



TELANGANA STATE ELECTRICITY REGULATORY COMMISSION
5th Floor, Singareni Bhavan, Lakdi-ka-pul, Hyderabad 500 004

O.P.No.28 of 2020

Dated 09.03.2021

Present

Sri T. Sriranga Rao, Chairman
Sri M. D. Manohar Raju, Member (Technical)
Sri Bandaru Krishnaiah, Member (Finance)

Between:

M/s Enrich Energy Private Limited,
8-2-337, Road No.3, Banjara Hills,
Hyderabad – 500 034.

... Petitioner.

AND

1. Southern Power Distribution Company of Telangana Limited,
6-1-50, 5th Floor,
Mint Compound, Secretariat Road,
Hyderabad – 500 063.
2. Chief General Manager (Comml & RAC),
Corporate Office, TSSPDCL, # 6-5-50, 5th Floor,
Mint Compound, Hyderabad – 500 063.
3. Chief General Manager (Comm., Plg. & Coordn.),
TSPCC, Vidyut Soudha, Hyderabad – 500 082.
4. General Manager, TSPCC,
Vidyut Soudha, Hyderabad – 500 082.

... Respondents.

This petition has come up for hearing on 09.11.2020 and 11.12.2020. Sri. Challa Gunaranjan, Advocate for the petitioner and Sri Mohammad Bande Ali, Law Attaché of TSSPDCL for respondents appeared through virtual hearing on 09.11.2020 and 11.12.2020. This petition having been heard and having stood over for consideration to this day, the Commission passed the following:

ORDER

M/s Enrich Energy Private Limited (petitioner) has filed a petition under section 86 (1) (e), (f) and (k) of the Electricity Act, 2003 (Act, 2003) and in terms of clause 9.2 of the power purchase agreement (PPA), seeking declaration of COD as 31.03.2017 of 7 MW solar power project and reimbursement of penalties by encashing bank guarantee of Rs.24,26,667/-. The case of the petitioner, in brief, is as under:

- a) That, the 1st respondent, on behalf of TSDISCOMs, on the directions of TSTRANSCO and TSPCC by way of letter dated 31.03.2015, floated tender for procurement 2000 MW solar power under competitive bidding route on 01.04.2015.
- b) That, the petitioner was successful bidder for setting up a 7 MW Solar Power Project at Thattepally Village, Peddamul Mandal, Rangareddy District, Telangana for the sale of solar power to 1st respondent with a quoted tariff of Rs.5.7249 per KWh.
- c) That ,the petitioner as required submitted Performance Bank Guarantees (PBG) for Rs.49 lakh and executed the Power Purchase Agreement (PPA) on 26.02.2016 for the sale of power to 1st respondent for a period of 25 years.
- d) That, as per Article 1.43 of PPA, the Scheduled Commercial Operation Date (SCOD) was to be twelve (12) months from the date of execution of PPA.
- e) That, despite of best efforts put up by the petitioner it could not complete the project and achieve the SCOD as per timeline. However, it was able to complete the project and achieve the Commercial Operation on 31.03.2017. The reasons of delay in commissioning the project were mainly on account of Force Majeure events affecting of project and Force Majeure events affecting site execution.
- f) That, it is made to understand to the petitioner about the Government of Telangana (GoTS) by considering the representations of various Developers of Solar Projects across the State with the letter dated 21.04.2017 directing the TSDISCOMs to extend the SCOD of all the solar power projects, which are having PPAs with TSDISCOMs upto 30.06.2017, without any penalties.
- g) That, the petitioner was under an impression that TSDISCOMs shall follow the directions of GoTS, but a letter dated 03.02.2018 was received from 1st respondent wherein it was informed for filing of petition for extension of SCOD

before this Commission as per the directions issued in the letter dated 30.11.29017 of this Commission.

- h) That, to the utter dismay of petitioner, the 3rd respondent without issuing any notice, in a high handed manner had invoked the bank guarantee on account of aforesaid delay in commissioning the solar power project, which was beyond the control of petitioner.
- i) That, in the given circumstances the petitioner has constrained to address letters dated 21.03.2018 and 24.03.2018 to the 3rd respondent by bringing into the notice about the GoTS extending the SCOD through the letter dated 29.06.2017. In the letters it is also informed about the penalty/liability which the petitioner liable for Rs.23,80,000/- for the delay caused in commissioning of the solar power project by calculating number of days and offered to pay that amount under protest in exchange for the return of the proposed encash of bank guarantee. The 3rd respondent verbally asked to pay an amount of Rs.24,25,667/- towards the penalties payable under Article 10.5 of PPA in exchange of bank guarantee. By raising demand draft to the tune of Rs.24,26,667/- the petitioner submitted them to 3rd respondent along with a protest letter dated 27.03.2018 with a request not encash bank guarantee.
- j) That, the petitioner having no other alternative remedy constrained to file this petition for extension of SCOD.
- k) That, the petitioner humbly requests this Commission to allow this petition by granting the following reliefs –
 - a) To declare the Scheduled Commercial Operation Date (SCOD) of the 7 MW solar power project as 31.03.2017.
 - b) Consequently, declare that the petitioner not liable to pay any penalties as per the PPA and direct the respondents to refund the amounts adjusted towards penalty amounting to Rs.24,26,667/- (Rupees twenty four lakh twenty six thousand six hundred and sixty seven only) adjusted towards bank guarantees invoked amounting to Rs.49 lakh.
 - c) Grant any such other relief which this Commission deems fit.

2. The 2nd respondent sought dismissal of the petition for the following reasons:
 - a. That, the 7 MW Solar power project of the petitioner was synchronized to the grid on 31.03.2017 with delay of thirty four (34) days as against the SCOD i.e., 25.02.2017.
 - b. That, as per the PPA, the respondents are entitled to encash the PBG in the following manner in Article 10.5 of PPA in case of delayed commissioning of the project.
 - c. That, by calculating 34 days delay the petitioner submitted the demand draft (DD), dated 26.03.2018 for Rs.24,26,667/- to avoid encashment of PBG to the extent of the above amount and the same was encashed. After encashment of the DD, the original PBGs furnished by the petitioner at the time of signing of the PPA were returned along with letter dated 09.01.2018.
 - d. That, the events which are all stated and which are all said to be Force Majeure events do not fall under the head of Force Majeure covered under Article 9 of the PPA. The contention of the petitioner the delay in commissioning of solar power project as delayed in the petition cannot be accepted. The petitioner is trying to gain time under the guise of Force Majeure. The reasons cited by the petitioner do not deserve any consideration. At no point of time the petitioner company informed the reasons for delay as pleaded in the petition.
 - e. That, after extension of the SCOD for additional four (4) months i.e., from 30.06.2017 to 31.10.2017, by GoTS to the solar power projects in the State who entered PPA with DISCOMs who participated in the bidding 2015, the same was communicated to this Commission seeking approval for extension of SCOD. Thereupon this Commission through letter dated 30.11.2017 without extending SCOD upto 31.10.2017, intimated that for extension of time, each case has to be examined with reference to the terms of PPA by following the principles of Natural Justice and for that each developer has to file a petition before the Commission by furnishing the reasons for extension of time which can be examined within the framework of the PPA.
 - f. That, the aforementioned order of the Commission was communicated to the petitioner through letter No.148, dated 03.02.2018 and the petitioner failed to file any such petition till 21.05.2020 and on the other hand the petitioner deposited Rs.24,26,667/- through demand draft dated 26.03.2018 towards penalty for the delay of 34 days in commissioning the project and the instant

petition is filed after a lapse of two (2) years nine (9) months. So, the petitioner is not entitled to seek refund of the amount deposited by it.

g. That, on the event of considering the request of petitioner in extending the SCOD this Commission to re-fix/revise the tariff as per the prevailing rates as such the prices discovered through competitive bidding are falling down.

3. Heard the arguments of both sides.

4. The petitioner was a successful bidder in the open competitive bidding process for setting up solar photovoltaic power project of 7 MW to be connected to 33 / 11 kV voltage level Turmamidy substation. The petitioner has entered into PPA with the respondent No.1 on 26.02.2016. As per the terms of the PPA, the petitioner has to complete the project and make it operational within 12 months from the date of execution of PPA. The date of SCOD of 7 MW as per PPA is 25.02.2017 and whereas, the actual SCOD achieved for 7 MW was on 31.03.2017.

5. The Energy Department of Government of Telangana (GoTS) gave extension of SCOD upto 30.06.2017 to the solar power projects in the State, who have concluded PPAs with TSDISCOMs without any penalty by following all the technical requirements under CEA and TSTRANSCO guidelines.

6. The petitioner pleaded delay due to re-organisation of districts, the confusion in the offices of the revenue authorities, difficulty in cash flow, difficulties in procuring labour to carry out project work. The petitioner further pleaded that Sada Bainamas, land acquisition affected by demonetisation and districts re-organisation contributed to delay in setting up the project. The respondent, on the other hand contended that the incidents as force majeure pleaded by the petitioner are not force majeure events and the petitioner is not entitled to such benefit and the reasons given by the petitioner for delay cannot be termed as force majeure events covered by Article 9.2 of PPA.

7. Some incidents mentioned by the petitioner have some force to treat them as non-political events, which included labour difficulties mentioned in Article 9.1 (b) (i) of PPA as one of the force majeure events. Further, Article 9.1 (a) of PPA clearly mentions that if the *“any event or circumstance or combination of events or circumstances that materially and adversely affects the performance by either party*

(the “Affected Party”) of its obligations pursuant to the terms of this agreement (including by preventing, hindering or delaying such performance), but only if and to the extent that such events and circumstances are not within the affected party’s reasonable control and were not reasonably foreseeable and the effects of which the affected party could not have prevented by prudent utility practice or, in the case of construction activities, by the exercise of reasonable skill and care. Any events or circumstances meeting the description of force majeure which have the same effect upon the performance of any of the solar power project and which therefore materially and adversely affect the ability of the project or as the case may be, the DISCOM to perform obligations hereunder shall constitute force majeure with respect to the solar power developer or the DISCOM, respectively.” which clearly encompasses the reasons given by the petitioner for the delay of 34 days as events termed as force majeure. The petitioner had no control or dominance over the incidents mentioned causing the delay in completing the project and therefore, the said delay cannot be totally attributable to the petitioner.

8. The SCOD should have been achieved for the project as per PPA by 25.02.2017. The PPA provides for condonation of delay up to 12 months for reaching SCOD in case of force majeure events under clause 9.2 of the PPA, which would be 25.02.2018 with penalties as per clause 10.5 of the PPA. Therefore, the PPA would be still in force upto 25.02.2018, since SCOD has been extended up to 30.06.2017 with the concurrence of the Commission, the respondent can apply clause 10.5 of the PPA for the period beyond 30.06.2017 to regularise the project. The instant case does not even call for this consideration as the project is well within the extended period of SCOD by the government, which the Commission had earlier accepted it.

9. The petitioner is of the view that if the delay exceeds beyond the period stipulated in the PPA, the respondent could terminate the contract. An important aspect regarding termination of PPA has been dealt with by the Hon’ble Supreme Court while upholding imposition of penalty in a decision rendered in M.P.Power Management Company Ltd., Vs. Renew Clean Energy Pvt. Ltd., & Others reported in AIR 2018 SC 3632. In paragraph 11, the Hon’ble Supreme Court observed as follows:

“The delay in commissioning the project appears to be due to unavoidable “circumstances like resistance faced at the allotted site in Rajgarh District and subsequent change of location of the project. These circumstances, though not

a Force Majeure event, time taken by respondent no.1 in change of location and construction of the plant have to be kept in view for counting the delay. Having invested huge amount in purchasing the land and development of the project at Ashok nagar district and when the project is in the final stage of commissioning, the termination of the contract is not fair.”

In paragraph 12 of the above said judgement, it has been observed as follows:

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

10. This observation of the Hon'ble Supreme Court with equal vehemence applies to the present matter too. In the light of the above judgement, the Commission is not inclined to go into the merits of the contention of the delay beyond the date of SCOD under the terms of the PPA as clause 10.5 provides for levy of penalty. However in the instant case, the delay that is attributed to the petitioner is 34 days only and even that period got merged into the extension granted by the government upto 30.06.2017. The extension granted by the government has been accepted by the Commission in several cases filed in the year 2018. That being the case, the petitioner cannot be fastened with any sort of penalty in view of the provisions of the PPA.

11. Undoubtedly, the obligation to obtain all approvals and bearing the cost lies with the project developer as per the terms of PPA. However, the question is whether it is not the obligation of the project developer to obtain such approvals but whether the delay in obtaining such approvals from the government instrumentalities despite the project developer complying with the legal requirements to obtain such approvals could be covered under force majeure event or not. In a case between Gujarat Urja Vikas Nigam Limited (GUVNL) Vs. Cargo Solar, a project developer, the Gujarat State Electricity Regulatory Commission has examined the provisions of PPA dated 30.04.2010 entered between the parties and the Commission held that the delay caused due to obtaining the permission/approval for land, water, etc., are prerequisite for the project and fall under the category of force majeure events. Accordingly, the

state Commission decided that the period of delay in obtaining such clearances, it is required to be suspended or excused and to that extent the period of commercial operation date, date of construction default and scheduled commercial operation date are to be extended.

12. The GUVNL filed an appeal before the Hon'ble ATE against the ruling of the state Commission in Appeal No.123 of 2012 and I.A.No.396 of 2012. The Hon'ble ATE in its judgment dated 04.02.2014 concluded that;

*“(i) The approvals under Bombay Tenancy and Agriculture Land (Vidharba Region and Kutch Area) Act, 1958 and for water source under the Environment (Protection) Act, 1986 and CRZ Regulations sought by Cargo Solar are the statutory/legal approvals under the PPA. The delay in obtaining these approvals by the Government instrumentalities by Cargo Solar would fall in the category of Force Majeure Events under Article 8.1 (a) (v) of the PPA. As such the period of such delay is required to be suspended or excused and to that extent the period of Commercial Operation Date, Date of Construction default and Scheduled Commercial Operation Date are to be extended in terms of the PPA.
(ii) The findings of the State Commission and the consequential relief granted to Cargo Solar are correct and therefore, upheld.”*

13. This observation of the Hon'ble ATE applies to the present matter also. In the light of the above judgment, the petitioner is also entitled to receive the relief in terms of Article 9 of the PPA. Given the facts and circumstances, the petitioner initially allowed the performance bank guarantees (PBGs) to be encashed by the licensee and later recovered the said PBGs by paying the amount towards penalty and sought return of the PBGs, thus complied with the provisions of the PPA. Subsequently, it has realised its action and is now before the Commission, seeking extension of SCOD as well as refund of the penalty paid by it, keeping in view the decision of the government and the Commission.

14. The petitioner ought to have approached the Commission with a proper petition as has been informed to it by the licensee in its letter dated 03.02.2018. For whatever reasons that may be attributable to the petitioner, the petitioner has chosen not to invoke the jurisdiction of the Commission for a period of two years nine months and no reasons are set forth in the petition.

15. The Commission notices that the petitioner having accepted the delay could not have reverted to the Commission seeking to recover the amounts which it has voluntarily paid the amount. But at the same time, the delay as occasioned has been

already accepted by the Commission based on the acceptance of the government of the force majeure events. Since the Commission has considered these aspects in several cases and that the extension of SCOD as accepted by the government insofar as several other generators are concerned, the present request made by the petitioner can be accepted.

16. The present prayer is to accord approval for extended SCOD, as such the same can be considered for allowing. Thus, the SCOD of the petitioner's project would stand to be synchronized on 31.03.2017, which date is not denied by the licensee. In fact, this will fit into the generic extension given by the government as accepted by the Commission as stated above. Accordingly, as the SCOD is within the time granted by the government and accepted by the Commission, the petitioner is not liable to pay any penalty in terms of the PPA.

17. The Commission, in the circumstances and for the reasons observed above, allows the petition and declares the SCOD as 31.03.2017. Consequently, the petitioner is entitled to refund of the penalty collected by the licensee for a sum of Rs. 24,26,667/- (Rupees twenty four lakh twenty six thousand six hundred and sixty seven only).

18. Subject to the findings and observations recorded above, the petition is allowed as prayed for, but in the circumstances, without costs.

This order is corrected and signed on this the 9th day of March, 2021.

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| Sd/- (BANDARU KRISHNAIAH) MEMBER | Sd/- (M. D. MANOHAR RAJU) MEMBER | Sd/- (T. SRIRANGA RAO) CHAIRMAN |
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