

**BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY
COMMISSION, SHIMLA**

In the matter of:-

M/s Haryana Powertech (Project-I)
Cabin No. 2, SCO 411, Sector 20,
Panchkula, Haryana-134112

..... **Petitioner**

Versus

1. The HP State Electricity Board Ltd.
(through its Director (Personnel),
Kumar House, Shimla-171004

2. The HIMURJA thro' its Director
Urja Bhawan, SDA Complex,
Kasumpti, Shimla-171009

.....**Respondents**

Petition No. 13 of 2018

(Decided on **19th May, 2018**)

CORAM:

**S.K.B.S NEGI
CHAIRMAN**

**BHANU PRATAP SINGH
MEMBER**

Counsel:-

for petitioner:	Sh. Hamender S. Chandel , Advocate
for respondent No.1:	Sh. Kamlesh Saklani (Authorized Representative) a/w Er. Suneel Grover, CE(SO)
for respondent No.2:	Sh. Joginder Singh, P.O.

ORDER

(Last heard on 28.04.2018 and Orders reserved)

M/s Haryana Powertech (Project-I) Cabin No. 2, SCO 411, Sector 20, Panchkula, Haryana-134112 has moved this petition under Sections 86 of the Electricity Act, 2003 seeking extension of Commercial Operation Date (COD) which is 31.03.2018 as per power purchase agreement for further six months at same tariff of Rs. 5.31 per kWh.

2. The petitioner submits as under:-
- (a) that on 04.11.2015, 1.00 MW solar power plant was allotted to him and he decided to install the same at village Salani, P.O. Katola Tehsil Nahan, Distt. Sirmour, which was later on changed from Salani . Distt. Sirmour to Bhathri Distt. Una. On 08/03/2017 respondent No. 1 issued a corrigendum regarding the change of site;
 - (b) that on 22.03.2017 the respondent Board sanctioned the grid connectivity to him and on the same day he started the process of ancillary sanction and process of registration of project. The project of the petitioner was registered on provisional basis by the Govt. of HP through its Nodal Agency HIMURJA on 30.03.2017;
 - (c) that on 31.03.2017 the PPA was signed by him and respondent No. 1 which was approved by the Commission on the same day vide petition No. 15 of 2017. After this he started collecting necessary documents for the grant of permission under section 118 of the HP Tenancy and Land Reform Act;
 - (d) that on 26.04.2017 he made a representation to respondent No. 1 for revision of grid connectivity and mentioned that as per solar power policy he was entitled for solid tap to the nearest HPSEBL 11 kV transmission line. He also stated that this matter remained pending with respondent No. 1 and there was undue delay in deciding the application for sanction of revise grid connectivity and sanction was accorded on 26.12.2017;
 - (e) that during collecting all necessary ECs the election code of conduct for State Assembly Election was imposed by the Election Commission on 13.10.2017 therefore, his case for grant of necessary sanction under Section 118 could not be processed. He also submitted that the process of obtaining the necessary revenue documents and other approvals is tedious, cumbersome and time consuming process. ECs was granted to him by HIMURJA on 22.04.2017 which was valid upto 22.10.2017 and vide letter dated 16.11.2017, he requested the HIMURJA for the extension of EC. and the HIMURJA vide letter dated 26.12.2017 extended the ECs upto 31.03.2018;

- (f) that 18.02.2018 he informed the respondent No. 1 about the delay caused due to processing and finalizing the case under Section 118 and revision of grid connectivity and these two reasons are beyond his control.
- (g) that on 08.01.2018, the Deputy Commissioner, Una submitted the file to Government for approval and accordingly on 23.02.2018 approval under Section 118 was accorded and forwarded the file to office of Deputy Commissioner, Una on 26.02.2018. On 01.03.2018 petitioner requested the District Revenue Officer Una for appropriate consideration of stamp duty on registered lease deed and further revenue procedure so that mortgage to the bank can be initiated immediately;
- (h) that on 15.02.2018 he received a connection agreement for 1+1 MW solar project with respondent No. 1 by fulfilling all the requisite formalities;
- (i) that he applied for sanction of loan from Bank of India in the month of September, 2017 and the bank communicated that permission under Section 118 tenancy and land reform act is required for the purpose. He has prayed that due to delay in grant of permission under Section 118 his case for loan was also delayed;
- (j) that on 01.03.2018, he informed the Respondent No. 1 i.e. HPSEBL about the delay and requested for the extension of CoD to six months on the existing tariff of Rs. 5.31 per kWh, which was rejected by the Respondent No. 1 vide letter dated 13.03.2018 and it was informed to him that the CoD on the same rate cannot be extended in terms of the modified tariff by the Commission's order dated 12.02.2018. He further submitted that feeling aggrieved by this rejection he approached this Commission with a prayer that as per Article 12.2 of the PPA, his case falls under illustration of Force Majeure as the facts narrated above are beyond his direct or indirect control. He further prayed that he is not liable to Liquidator Damages in terms of Article 16 of PPA as mentioned in letter dated 13.03.2018 of the respondent No. 1 and requested to declare the communication dated 13.03.2018 illegal and he may be entitled for the extension of CoD on the same tariff for the period of six months.
- (k) that in case extension is not allowed on the same tariff the project would become unviable as per the sanction accorded by the bank and the loan would not be process by the funding agency. He has also submitted that

he has made huge investments and completed all the codal formalities and in case extension of further six month is not granted to him his project would not be in consonance with the solar power policy of the Government and would defeat the aim and object of HP Solar Power Policy as the policy provides minimum 3 years time for commissioning the projects.

3 In response to the petition the authorized representative of respondent No.1 HPSEBL submitted that the PPA was executed between the petitioner and the respondent Board on 31.03.2017 and as per article 6.2.-

“(a) The HPSEBL shall pay for the Net Saleable Energy delivered and sold to it by the Company at the interconnection point at a fixed rate of 5.31 per kWh as determined in the commission’s tariff order dated 06.07.2016.

(b) (i) the rate given above shall be applicable if the entire capacity of the project is commissioned on or before 31.03.2018. However, if the commissioning of the project delayed beyond 31.03.2018, the rate determined by the commission for the category under which the total capacity of the project falls for the financial year(s) in which the capacity are commissioned for the respective capacities or the rate of 5.31 per unit as above whichever is lower, shall be applicable”.

Therefore this petition is not maintainable as it is liable to be rejected.

(a) The HPSEBL submitted that HPERC(Promotion of Generation for Renewable Energy Sources and Terms & Conditions for Tariff Determination) Regulations, 2017, came into force on 01.10.2017 and in petition No. 1 of 2018 dated 12.02.2018 the Commission has decided that where the rate for FY 2017-18 is to be considered in cases involving slippage commissioning of the project, in accordance with the provisions of the PPA, tariff computed under Part -A of this order, being higher than the tariff computed under Part-B of the order shall be considered as the rate for FY 2017-18 for the limited purpose of arriving at the reduced rate actually payable in the slippage cases, as per the provisions of the PPA.

(b) The HPSEBL further submitted that the case of the petitioner is similar to the representation filed by M/s Surya Ushma Pvt. Ltd. in Petition No. 1 of 2018 for the extension of CoD of their project, for a period of six months so that the solar PV project shall be eligible for tariff already agreed in the PPA in case project get commissioned on or before 31.03.2018 and the Commission considered the claim and rejected the same vide para 9 of the Order. Hence, the present case is similar to the aforesaid case of Surya

Ushma Pvt. Ltd. and hence, same deserve to be rejected on this ground only.

4. During the course of hearing learned Counsel for the petitioner and Respondent argued at length and after going through the submission made by the respective parties and also after hearing them, the Commission now proceeds to consider the question as to whether the request made by the petitioner can be accepted and, if so, to what extent.

4.1 The petitioner has prayed in his petition that in view of the grounds stated in the petition, the communication dated 13.03.2018 by HPSEBL, may be held illegal and the petitioner may be held entitled for extension of COD on the same tariff as mentioned in the PPA i.e. Rs. 5.31/- per kWh for a period of six months. Further, it has also been requested that the observation with regard to payment of liquidated damages may also be held illegal and the petitioner may be exonerated of the said observation made in the impugned order dated 13/03/2018 of HPSEBL, in the interest of justice.

4.2 In relation to the request made by the petitioner that he may be held entitled for extension of COD at the same tariff mentioned in the PPA for a period of 6 months from the scheduled COD, we observe that the tariff payable to the Generator is to be governed by the provisions of PPA which are adequately clear. In accordance with Clause 6.2 of the PPA, the rate of Rs. 5.31 per kWh was applicable only, if the project is commissioned on or before 31.03.2018. The PPA also clearly states the rate which shall be applicable in the event of delay in commissioning beyond 31.03.2018. We observe that the cutoff date of 31.03.2018 with regard to applicability of tariff as incorporated in the PPA emanates from the tariff order issued by the Commission on 06.07.2016 after following due process, is absolute and the Commission does not have any power to extend the same on project specific considerations irrespective of whether these constitute Force Majeure or otherwise.

4.3 The petitioner has elaborated variety of reasons for delay in commissioning of the project and has also stressed that some of these delays, particularly permission under section 118 of the HP Tenancy and Land Reform Act, constitute Force Majeure events. We have, inspite of our observation in the preceding paragraph, considered all such submissions made by the petitioner and observe that whereas some of the events like change of site are pertains to pre PPA stage, some of the others may be beyond the scope of the project envisaged

in the PPA. For example change of Grid connectivity only provide certain relief to the petitioner under such arrangements as in that process, the petitioner has saved the cost of 33 kV line which would not only have taken more time for construction but would have been costlier also. Moreover, the obligation of the erecting Project Line is that of the Developer and not of the Discom as per the PPA. As such these activities in fact amount to deviation from the PPA and no benefit can be claimed by any party. As regards the petitioner's plea for treating some of the delays particularly in relation to the delay in the permission under Section 118 of the HP Tenancy and Land Reform Act, we after going through the details submitted by the parties, are of the view that none of the events mentioned by the petitioner in this regard can be considered as **Force Majeure** event in accordance with the provisions of the PPA. We would also like to add here that even if, purely for argument sake, any of these events were to be considered as Force Majeure, the same would not entitle the petitioner for higher rate, in view of various provisions under the PPA particularly in view of the provisions of the Article 12 and Section 6.2 of the PPA and also the fact that cutoff date of 31.03.2018 mentioned in section 6.2 of PPA has been picked up from the tariff order and is not a subject matter for review on project specific considerations. As brought out by the HPSEBL also, the Commission has already rejected the request for extension of this date in a separate case, where the Generator had entered into PPA with HPSEBL in the similar time frame and on similar terms.

4.4 The petitioner has also referred to the provisions of the Solar Power Policy in the State which envisages a normal period of 18 to 24 months commissioning of the project after obtaining statutory clearance depending on size of the project. In this connection, we observe that inspite of knowing the extent of reasonable period normally required for commissioning the project, the petitioner had chosen to agree to the provisions of the PPA to the effect that lower rate would be applicable in case of delay of commissioning the project beyond 31.03.2018. The joint Petition for approval of PPA was submitted to the Commission on 31.03.2017 and on request from the generator, the same was approved on 31.03.2017 itself. The petitioner had obviously requested the same with a hope that in case he is able to Commission the project by 31.03.2018, he shall be able to get a higher rate. Unfortunately, the petitioner failed to achieve the targeted date and is now seeking relief in one of the main conditions which

had been specifically agreed by him in the PPA. We have however otherwise also applied our mind about the rationale for allowing a lower rate in case of delayed commissioning and observe that such reduction is not attributed to a penalty but in fact only suitably accounts for the savings that would accrue to the Generator on account of declining cost of the Solar Panels in case of late procurement of such panels which form a main component of the project cost. The petitioner has not stated anything in his petition about the procurement of Solar Panels. As such even if the request of the petitioner were to be considered as permissible under any provisions of the law, the same shall only amount to a situation where generator may get rewarded for delay in commissioning the project.

4.5 In view of above and after going through the submission made by respective parties, we do not find any merit in the prayer made by the petitioner for a higher rate of Rs. 5.31 per kWh for delay in commissioning of the project beyond 31.03.2018.

4.6 After having analyzed the matter on merit with independent mind in isolation of the case law on the matter, we have also endeavoured to study the case law in the matter and in this regard we rely on the findings of the Hon'ble Supreme Court of India in Case titled *Gujarat Urja Vikas Nigam Limited Versus Solar Semiconductor Power Company (India) Pvt. Ltd and Another (2017) 16 SCC 498*. In that case, the Generator and Discom entered into PPA which contained similar conditions with regard to applicability to tariff based on the date of commissioning of the project. The tariff, as incorporated in the PPA based on the tariff order of that State Commission, would have been applicable in case of the commissioning of the project within the cutoff date of 31st December, 2011 and in case of delay in commissioning of Solar Power Project beyond 31st December, 2011, the utility was to make payment at the tariff as determined by State Commission for Solar Projects effective on the date of commissioning of Solar Power Project or the tariff mentioned in the PPA as aforesaid, whichever is lower. However, since the project was commissioned beyond 31.12.2011 i.e. in a subsequent control period, the generator had requested the State Commission for extension of the control period which expired on 31st December, 2011. As in the present case also, the Generator had advanced many reasons for delay in commissioning of the project. The Hon'ble Supreme Court however decided that it was beyond the inherent power of the State Commission to extend the control

period and as such the request of the generator for extension of the control period was rejected. The facts of the case before us are similar to the above referred case decided by the Hon'ble Supreme Court. In the present case also, the generator is seeking the extension of the period upto which the rate of Rs. 5.31 per kWh was applicable as per the tariff order, which was subsequently incorporated in the PPA. Our findings are thus supported by the above referred case law.

4.7 In view of the foregoing we decline to accept the prayer made by the petitioner for allowing the rate of Rs. 5.31 per kWh even if the commissioning of the project is delayed for a period of only 6 months beyond the cutoff date of 31st March, 2018, as incorporated in the PPA based on the provisions of the tariff order. We also find no reasons for holding the communication issued by HPSEBL on 13.03.2018 as illegal as stressed by the petitioner so far as it relates to applicability of the rate.

4.8 After having decided the question of the applicability of rate, we now proceed to consider the request made by the petitioner that the communication dated 13.03.2018 issued by the HPSEBL, be held illegal and the petitioner may be exonerated of the said observation issued by the HPSEBL in the letter dated 13.03.2018. We find that the HPSEBL has simply informed the developers that in case their project is commissioned after 31.03.2018 (as per Schedule-1 of PPA) their company shall also be liable to pay Liquidated Damages as per article 16 of PPA. On going through the Article 16 of the PPA, we find the provisions of Section 16.2, as reproduced below, to be of direct relevance: -

“16.2 DELAY IN SYNCHRONIZATION OF UNITS:

If all the generating units are not synchronized on or before the Scheduled Date of Synchronization specified for different generating units, the Company shall be liable to pay to the HPSEBL Liquidated Damages for the delay @ Rs. 1000/- (one thousand) per MW for each day of delay beyond the Scheduled Date of Synchronization subject to maximum of 180 days after which it would constitute Company Event of Default. “

4.9 We do not find any illegality in the communication dated 13.03.2018 addressed by HPSEBL to the Generator in this regard as HPSEBL has simply informed, and infact cautioned, the petitioner company that in case the Project is commissioned after 31.03.2018 (as per Schedule -1 of PPA) their company shall also be liable to pay Liquidated Damages as per Article 16 of PPA.

4.10 We however also observe that the claims of Liquidated Damages as per aforesaid section of 16.2 of PPA are to be raised by HPSEBL soon after commercial operation date of the project. Since the commercial operation of the project is yet to be achieved and HPSEBL has so far not raised any claim for the Liquidated Damages, the question to settle the dispute, if any, is pre mature. We shall also like to mention here that the provisions relating to Liquidated Damages are linked with the Scheduled Commercial Date initially agreed by the petitioner as per Schedule-1 of PPA, is to be considered as 18th March, 2018. This date is entirely different from the absolute date of 31.03.2018 (upto which the project was as per the provisions of Section 6.2 of this PPA and) which had been incorporated in the PPA based on the provision of tariff order issued by the Commission after taking due process, and corresponds to the date upto which the project was to be commissioned by the Developer so as to avail the benefit of the rate of Rs. 5.31 per kWh. In view of above, we decline to hold the communication dated 13.03.2018 as illegal or to exonerate the generators from the observation made by the HPSEBL in that letter as requested by the petitioner. However, the petitioner shall have the liberty to approach the Commission for settlement of dispute, if any, relating to Liquidated Damages at appropriate later stage after exhausting the procedure laid down in the PPA for resolution of disputes.

In the light of the above findings and discussion, the Commission declines to accept the requests made by the petitioner.

The petition is disposed of accordingly.

(Bhanu Pratap Singh)
Member

(S.K.B.S. Negi)
Chairman