

**BEFORE THE GUJARAT ELECTRICITY REGULATORY COMMISSION
GANDHINAGAR**

Petition No. 1854 of 2020

In the matter of:

Petition under Section 86 (1) (b), (e) and (f) of the Electricity Act, 2003 and Regulation 26 of GERC (Conduct of Business) Regulations, 2004 seeking extension of time and directions from the Commission.

Petitioner : Avaada Sunrise Energy Pvt. Limited

Represented by : Learned Senior Advocate Shri Gopal Jain with Advocates Shri Ankur Sood, Ms. Romila Mandal, Shri Prithu Parimal alongwith Shri Amit Ojha, Shri Ashish Bhardwaj and Ms. Snigdha Bhandari

V/s.

Respondent : Gujarat Urja Vikas Nigam Limited

Represented By : Learned Advocates Ms. Ranjitha Ramachandran, Ms. Anushree Bardhan, Ms. Srishti Khindaria alongwith Ms. Sailaja Vachhrajani and Shri Parthik Joshi

And

Petition No. 1960 of 2021

In the matter of:

Petition under Section 86 (1) (b), (e) and (f) of the Electricity Act, 2003 and Regulation 26 of GERC (Conduct of Business) Regulations, 2004 seeking extension of time.

Petitioner : Avaada Sunrise Energy Pvt. Limited

Represented by : Learned Senior Advocate Shri Gopal Jain with Advocates Shri Ankur Sood, Ms. Romila Mandal, Shri Prithu Parimal alongwith Shri Amit Ojha, Shri Ashish Bhardwaj and Ms. Snigdha Bhandari

V/s.

Respondent : Gujarat Urja Vikas Nigam Limited

Represented By : Learned Advocates Ms. Ranjitha Ramachandran, Ms. Anushree Bardhan, Ms. Srishti Khindaria alongwith Ms. Sailaja Vachhrajani and Shri Parthik Joshi

CORAM:

Mehul M. Gandhi, Member
S. R. Pandey, Member

Date: 04/08/2021

DAILY ORDER

1. These matters were listed for hearing on 26.07.2021 through virtual hearing by Video Conferencing on account of prevailing COVID 19 pandemic.
2. Heard Ld. Senior Advocate Shri Gopal Jain, on behalf of the Petitioner in above matters.
- 2.1. It is submitted that the Petitioner participated in the competitive bidding process of the Respondent and submitted bid on 05.09.2018 in terms of RFS dated 28.06.2018 for 300 MW power project in the State. Based on the bid submitted, the Petitioner was declared as a successful bidder and LoA issued by the Respondent on 19.09.2018 and thereafter, PPA signed between the parties on 19.10.2018.
- 2.2. It is argued that the Petitioner had tried its best efforts to commission part project capacity within the timelines of PPA. i.e. within 18.03.2021. However, on account of ongoing circumstances and despite best possible efforts, the balance capacity could only be commissioned during April 2021 and June 2021 respectively. Therefore, the Petitioner is seeking for extension of 3 months' time for commissioning of the 300 MW Solar PV project. It is further argued at length on following issues as an element of 'Force Majeure' leading to delay in commissioning of the Solar PV project:
 - (i) Delay due to unprecedeted Rainfall and cyclones
 - (ii) Delay due to COVID-19 pandemic,
 - (iii) Delay in supply due to international impact
 - (iv) Delay by Government authorities like (a) State wide strike of Tehsildars, (b) Land assessment order and (c) providing land under government scheme,
 - (v) Delay in court permissions,
 - (vi) Incomplete land records causing delay,
 - (vii) Limited functioning of Sub-Registrar offices,

(viii) Right of Way issues

- 2.3. It is further argued that delay in commissioning of the solar project is covered by force majeure events provided in the PPA. Referring to Article 8 of the PPA, it is argued that clause 8.1 deals with force majeure events and circumstances which are beyond the reasonable control of the parties i.e. Acts of God, floods, typhoons, hurricane, epidemic or other natural calamities, which are only examples and illustrative in nature because definition of force majeure under the PPA is an inclusive definition. It is also argued that clause 8.1.(a) (i) and (ii) are relevant since some events fall under them including on two occasions, the cyclones viz. Nisarga in Jun to Sept-2020 and thereafter, in 2021 Taukate falling in clause 8.1.(a)(ii) require consideration.
- 2.4. It is argued that clause 8.1.(b) provides for force majeure exclusions, whereas Clause 8.1 (c) states about 'Notices' to be issued. However, there is no prescribed form or format and no period is provided for issuing 'Notice' after occurrence or claiming force majeure. However, it is clarified that there is no delay in issuing the notice because as soon as the event occurred, the Petitioner had taken appropriate steps and issued notices. It is argued that even if any delay occurs, the consequence cannot be a complete exclusion of the benefit of the force majeure.
- 2.5. Referring clause 8.2 of the PPA it is argued that breach cannot happen if the performance of the Petitioner is hindered or delayed due to force majeure event. It is submitted that there was unprecedented rainfall and cyclone in June 2020 to September-2020 followed by another cyclone in 2021. It is argued that, the Petitioner has also requested the Respondent to consider the heavy rain fall in months of August to September as force majeure event under Article 8 of the PPA and grant additional time of 30 days for achievement SCOD for 300 MW solar project.
- 2.6. It is argued that from March 2020, Covid 19 pandemic and consequent lock down was declared which affected performance at the site due to non-availability of labour, resources, non-functioning of Govt. offices and circumstances not being normal. It is further argued that normally solar modules used are imported and there was significant impact on international supply of imported solar modules from January 2020. Although, as per the PPA and the SCOD, the supply was required to be delivered in October 2019 but due to force majeure events the delivery was extended till May 2021.
- 2.7. It is argued that there was State-side strike of Tehsildars and issuing land assessment order by Industry Department of Government which was essential for acquiring land beyond ceiling limit. It is also submitted that there was delay in allotment of land under Govt. scheme. The application was filed by the Petitioner on 24.09.2019 for allotment of 94 acre land which was under Government Scheme but on account of delay as mitigation measure the same was replaced with alternative land and application revised for 71 acre. The actual permission was received on 14.12.2020 with delay of more than 1 year. Therefore, the

time taken for allotment of land by Government authorities is more than 1 year, which in terms of number of judgments, qualifies as force majeure.

- 2.8. It is further argued that in certain land parcels wherein the land owners as per record were either minors or deceased or in name of ancestors, there was delay in obtaining the court permission, land registration process from Civil Court and also get the relevant permission for transfer of land. Moreover, due to incomplete land records, it took more time since the land was not registered in the name of the current owners. Therefore, the transfer of name registration process and clearance of land was also delayed.
- 2.9. It is submitted that the delay was also caused due to limited functioning of the sub-registrar office which works for only two days in a week delaying the land sale deed registration process. The Petitioner also faced certain Right of Way issues regarding laying the transmission lines because the local farmers and local elements preventing the laying of transmission lines.
- 2.10. It is submitted that despite above facts and circumstances, the Petitioner has commissioned first 75 MW on 18.03.2021 before the SCOD and thereafter, another 50 MW on 15.04.2021 followed by 125 MW on 24.04.2021 for which commissioning certificate is received from GEDA but yet to be filed and finally on 23.06.2021 remaining 50 MW was completed for which commissioning certificate is awaited from GEDA. Referring to various commissioning certificates, it is submitted that as on 23.06.2021, the entire 300 MW project stands fully commissioned. Explaining delay on part of GEDA for issuing commissioning certificate for 125 MW on 24.04.2021, it is submitted that the Petitioners have been informed that COVID-19 and other issues have caused delay.
- 2.11. Ld. Senior Counsel for the Petitioner while referring to various other communications/letters argued that the Petitioner has consistently provided the status of the project while explaining delay on account of various reasons to the Respondent and requesting for extension of SCOD from time to time. It is argued that photographs filed itself evidenced the situation of flooding at site.
- 2.12. In support of his arguments, he relied upon the following judgments:
 - (i). MP Power Management Company [(2018) 6 SCC 157];
 - (ii). Bhagwan Swaroop vs. Kunwarlal [(2010) 12 SCC];
 - (iii). Nabha Power Ltd. vs. Punjab State Power Corp. (Judgment by Hon. APTEL in Appeal No. 283 of 2015);
 - (iv). Maharashtra State Power Generation vs. MERC (Judgment by Hon. APTEL in Appeal No 72 of 2010 dated 27.04.2011);
 - (v). GUVNL vs. Green Infra (Judgment by Hon. APTEL in Appeal No 198, 199, 200 and 291 of 2014);

- (vi). Order passed by Uttarakhand Electricity Regulatory Commission Order in Petition No. 13 of 2020 on 13.06.2020;
- (vii). Order passed by Delhi Electricity Regulatory Commission in Petition No. 34/2020.

- 2.13. Based on the above facts, voluminous communications, notices, photographs, relevant documents and judgements, it is clearly established beyond doubt that the Petitioner had no control over various events, that there is no imprudence on part of the Petitioner and delay is due to natural calamity and force majeure events in the present case.
- 2.14. Ld. Senior Counsel on behalf of the Petitioner, concluding his arguments submitted that therefore, both on facts and in law including various judgments referred, it is a fit case to grant the reliefs as prayed by the Petitioner.
3. Ld. Senior Advocate Shri Gopal Jain also agreed to provide the relevant details, comprehensive chart identifying each of issue and the notices given and delay with reasons to the Commission and the Respondent. He also agreed to provide various details which are necessary to ascertain the claims of the Petitioner for Force Majeure events, its period etc. as per queries of the Commission as well as to provide comprehensive chart showing various Force Majeure events, periods and stating reasons for each as claimed by the Petitioner for each activity.
4. We have considered the submissions made by the parties. We note the submission made by the Petitioner and also referred to the various letters of the Government authorities before the Commission to establish its case for delay in achieving the Commercial Operation.
- 4.1. We also note that Ld. Senior Counsel for the Petitioner argued at length narrating factual matrix, provisions of Force Majeure in the PPA and legal aspects. During the hearing, the Commission has directed to the parties to file and place on record the entire data of generation of solar power project from beginning. Further, the Commission has raised certain queries considering the issues involved in the present matter as well as arguments advanced and the Petitioner needs to substantiate the same through appropriate documents so as to provide clarity about different events claimed to be Force Majeure as under:
- (i). For all different Force Majeure Events claimed, it is necessary for the Petitioner to provide start date and end date of each of Force Majeure events with its respective period. Moreover, amongst each of them what period is overlapping thereof needs to be clearly demarcated.
 - (ii). With regard subject matter of delay in land on different grounds, the same needs to be specified with different activities leading to delay, on whose part such delay was caused with supporting documents.

- (iii). With regard to water logging due to heavy rainfall it is necessary that contour report of the project site clearly depicting water logging areas, natural flow of rain water, levelling of site by land filing with consideration and arrangements made for avoiding any water logging while preparing/levelling the site for setting up the project carried out by the Petitioner.
- (iv). With regard to Govt. land and other land, it is necessary that detailed map showing the land proposed for the project and layout plan for installing Solar Panels, balance of plant, various equipment/ material to set-up as per original design showing the area & size of Solar Panels, its Associated equipment, Control Room, any other place if required.
- (v). Whether acquisition of government land parcel was indispensable/compulsory & necessary or could be avoided with consideration of non-contiguous land requirement for Solar was possible or not. Why contiguous land is required? Is it not possible to set up Solar Plant if contiguous land is not available so as to progress and complete the project in time?
- (vi). Activity chart related to the project with time lines for various activities showing details of planned, scheduled, start date and actual completion date through PERT chart or CPM chart. Details of delay, if any, qua planned vs actual with supporting documents and adequate justification & reasons.
- (vii). Details regarding land obtained, permission received - specifying survey/permission letter for project land as under:

Particulars	Area	Date of Purchase	Survey No.	Date of Possession	Sale Deed Executedon	Date of Registration	Collector / Revenue Permission applied on	Permission received on & if not received, status thereof	Amount paid	Date of Payment	Date of MoU
Total Land Required--- Govt											
Total Land Required--- Private											
Total Land Purchased---Govt											
Total Land Purchased---Private											
Possession of Land-- Govt											
Possession of Land-- Private											

- (viii). Details pertaining to various activities carried out on land & construction thereon as under:

Particulars of Activities	Date of Work Order	Completion Date as per Order	Actual date of completion	Payments made	Date of payment	Name of the agency to whom work order is placed	Remarks specifying delay in work completion, if any.
Construction							
Civil Works (various activities)							
Electrical Works (various activities)							

(ix). Details of various Supply Contracts / Purchase Order etc. pertaining to Plant & Machinery and Balance of Plant including for Solar Modules, Inverters, Steel, other Contracts for Civil works, EPC contract, AC / DC switch gears and their panels, Instrumentation and Metering clearly showing Scheduled Date of Delivery/Supply, Actual Receipt, Port and Customs Clearance as under with supporting Contract / Agreements etc.:

Date of Contract	Statutory Clearance	Scheduled Date of Completion of Contract	Actual date of Completion of Contract	LD amount for delay or compensation provisions	Reasons & Justification of delay, if any

(x). Penalty / Compensation Damages claimed / received from the suppliers, contractors etc. in case of failure to adhere to time limit as per contract and if attracts any penalty for such delay which affects the Commissioning of the Solar project.

(xi). Details of various bills/invoices for above in following format:

Bill of Material	Unit / Qty	Inspection date	Dispatch Date	IGST/GST Challan	LR Copy	Goods Receipt date	Site Goods Receipt Memo date

(xii). Details of Evacuation facilities, transmission line route alignment map from Solar Project Switch yard up to GETCO sub-station, relevant bay details at both end, scope of work of Petitioner for above and details of relevant contract, when aforesaid work completed by GETCO or Petitioner with supporting documents and RoW issues, delay, if any.

(xiii). Details regarding achievement of financial closure.

(xiv). Any additional details if so desire by the Petitioner to substantiate its claim.

- 4.2. Accordingly, the Petitioner is directed to provide above details alongwith comprehensive chart identifying each of issue including relevant documents, evidence etc. with explanation of each delay / overlapping delay with specified period and dates. We further note that the Petitioner has referred to various judgements in support of its arguments in the present matter but has not submitted to the Respondent. We therefore, direct the Petitioner to file the same alongwith above duly supported through affidavit with a copy of same to the Respondent to be part of record of present Petition at the earliest with copy to the Respondent. The Respondent is at liberty to file additional reply/submissions on receipt of above from the Petitioner within 7 days thereafter.
5. With consent of Ld. Advocates for both parties, the next date of hearing is 12.08.2021 at 11:30 A.M.
6. We order accordingly.

Sd/-

[S.R. Pandey]
Member

Sd/-

[Mehul M. Gandhi]
Member

Place: Gandhinagar.

Date: 04/08/2021.