

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION

No. 16 C-1, Miller Tank Bed Area, Vasantha Nagar, Bengaluru- 560 052

Dated : 29th May, 2018

Present:

Shri M.K. Shankaralinge Gowda	..	Chairman
Shri H.D. Arun Kumar	..	Member
Shri D.B. Manival Raju	..	Member

OP No.28/2018

BETWEEN:

Aikyam Holidngs Private Limited,
No.5/82, Blue Beach Road,
Neelankarai,
Chennai – 600 041.

.. **PETITIONER**

[Represented by Navayana Law Offices, Advocates]

AND:

- 1) Bangalore Electricity Supply Company Limited,
K.R. Circle,
Bengaluru – 560 001.
- 2) Karnataka Power Transmission Corporation Limited,
Cauvery Bhavan,
K.G. Road,
Bengaluru – 560 009.

.. **RESPONDENTS**

[Respondent-1 is represented by Justlaw, Advocates]

ORDERS

- 1) This Petition is filed under Section 86(1)(f) of the Electricity Act, 2003 praying for a direction against the 1st Respondent-Bangalore Electricity Supply Company Limited (BESCOM) to pay the tariff of ₹4.50 per unit, as agreed in the Power Purchase Agreement (PPA) dated 01.03.2017, and to pay a sum of ₹12,52,08,175/- towards the energy already supplied with interest @ 1.25% per month, and to pass such other orders as deemed fit under the facts and circumstances of the case.

- 2) The material facts required for the disposal of the controversy involved in this Petition may be stated as follows:
 - (a) That, the Petitioner and the 1st Respondent (BESCOM) entered into the PPA dated 01.03.2017 for sale of Wind energy, @ ₹4.50 per unit for the Delivered Energy from the 8 MW capacity Wind Power Project of the Petitioner, situated in the Chitradurga District of the Karnataka State. The tariff of ₹4.50 per unit was agreed to between the parties as per the then prevailing Generic Tariff Order dated 24.02.2015.

 - (b) The PPA, in question, was submitted by the 1st Respondent (BESCOM) by letter dated 13.03.2017, for approval of this Commission. However, the

Commission returned the PPA, by letter dated 21.05.2017, with the observations that, the ESCOMs continuing to enter into PPAs and forwarding the same to the Commission for approval, despite fulfilling their RPO obligations, was detrimental to the interest of the ESCOMs, as the increased drawal of RE power would result in backing down of the new Thermal Power Stations, which had been commissioned in the State and it would result in payment of Fixed Cost without drawing energy from them, and further that the tariff of the Wind Projects across the country had come down significantly, thereby adding further capacity through signing of Wind Projects' PPA at the existing generic tariff of ₹4.50 per unit, was not sustainable.

- (c) In the meanwhile, the Commission had determined the generic tariff for the Wind Power Projects, by its Order dated 04.09.2017 fixing the tariff for the Wind Power Projects at ₹3.74 per unit, in modification of its Order dated 24.02.2015. The Order dated 04.09.2017 specified that, the tariff of ₹3.74 per unit determined in the Order shall be applicable to all the new Wind Power Projects, the PPAs for which were entered into and approved by the Commission after the date of issue of the said Order, subject to the quantum as may be fixed by the Commission, separately.

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- (d) The said Order dated 04.09.2017 also specified that, the tariff determined in it should also be applicable for the Projects, which had entered into PPAs with any ESCOM (Electricity Supply Company) prior to the date of the Order and which were not approved by the Commission, if they so opted. Here, itself, it may be noted that the PPA in question of the Petitioner was not approved by this Commission, though it was entered into between the Petitioner and the 1st Respondent (BESCOM) and submitted for approval, prior to the date of the said Order dated 04.09.2017. Therefore, had the Petitioner opted for the tariff of ₹3.74 per unit, instead of ₹4.50 per unit, as mentioned in the PPA, the PPA could have been submitted for approval of this Commission, as noted above.
- (e) Subsequently, this Commission, by Order dated 13.12.2017, modified the applicable tariff for the Wind Power Projects, which had entered into PPAs with the ESCOMs prior to the date of the Commission's Order dated 04.09.2017, and had been commissioned, on or before 31.03.2017, specifying that such Wind Power Projects should be governed by the tariff determined in the Commission's Order dated 24.02.2015. Therefore, any Wind Power Project, which had entered into a PPA with any ESCOM, prior to the Commission's Order dated 04.09.2017 and had been commissioned on or before 31.03.2017, would be governed by the tariff of ₹4.50 per unit, as determined in the Generic Tariff Order dated 24.02.2015.

- (f) The effect of these Orders is that, any Wind Power Project having entered into a PPA with any ESCOM, prior to the Order dated 04.09.2017 and submitted for approval of the Commission, but was not approved by the Commission, could have opted for the tariff of ₹3.74 per unit, for getting the approval of the Commission. Further that, such Project, for which the PPA was not approved, but had been commissioned on or before 31.03,2017, would be entitled to the tariff of ₹4.50 per unit, as per the Generic Tariff Order dated 24.02.2015.
- (g) The PPA dated 01.03.2017, in question, was re-submitted to the Commission subsequent to the Order dated 13.12.2017, stating that the Project had been commissioned / achieved Commercial Operation on 28.03.2017 and thereby, it was entitled to the tariff of ₹4.50 per unit.
- (h) The Commission, while scrutinizing the PPA in question, found that, though the Project was stated to have been commissioned on 28.03.2017, the Commercial Operation and the actual injection of energy had not taken place on or before 31.03.2017, as per the 'B' Form and the Log Book Extract of the Sub-Station of the 2nd Respondent-Karnataka Power Transmission Corporation Limited (KPTCL), secured by the Commission, which were the documents essential to evidence the actual injection of

energy into the Grid. Therefore, the Commission, by letter dated 18.01.2018, informed that, if the Developer opts for the tariff of ₹3.74 per unit, the PPA could be re-submitted for approval. A copy of the said letter dated 18.01.2018 has been produced by the 1st Respondent (BESCFOM), along with its Objections to the Interlocutory Application.

- (j) In essence, the Petitioner has contended that, achievement of the Commercial Operation does not contemplate the actual generation of the power or its injection into the Grid. Alternatively, that there was actual generation of 511 units of power and the same was injected into the Grid, though the same was not recorded in the Meter at the Delivery Point installed in the Sub-Station, as the quantum of the generated energy was meagre, compared to the high multiplying constant of 1,50,000 of the Meter at the Delivery Point. Therefore, the real grievance of the Petitioner is that, the view taken by this Commission, for not allowing the tariff of ₹4.50 per unit, is incorrect.
- 3) In the Petition itself, the Petitioner had also requested for grant of an interim relief by way of a direction to the 1st Respondent (BESCOM), to pay for the energy delivered @ ₹4.50 per unit. During the first hearing itself, the learned counsel for the Petitioner pressed for the interim relief @ ₹4.50 per unit for the energy delivered. The Commission orally observed that, the

granting of interim relief, @ ₹4.50 per unit for the energy delivered, was not tenable on the facts of the present case, as it would amount to granting of the main relief itself. Thereafter, the Petitioner filed an Interlocutory Application, claiming payment for the energy delivered @ ₹3.74 per unit, during the pendency of the Petition.

- 4) The 1st Respondent (BESCOM) filed Objections to the Interlocutory Application opposing the grant of an interim relief to the Petitioner and also filed its Statement of Objections, which was assumed by the Commission as Objections to the main Petition. However, at the time of preparing this Order, it is noticed that, it was only a Preliminary Objection regarding the maintainability or otherwise of the Petition, stating that, none of the claims was maintainable, as the PPA in question had not, admittedly, been approved by this Commission, therefore, there was no binding contract between the parties, and accordingly, had requested for rejection of the Petition and in the event the Preliminary Objection was not upheld, to grant time for filing its main objections.
- 5) The learned counsel for the Petitioner pressed for an early hearing of the Petition, as the 1st Respondent (BESCOM) opposed the grant of an interim relief to the Petitioner. The learned counsel for the 1st Respondent (BESCOM) agreed for posting of the case for final hearing. Thereafter, the

learned counsel for the parties submitted their arguments on merits. During the arguments, the learned counsel for the 1st Respondent (BESCOM) submitted that, without the actual energy being injected into the Grid, there would be no achievement of Commercial Operation of the Project and that the actual injection of energy into the Grid is essential to declare the Commissioning / Commercial operation of the Project, as indicated in the Commission's letter dated 18.01.2018, referred to above. Before commencing his arguments, the learned counsel for the 1st Respondent (BESCOM) did not make a request for filing the 1st respondent (BESCOM)'S objections to the main Petition and had made submissions on merits, as noted above. Therefore, the Commission is of the view that, granting of any further time for filing the objections to the main Petition by the 1st Respondent (BESCOM) would not be necessary and it can proceed to pass the orders, considering the oral submissions of the learned counsel for the 1st Respondent (BESCOM) as the 'Objections to the main Petition'. The learned counsel for the Petitioner reiterated the contentions stated in the Petition and also expressed his doubt, as to whether the contents of the letter dated 18.01.2018, referred to above, were based on any decision of this Commission or was it merely a communication from the Secretary of this Commission, without there being any decision or Order of this Commission. The learned counsel for the Petitioner submitted that, a reading of this letter would give rise to such

a doubt. The Commission pointed out that, under Section 92(5) of the Electricity Act, 2003, the Secretary of the Commission is authorized to communicate the decision of the Commission and the letter dated 18.01.2018 is one such communication.

6) Considering the rival contentions, the following issues would arise for our consideration:

(1) Whether the actual injection of energy into the Grid is an essential element for achieving the Commercial Operation of the Wind Power Project in question?

(2) Whether 511 units of energy, recorded in the Wind Turbine Meter, could be considered to declare the achievement of the Commercial Operation of the Wind Power Project on or before 31.03.2017?

(3) Whether the Petitioner is entitled to claim any amount for the energy injected into the Grid, in the absence of the approval of the PPA in question by this Commission?

(4) What Order?

7) After considering the oral submissions of the parties and perusing the material placed on record, our findings on the above issues are as follows:

8) **ISSUE No.(1)**: *Whether the actual injection of energy into the Grid is an essential element for achieving the Commercial Operation of the Wind Power Project in question?*

ISSUE No.(2): *Whether 511 units of energy, recorded in the Wind Turbine Meter, could be considered to declare the achievement of the Commercial Operation of the Wind Power Project on or before 31.03.2017?*

As Issue Nos.(1) and (2) are interconnected, they are dealt with together, hereunder:

(a) It may be useful to note certain relevant definitions and provisions of the PPA dated 01.03.2017 entered into between the parties, to arrive at a conclusion on these Issues:

“Article 1.1

XXX

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XXX

(vi) **‘Commercial Operation Date’** with respect to the Project shall mean the date on which the Project is available for commercial operation as certified by Corporation / SLDC and in any case, shall not be beyond the Scheduled Date of Completion.

XXX

XXX

XXX

(xli) **'Scheduled Date of Completion'** shall mean the date on which the Project is scheduled to deliver electricity to BESCO at the Delivery Point after completion of all the required tests, and shall be within eighteen months from the date of achievement of Financial Closure or Twenty Four months from the date of execution of agreement whichever is later.

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XXX

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(xii) **'Delivered Energy'** means the kilowatt hours of Electricity actually fed and measured by the energy meters at the Delivery Point in a Billing Period.

XXX

XXX

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(xi) **'Delivery Point' or 'Interconnection/Evacuation Point'** shall be the point at which the power is injected into the substation bus of the BESCO/Corporation."

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(xxvi) **'Interconnection / Evacuation Facilities'** in respect of the Company shall mean all the facilities installed by the Company or by any other person acting on its behalf to enable BESCO to receive the Delivered Energy from the Project at the Delivery Point, including transformers and associated equipment, relay and switching equipment, protective devices and safety equipment and transmission lines from the Project to Corporation's/BESCO nearest sub-station."

"5.1 Monthly Energy Charges:

Subject to clause 5.4, BESCO shall for the Delivered Energy pay, for the term of the PPA from the Commercial Operation Date, to the Company at the rate of Rs.4.50 (Rupees Four and Fifty Paise only) per Kilowatt hour without any escalation."

"9.1 Term of the Agreement:

This Agreement shall become effective upon the execution and delivery thereof by the Parties hereto subject to approval of the Commission and unless terminated pursuant to other provisions of the Agreement, shall continue to be in force for such time until the completion of a period of twenty (20) years from the Commercial Operation Date and may be renewed for such further period of five (5) years on such terms and conditions as may be mutually agreed upon between the Parties subject to approval by the Commission ninety (90) days prior to the expiry of the said period of twenty (20) years."

- (b) Under the PPA, there is no definition of 'Commission / Commissioning of Project'. However, it is not in dispute that the words 'Commissioning' and 'Commercial Operation' are one and the same, when there is commissioning of the Project subsequent to the execution of the PPA. 'Commissioning / Commercial Operation' of the Project would imply the injection of the energy into the State Grid, in pursuance of some commercial transactions, either with a Distribution Licensee or with a third

party availing Open Access. The above view of the Commission is supported by various definitions and the clauses in the PPA, as noted above.

- (c) Article 5.1 of the PPA provides that, the BESCO shall, for the Delivered Energy, pay for the term of the PPA from the Commercial Operation Date (COD) to the Company at the rate of ₹4.50 per unit without any escalation. This liability would arise from the COD for the Delivered Energy. Therefore, one could infer that, without there being the energy delivered, there cannot be any Commercial Operation of the Project. Article 9.1 of the PPA provides for the term of the PPA, which states that, the term of the PPA would be for a period of twenty (20) years from the COD, unless terminated earlier. The term of the PPA should begin from the time when the energy is delivered from the Project, for the purpose of counting the period of completion of the term.
- (d) The Commissioning Certificate issued by the authorities concerned (ANNEXURE-5 to the Petition) and the connected papers may, at best, evidence that the Wind Power Project of the Petitioner was interconnected to the Grid System on 28.03.2017. The veracity of the Commissioning Certificate could be accepted, provided there is injection of energy into the Grid, soon after the interconnection of the generator

with the Grid. Therefore, it could be said that, the Commissioning Certificate does not prove the Commercial Operation of the Project, which requires actual injection of power into the Grid as on 28.03.2017. In the absence of any valid explanation for non-injection of energy into the Grid, the inference that could be drawn is that, all the facilities for the interconnection had not been provided. This is the reason why the Petitioner has pleaded at Paragraph-4 of the Petition that, 'Commercial Operation' does not contemplate the actual generation of power or delivery of power into Grid system. For the above reasons, we are of the considered view that, the actual injection of the energy into the Grid is an essential ingredient for claiming the 'Commercial Operation' of the Project at a particular time and date.

- (e) Therefore, the learned counsel for the Petitioner has mainly contended that, in the present case, there was injection of 511 units of energy into the Grid between 23:03:25 hours and 23:18:28 hours on 28.03.2017. The learned counsel for the Petitioner has pointed out that, the Meter at the Delivery Point has a multiplying constant of 1,50,000, thereby, the meagre 511 units of energy injected into the Grid by the Wind Power Project of the Petitioner could not be recorded in the Meter at the Delivery Point. The Petitioner has not produced the generation details from 29.03.2017 to 31.03.2017. The non-production of such evidence would lead to an

inference that, from 29.03.2017 to 31.03.2017, there was no generation from the Petitioner's Wind Power Project. The Commissioning Certificate produced by the Petitioner would only show that the Project was interconnected to the Grid on 28.03.2017 without stating anything with regard to the actual injection of energy into the Grid. The Commission notes that, the possibility of the Meter at the Generation Point recording the generation of certain units of power, by connecting it to some load, without there being any interconnection to the Grid, cannot be ruled out. Assuming that 511 units of energy was injected into the dedicated transmission line, admittedly, the quantum of Delivered Energy at the Delivery Point was 'nil', as recorded in the Meter at the Delivery Point. As noted above, even at the Generation Point, there was no generation of energy during the period, from 29.03.2017 to 31.03.2017. The Petitioner has not stated the reason as to why there could not be any generation of energy during this period. Therefore, we hold that, the 'Commercial Operation' has not taken place on or before 31.03.2017, as far as the Petitioner's Project is concerned. It is noted that, during the period from April, 2017 to June, 2017, there was injection of energy into the Grid. On the date of conclusion of the arguments, the Petitioner was asked to produce the extract of the Log Book, to ascertain the date from which the injection of energy had commenced in April, 2017. But, the Petitioner has not, so far, produced any such extract of the Log Book. Therefore, it could

be inferred that, even during the beginning of April, 2017 also, there was no injection of energy into the Grid.

- (f) We may note here that, the meaning of the word 'commissioning', as could be made out from the contents of the 'Commissioning Certificate', is only 'interconnection / synchronization of the Plant with the Grid, after following the Technical / Safety requirements'. The meaning of the word 'commissioning', as used in the various Generic Tariff Orders, is 'commercial operation of the Plant by injecting energy into the Grid, after interconnection with the Grid'.
- (g) For the above reasons, we answer Issue No.(1) in the affirmative and Issue No.(2) in the negative.
- 9) **ISSUE No.(3):** *Whether the Petitioner is entitled to claim any amount for the energy injected into the Grid, in the absence of the approval of the PPA in question by this Commission?*
- (a) The 1st Respondent (BESCOM) has contended that, in the absence of an approved PPA, there is no valid contract and therefore, it has no liability to pay any amount towards the energy injected into the Grid from the Wind Power Project of the Petitioner. The Commission is of the considered view that this contention of the 1st Respondent (BESCOM) is not

acceptable. It may be noted that, the Petitioner has not injected the energy into the Grid, intending to do so gratuitously and the 1st Respondent (BESCOM) has enjoyed the benefit, thereof. Therefore, we are of the considered view that, the principles stated in Section 70 of the Contract Act would attract and the 1st Respondent (BESCOM) is bound to compensate the Petitioner for the energy injected into the Grid, on the facts and in the circumstances of the case.

- (b) The Petitioner has contended that, when once the 1st Respondent (BESCOM) has executed the PPA to purchase the energy @ ₹4.50 per unit, even in the absence of the approval of the PPA by this Commission, the 1st Respondent (BESCOM) is bound to pay for the energy delivered @ ₹4.50 per unit. We are of the considered view that, the approval of the Commission, regarding rate at which the energy is to be purchased, is a pre-requisite for the validity of the PPA executed between the Petitioner and the 1st Respondent (BESCOM). The rights and liabilities of the parties to the PPA would start from the date of the execution of the PPA, subject to the approval of the PPA by this Commission. Therefore, the Petitioner cannot claim the tariff of ₹4.50 per unit for the energy delivered, unless its claim is legally sustainable, inspite of the Petitioner and the 1st Respondent (BESCOM) entering into the PPA, in question. The Petitioner has also not opted for the tariff of ₹3.74 per unit, to which it was entitled. Therefore,

we are of the considered opinion that, the Average Power Purchase Cost (APPC) of ₹3.64 per unit, prevailing for FY18, could be allowed as compensation for the energy supplied by the Petitioner. The Petitioner is still at liberty to exercise its option for the sale of energy @ ₹3.74 per unit. In that event, the 1st Respondent (BESCOM) is liable to pay for the energy delivered @ ₹3.74 per unit, instead of the APPC rate of ₹3.64 per unit.

(c) Therefore, we answer Issue No.(3), accordingly.

10) **ISSUE No.(4):** *What Order?*

(a) The Petitioner has claimed interest at the rate of 1.25% per month on the amount claimed. In the absence of a valid PPA, the Petitioner cannot rely upon the term regarding 'interest', stated in Article 6.3 of the PPA. The question of payment of interest / late payment under Article 6.3 of the PPA would arise, only when there is a delay in payment of any Tariff Invoice beyond the due date. There cannot be a valid Tariff Invoice for the energy supplied, unless the PPA is approved. The Commission is of the considered view that, awarding of interest to the Petitioner, on the compensation payable for the energy injected into the Grid, does not arise, till the compensation is quantified and awarded. However, in case the Petitioner opts for the tariff of ₹3.74 per unit, the Commission would

pass appropriate orders regarding the payment of interest on the arrears that becomes due and payable to the Petitioner towards the energy supplied.

(b) For the foregoing reasons, we pass the following:

ORDER

- (1) The Petitioner is not entitled to claim the tariff of ₹4.50 (Rupees Four and Paise Fifty) only per unit for the Delivered Energy, as mentioned in Article 5.1 of the PPA dated 01.03.2017, executed between the Petitioner and the 1st Respondent (BESCOM). However, the Petitioner could opt for the tariff of ₹3.74 (Rupees Three and Paise Seventy Four) only per unit for the Delivered Energy, by executing a Supplemental PPA with the 1st Respondent (BESCOM), with the suitable terms therein; and,
- (2) The 1st Respondent (BESCOM) shall pay for the Delivered Energy, from April, 2017 till the date of this Order, as compensation, at the APPC rate of ₹3.64 (Rupees Three and Paise Sixty Four) only per unit, in 3 (three) equal monthly instalments, with Single Default Clause, from the date of this Order. If the 1st Respondent (BESCOM) commits default in payment, as ordered above, it shall pay the interest at the rate of 8% (eight percent) per annum, from the date of default upto the date of payment, on the amounts due.

Sd/-
(M.K. SHANKARALINGE GOWDA)
CHAIRMAN

Sd/-
(H.D. ARUN KUMAR)
MEMBER

Sd/-
(D.B. MANIVAL RAJU)
MEMBER