforceable by the parties. Therefore, the Commission directed the DISCOM to file a petition for amendment of the PPA as also determination of tariff as the conditions of the PPA have varied due to the proposed amendment of the PPA.

The counsel for the respondents stated that the judgment rendered by the Hon'ble Supreme Court in the matter of M/s. Gujarath Urja Vikas Nigam Limited against M/s. Solar Semiconductor Power Company (Indian) Private Limited and another is not applicable to the facts of the present case, as the said judgment had arisen out of the context of determination of the tariff and not amendment of PPA, though it may be correct to state that the Commission has inherent power in respect of the procedure but not on substantial issue.

Therefore, the Commission may consider the petition and the prayer in the light of the submissions of the respondent. The Commission may consider imposing of suitable penalty as well as liquidated damages.

The counsel for the petitioner made a fervent appeal for direction to pay part of the tariff for the time being till the Commission considers and allows extension of the SCOD as the petitioner has to pay for the bank loans etc. This is opposed by the counsel for the respondents stating that since the matter is already heard finally, the petitioner should await the decision of the Commission. While refusing such a request of the petitioner, the petition is reserved for orders.

Sd/-
Chairman

O. P. No. 20 of 2018

M/s. ACME PV Powertech Private Ltd. Vs. TSDISCOMs & TSTRANSCO

Petition filed seeking orders for granting extension of time for SCOD of (88) days

Sri. Hemant Sahai, Senior Counsel for the petitioner along with Ms. Puja Priyadarshini, Advocate and Sri. Y. Rama Rao, Standing Counsel for the respondents along with Ms. Pravalika, Advocate are present. The counsel for the petitioner stated that the PPA was signed on 19.02.2016. The SCOD date was 18.05.2017 as per PPA. The plant was actually synchronized on 07.07.2017 for 40 MW with a delay of 49 days and 10 MW on 14.08.2017 with a delay of 88 days, resulting in a total delay of 88 days in commissioning the project.

The counsel for the petitioner stated that there were incessant rains for a period of one week during the execution of the project in the month of September, 2016. Thereafter, the supplier of panels sought one week time. It is further stated that due to reorganization of the districts in the State of Telangana, the substation under which the project is located in Sanga Reddy District and the project went to Medak District. This resulted in a delay of 88 days. The contractor employed for construction of the project by the petitioner raised the issue of demonetization, which added to the delay of the project.

The counsel for the petitioner stated that there are right of way issues in the project and the same was informed to the TSTRANSCO, which in turn requested the concerned revenue officials to ensure removal of the difficulty in laying lines. Thus, it resulted in delay of 41 days for that purpose during the months of April and May, 2017.

The counsel for the petitioner sought to place the argument in two fold namely the provisions of the PPA provide enough protection and allow extension of SCOD and that there is no necessity of amendment of the PPA. The Article 9.2 of the PPA would effectively provide the relief to the petitioner in the case of delay, as the said article explains the force majeure incidents and the way same have to be applied. The petitioner has relied on the reasons that there were right of way issues, reorganization of the districts and demonetization. However, the counsel for the petitioner was clear in his thought that the demonetization cannot be quantified and therefore, it will be last reason of force majeure.

The counsel for the petitioner would endeavor to submit that in this particular case, the expansion of the existing lake has resulted in delay of the project and nothing more can be attributed to the delay as it is not within its control. The generic issues of force majeure have been accepted by the government and therefore, the office of the Chief Minister directed the concerned department to provide extension of time for SCOD till 30.06.2017. Thereafter, a letter was issued by the concerned department, however, it was issued on the penultimate day conveying the decision of the government. Thus, the government by its own conduct has accepted that there are force majeure conditions and that the same are acceptable. Based on such directions of the government, the DISCOM has acted and approached this Commission, the same was accepted by the Commission also, but with conditions.

The counsel for the petitioner stated that by its conduct the DISCOM has in-effect conceded the existence of force majeure conditions. Such acceptance has led to the DISCOM to approach the Commission for ratification of its action. The DISCOM ought to have agreed to extension of SCOD as provided in the PPA which can be extended by 12 months on a day-to-day basis. Instead of taking such a step, the DISCOM approached the Commission and obtained approval of the same. Albeit such approval came with riders.

The counsel for the petitioner stated that as the DISCOM by its conduct has accepted the reasons which was also approved by the Commission in respect of force majeure there is no necessity of amending the PPA. The other condition imposed by the Commission regarding seeking of determination of the tariff is also

not appropriate for the reason that the tariff was discovered in the bidding and the same had been approved by the Commission under section 63 of the Act, 2003 contrary to the determination undertaken under section 62 of the Act, 2003. Moreover, section 63 of the Act, 2003 starts with the words 'notwithstanding anything contained in section 62' of the Act, 2003, therefore, the Commission cannot redo the exercise having approved the same. It is not out of place to state that the Commission has other power to regulate the agreements for power procurement and the price at which it is procured, but the present situation does not call for exercise of such a power.

In the case of default or force majeure not being accepted, the DISCOM had right to terminate the agreement under Article 10 of the PPA. This option was not exercised by the DISCOM, prima facie due to the understanding that it has already accepted the directions of the government based on the very same reasoning of force majeure. The Article 6 of the PPA also cannot be invoked by the DISCOM as the delay is not relating to the said period that is 6 months from the date of signing of the PPA. For invoking the Article 6.6 of the PPA, the DISCOM has to issue notice to the petitioner contrary to Article 10 where no notice was required for termination of the agreement.

The counsel for the petitioner stated that the second extension issued by the government up to 30.10.2017 though not accepted by the Commission, is only a corollary to the first extension and cannot be seen separately. If the extension is not given, the petitioner will be mulcted with the burden of penalty and liquidated damages. To safeguard the interest of the petitioner and the investment made, the Commission may consider extending the SCOD as it sought in the petition.

The counsel for the petitioner sought to rely on the judgments rendered by the Hon'ble Supreme Court in the matter of M/s. Gujarat Urja Vikas Nigam Limited against M/s. Solar Semiconductor Power Company (India) Private Limited and another as well as Ms. G. Jayashree and others against Sri. Bhagwandas S. Patel and others. In the first case, reliance is placed on the finding that the Commission will ensure the binding nature of clauses of the PPA and endeavor for the compliance of the provisions of the Act, 2003. It is also relevant to state that the Commission cannot revisit the tariff once approved. In the other case, the finding

relating to conduct of parties and the factors to be considered for such conduct have been examined in depth and therefore, the power of the Commission depends upon the facts and the circumstances of each case, which must be exercised judiciously and not arbitrarily and capriciously.

The counsel for the respondents sought to rebut the arguments set out by the counsel for the petitioner, the timelines have been set forth in the agreement itself and deviation of the same would entail invoking of penal provisions including the termination of the agreement. It is the case of the DISCOM that the force majeure conditions sought to be relied upon by the petitioner neither constitute a force majeure situation nor fit into the definition provided in the agreement which is consensus of the parties. The counsel for the petitioner has only read part portion of the Article 9 omitting the definition which explained as to what constitutes a force majeure events. In fact, Article 6.6 is available to the DISCOM as Article 6 provides for timelines upon signing of the PPA, which have not been complied with even before the alleged force majeure conditions have arisen as stated in the petition.

The counsel for the respondents sought to emphasize the fact that the petitioner has committed default of delay in completing the project and synchronizing it with the grid. The fact that the project was commissioned beyond the SCOD is itself sufficient for the DISCOM to deny the benefit of provisions of the PPA more particularly force majeure or default. The PPA is binding document between the parties and thus, neither of the parties can deviate from the terms of the PPA.

The counsel for the respondents stated that there is no reason for accepting the force majeure conditions proposed by the petitioner as the petitioner had ample opportunity to comply with the provisions of the PPA. The representations made to the government or acting thereof on the decision of the government is of no relevancy as the government also is a party in the adjudicatory process before the Commission. In fact, the erstwhile APERC did not accept these conditions in the decisions rendered in the year 2012. The administrative action cannot and would not constitute a direction as it flows by way of letters only. The Commission has power under section 86 (1) (b) of the Act, 2003 but such power is circumscribed by the judgment of the court of law that the agreement cannot be interfered with.

The counsel for the respondents stated that any amendment or modification is required to be agreed to by the parties in writing under the provisions of the PPA more particularly Article 12. The said article also requires obtaining the consent of the Commission for any amendment proposed to be made to the agreement as otherwise the same is not valid and enforceable by the parties. Therefore, the Commission directed the DISCOM to file a petition for amendment of the PPA as also determination of tariff as the conditions of the PPA have varied due to the proposed amendment of the PPA.

The counsel for the respondents stated that the judgment rendered by the Hon'ble Supreme Court in the matter of M/s. Gujarath Urja Vikas Nigam Limited against M/s. Solar Semiconductor Power Company (Indian) Private Limited and another is not applicable to the facts of the present case, as the said judgment had arisen out of the context of determination of the tariff and not amendment of PPA, though it may be correct to state that the Commission has inherent power in respect of the procedure but not on substantial issue.

Therefore, the Commission may consider the petition and the prayer in the light of the submissions of the respondent. The Commission may consider imposing of suitable penalty as well as liquidated damages.

The counsel for the petitioner made a fervent appeal for direction to pay part of the tariff for the time being till the Commission considers and allows extension of the SCOD as the petitioner has to pay for the bank loans etc. This is opposed by the counsel for the respondents stating that since the matter is already heard finally, the petitioner should await the decision of the Commission. While refusing such a request of the petitioner, the petition is reserved for orders.

Sd/-
Chairman

O. P. No. 21 of 2018

M/s. Sun World Solar Power Private Ltd. Vs. TSDISCOMs & TSTRANSCO

Petition filed seeking orders for granting extension of time for SCOD of (175) days

Sri. Hemant Sahai, Senior Counsel for the petitioner along with Ms. Puja Priyadarshini, Advocate and Sri. Y. Rama Rao, Standing Counsel for the

respondents along with Ms. Pravalika, Advocate are present. The counsel for the petitioner stated that the PPA was signed on 26.02.2016. The SCOD date was 26.05.2017 as per PPA. The plant was actually synchronized on 15.11.2017 for a capacity of 20 MW with a delay of 174 days and the remaining capacity of 10 MW on 16.11.2017 with a delay of 175 days. There is a delay of 175 days in commissioning the project.

The counsel for the petitioner stated that due to reorganization of the districts in the State of Telangana, the plant location has moved from erstwhile Karimnagar District to the new District of Jagtial. The petitioner completed 81 towers, foundation was laid for 101 towers and 70 towers were erected. The right of way issues at certain locations had resulted in works not being completed for laying foundation and erection of towers. The petitioner addressed letters to the Director General of Police and the Energy Department, seeking protection and clearance of right of way issues. Subsequently at few places it could resolve RoW issue. However, it brought to the notice of the TSTRANSCO about the RoW issue in two other places. The TSTRANSCO in turn addressed letter to the revenue officer. The revenue officer initiated discussion with the land oustees as there was agitation in the area. There were incessant rains for a period of one week during the month of September, 2016. The panel supplier sought a period of one week in the month of October, 2016. The contractor employed for construction of the project by the petitioner raised the issue of demonetization, which added to the delay of the project. All these events contributed to the delay in the project.

The counsel for the petitioner sought to place the argument in two fold namely the provisions of the PPA provide enough protection and allow extension of SCOD and that there is no necessity of amendment of the PPA. The Article 9.2 of the PPA would effectively provide the relief to the petitioner in the case of delay, as the said article explains the force majeure incidents and the way same have to be applied. The petitioner has relied on the reasons that there were right of way issues, reorganization of the districts and demonetization. However, the counsel for the petitioner was clear in his thought that the demonetization cannot be quantified and therefore, it will be last reason of force majeure.

The counsel for the petitioner would endeavor to submit that in this particular case, the expansion of the existing lake has resulted in delay of the project and nothing more can be attributed to the delay as it is not within its control. The generic issues of force majeure have been accepted by the government and therefore, the office of the Chief Minister directed the concerned department to provide extension of time for SCOD till 30.06.2017. Thereafter, a letter was issued by the concerned department, however, it was issued on the penultimate day conveying the decision of the government. Thus, the government by its own conduct has accepted that there are force majeure conditions and that the same are acceptable. Based on such directions of the government, the DISCOM has acted and approached this Commission, the same was accepted by the Commission also, but with conditions.

The counsel for the petitioner stated that by its conduct the DISCOM has in-effect conceded the existence of force majeure conditions. Such acceptance has led to the DISCOM to approach the Commission for ratification of its action. The DISCOM ought to have agreed to extension of SCOD as provided in the PPA which can be extended by 12 months on a day-to-day basis. Instead of taking such a step, the DISCOM approached the Commission and obtained approval of the same. Albeit such approval came with riders.

The counsel for the petitioner stated that as the DISCOM by its conduct has accepted the reasons which was also approved by the Commission in respect of force majeure there is no necessity of amending the PPA. The other condition imposed by the Commission regarding seeking of determination of the tariff is also not appropriate for the reason that the tariff was discovered in the bidding and the same had been approved by the Commission under section 63 of the Act, 2003 contrary to the determination undertaken under section 62 of the Act, 2003. Moreover, section 63 of the Act, 2003 starts with the words 'notwithstanding anything contained in section 62' of the Act, 2003, therefore, the Commission cannot redo the exercise having approved the same. It is not out of place to state that the Commission has other power to regulate the agreements for power procurement and the price at which it is procured, but the present situation does not call for exercise of such a power.

In the case of default or force majeure not being accepted, the DISCOM had right to terminate the agreement under Article 10 of the PPA. This option was not exercised by the DISCOM, prima facie due to the understanding that it has already accepted the directions of the government based on the very same reasoning of force majeure. The Article 6 of the PPA also cannot be invoked by the DISCOM as the delay is not relating to the said period that is 6 months from the date of signing of the PPA. For invoking the Article 6.6 of the PPA, the DISCOM has to issue notice to the petitioner contrary to Article 10 where no notice was required for termination of the agreement.

The counsel for the petitioner stated that the second extension issued by the government up to 30.10.2017 though not accepted by the Commission, is only a corollary to the first extension and cannot be seen separately. If the extension is not given, the petitioner will be mulcted with the burden of penalty and liquidated damages. To safeguard the interest of the petitioner and the investment made, the Commission may consider extending the SCOD as it sought in the petition.

The counsel for the petitioner sought to rely on the judgments rendered by the Hon'ble Supreme Court in the matter of M/s. Gujarath Urja Vikas Nigam Limited against M/s. Solar Semiconductor Power Company (India) Private Limited and another as well as Ms. G. Jayashree and others against Sri. Bhagwandas S. Patel and others. In the first case, reliance is placed on the finding that the Commission will ensure the binding nature of clauses of the PPA and endeavor for the compliance of the provisions of the Act, 2003. It is also relevant to state that the Commission cannot revisit the tariff once approved. In the other case, the finding relating to conduct of parties and the factors to be considered for such conduct have been examined in depth and therefore, the power of the Commission depends upon the facts and the circumstances of each case, which must be exercised judiciously and not arbitrarily and capriciously.

The counsel for the respondents sought to rebut the arguments set out by the counsel for the petitioner, the timelines have been set forth in the agreement itself and deviation of the same would entail invoking of penal provisions including the termination of the agreement. It is the case of the DISCOM that the force majeure conditions sought to be relied upon by the petitioner neither constitute a force

majeure situation nor fit into the definition provided in the agreement which is consensus of the parties. The counsel for the petitioner has only read part portion of the Article 9 omitting the definition which explained as to what constitutes a force majeure events. In fact, Article 6.6 is available to the DISCOM as Article 6 provides for timelines upon signing of the PPA, which have not been complied with even before the alleged force majeure conditions have arisen as stated in the petition.

The counsel for the respondents sought to emphasize the fact that the petitioner has committed default of delay in completing the project and synchronizing it with the grid. The fact that the project was commissioned beyond the SCOD is itself sufficient for the DISCOM to deny the benefit of provisions of the PPA more particularly force majeure or default. The PPA is binding document between the parties and thus, neither of the parties can deviate from the terms of the PPA.

The counsel for the respondents stated that there is no reason for accepting the force majeure conditions proposed by the petitioner as the petitioner had ample opportunity to comply with the provisions of the PPA. The representations made to the government or acting thereof on the decision of the government is of no relevancy as the government also is a party in the adjudicatory process before the Commission. In fact, the erstwhile APERC did not accept these conditions in the decisions rendered in the year 2012. The administrative action cannot and would not constitute a direction as it flows by way of letters only. The Commission has power under section 86 (1) (b) of the Act, 2003 but such power is circumscribed by the judgment of the court of law that the agreement cannot be interfered with.

The counsel for the respondents stated that any amendment or modification is required to be agreed to by the parties in writing under the provisions of the PPA more particularly Article 12. The said article also requires obtaining the consent of the Commission for any amendment proposed to be made to the agreement as otherwise the same is not valid and enforceable by the parties. Therefore, the Commission directed the DISCOM to file a petition for amendment of the PPA as also determination of tariff as the conditions of the PPA have varied due to the proposed amendment of the PPA.

The counsel for the respondents stated that the judgment rendered by the Hon'ble Supreme Court in the matter of M/s. Gujarat Urja Vikas Nigam Limited against M/s. Solar Semiconductor Power Company (Indian) Private Limited and another is not applicable to the facts of the present case, as the said judgment had arisen out of the context of determination of the tariff and not amendment of PPA, though it may be correct to state that the Commission has inherent power in respect of the procedure but not on substantial issue.

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