

TAMIL NADU ELECTRICITY REGULATORY COMMISSION
(Constituted under section 82 (1) of the Electricity Act, 2003)
(Central Act 36 of 2003)

PRESENT:-

Thiru S.Akshayakumar	Chairman
Thiru.G.Rajagopal	Member
	and	
Dr.T.Prabhakara Rao	Member

P.R.C.No.3 of 2016

Kamuthi Solar Power Ltd.
Adani House, Nr.Mithakhali Six Roads
Ahmedabad – 380 009
Gujarat, India.

... Petitioner
(Thiru Rahul Balaji
Advocate for the Petitioner)

Vs.

1. Tamil Nadu Generation and Distribution Corporation Limited
Represented by its Chairman
No.144, Anna Salai, Chennai – 600 002.
2. Chief Engineer / Non-Conventional
Energy Sources (NCES)
2nd Floor, NPKRR Maligai
144, Anna Salai, Chennai – 600 002.

... Respondents
(Thiru M.Gopinathan,
Standing Counsel for the Respondents)

Date of hearing: 27-09-2016

Date of Order: 16-11-2016

ORDER

The P.R.C.No.3 of 2016 came up for hearing as to maintainability on 27-09-2016. The Commission upon perusal of the Petition and all other connected records and after hearing the arguments of the Petitioner hereby makes the following:

ORDER

1. **Prayer of the Petitioner:**

(a) **Prayer of the Petitioner in PRC No.3 of 2016:-**

The prayer of the Petitioner in the above P.R.C.3 of 2016 is to -

- (i) grant the Petitioner a project specific extension of the Control Period from March 31, 2016 to the date of inter-connection of the Petitioner's 216 MW project to the grid, in order for the Respondent to pay the Petitioner the tariff of Rs.7.01 a unit;
- (ii) declare that the Petitioner has successfully commissioned its 216 MW solar power project on or before March 31, 2016;
- (iii) declare that the Petitioner's solar power project is entitled to a tariff of Rs.7.01 a unit;
- (iv) pass an exparte ad-interim order and / or grant interim relief directing TANGEDCO to provide interim connectivity to the Petitioner's project till the substation is ready;
- (v) pass an exparte ad-interim order and / or grant interim relief in terms of prayer (iii) directing TANGEDCO to pay the Petitioner a tariff of Rs.7.01 per unit upon commissioning of its project pending disposal of this petition;
- (vi) pass such other and further orders, as the Commission deems fit and proper in the facts and circumstances of the case.

2. **Contentions of the Petitioner:-**

2.1. The Petitioner is a developer of 216 MW photovoltaic solar power project ("Solar PV Project") in the state of Tamil Nadu. The Petitioner has entered into a Power Purchase Agreement ("PPA") of 216 MW capacity with the Tamil Nadu

Generation and Distribution Corporation Ltd. ("TANGEDCO") on 04-07-2015 for the implementation of its 216 MW Solar Power Project.

2.2. The Petitioner states that one of the main reasons for executing the PPAs with TANGEDCO was the Commission's "Comprehensive Tariff Order on Solar Power" dated 12-09-2014 under Order No 4 of 2014 ("Tariff Order") by which it has determined the tariff payable, to solar power plants commissioned during the control period of the said order i.e. on or before 11-09-2015, at the rate of Rs.7.01 per unit. By an Order dated 01.04.2015, the Commission extended the control period of solar power tariff till 31-03-2016. By virtue of this Order, all solar power projects commissioned on or before 31-03-2016 became entitled to a tariff of Rs.7.01 per unit.

2.3. The State Government came out with a Solar Energy Policy with a vision to lead the country by generating 3000 MW of Solar Power by 2015 through a policy conducive to promote solar energy in the State. The Petitioner, which is a part of the Adani group of companies, had in 2015 proposed to set up plants of varied capacity using solar photovoltaic (PV) technology in the State in consonance with the new solar initiative by the State.

2.4. As stated above, the Commission issued a comprehensive tariff order on solar power dated 12-09-2014 vide Order No.4 of 2014 and the tariff was fixed at Rs.7.01 per unit. Furthermore, in terms of the TNERC Power Procurement from New and Renewable Sources of Energy Regulations, 2008, the control period of the tariff was fixed as two years and the format for the Energy Purchase Agreement

(EPA) was to be determined by this Commission after discussions with the generators and the distribution licensees.

2.5. Consequent upon such Tariff Order, the Respondent issued proceedings contained in CMD TANGEDCO Proceedings No.454 dated 7.10.2014 issued the following instructions for the processing of applications for establishment of solar power plants under the Preferential Tariff Scheme:-

- (a) a request letter mentioning the project capacity, apart from the duly filed application and a copy of the land document, being either the registered sale deed or lease deed;
- (b) a request letter of the developer mentioning the project capacity, location viz. survey number of the land, Village Taluk, District and option (sale to Board / captive / third party sale);
- (c) Duly filled application format;
- (d) Copy of land document – registered sale deed or lease deed if available;
- (e) Registration fees – Rs.10,000/- per application
- (f) Load flow study consultation charges: upto project capacity of 15 MW-Rs.2,00,000/- + service tax (for project capacity upto 15 MW and if the transmission feasibility is at 110 KV voltage level, then the developer has to pay an amount of Rs.5,00,000/- + service tax). For project capacity greater than 15 MW (Rs.5,00,000/- + service tax)
- (g) 50% of the applicable security deposit.

2.6. The Petitioner Company, issued an expression of interest for the establishment of a 216 MW solar PV power plant at Sengapadai and Pudukkottai Villages, Kamuthi Taluk, Ramnad District, vide its application dated 26-05-2015. TANGEDCO vide its letter dated 17-06-2015 proposed to interface the above referred power plant with the TANTRANSCO grid at the sanctioned new Kamuthi 400/230-110 KV SS at 230 KV level by erecting 230 KV line for a distance of 5 KM,

by connecting the proposed 216 MW solar PV power plant at the sanctioned Kamuthi 400/230-110 KV SS.

2.7. Pursuant to the Tariff Order dated 12.09.2014, the Energy Purchase Agreement was approved only on 21.01.2015, and therefore the Commission suo motu extended the control period from 01.04.2015 as provided for under the Tariff to 31.03.2016.

2.8. The Petitioner's proposal was accepted by the 1st Respondent as per its Letter of Approval dated 04.07.2015 and consequently, an Energy Purchase Agreement was entered into between the Petitioner and the 1st Respondent on 04.07.2015. Subsequent to the execution of the PPA, the Petitioner commenced construction of its 216 MW project in right earnest, fully aware that it had to commission its project on or before 31.03.2016, i.e., the expiry of the control period, in order to avail the preferential tariff declared by the Commission under its tariff order.

2.9. The Petitioner immediately after execution of the PPA, started acquiring land in respect of the project and appointed an Engineering, Procurement and Construction ("EPC") contractor. It is further stated that the Petitioner got the requisite permissions and approvals from the local bodies including consent from the Tamil Nadu Pollution Control Board for the commencement of the project. The Petitioner also made arrangements for financial assistance from banks and financial institutions for the project. It is pertinent to note that 70% of the funding was provided by banks and financial institutions and the entire financial projections and estimates were computed on the basis of the tariff order dated 12-09-2014.

2.10. As a result of a cyclone that hit the State of Tamil Nadu and as a result of unprecedented rainfall recorded in Kamuthi Taluk, Ramnad District, there was a stoppage of construction work. Despite the Petitioner's best efforts, the entire project was delayed due to the flooding, which was entirely beyond the Petitioner's control. The Petitioner informed the 1st Respondent that the stalling of the construction was on account of force majeure, and was beyond the petitioner's control.

2.11. The Respondents were entirely responsible for the commissioning of the sub-station and as per the extant regulations, the evacuation facilities for evacuating power from the solar power plant were to be provided by the Respondents. However, TANGEDCO was not acting with the same vigour and speed to enable the completion of the construction of the evacuation facilities. It is further relevant to state that as per the Energy Purchase Agreement dated 04.07.2015, TANGEDCO was to provide the evacuation facility from the point of generation to the interconnection point which the Petitioner had duly put in place from the point of generation to the interconnection point.

2.12. The Petitioner's plant was ready for commissioning by 15.03.2016. However, the Respondents failed to commission the 400 KV substation at Kamuthi and it was evident to the Petitioner at that point that the project would likely be delayed beyond the 31.03.2016 deadline. This put the commissioning of the Petitioner's project on or before 31.03.2016 at grave risk. In such circumstances, the Petitioner issued a letter dated 07-03-2016 to the Respondents and duly informed them that the Solar PV power plant was ready for commissioning by 15.03.2016 and requested the Respondents to consider their alternate proposal by permitting the Petitioner to evacuate the power through a 230 KV Kavnoor substation.

2.13. The Chief Electrical inspector issued a letter dated 22.03.2016 and granted approval for the commissioning of the Petitioner's 216 MW project, in terms of Regulation 43 (2) of the Central Electricity Authority (Measures relating to Safety and Electric Supply) Regulations, 2010. Similar consents for operation of the power plant was issued by the Tamil Nadu Pollution Control Board in accordance with Sections 21 and 25 of the Air (Prevention and Control of Pollution) Act, 1981 and Water (Prevention and Control of Pollution) Act, 1974 respectively on 19.2.2016.

2.14. The Commission has powers to extend the control period for the Petitioner on a project specific basis to meet the ends of justice. Clause 48 (1) of TNERC (Conduct of Business) Regulations, 2004 provides that—"Nothing in these Regulations shall be deemed to limit or otherwise affect the inherent power of the Commission to make such orders as may be necessary for ends of justice or to prevent the abuse of the process of the Commission." In the instant case, despite all efforts put in by the Petitioner to complete construction of its project well before March 31, 2016, and having demonstrably being ready to generate and supply power, the Petitioner could not supply the power solely for reasons attributable to TANGEDCO. As the project is ready and only due to the failure of the Respondent to provide connectivity for evacuation, the Petitioner, ought not to be denied the benefit of Rs.7.01 tariff available under the Tariff Order. Indeed, regulatory commissions in the past have invoked such inherent powers vested in them and granted project specific extension of the control period to project developers whose project commissioning had been delayed for no fault of theirs. For example, the Gujarat Electricity Regulatory Commission, vide its Order dated 05.04.2014 in Petition No.1188 of 2012 has extended the Control Period for applicability of tariff of RS.15/unit for Solar PV Power Project of M/s Solar Semiconductor Power Company

(India) Private Limited. Similarly Maharashtra Electricity Regulatory Commission, in its order dated 20-08-2014, in case No.128/2014 extended the control period with respect to MSPGCL's Solar Project at Sakri, where the project commissioning was delayed beyond the control period for reasons not attributable to the project developer. It is pertinent to note that in the MSPGCL's case, one of the reasons for the delay in commissioning was on account of delay in making evacuation arrangements by the procurer.

2.15. TANGEDCO cannot be permitted to take advantage of their own wrong in delaying the commissioning of the Petitioner's project by failing to provide the required infrastructural facilities despite the Petitioner having kept up its obligations solely because the 400 KV sub-station at Kamuthi, Ramnad to which the Petitioner's project is required to inter-connect is not ready yet. It is unfortunate for a State undertaking to act in such an arbitrary and illegal manner despite there being a firm statutory mandate under Section 86(1)(e) of the Electricity Act, 2003 and even the Government of Tamil Nadu has launched the Tamil Nadu Solar Energy Policy 2012 to promote solar energy. TANGEDCO's lethargic attitude in both delaying construction of the substation, as well as failure to act on the representations of the Petitioner dated 07.03.2016, 23.03.2016, 29.03.2016, 30-03-2016 and 31-03-2016 smacks of illegality and has been done with a view to scuttle the benefit of the tariff rate of Rs.7.01/- as per the Tariff Order and is clearly calculated to unfairly gain advantage.

2.16. The Petitioner has invested over Rs.1356.20 crores in constructing its 216 MW solar power plant based on the state government's solar power policy and expectation of a tariff of Rs.7.01 per unit. The Petitioner executed its PPA with

TANGEDCO only after the control period was extended from September 11, 2015 to March 31, 2016 by the Commission's order dated 01-04-2015. The Petitioner had a legitimate expectation which was reasonable under the circumstances that TANGEDCO, a public authority, would act in a rational and prudent manner in carrying out its obligations and constructs the sub-station in time for the Petitioner to evacuate power from its plant on or before 31-03-2016.

2.17. As per TANGEDCO's preferential tariff scheme, TANGEDCO claimed that it would contract and commission upto 1500 MW in Tamil Nadu under the Tariff Order. It follows that TANGEDCO made a budget allocation for purchasing 1500 MW of solar power at Rs.7.01 a unit. However, the total capacity commissioned prior to March 31, 2016 in Tamil Nadu under the tariff order does not even cross the 1000 MW mark. In other words, the total capacity commissioned is less than two-thirds of what TANGEDCO claimed that it would contract and commission. Therefore, granting a project specific extension of the control period in the Petitioner's case is not going to upset any financial commitments made by TANGEDCO, much less cause any prejudice to it as its capacity of 216 MW is well within the 1500 MW contemplated by TANGEDCO.

2.18. TANGEDCO, being a State owned body, is expected to act in a just fair and reasonable manner even in the sphere of contractual relationships. TANGEDCO has allowed commissioning of other projects where the permanent evacuation facilities were yet to be readied by allowing for interim connectivity. Several projects have been granted this in order for the projects which have been completed to obtain the benefit of commissioning before the end of the control period.

2.19. The Petitioner's project is predicated upon the applicability of the tariff order. The financial closure, cash flows, investment and debt commitments are all on the basis of the applicability of such tariff. The Petitioner, having complied with all of its obligations, has a vested right that has already accrued in its favour and it becomes entitled, in law and in fact, to the benefit of the tariff order. Significantly, the tariff order applicable from 01-04-2016 for solar projects in the State has seen a reduction of tariff which if made applicable to the Petitioner's project wherein the entire investment was made on the basis of the position prevailing during the relevant time, the Petitioner would be put to grave and irreparable hardship. The Petitioner has incurred around Rs.1524 crores on the project and has set up the plant with the funding from banks and financial institutions. The entire financial planning and projection of the Petitioner with regard to the project is based on the tariff rate at Rs.7.01 as determined by the Commission. Therefore, if this tariff is not applicable, the Petitioner will suffer huge losses. Thus on grounds of promissory estoppel as well, the Petitioner is entitled to a tariff of Rs.7.01 a unit.

2.20. It is universally acknowledged that conventional source of energy, in particular coal and hydrocarbon, result in significant environmental degradation and adverse impact. The last few decades have seen a global recognition of the adverse environmental impact (externality) of conventional energy (particularly coal and hydrocarbon) and the need to promote gradual but steady development of renewable energy sources to substitute conventional power. These stated legislative and policy objectives of environment protection and sustainable development are now well established in our jurisprudence in context of Articles 48-A, 51, 51-A (g) and 21 of the Constitution of India. India is a party to the global move on climate change-committed to sustainable development, viz.,- The United Nation's

Framework Convention on climate Change ("UNFCCC") signed by India on 10.06.1992 and ratified on 01.11.1993. Adoption of Protocol to the UNFCCC adopted in Kyoto, Japan on 11.12.1997 ("Kyoto Protocol") acceded to by India on 26.08.2002. The Electricity Act, 2003, the National Electricity Policy and National Tariff Policy mandate encouragement to be provided to non-conventional energy sources. The consequence of TANGEDCO's default would have a direct effect of negating such mandate and therefore on this ground also, the Petitioner's project is entitled to the relief sought for.

2.21. Prima facie case and balance of convenience lie entirely in its favour for the grant of the interim reliefs as sought for, since it is of urgent necessity that it is provided temporary connectivity to achieve commissioning. The Respondent has provided such connectivity for other projects and can therefore have no objection. Further, not only is the Petitioner losing precious revenue on account of lack of inter-connectivity, the State of Tamil Nadu too is being deprived of precious green energy to the extent of 216 MW at a time when it is facing drought conditions and severe power shortage. Inasmuch as the PPA is a long term contract, the balance of convenience would be to continue to pay such tariff at Rs.7.01 pending adjudication and the equities could be balance, if required at the time of final disposal. No hardship or prejudice would be caused to the Respondent by grant of the interim reliefs. However, if the same are not granted, it would cause grave and irreparable hardship and prejudice to the Petitioner.

3. Findings of the Commission:-

3.1. Before rendering our findings on the maintainability of this petition, it is necessary to set out the background leading to filing of the present petition. The

Petitioner initially filed the present petition as a Miscellaneous Petition with the prayers as seen in para 1 of this order.

3.2. The Registry of the Commission upon perusing the prayers, directed the Petitioner to file the same as a Dispute Resolution Petition and returned the petition. Being not satisfied with the return of the petition, the Petitioner again approached the Registry to place the matter before the Commission for maintainability. In view of the same, the Registry listed the matter on 29-09-2016 for maintainability by numbering this petition as Pre Registration Case (P.R.C.).

3.3. The Fees and Fines Regulations of the Commission provide for filing of various types of petition and appropriate fees have also been prescribed in the said Regulations. As per the provisions of the TNERC Fees and Fines Regulations, 2004, the fee applicable to a Miscellaneous Petition (M.P.) is Rs.10,000/- and fee for adjudicating of disputes between the Licensees and Generating Companies under section 86 (1) (f) of the Act is 1% of the amount in dispute subject to a minimum of Rs.20,000/-.

3.4. In the event of any petition not meeting the said requirement, such petition is either returned by the Registry on its own or placed before the Commission as a Pre-Registration Case upon the insistence of the party who disputes the decision of the Registry. The present case is one of such Pre Registration Cases where the Petitioner disputes the decision of the Registry with regard to classification of the petition. While the Petitioner seeks to treat the present petition as a Miscellaneous one, the Registry on the other hand has taken the stand that this petition should be

treated as a Dispute Resolution Petition and hence the present proceedings before this Commission.

3.5. In this connection, it is necessary to elaborate on the nature of Dispute Resolutions. A Dispute Resolution Petition is one which is taken up upon a motion made by either of the parties i.e. the Petitioner or the Licensee for resolution of a dispute. The power of the Commission to resolve the dispute flows from section 86 (1) of the Electricity Act, 2003 which provides as follows:-

“Section 86. (Functions of State Commission): --- (1) The State Commission shall discharge the following functions, namely: -

(a) x x x

(b) x x x

(c) x x x

(d) x x x

(e) x x x

(f) *adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;*

x x x

x x x

3.6. It may be seen from the express provision in section 86 (1) (f), the Commission is empowered to adjudicate all disputes between the Licensees and Generating Companies and hence any dispute between a Licensee and a generating company, or generating companies or Licensees *inter se* whether such dispute relates to a period anterior to the signing of PPA or posterior to the signing of PPA can be adjudicated only by the Commission.

3.7. Having held so, the short question which arises for consideration in this petition is whether the prayers of the Petitioner as set out in para 1 herein are in the nature of dispute resolution. It may be seen from the prayers of the Petitioner that there are prayers such as (a) to declare that the Petitioner’s 216 MW Solar Project,

was commissioned on or before March 31, 2016, (b) to declare that the Petitioner's Solar Power Project is entitled to a tariff of Rs.7.01 per unit which in our view, are in the nature of dispute resolution as they involve monetary claims between the Licensee and the Generator. Needless to say, any monetary claim cannot be adjudicated without resorting to appropriate dispute resolution mechanism. Any order passed without following the required procedures would not be in consonance with the section 86 (1) (f) of the Electricity Act, 2003. Though the Petitioner seeks to contend that the prayers are of miscellaneous nature, the fact remains that the prayers herein are clothed with the attributes of dispute resolution. Without hearing the response of the Licensee the issues raised in this petition cannot be disposed on merit.

3.8. In view of the same, the Commission is unable to accede to the prayer of the Petitioner for treating the present petition as miscellaneous one. In the result, we hold that this petition cannot be treated as a miscellaneous petition. The Petitioner is directed to pay the required fees as applicable for D.R.P. to enable the Registry to admit and list the same.

Ordered accordingly.

(Sd)
(Dr.T.Prabhakara Rao)
Member

(Sd.....)
(G.Rajagopal)
Member

(Sd.....)
(S.Akshayakumar)
Chairman

/ True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission