

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

O. P. No. 30 of 2018

Dated: 23.10.2018

Present

Sri. Ismail Ali Khan, Chairman

Between:

M/s. Mytrah Adarsh Power Private Limited
Regd. Office: 8001, 8th Floor, Q-city, S.No.109,
Nanakramguda, Gachibowli, Hyderabad – 500 032.

... Petitioner.

AND

1. Southern Power Distribution Company of Telangana Limited,
Corporate Office: 6-1-50, Mint Compound,
Hyderabad – 500063.
2. Northern Power Distribution Company of Telangana Limited,
H.No. 2-5-31-2, Corporate Office, Vidyut Bhavan,
Nakkalagutta, Hanamkonda, Warangal-506001.
3. Special Chief Secretary, Energy Department,
Government of Telangana, Telangana Secretariat,
Khairatabad, Hyderabad.

... Respondents.

This petition came up for hearing on 26.05.2018, 21.07.2018, 03.08.2018, 05.09.2018 and 22.09.2018. Ms. Mazag Andrabi, Advocate and Sri. Varun Kapur, Advocate representing Sri. Challa Gunaranjan, Advocate for the petitioner appeared on 26.05.2018, Sri. Hemanth Sahai, Senior Counsel along with Ms. Mazag Andrabi and Sri. Varun Kapur, Advocates representing Sri. Challa Gunaranjan, Advocate for the petitioner appeared on 21-07-2018, 03-08-2018 and 05.09.2018. Sri. Hemanth Sahai, Senior Counsel along with Ms. Puja Priyadarshini, Advocate and Sri. Varun Kapur, Advocate representing Sri. Challa Gunaranjan, Advocate for the petitioner appeared on 22.09.2018. Ms. M. Pravalika, Advocate representing Sri Y.Rama Rao, standing counsel for the respondents appeared on 26.05.2018 and Sri. Y. Rama Rao, Standing Counsel for the respondents along with Ms. M. Pravallika appeared on 21.07.2018, 03.08.2018, 05.09.2018 and 22.09.2018. The petition having stood over for consideration to this day, the Commission passed the following:

ORDER

This petition is filed under section 86(1) (f) and (k) of the Electricity Act, 2003 r/w Article 9.2 of PPA seeking extension of SCOD by 488 days with the following material allegations:

(i) The TSSPDCL on behalf of TSDISCOMS floated tender for procurement of 2000 MW solar power through e-procurement platform as per the directions of the Energy Department, GoTS, Hyderabad. In the tender process, the petitioner was a successful bidder through open competitive bidding process to setup the solar photovoltaic power project of 15 MW capacity in Shanigaram, Karimnagar Dist. Thereafter, a Power Purchase Agreement (PPA) was executed on 08-03-2016 between the petitioner and the respondent no.1. As per the PPA, the petitioner was to make solar photovoltaic power project operational within 12 months from the date of PPA and achieve the Commercial Operation Date (COD) by 07.03.2017.

(ii) During the year, 2016 the Government of the State of Telangana initiated re-organisation of the districts and formation of new districts and there was uncertainty in the offices of the revenue authorities regarding jurisdiction of villages, Mandals etc. This has slowed down the pace of site mobilisation. Further, there was change of circle rates, causing land owners to re-negotiate / renege on land sale agreements, shifting of revenue records, non-availability of contiguous land parcels because the land owners were unwilling to sell their lands for development of projects also caused delay. Sada Bainamas caused delay since the owners had these documents without any registered documents which needed regularisation.

(iii) The second major cause for delay is demonetization of high value currency by the central government, which resulted in shortage of cash and difficulties in bank transactions. The vendors / sub-contractors could not pay rents for machinery and labour charges and faced severe setbacks due to limited resources which had an adverse impact in the progress of the work. Land owners were unwilling to accept demand drafts for payment and wanted cash, encumbrances could not be cleared by the land owners for want of cash to settle the loans. Thus, the delay caused due to various factors narrated

above were beyond the control of the petitioner and they could not be regulated or controlled and the petitioner suffered badly in the process.

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

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

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

(vii) Module suppliers reneged on orders because of various factors like increase in internal targets by the State of China for 2017, reduction in anti-dumping duty by the European Union, exponential purchases by US based IPPs which forced the developers to either agree on increased rates and amend the LCs which resulted in increase in Capital cost or to look at alternative suppliers which resulted in further delays. Further, Customs authority in our country have been wrongly classifying SPV modules and charging taxes at 7.5% which also delayed release of SPV modules.

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

consideration of the representation of force majeure events extended SCOD of solar power projects up to 31.10.2017 and directed TSDISCOMS to take further action and extend SCOD. Further, the Commission by way of letter dated 11.01.2018 directed the respondents to allow synchronisation of all solar power projects which have filed completion certificates subject to giving an undertaking in the format given.

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

(x) The petitioner is seeking acceptance of the force majeure events and extension of SCOD by 488 days.

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

(i) The petitioner has entered into PPA with the respondent no.2 on 08.03.2016 to set up 15 MW solar power project under competitive bidding of 2015 in group I category with interconnection point at 132 / 33 KV Shanigaram SS at 33 kV voltage level with tariff at Rs.5.7249 per unit. As per the terms of the PPA, the petitioner has to commission the project within 12 months from the effective date of signing of PPA i.e., 07.03.2017. The petitioner has synchronised a part capacity of 5MW to the grid on 07.12.2017 i.e., within 21 months i.e., maximum time period as per Article 10.5 (e) of PPA. The balance capacity of 10MW was synchronised to the grid on 23.05.2018.

(ii) As per Article 6 of the PPA, the petitioner has to obtain all consent, clearances and permits required for supply of power to the respondent and procure land for setting up the project at least at 4 acres per MW in the name of the petitioner within 6 months at its own cost and risk, from the date of signing of the PPA. In fact, the Districts Reorganisation in the State of Telangana and demonetisation of high value currency in the country have occurred post scheduled date (i.e., 07.09.2016) to obtain necessary approvals and to procure land for the said project and therefore, the contention of the

petitioner on this aspect is not tenable. The petitioner cannot arbitrarily declare an event or circumstance a force majeure. Introduction of GST is w.e.f 01.07.2017 and it is not applicable to the petitioner's project as the SCOD of the project is 07.03.2017.

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

(iv) As per Article 10.5 of PPA, the petitioner has to pay a penalty for delay in SCOD. The maximum time period allowed for commissioning the full project with encashment of performance bank guarantee and payment of liquidated damages shall be limited to 21 months from the effective date of PPA. If the delay is beyond 21 months for projects connected to 132 / 33 KV SS, it shall be considered as an SPD event of default and provisions of Article 10 of PPA shall apply and contracted capacity shall stand reduced / amended to the project capacity commissioned within 21 months and the agreement for the balance capacity shall stand terminated. Thus, the penalty to be levied for the delay of 275 days is Rs.4.87 crores and for the delay in excess of 275 days further penalty is to be imposed.

(v) As per Article 3.8.1 of PPA, the solar power developer shall give a notice in writing to SLDC and DISCOM at least 15 days before the date on which it intends to synchronise the project to the grid. Based on the request of the petitioner dated 06.12.2017 for synchronisation of 5MW project, the CGM (IPC & RAC) vide letter dated 06.12.2017 has issued instructions to SE / OMC / Karimnagar to synchronise 5 MW solar power project at 132 / 33 KV Shanigaram SS, Siddipet District duly following the department procedure in vogue. Thus, the 5 MW of the project was synchronised to the grid on 07.12.2017 within the period of 21 months as per PPA. The petitioner has requested the vide letter dated 28.03.2018 for synchronisation of balance 10 MW duly enclosing an undertaking as per the directions of the Commission.

(vi) After reorganisation of districts, the location of the project fell under Siddipet circle under TSSPDCL from TSNPDCL. Thus, transfer of PPA from TSNPDCL to TSSPDCL was under process.

(vii) On the basis of the letters dated 11.01.2018 and 30.01.2018 of the Commission, a letter dated 02.05.2018 was addressed to the Commission for concurrence of synchronisation of balance 10 MW of the project. The Commission accorded concurrence vide letter dated 15.05.2018 and thus approval for synchronisation was issued vide letter dated 21.05.2018 and accordingly 10 MW was synchronised to the grid on 23.05.2018.

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

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

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

(i) For reason of force majeure events beyond the control of the petitioner, the actual COD of the project was achieved on 07.03.2018. The force majeure events narrated by the petitioner were acknowledged by the GoTS and therefore the petitioner is entitled to extension of SCOD of the project commensurate with the delay. There was delay in acquisition of land due to districts reorganisation. Due to this reason, the petitioner could not get the lease / sale deeds to procure Acres 113 of contiguous land parcel for its project during June 2016 to September 2016 which took 111 days in acquiring

land for execution of the project. Apart from this there was 50 days delay on the part of the village revenue office in procuring revenue record. Due to demonetisation, delay in financing, delay in grant of approval for the evacuation scheme all due to force majeure events the delay in the construction of the project occurred.

(ii) The petitioner attributed delay of 50 days in procurement of records from the village revenue office, 111 days due to pass book circular, 42 days due to DR circular, for demonetisation 60 days, for evacuation scheme approval 38 days, due to introduction of GST 87 days, due to unprecedented and incessant rains 51 days, due to module reclassification by customs 40 days and delay in synchronisation for 10 MW 55 days totalling 534 days, after duly considering the overlapping events 390 days.

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

5. The point for determination is whether the petitioner is entitled to condonation of delay for synchronisation of 5MW to the grid on 07.12.2017 and synchronisation of 10MW to the grid on 23.05.2018 in reaching SCOD as per the terms of PPA signed on 08-03-2016?

6. The petitioner was a successful bidder in the open competitive bidding process for setting up solar photovoltaic power project of 15 MW to be connected to 132 / 33 KV Shanigaram SS, at 33 kV voltage level. The petitioner has entered into PPA with the respondent on 08-03-2016. As per the terms of the PPA, the petitioner has to complete the project and make it operational within 12 months from its date. The date of SCOD of 15MW as per PPA is 07.03.2017 and whereas, the actual SCOD achieved for 5MW was 07.12.2017 with a delay of 37 days (31.10.2017 to 07.12.2017) and for balance 10 MW, SCOD was achieved on 23.05.2018 with a delay of 204 days (31.10.2017 to 23.05.2018).

7. The Government of Telangana (GoTS), Energy Department gave extension of SCOD up to 30-06-2017 to the solar power projects in the state, who have concluded PPAs with TSDISCOMs without any penalty by following all the technical requirements under CEA and TSTRANSCO guidelines. The Commission vide letter

dated 18.08.2017 has approved in principle the proposal of the State Government for extension of SCOD up to 30-06-2017 without any penalty, after examining the merits of the matter. The respondent has admitted these facts and the proposal of the GOTS and concurrence of this Commission for the extension of SCOD up to 30-06-2017 without any penalty.

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

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

10. The incidents mentioned by the petitioner have some force to treat them as non-political events, which included labour difficulties mentioned in Article 9.1.(b) (i) of PPA as one of the force majeure events. Further, Article 9.1(a) of PPA clearly mentions that if the *“events and circumstances are not within the affected party’s reasonable control and were not reasonably foreseeable and the effects of which the affected party could not have prevented by prudent utility practices or, in the case of construction activities, by the exercise of reasonable skill and care. Any events or circumstances meeting the description of force majeure which have the same effect upon the performance of any of the solar power project set up in accordance with solar policy announced by GOTS under the competitive bidding route and which therefore materially and adversely affect the ability of the project or, as the case may*

be the DISCOM to perform its obligations hereunder, shall constitute force majeure with respect of the solar power developer or the DISCOM, respectively’ which clearly encompasses the reasons given by the petitioner for a part of the delay of 442 days as events termed as force majeure. The petitioner had no control or domain over the incidents mentioned causing a part of the delay in completing the project and therefore a part of the delay cannot be totally attributable to the petitioner.

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

12. In view of the aforementioned reasons, the delay as pleaded by the petitioner is liable to be condoned up to 31.10.2017 based on the plea of force majeure events. It is clear from the material on record that as per the terms of PPA, the petitioner had to synchronise the project by 07.03.2017. The petitioner through letter dated 06.12.2017 sought synchronisation of 5MW project which was processed and synchronised to the grid on 07.12.2017. Thus, 5 MW of the project was synchronised to the grid on 07.12.2017. The delay up to 31.10.2017 is condoned. Thus, the delay in achieving SCOD for 5MW of the project is 37 days (01.11.2017 to 07.12.2017).

13. As far as the balance 10 MW is concerned, it is clear that the petitioner requested through letter dated 28.03.2018 for synchronisation of the project and after receiving concurrence of the Commission vide letter dated 02.05.2018, synchronisation of the balance 10 MW was achieved on 23.05.2018. The petitioner thus suffered delay from 28.03.2018 to 23.05.2018 on account of the process of administrative decision making which is solely attributable to the administration of the

respondent in which the petitioner has no role. Thus, the delay in achieving SCOD as far as 10MW project is concerned can be arrived at as follows:

Total delay from 31.10.2017 to 23.05.2018 is 204 days

The delay attributable to the administrative decision making from 28.03.2018 to 23.05.2018 is 57 days which has to be deducted from the total delay of 204 days. The petitioner is thus found liable for the balance delay of 148 days in achieving SCOD for 10MW of the project.

14. The project was synchronised to the grid as per the general directions of the Commission. Thus, the DISCOM had no occasion to deal with this delay at the time of synchronisation. Under the circumstances, the DISCOM to take appropriate steps as per Article 10.5 of PPA based on the delay of 37 days relating to synchronisation of 5 MW of the project and 148 days relating to synchronisation of balance 10 MW of the project. The issue is answered accordingly.

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

This order is corrected and signed on this the 23rd day of October, 2018.

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

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