

**BEFORE THE GUJARAT ELECTRICITY REGULATORY COMMISSION
GANDHINAGAR**

Petition No. 1998 of 2021.

In the matter of:

Petition seeking extension of Scheduled Commercial Operation Date (SCOD) on (i) account of Force Majeure Events and (ii) delays solely attributable to Gujarat Energy Transmission Corporation and consequential reliefs under Section 86(1)(f) of the Electricity Act, 2003 read with Article 10.4 of Power Purchase Agreement executed between Goodwatts WTE Jamnagar Pvt Limited and GUVNL.

Petitioner : Goodwatts WTE Jamnagar Pvt. Limited
Represented by : Ld. Senior Counsel Mr. Mihir Thakore and Advocates Ms. Poonam Verma & Mr. Saunak Rajguru, Ms. Gayatri Aryan, Mr. Tabish Samdani and Mr. Tarlik Damani alongwith Mr. Aditya Handa, Mr. Arjun Handa, Mr. Ashish Mehta, Mr. Anup Pillai and Mr. Pankaj Patel

V/s.

Respondent No. 1 : Gujarat Urja Vikas Nigam Limited
Represented by : Ld. Advocate Mr. Anand Ganesan and Ms. Shailja Vachhrajani

Respondent No. 2 : Jamnagar Municipal Corporation
Represented by : Nobody was present.

Respondent No. 3 : Gujarat Energy Development Agency
Represented by : Mr. H.S. Silajiya

Respondent No. 4 : Gujarat Energy Transmission Corporation Limited
Represented by : Ld. Advocate Mr. Anand Ganesan and Mr. Kanti Bhuva and Mr. K.H. Rathod

Respondent No. 5 : State Load Despatch Centre - Gujarat
Represented by : Ld. Advocate Mr. Anand Ganesan alongwith Mr. A.B. Rathod and Mr. D.N. Shah

CORAM:

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

Date: 18/11/2021

DAILY ORDER

1. The present matter was listed on 12.11.2021 through virtual hearing.
2. Heard Ld. Senior Advocate Shri Mihir Thakore for the Petitioner on factual aspects of the present matter.
 - 2.1. Referring prayer clauses, it is argued that the events pleaded in the Petition qualify as Force Majeure events affecting completion of the WTE project for which Petitioner is entitled to extension of SCOD. It is submitted that the project is almost ready and is commissioned on 03.11.2021. It is submitted that the same is conveyed to GEDA for issuance of commissioning certificate of the project. The Petitioner also wrote a letter to GUVNL on 03.11.2021 and conveyed it regarding non-commissioning of the project in March April due to some Force Majeure Events.
 - 2.2. It is submitted that the Petitioner has setup Municipal Solid Waste (MSW) based Waste to Energy (WtE) Power Project of 7.5 MW under Gujarat Waste to Energy Policy, 2016 in the State of Gujarat.
 - 2.3. He referred the National Electricity Policy 2005, the provisions of the Tariff Policy 2016, Preamble and Objective of Gujarat Waste of Energy Policy, 2016 notified by Govt. of Gujarat. Also, he has referred the provision of Concession Agreement executed with JMC on 25.04.2017, provisions of WTE Tariff Order dated 10.11.2016 and also various provisions of the PPA was executed with the Respondent on 30.05.2018.
 - 2.4. It is further argued at length on following issues as an element of 'Force Majeure' leading to delay in commissioning of the WtE project:
 - (i) Delay in availability of approach road for the project
 - (ii) Delay in raising the heights of overhead lines on the road posing as an obstruction for transport of equipment to the project site
 - (iii) Delay in granting of statutory clearances
 - (a) Delay caused in construction of Chimney on account of belated approval granted by Ministry of Defence;
 - (b) Delay in RTU connectivity
 - (c) Delay on part of GETCO to provide S/S for the project

- (iv) Delay due to heavy floods on the project site
- (v) Delay due to law and order issues faced by sub-contractor hindering civil construction work at the project
- (vi) Delay caused due to COVID-19
 - (a) Delay due to lack of man power, re mobilisation, covid positive cases
 - (b) Delay caused due to disruption in supply of equipment

- 2.5. Referring the definition of SCOD, it is submitted that there is delay in achieving Scheduled Commercial Operation Date (SCOD) occasioned for multifarious reasons. SCOD means 30.06.2020 within control period of GERC Order No. 4 of 2016 dated 10.11.2016 as extended by the Commission upto 31.03.2021.
- 2.6. Referring the Clause 4.1 in respect of Obligation of power producer, Clause 4.2 in respect of Obligation of GUVNL and Clause 4.3 with regard to LD for delay in commissioning the project beyond SCOD, it submitted that the Petitioner's project is entitled for condonation of delay and not liable for any adverse financial implications in terms of levy of LD or encashment of BG or reduction of tariff entitlement as per the Commission's WTE Order, 2016.
- 2.7. It is further argued that delay in commissioning of the 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.
- 2.8. It is argued that clause 8.1.(b) provides for force majeure exclusions, whereas Clause 8.1 (c) states about 'Notices' to be issued. It is also argued that during the period of covid pandemics, on account of restrictions on international travel, the technical team was not to be able to visit the site. This cannot become ground for denying the extension when the people cannot come in India. Even if any delay occurs, the consequence cannot be a complete exclusion of the benefit of the force majeure.
- 2.9. 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 flood in July 2020 to August-2020. 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.
- 2.10. 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.

2.11. In support of the case, he relied upon the following judgements:

- (a) 2020 5 SCC 54, page 93;
- (b) 1961 3 SCR 1020: AIR 1961 SC 1285, Page 959 and 964;
- (c) (2017) 14 SCC 80.

2.12. He has referred the para 20 of the petition and submitted that it was an obligation on part of JMC to provide approach road and accordingly the same was provided to the Petitioner only in January 2021, i.e. after a delay of 908 days. Moreover, there is delay of 41 days caused by low height overhead power lines on the alternate route in the absence of original approach road, is not on account of the Petitioner and beyond its control and scope. Also, chimney height clearance was granted only on 11.03.2020 by Ministry of Defence and chimney was finally erected only on 03.10.2020.

2.13. It is submitted that there is also delay in RTU connectivity and only after getting RTU connection, substation allotted to the Petitioner was charged by GETCO and PGVCL on 26.06.2021. It is also submitted that there is some delay on part of GETCO to provide Substation to the Petitioner's project and connectivity agreement was signed between the Petitioner and GETCO on 22.03.2021 wherein it was specified that evacuation will happen through transmission system interconnection point at 66 kV Navagam Ghed S/s -s inle circuit transmission line whereas the GETCO's 66 kV Navagam Ghed S/s was charged on 08.06.2021.

2.14. It is also submitted that the Petitioner also sought help from the Police to resolve the issue raised by local goons and harassment by local antisocialists to various agencies working on the project. However, despite having adequate measures, such instances of extortion etc. continued and therefore, Thermodyne was forced to stop civil construction works in view of threat to life and security of their officials for about 57 days.

2.15. It is further submitted that there is heavy rainfall on the project site on 06.07.2020 and on 16.07.2020 floods were aggravated by excess water from Dam and opening of all lock gates on river which resulted in severe floods in the project site from 06.07.2020 to 10.08.2020. It was informed to the Petitioner that the project site was totally flooded and office of Thermodyne also got immersed in the water which is continued for 35 days from 06.07.2020 and normally restored on 11.08.2020. The Petitioner took measures to mitigate the damage caused by floods and deployed additional labour, machinery and equipment to expedite the works to remedy the delay caused due to such floods. It is argued that photographs filed itself evidenced the situation of flooding at site.

2.16. It is also submitted that due to nation-wide lockdown imposed by Central Government and imposed restrictions, the project's manpower was decided to return to their respective States and returned back in a phased manner around September/October

2020 and further asked them to mandatorily quarantine for a period of 14 days before getting to work on the project site. Further there are also key managerial personal, workers, employees of the Petitioner's company tested positive for Covid-19 at different stages of the project, which hindered the works.

- 2.17. It is also submitted that the supply of the key pre-processing units was disrupted since March 202 due to COVID-19 as the same is being supplied by Untha and Komptech which are European suppliers and the SAT of pre-processing equipment could not be possible due to foreign travel restriction. In view of this, the Petitioner is scheduling the erection and commissioning of pre-processing equipment in the month of August 2021.
- 2.18. 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.
- 2.19. 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.
- 2.20. Ld. Senior Counsel for the Petitioner requested the Commission to give another date for completing the arguments in the present matter and continuing decision regarding no coercive action by Respondent GUVNL till next hearing.
3. Considering the request of the counsel of the Petitioner, the matter is listed for hearing on 24.11.2021 at 11:30 A.M. We also note that Ld. Sr. Adv. Mr. Thakore appearing on behalf of Petitioner requested that till next hearing the decision regarding no coercive action by the Respondent GUVNL may be continued which is not objected by Respondent GUVNL, accordingly the same stand continued till next hearing.

Sd/-
[S. R. Pandey]
Member

Sd/-
[Mehul M. Gandhi]
Member

Place: Gandhinagar.
Date: 18/11/2021.