

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 |

M.P. No.6 of 2018

M/s ReGen PowerTech Private Limited
KRM Plaza North Tower, 7th Floor,
No.2, Harrington Road, Chetpet,
Chennai – 600 031.

... Petitioner
(Thiru. Kannan, Advocate for
M/s Fox Mandal & Associates
Advocates for the Petitioner)

Vs.

Tamil Nadu Generation and Distribution Corporation Ltd.
Represented by the Chairman & Managing Director
144, Anna Salai
Chennai – 600 002

...Respondent
(Thiru M.Gopinathan
Standing Counsel for TANGEDCO)

Dates of hearing : 13-03-2018; 08-06-2018; 14-08-2018;
18-09-2018; and 16-11-2018

Date of Order : 30-11-2018

The M.P.No.6 of 2018 came up for hearing on 16-11-2018. The Commission upon perusal of the Petition and connected records and after hearing the submissions of the Petitioner hereby makes the following:

ORDER

1. Prayer of the Petitioner in M.P.No.6 of 2018:-

The prayer of the Petitioner in the above M.P.No.6 of 2018 is to suspend or terminate the application of clauses 6 & 7 of the Energy Purchase Agreement dated 13.10.2017 approved by this Commission vide order dated 13.11.2017 in PPAP No.6 of 2017, to the extent that TANGEDCO will purchase the excess generation, at 100% of the PPA tariff till such time as the TANGEDCO achieves RPO compliance or at least until such time as the Commission deems fit and pass such other and further orders, as the commission deems fit and proper in the facts and circumstances of the case.

2. Facts of the Case:-

2.1 The respondent issued a letter of Intent to M/s ReGen Powertech Pvt Ltd in D.No.2067/17 dated 21.09.2017 accepting the offer to purchase 200 MW of wind energy at Rs.3.42/kwh.

2.2 Respondent accordingly approached the Commission seeking approval to the procurement of 500 MW (which includes the bid awarded to the Petitioner for 200 MW) of wind power at the rate of Rs.3.42 per unit and also for approval of the draft Energy Purchase Agreement, which Respondent had intended to execute with the successful bidders including the Petitioner herein. The said Energy Purchase Agreement draft had been annexed to the said petition P.P.A. P. No.6 of 2017. The

Commission also approved the draft Energy Purchase Agreement to be signed between the Petitioner and TANGEDCO, the 1st Respondent here.

2.3 Respondent had in the meanwhile executed EPA with the Petitioner. Clauses 6 and 7 of the said EPA are extracted below:

“6. Capacity Utilisation Factor (CUF):

The capacity utilisation factor (CUF) shall be 20% to 27.15% (as specified by the TNERC in Wind Tariff Order No.3 of 2016-17 dt.31.3.2016), calculated on yearly basis. In case the availability is more than the maximum CUF specified i.e. 27.15%, the TANGEDCO will purchase the excess generation, at 75% of the PPA tariff. In case the availability is less than the minimum CUF specified i.e. 20% the WPG shall pay TANGEDCO for the actual shortfall in terms of units at the prevailing forbearance price fixed by the CERC, since, the TANGEDCO is an obligated entity to utilise Wind Power as per TNERC's RPO Regulation.

7. Repowering:

The WPG will be free to re-power their projects from time to time during the EPA duration. However, the TANGEDCO will be obligated to buy power only within the CUF specified in the EPA. Any excess generation will be purchased by the TANGEDCO at 75% of the PPA tariff. If there is any shortfall of generation after repowering of project, the WPG shall pay TANGEDCO the prevailing forbearance price fixed by the CERC for the actual shortfall in units”.

2.4 The petition has been filed for suspension of or deletion of clauses 6&7 of the Energy Purchase Agreement dated 19.10.2017 executed between Regen Power tech Pvt Ltd and TANGEDCO covered under the Tender Specification in CE/NCES/OT No. 2/2017-18 approved by the Commission vide order dated 13.11.2017 in PPAP No. 6 of 2017 permitting TANGEDCO to purchase and petitioner to sell the excess generation at 100% of the PPA tariff.

3. Contentions of the Petitioner:-

3.1 The above mentioned clauses in EPA enable Respondent to utilize the

maximum utility and potential of the Petitioner's wind power project of 200 MW but unjustly restricted on account of the above mentioned two clauses. The aforementioned clauses of the impugned EPA restrict the Capacity Utilization Factor (CUF) within 27.15% beyond which the Petitioner will be paid at 75% of the PPA tariff.

3.2. Respondent is obligated to purchase 1611 MW of wind power to meet its Renewable Purchase Obligations ("RPO") for the year 2017-18. The above mentioned bid was also pursuant to such requirements. In fact Respondent was short of 1611 MW of renewable purchase power obligations as on the date of calling for the above bids, and hence the power generated can be utilised to the full potential of each wind power project.

3.3. The promotion of competition in the electricity industry in India is one of the key objectives of the Electricity Act, 2003 and in addition to tariff fixation under section 62 of the Act, the statutory regime contemplates bidding for procurement of power.

3.4. There are plethora of judgments which will allow the Commission to reassess its decision and allow Power Purchase Agreements to be re-opened for the purpose of giving a thrust to the renewable energy projects and not for curtailing the incentives.

3.5. The RPO obligation for the financial year 2017-18 has been targeted at 9%. It is the accepted position in Tamil Nadu that Respondent is unable to

achieve the RPO with the present capacity allotment till date and also considering its intended further allotment, all of which would consume further time. It is pertinent to state that going ahead there will be a deficit and no fresh tenders for procurement Wind Power from Developers establishing Wind Power Projects. In view of the same, the Petitioner is filing the present petition seeking for a suspension of Clauses 6 and 7 of the EPA approved by the commission in its order dated 13.11.2017 in P.P.A.P. No.6 of 2017 for purposes of monthly Invoice payments alone such that payments on breach of the upper end of the CUF would be paid at the tendered rate till the RPO compliance is achieved. It is further submitted that such removal of the upper cap will encourage higher generation of wind power. This will allow the Petitioner to not only utilise the maximum potential and utility of its power project but also make it consider installing advanced wind turbines, generators, machines etc. which may otherwise be too expensive for the venture. Respondent would benefit if the full generation is absorbed as the competitive rate decided under the tender which will be more competitive than the current feed-in-tariff, thereby benefitting more consumers and serving societies' interest at large. The removal of upper limit restriction would result in better utilisation of resources and would also serve as an encouragement for the Petitioner to further improvise upon the Power Generation as well as utilise advanced technology. Normally wind power generators would only invest in turbines which are optimal for achieving the said purpose and are not the most efficient available in the industry as there is a disincentive that is built in for being efficient.

The impugned Clauses fix a maximum CUF, which would also result in

inefficiencies. However, while the minimum CUF could be retained to protect the interests of TANGEDCO, the maximum cap can be suspended for the purposes of payment of monthly Invoices without the discounting factor.

3.6 CUF is in reality a normative factor and is relevant typically only for Tariff fixation and would not have relevance for purposes of payment in procurement through bidding.

3.7 The CUF is a normative factor that is dependent on several factors, including, location, technology used, age of machines, location of the windmill, hub height, weather conditions etc.,

3.8 The maximum CUF of 27.15% which has been adopted in the current case and is evidently fixed on the basis of the Tariff orders for Wind. In this regard the maximum limit arrived at in the EPA is peculiarly even less than the CUF arrived at for the inefficient “kW” machines in the NCES tariff order dated 15.05.2006.

3.9 The CUF of the MW Scale machines will be at least 4% to 6 % more than the kW machines and hence the maximum CUF adopted by Respondent, the bid is technically erroneous apart from contradicting.

3.10 By barring incentives for higher generation, it would result in a situation where it would be against the interest of the Petitioner to invest in the best technology and machines.

3.11 Such a limit would also be against the interest of Respondent since it would result in a situation where the Petitioner would curtail generation to get the best return on investment and best to rate and thereby deny the electricity from NCES to Respondent at the lowest rate in the state.

3.12 Where Respondent is deficient in its procurement towards its RPO and therefore will have to spend even more through purchase of other power at costlier rates or through RECs when it could have easily procured the wind power itself under the tendered rates if there was no disincentive to produce to the maximum extent.

3.13 The entire objective of Respondent ought to be to procure the maximum under this tender rather than include clauses which would discourage that.

3.14. Such clauses would be contrary to the National Electricity Policy in so far as it does not take into account promotional measures specified in the said policies.

3.15 While the Policy encourages private sector allowing them to use efficient and cost effective technologies, participate through suitable promotional measures and effective utilization of all available resources for generation, the said clauses of the EPA is contrary to the National Electricity Policy.

3.16 The same disincentive is set out for repowering. It is submitted that repowering will involve substantial capital investment and no generator would do so if the result of the same would be lower returns. This is also therefore against the interest of petitioner, Respondent and the ultimate consumer i.e. public.

3.17 The impugned clauses of the EPA are violative of regulation 8 of the Tamil Nadu Grid Code which inter alia provides that SLDC shall regulate overall state generation in such a manner that generation from wind power stations and renewable energy sources where energy potential, if unutilised, goes as a waste shall not be curtailed.

3.18 In spite of increase in installed capacity every year, the total wind energy generation came down every year since 2012-13 except in 2016-17 it clearly shows that the total wind power generation and hence the CUF varies every year and hence it is not controllable and therefore fixing a limit to CUF for payment of tariff also meaningless for Wind energy. Any attempt to fix CUF is violating this basic principle adopted in the said Regulations of the Grid Code.

4. Hearing held on 08.06.2018:-

In the hearing held on 08.06.2018, the Commission directed respondent to file the counter on the admissibility of the petition. Accordingly, TANGEDCO has filed its counter on 03.07.2018.

5 Contention of the Respondent:-

5.1 The Tender RfS document and Power Purchase Agreement

(PPA) were prepared in line with the draft guidelines for procurement of wind power through transparent process of bidding issued by MNRE vide Notification F.No.238/1/2017- Wind.

5.2 The Commission approved the Rfs document and draft Power Purchase Agreement (PPA) in the P.P.A.P. NO.6 of 2017 filed by TANGEDCO for quantity approval.

Thereafter only, Tender was floated by TANGEDCO on 18.06.2017 for procurement of 500 MW of Wind Power within the State of Tamil Nadu through reverse e-bidding process. During Tender process a pre-bid meeting was conducted by TANGEDCO on 05.07.2017 to address the queries of the prospective bidders and reply to the queries was also uploaded in the website on 12.07.2017 as per the guidelines issued by MNRE. Impugned clauses of PPA, covers all eventualities and as such it is a binding contract between the parties.

5.3 During the pre-bid meeting some of the bidders raised the question of relaxation of upper limit of CUF and it was replied as not feasible. Knowing very well the above facts and with the eyes wide-open, the Petitioner participated in the Tender and signed PPA after being a successful bidder.

5.4 In the above Tender process, the Power Purchase rate approval along with draft PPA to be signed with the successful bidder was also approved by the Commission in the PPAP NO.6 of 2017 and as per the direction of the Commission, PPA was signed with the successful bidder including the Petitioner.

5.5 After signing of PPA, the Tender process was duly completed and so reopening the Tender process and modifying a clause in the RfS document and PPA are not legally maintainable.

5.6 During the pre-bid meeting on 05.07.2017 and the reply to the pre-bid meeting uploaded in the website it was clearly replied that removing the upper limit of CUF is not feasible of compliance. Knowing and accepting the above conditions only, all the tenderers including the petitioner participated in the tender.

5.7 All the bidders, no doubt, factored their generation based on the above upper limit of CUF and quoted the price in the tender. After due evaluation of tender and signing of PPA, raising this prayer is not maintainable. If at all the Petitioner was said to be aggrieved over any of the clauses in the RfS document and/or PPA, the petitioner ought to have raised its objection(s) at the earliest point of time in accordance with law and in the manner known to law and not after participating in the Tender, accepting the condition and also Signing of the PPA.

5.8. If the petition is taken up for further consideration, it will not only offend the other unsuccessful tenders who might have quoted a lesser price in the tender than the petitioner by factoring their price based on the maximum CUF specified in the RfS document, but also it would offend the established/ statutory competitive bidding process itself. If allowed there will not be any certainty and it would, no doubt, pave way for unscrupulous elements to sneak through the

threshold limit with a sinister motive by unjust means including by pushing down the competitors and thereafter achieve the desired objectives in an illegal method. In other words, a petitioner intends to achieve its objective indirectly and as such it is against the settled principle in law that what cannot be done directly cannot be done indirectly. So also, the claim is an affront to the competitive bidding process itself and cherry picking the benefits, which are aggrandizement and against the public policy.

6. Findings of the Commission:-

6.1. We have given anxious consideration to the prayer of the petitioner seeking to suspend and delete clauses 6 & 7 of the EPA executed. On going through the averments of the petitioner, it is seen that the relief sought for by the petitioner rests primarily on six grounds, namely, 1) TANGEDCO has to meet the Renewable Purchase Obligation to the extent of 1611 MW and hence, excess generation would be helpful to TANGEDCO in meeting its RPO. 2) impugned clauses being detrimental to the consumers interest, 3) the clauses being against the Electricity Act, 4) the fixation of CUF at 27.15% leading to inefficiency, 5) the CUF being a normative factor in reality and relevant typically only for tariff fixation etc. and not for competitive bidding etc. 6) The wind power being uncontrollable as defined in the Grid Code, and enjoys "MUST RUN" status and hence the fixing of CUF is violative of Grid Code. On these grounds, the petitioner seeks to suspend the operation of clauses 6 & 7 of the EPA dated 13.10.2017.

6.2. On careful perusal of the clauses, which are sought to be suspended by the petitioner, we are of the view that these clauses are even-handed and do not require any suspension. The very same issue of removing the Cap on the issue of CUF was raised by the Petitioner in the pre-bid meeting and clarification has been given to the Petitioner in this regard by the Respondent. Having participated in the pre-bid meeting and accepted the CUF fixed by the Respondent, it is not open to the Petitioner now to seek suspension of the same. The arguments advanced by the petitioner to the effect that the said clauses would result in inefficiency is not acceptable to the Commission for the simple reason that any generation by the WEGs over and above the stipulated CUF would be paid at the rate of 75% by TANGEDCO. Hence, we see no reason as to why these clauses have to be suspended on the grounds of inefficiency. Further, the TANGEDCO is also entitled to compensation for the actual shortfall, if the generation is less than the minimum CUF at 20% at the prevailing forbearance price fixed by CERC. Such compensation is factored in the financials of TANGEDCO and passed on to the consumers. Hence, these clauses not only ensure efficiency but also discourage generation below PLF which in our opinion, protects the consumer interest. In our view, these clauses provide a level playing field and in fact, encourages the WEGs to generate not only upto their potential but also more than the CUF with a reward of 75% of the tariff. Therefore, we are unable to accept the submission of the petitioner in this regard.

6.3. On a careful consideration of the other contentions of the petitioner, we are of the view that the impugned clauses cannot be interfered with in the absence of any

statutory violation or miscarriage of justice. We cannot ignore the contention of the respondent that the Tender RfS Document and PPA were prepared in line with the draft guidelines through a transparent process of bidding issued by MNRE vide Notification F.No.238/1/2017/wind. This Commission has also approved the RfS Document and draft PPA in PPAP No.6 of 2017 in regard to quantum approved. Further, all the queries of the prospective bidders were addressed and reply to the queries uploaded in the website of TANGEDCO as per guidelines. Therefore, in our view, the petitioner has failed to point out any statutory violation and hence, the petition is not maintainable on this ground alone.

6.4. Further, we also do not see any miscarriage of justice. Firstly, there is nothing in the impugned clause which seek to discourage Renewable and Non-conventional sources and even on the question of fulfilment of RPO by the licensee, the clauses encourage the purchase of RE power over and above the PLF at the rate of 75% of the tariff. Hence, the RPO is not affected in any manner as apprehended by the petitioner. On the other hand, as rightly pointed out by the respondent, TANGEDCO, the deletion of the clauses would prejudice the interests of the unsuccessful bidders. The acceptance of present plea would amount to changing the rules of the game after the game is over through the back door. The unsuccessful bidders who were ejected out of the bid only on account of the lowest bid of the petitioners herein would be discriminated if the present plea is accepted.

6.5. We also do not see any force in the petitioner's argument that the respondent raises only a technical plea with regard to sanctity of the terms and conditions of the

tender. The Petitioner has also argued that the issue involved relates to the powers of the Commission to reassess the provisions of the PPA which, in our opinion, is flawed. The entire process, in our opinion, satisfied the statutory formalities and any defence on that ground cannot be regarded as a mere technical defence. For accepting the contention of the petitioner that the issue not merely pertains to technicality but also the powers of the Commission to vary the terms, the petitioner has to substantiate the same need in terms of statutory violation, miscarriage of justice which has not been done in the instant case.

6.6. It is contended by the petitioner that wind power is uncontrollable and varying in nature and capping its generation by fixing a CUF would tantamount to wastage of renewable energy and is violating the basic principle adopted in the Commission's regulation. The petitioner has failed to note that the respondent does not seek to cap the CUF and back down the generation beyond the specified CUF but only stipulates that tariff payable beyond the specified CUF would be paid at a lesser tariff @ 75%. The contention of the petitioner is untenable. Regulation 8 of the Tamil Nadu Grid Code relied on by the Petitioner is also of no help to the Petitioner inasmuch as the generation over and above the CUF fixed in the EPA is not sought to be curtailed totally but would only limit the tariff at 75% of the applicable tariff for the contractual quantum.

6.7. We have also considered the position of law arising out of the judgement of the APTEL in the matter M/s.Rithvik Energy System wherein it was held that the PPA can be re-opened for the purpose of giving thrust to renewable energy projects. We

are unable to comprehend as to how a concluded contract which is even-handed and gives level playing field to both the parties can be re-opened on grounds which are not germane to the prayer on hand. It is seen from the overall reading of the petition that the thrust is more on the avoidance of the compensating clause imposed on the petitioner and to obtain the full tariff for the generation over and above the stipulated PLF rather than anything else. The reasons set out such as RPO of 1611 MW on the TANGEDCO, the consumer interest, the resultant inefficiency arising out of the fixation of present CUF and other grounds have been appropriated, in our view, only to achieve the said object. The petitioner has failed to point out as to how the interest of the consumers would be protected by deletion of these clauses. Conversely, the retention of these clauses would in fact lead to reduction in cost of power purchase to an extent of 25% of tariff and will have a salubrious bearing on the consumer tariff. The RPO of TANGEDCO is an extraneous issue as far as the petitioner is concerned and hence, it cannot support the case of the petitioner for seeking relief.

6.8. A comprehensive reading of the provisions of the Act laid down in section 61(h), 86(1)(e), 61(d) & 61(b) and Commissions renewable purchase regulations clearly brings out the position that the Commission has to promote the non-conventional energy sources by balancing the interest of both the non-conventional energy sources generators and the distribution licensee and interest of the consumers. When the impugned clauses, in no way, have the effect of affecting the generation of the NCES or the financial interest of the generators, we

are afraid, we have no reason to interfere. In the result, the petition is dismissed as not maintainable.

7. Appeal: - An appeal against this order shall lie before the Appellate Tribunal for Electricity under section 111 of the Electricity Act, 2003, within a period of 45 days from the date of receipt of the copy of this order by the aggrieved person.

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

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

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

/ True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission