

Rajasthan Electricity Regulatory Commission

Petition No. RERC-1374/18

Petition filed for adjudication of dispute under Section 86(1)(f) of the Electricity Act, 2003.

Coram:

Shri Shreemat Pandey, Chairman
Shri S.C. Dinkar, Member
Shri Prithvi Raj, Member

Petitioner : M/s Arjun Green Power Pvt. Ltd.

Respondent : 1. Rajasthan Renewable Energy Corporation Ltd.
2. Jodhpur Vidyut Vitaran Nigam Ltd.
3. Rajasthan Vidyut Prasaran Nigam Ltd.
4. Rajasthan Urja Vikas Nigam Ltd.

Date of hearings : 02.11.2018, 27.11.2018, 18.12.2018, 15.01.2019 & 05.02.2019

Present : 1. Sh. Sandeep Taneja, Advocate for Petitioner
2. Sh. V.K. Gupta, Authorised rep. of Petitioner
3. Ms. Susan Mathew, Advocate for Respondent No. 1
4. Sh. Bipin Gupta, Advocate for Respondent No. 2 & 4

Order Date:

23.04.2019

ORDER

1. Petitioner, M/s Arjun Green Power Pvt. Ltd. has filed this petition on 31.08.2018 for adjudication of dispute u/s 86(1)(f) of the Electricity Act, 2003 regarding extension of Commercial Operations Date of the Project and consequential determination of applicable tariff and liquidated damages under PPA dated

28.03.2013.

2. Notice was issued to Respondents on 05.09.2018. Respondent Rajasthan Renewable Energy Corporation Ltd. (RREC) filed its reply on 08.01.2019. Respondent Jodhpur Vidyut Vitaran Nigam Ltd. (JdVVNL) and Rajasthan Urja Vikas Nigam Ltd. (RUVNL) have filed their common reply on 24.01.2019. Petitioner also filed rejoinders to the replies on 04.02.2019.
3. The matter was finally heard on 05.02.2019. Sh. Sandeep Taneja, Advocate appeared for Petitioner. Ms. Susan Mathew, Advocate appeared for RREC and Sh. Bipin Gupta, Advocate appeared for JdVVNL and RUVNL.
4. Counsel of the Petitioner in petition, rejoinders and during the hearing submitted as under:
 - 4.1. Respondent RREC, under the Rajasthan Solar Energy Policy, 2011 initiated a competitive bidding process for selecting Solar Power Producer for setting up of Solar PV Projects of total aggregate capacity of 100 MW for supply of solar energy for 25 years to the RREC.
 - 4.2. Petitioner was selected for construction, operation and maintenance and supply of power from a solar PV project of 5 MW capacity to the RREC for a continuous period of 25 years. In pursuance of the above mentioned selection, Power Purchase Agreement (PPA) dated 28.3.2013 was executed between the Petitioner and Respondent RREC for procurement of 5MW Solar Power on long term basis.
 - 4.3. In terms of the PPA, Scheduled Commercial Operation Date (SCOD) was twelve (12) months from the date of signing of PPA. However, Project could not be commissioned on SCOD due to various force majeure conditions viz allotment of land without any encumbrance as per provisions of PPA. SCOD of the Petitioner's power plant was extended by RREC up to 27.9.2014 then upto 30.9.2015 and thereafter up to 31.03.2016.

- 4.4. Further, RREC granted provisional extension in SCOD for the project till September, 2016. Thereafter, on request of the Petitioner, RREC vide its letter dated 15.12.2016 further accorded extension in SCOD upto 31.03.2017 subject to the various conditions.
- 4.5. Being aggrieved, Petitioner approached the Commission through petition No.1031/2017 assailing the order dated 15.12.2016 to the extent of imposition of liquidated damages and reduction of applicable tariff from Rs 6.45/KWh to Rs 4.85/KWh. Commission vide order dated 09.11.2017 partly allowed the petition and directed the RREC to grant 3 months extension in SCOD within 15 days from the date of the order. Commission also ruled that change in tariff (from Rs.6.45 per kwh) is valid and legal subject to the observation that if Petitioner is not availing AD benefit and satisfies the Respondent with documentary proof then the tariff of Rs. 5.40 per kWh (i.e. without AD benefit) shall apply as per Commission's order. Accordingly, Respondent vide its letter dated 22.11.2017 granted an extension of three (3) months to the Petitioner.
- 4.6. Petitioner vide its letter dated 20.01.2018 requested RREC for formation of connectivity/commissioning committee in reference to its power plant. The RREC pursuant to said letter of the Petitioner, issued letter dated 16.2.2018 to the Managing Director, RUVNL requesting him to arrange to constitute a committee for connectivity /commissioning of the plant.
- 4.7. Petitioner completed the entire work by 21.2.2018 and vide letter dated 22.2.2018 while narrating the compliance carried out by it, requested the RREC to expedite the formation of committee for commissioning of the Solar Power Project. However, the officers of the RREC verbally told that since the extended period of three months in SCOD has expired, the Petitioner should obtain the further extension from the Commission.
- 4.8. Being aggrieved by the above mentioned conduct of the Respondent

RREC, Petitioner approached the Commission and Commission vide its interim order dated 26.04.2018 directed RUVNL to constitute a Committee for COD of the project and carry out the tests etc. required for commissioning the project.

- 4.9. Thereafter, the committee was constituted on 14.5.18 but Project could not be commissioned on 20.5.18 due to failure of power cable laid down by the Discom. Petitioner vide its letter dated 21.05.2018 requested JdVVNL to check and replace the cable. After all the efforts put by the Petitioner, the project was commissioned on 26.05.2018.
- 4.10. After commissioning of the project, Petitioner has raised the energy bills of May and June 2018 vide its letter dated 10.07.2018 @ Rs. 5.40 per kWh, in consonance of Commission's order dated 09.11.2017 to the RREC, but RREC vide its letter dated 25.07.2018 returned the invoices stating that the invoices of energy bill should be submitted as per applicable generic tariff of Rs.3.93 per kWh (without AD benefit) for solar power plant commissioned during FY 2018-19.
- 4.11. Petitioner vide letter dated 30.07.2018 clarified that the delay in commissioning was due to delay in Discom's work of cable jointing and constitution of Committee which was constituted after the interim order of RREC, therefore energy bills were raised @Rs.5.40 per kWh (without AD benefits) and requested to process the invoices @Rs.5.40 per kWh.
- 4.12. Thereafter, RREC vide its letter dated 03.08.2018 referring the Commission's order dated 09.11.2017 submitted that as per commissioning certificate of commissioning committee, the project was commissioned on 26.05.2018, which was after the duration of 3 months as allowed by the Commission thus the Petitioner is liable to deposit the liquidated damages for delay in commencement of supply of power as per Clause No. 4.6 of PPA.

- 4.13. It was the obligation of the RREC to constitute the Committee for commissioning of the project under Clause 4.7.1. Petitioner vide letter dated 20.01.2018 requested RREC for formation of commissioning committee. In response of the same, RREC vide letter dated 16.02.2018 requested to the Managing Director, RUVNL to constitute the committee. However, RUVNL had not formed the said committee till 22.2.18.
- 4.14. The action of the Respondents is violation of the principles of the natural justice as no reason whatsoever has been given in writing to the Petitioner for non- formation of the connectivity/ commissioning Committee even when the Petitioner had completed its part of the obligation within the stipulated period of SCOD.
- 4.15. Although it was not the Petitioner's obligation to request for constitution of Committee but even if committee would have been constituted on 16.02.2018 , project would have been tested on 22.02.2018. Thus the delay, up to 20.02.2018 was apparently not due to the fault of the Petitioner and was due to non- performance on the part of RREC. Discom failed to meet its obligation of providing transmission line is clearly the Discom's event of default.
- 4.16. Thus Respondents has been in default in fulfillment of obligations. RREC has caused a material breach of the contract under Clause 13.2.1 (iii) and has impliedly acted in collusion with interested party. All contracts are impliedly governed by the doctrine of good faith and fair dealing and therefore, period of such breach becomes void. JdVVNL and RUVNL have intentionally caused delay to have benefit of lower tariff.
- 4.17. Petitioner submitted that although solar power plant was commissioned on 26.5.18 but Petitioner was ready for commissioning on 22.2.18. Commissioning has been delayed on account of insistence of RREC for extension in SCOD by the commission, non-constitution of commissioning

committee by RUVNL(the agency identified by the RREC), and failure of 33 kV cable laid by discom, so for Respondents event of default, Petitioner should not suffer and on these default SCOD should have been extended and this project should be deemed to have been commissioned on 22.2.18 for the purpose of applicability of RERC tariff.

4.18. The parties to the PPA are bound by the Doctrine of Reciprocal promises, which clearly have not been adhered by the Respondents and thus their actions are illegal and arbitrary. Hence the letters imposition of low tariff rates and liquidated damages deserve to be quashed and set aside.

4.19. The decision of the Commission has been upheld by the Appellate Tribunal of Electricity (APTEL) in its order dated 03.07.2017. if non-action on the part of STU/Discoms, the same shall be considered as an event of default within the meaning of Article 4.5.1, then failure to perform obligation too will be the Event of default.

4.20. Hon'ble APTEL in Appeal no. 170 of 2014 noted that this Appellate Tribunal, in its judgment dated 02.01.2013 in Appeal Nos. 96 & 130 of 2012, held that the State Commission has been vested with inherent powers to meet the end of justice and to prevent abuse of the Code and such powers can be exercised by the State Commission to extend the control period of a tariff order when any project developer faces problem, due to reasons beyond its control, in completing its project in the said control period in the interest of justice after examining each case on its merits.

4.21. The above principle set by APTEL squarely applies to present case and petitioner should not be penalized by lower tariff for no fault of it.

4.22. Commission has jurisdiction to adjudicate upon the dispute between licensee (including trading licensee) and generating company under section 86(1) (f) of the Electricity Act, 2003. Besides this, Article 16.3 of the

PPA provides that where any dispute and difference arises in respect of PPA, such dispute and differences shall be referred to the appropriate Commission for adjudication.

4.23. Petition is not against principle of res-judicata because matters pertaining to present petition are different from former petition as contended by Respondent.

4.24. In view of the above facts and circumstances, Petitioner has constrained to file the present petition with the prayer as under:

- (a) Direct RREC to extend Scheduled Commissioning Date upto 26.05.2018 considering the event of defaults.
- (b) Issue appropriate direction to the impugned letter dated 03.08.2018 issued by RREC imposing liquidated damages upon the Petitioner.
- (c) Issue appropriate direction and/ or order for applicability of tariff for solar projects commissioned during FY17-18 to the Petitioner's power plant in considerations to the event of default of procurer and discom and give directions to the RREC for payment of tariff rates @ Rs 5.40/kWh to the Petitioner.

5. Ms. Susan Mathew, Advocate appeared on behalf of Respondent RREC and in reply and during the hearing submitted as under:

5.1. Petition is not maintainable under Section 86(1)(f) of the Electricity Act, 2003 as all the reliefs were sought against the RREC, and it is not a licensee as specified under the Electricity Act, 2003.

5.2. Prayer (c) made in the petition is hit by the Doctrine of Res Judicata. The Commission has already vide it's order dated 19.11.2017 and 9.01.2018 has decided the issue of tariff which has attained finality and cannot be re-

opened in a fresh proceeding.

- 5.3. Petitioner has submitted all the requisite documents to State Load Despatch Centre, only on 06.02.2018. RVPN vide its order dated 14.02.2018 informed that 33 kV Bay at 220 kV GSS Bhadla has been allotted to the Petitioner. Further, RREC vide its letter dated 16.02.2018 requested RUVNL to arrange constitution of committee for commissioning of the plant.
- 5.4. Thereafter, Electrical Inspector, Jodhpur vide its letter dated 19.02.2018 granted permission for energisation of installation of 5 MW Solar Plant and further vide letter dated 20.02.2018 informed JdVVNL about granting permission for energisation of the plant. Inspection and testing of bi-directional meters was carried out on 19.02.2018. A bare reading of the petition proved that by 19.02.2018 the work of the project was not completed.
- 5.5. It is only on 22.02.2018, Petitioner submitted documents to RVPNL and requested for permission for interconnection of the power plant i.e. Petitioner had shown intention on 22.02.18 about commissioning. As per Clause 5.5.1 of PPA, Petitioner supposed to give preliminary notice of 60 days advance and final written notice of 30 days advance, on which it intends to synchronize power project to the State grid system.
- 5.6. It is stated that the three months of extension was granted by the Commission to the Petitioner for commissioning the project including connectivity etc but it is evident from the pleadings of the Petitioner that they have completed their part of the obligations only by the end of the three months time and therefore the Petitioner cannot take advantage of its own mistake by holding the Discoms responsible for the delay so as to avoid the liquidated damages. Therefore, there is no delay on the part of the RREC in performing any of its contractual obligations, the project was

finally commissioned only on 26.05.2018.

- 5.7. In the review petition no. RERC/1297/2017 filed by the RREC against the Commission's order dated 09.11.2017, Commission vide its order dated 09.01.2018 held that the 'applicable tariff' used in the Clause 9.1.2 shall mean the tariff determined by the Commission for the year in which plant gets Commissioned and not the one applicable when PPA was signed.
- 5.8. From the above, it is clear that the Commission has already adjudicated the issue of applicable tariff and therefore the Petitioner is not entitled for the tariff for the previous year 2017-18 and liquidated damages imposed as per the provisions of the PPA as the Petitioner could not commission the project during the time extended by the Commission.
- 5.9. Therefore petition filed by the Petitioner may be dismissed as all the issues raised by the Petitioner are already adjudicated and decided by the Commission in the earlier petition.
6. Sh. Bipin Gupta, Advocate appearing on behalf of Respondents RUVNL & JDVVNL in reply and during the hearing submitted as under:
 - 6.1. Prayer No. (b) of the present petition, is barred by Order 2 Rule 2 of CPC because while filing the petition no. 1323/18, the Petitioner had a cause of action to claim the relief as it was aware that it was entitled for tariff as per the PPA Clauses in which its plant was commissioned.
 - 6.2. The Commission in its order while disposing of the petition no. 1031/17 has clearly held that the Petitioner would be entitled for tariff of the year in which the plant is commissioned. While getting the interim order in petition no. 1323/18 that is the interim order dated 26.04.2018 as well as 31.07.2018, didn't claim any such relief which is prayed in the petition though it had a cause of action on 07.03.2018 and 03.04.2018 when RUVNL & JDVVNL

impleaded in petition. Therefore, the present petition is barred by Order 2 Rule 2 of CPC.

- 6.3. Prayer no. (c) is also barred by Section 11 of CPC as the said prayer stood decided in his earlier petition no. 1031/17 vide order dated 09.11.2017 and therefore, is barred by res-judicata and liable to be rejected.
- 6.4. The extension of time of 3 months was granted on 22.11.2017 which comes to an end on 21.02.2018 and for the first time the Petitioner had shown intention on 22.02.2018 about commissioning. As per the Petitioners, he got permission from the Electrical Inspector on 19.02.2018. Thus, prior to that Petitioner was not in a position of commissioning the project. As per Clause 5.5.1, the Petitioner was supposed to give preliminary notice of 60 days advance and 30 days advance final written notice on which it intends to synchronize power project to the State grid system. Thus, the Petitioner cannot claim any delay on the part of Respondents.
- 6.5. Tariff of 645 paise per kWh was payable only if the project would have been commissioned within 12 months of signing the PPA otherwise as per Clause 9.1.2 of PPA, if there is delay in commissioning the project, the tariff would be either agreed or the applicable RERC tariff, whichever is lower. Therefore, since there is delay in SCOD, Petitioner is not entitled for the tariff as prayed.
- 6.6. Judgment of Gujarat Electricity Regulatory Commission which was upheld by Hon'ble APTEL in Appeal no. 170 of 2014 has been set-aside by the Hon'ble Apex Court in GUVNL vs Solar Semiconductor Power (India Ltd.) reported in SCC 2017 (16) 498 and thus, the judgment on which reliance has been placed, stands set-aside by the Apex Court. The Apex Court had further held that the sanctity of PPA has to be maintained.

Commission's view

7. Commission has considered the submissions, replies, rejoinders and oral arguments made on behalf of the Petitioner and Respondents.
8. Petitioner submitted that its solar power plant was ready for commissioning on 22.02.2018 but it was commissioned on 26.05.2018 as commissioning has been delayed on account of non-constitution of commissioning committee by RUVNL, insistence of RREC to get extension in SCOD from the Commission and failure of Discom in laying the 33 kV cable which are not attributed to the Petitioner.
9. According to the Petitioner, Respondent RREC considering the SCOD of the plant as 26.05.2018 imposed liquidated damages and also not passed its energy bills insisting that the bills should be submitted as applicable tariff for plants commissioned during FY 2018-19.
10. In view of above Petitioner prayed to extend the SCOD upto 26.05.2018 considering the event of default of Respondents and direct RREC to release the payment of energy bills considering the SCOD of the project as 22.02.2018 for the purpose of applicability of tariff.
11. Per contra Respondents contended that petition is not maintainable under Section 86(1)(f) of the Electricity Act, 2003 it is not a licensee as specified under the Electricity Act, 2003.
12. It is further contended that Petitioner was not ready for commissioning prior to 22.02.2018 and has completed their part of the obligations only by the end of the three months extended by the Commission. Further, Petitioner has got permission from the Electrical Inspector on 19.02.2018. Thus, prior to that Petitioner was not in a position of commissioning the project. Therefore, there is no delay on the part of the Respondents in performing any of its

contractual obligations and the project was finally commissioned only on 26.05.2018. As plant is commissioned in FY 2018-19, as per PPA, tariff determined for FY 2018-19 is applicable for the Petitioner.

13. Respondents also contended that petition is barred by res-judicata as the issue of applicability of tariff stood decided in his earlier petition no. 1031/17.

14. According to the Respondents, Petitioner is also liable to pay liquidated damages as it cannot commission the plant within the time extension allowed by the Commission.

15. At the outset, Commission look into the issue of jurisdiction. According to the Respondent petition is not maintainable under Section 86(1)(f) of the Electricity Act, 2003 it is not a licensee as specified under the Electricity Act, 2003.

16. It is observed that the Commission has granted license to RREC for trading in electricity in the State of Rajasthan, therefore RREC is a trading licensee.

17. Commission under section 86(1) (f) of the Electricity Act, 2003 has jurisdiction to adjudicate upon the dispute between licensee and generating company, therefore, the contention of the Respondent that petition is not maintainable as it is not a licensee is not merit acceptance. Now, the Commission has goes into the other issues raised by the Petitioner. Therefore, we are going into the other issues raised by the Petitioner.

18. The Commission has looked into the relevant Clauses of PPA to test the arguments of Petitioner which reads as under:

"4.5. Extension of Time

4.5.1 In the event that the SPP is prevented from performing its obligations under Article 4.1 by the Scheduled Commissioning Date due to:

a) any STU/Discom(s)/Procurer Event of Default; or

b) Force Majeure Events affecting STU/Discom(s)/Procurer; or

c) Force Majeure Events affecting the SPP

the Scheduled Commissioning Date and the Expiry Date shall be deferred, subject to the limit prescribed in Article 4.5.2, for a reasonable period but not less than 'day for day' basis, to permit the SPP or STU/ Discom(s)/ Procurer through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the SPP or Procurer, or till such time such Event of Default is rectified by STU/ Discom(s)/ Procurer".

19. Clause 4.5 provides that Scheduled Commissioning Date and the Expiry Date shall be deferred in case of any STU/Discom(s)/Procurer event of Default; or Force Majeure Events affecting STU/Discom(s)/Procurer; or Force Majeure Events affecting the SPP.
20. Commission, earlier, vide its order dated 09.11.2017, considering that the delay is not attributed to the Petitioner, had allowed 3 months extension in SCOD and RREC vide its letter dated 22.11.2017 has extended SCOD upto three months.
21. Commission observes that the Electrical Inspector has carried out inspection and testing of bi-directional meters at the site of the Petitioner's project on 19.02.2018 and informed JdVVNL vide its letter dated 20.02.2018 about permission of energisation of installation of Petitioner' project. Further, Petitioner on 22.02.2018, requested for permission for interconnection of the power plant from RVPN which shows that the Petitioner was not ready for commissioning of the project till 22.02.2018.
22. It is the responsibility of the Petitioner to complete the project well within the time period allowed and as per Clause 5.1.1 of the PPA give at least sixty days advanced preliminary written notice and at least thirty days advanced final notice of the date on which it intends to synchronize the plant to the State grid system. The role of the Respondents started only after the notices were issued and after issuance of notices a reasonable time should be

allowed for Respondents to do connectivity proceedings but Petitioner has not produced any such notice issued within time allowed.

23. Therefore, in Commission considered view, delay in commissioning the project is solely attributable to the Petitioner and as per Clause 4.5 Scheduled Commissioning Date cannot be deferred in the event of default of the Petitioner. Hence SCOD cannot be extended from 22.02.2018.

24. As regards liquidated damages, the relevant provisions of PPA reads as under:

4.6 Liquidated Damages for delay in commencement of supply of power to Procurer

4.6.1 If the SPP is unable to commence supply of power to Procurer by the Scheduled Commissioning Date other than for the reasons specified in Article 4.5.1, (emphasis supplied), the SPP shall pay to Procurer, Liquidated Damages for the delay in such commencement of supply of power and making the Contracted Capacity available for dispatch by the Scheduled Commissioning Date as per following:

- a. Delay up to 200 days - CMD, RREC will encash 0.5% per day of the total Performance Bank Guarantee.*
- b. Delay beyond 200 days from scheduled commissioning, PPA may be terminated. However, in exceptional cases, SLSC may consider to grant extension in the Scheduled Commissioning of project with a penalty @ 1% per day of the total Performance Bank Guarantee.*
- c. If the SPP fails to pay the amount of liquidated damages within the period of ten (10) days as specified in Article 4.6.1, RREC shall be entitled to recover the said amount of the Liquidated damages by invoking the Performance Bank Guarantee. If the then existing Total Performance Bank Guarantee is for an amount which is less than the amount of the liquidated damages payable by the SPP to RREC under this Article 4.6, then the SPP shall be liable to forthwith pay the balance amount within ten (10) days of the invocation of the Total Performance Bank Guarantee by RREC."*

25. Commission observes that Clause 4.6.1 of the PPA provides that if the SPP (herein Petitioner) is unable to commence supply of power to Procurer by

the Scheduled Commissioning Date other than for the default of Discoms/STU/Procurer, it shall pay to Procurer, liquidated damages for the delay in such commencement of supply of power. Further if delay is up to 200 days, RREC will encash 0.5% per day of the total Performance Bank Guarantee.

26. Commission in the foregoing paras has decided that SCOD cannot be extended from 22.02.2018, therefore, SCOD will remain 22.02.2018. Further, the plant was commissioned on 28.05.2018, therefore there is a delay in commissioning of the project. It has been observed that this delay is within 200 days therefore, as per Article 4.6.1 (a) of the PPA, RREC is entitled for liquidated damages of 0.5% per day of the total Performance Bank Guarantee submitted by the Petitioner.

27. Regarding the applicable tariff, it has been observed that Commission in its order dated 09.11.2017 passed in the petition 1031/17 filed by the Petitioner Arjun Green regarding extension of SCOD of the same project, observed as under:

" Article 9 Applicable Tariff

9.1.1 The SPP shall be entitled to receive a Tariff of Rs.6.45 kWh for the energy supplied at the Delivery Point during a contract Year pertaining to the contracted capacity throughout the term of PPA.

9.1.2 If as a consequence of delay in commissioning the applicable RERC tariff changes, that part of the capacity of the project for which the commissioning has been delayed shall be paid the agreed tariff as per PPA or the applicable RERC tariff whichever is lower.

Note: In case there is any change in tariff for that part of the capacity for which the commissioning has been delayed, the overall tariff for the project would be worked out on the basis of weighted average method."

"The plain reading of above provision negates the contention of Petitioner. The wordings used in Clause 9.1.2 states that consequence of delay in Commissioning shall change the tariff and the tariff applicable

at the time of COD shall apply. For what reason delay has taken is not material as far as Clause 9.1.2 is concerned----"

28. Commission in the said order has decided that as per Clause 9.1.2 of the PPA consequence of delay in commissioning of the project shall change the tariff and the tariff applicable at the time of COD shall apply. When Clause 9.1.2 is seen independently, reason for delay is not material. Now, the said order has attained finality.
29. In Petitioner's case also, commissioning of the project has been delayed, therefore in Commission considered view, as already decided, the applicable tariff for the Petitioner's plant is the tariff determined by the Commission for the plants commissioned during the FY 2018-19.
30. Accordingly, petition stands disposed of.

(Prithvi Raj)
Member

(S.C. Dinkar)
Member

(Shreemat Pandey)
Chairman