

ODISHA ELECTRICITY REGULATORY COMMISSION
BUDYUT NIYAMAK BHAWAN
PLOT NO.-4, CHUNOKOLI, SHAILASHREE VIHAR
BHUBANESWAR - 751021

Present: Shri G. Mohapatra, Officiating Chairperson
Shri S. K. Ray Mohapatra, Member

Case No. 100/2021

Sri Avantika Power Projects Pvt. Ltd.	Petitioner
Vrs.		
GRIDCO	Respondent

In the matter of: Application under Section 86(1)(f) of the Electricity Act, 2003 read with other applicable provisions of Law seeking adjudication of a dispute arising from the Power Purchase Agreement executed with GRIDCO Ltd.

For Petitioner: Shri Kulamani Biswal, advocate on behalf of Shri Avantika Power Projects Pvt. Ltd.

For Respondents: Shri A. K. Mishra, Legal Head, GRIDCO, Ms. Sasmita Patjoshi, AGM (PP), GRIDCO and Shri P. K. Mohanty, Sr. Advocate on behalf of GRIDCO.

ORDER

Date of Hearing: 12.04.2022

Date of Order: 07.05.2022

The petitioner, M/s. Sri Avantika Power Projects Pvt. Ltd. (SAPP), has constructed Saphthdharma Small Hydro Electric Project (SHEP) of 18 MW (3x6 MW) capacity on river Jamjhora near Bakuli Village in the district of Koraput (Odisha) at its own cost. M/s. SAPP had signed MoU with Govt. of Odisha on 19.08.2002 for construction of 15 MW Saphthdharma SHEP, subsequently installed capacity was enhanced to 18 MW on 15.10.2007. The Techno Economic Clearance (TEC) for this 18 MW SHEP was accorded in the 58th meeting of the State Technical Committee meeting (STC) at an estimated cost of Rs.126.97 crores (including IDC), vide office memorandum dated 28.04.2014 with stipulation that no further enhancement in project cost shall be allowed. Implementation Agreement (IA) was executed between developer and Govt. of Odisha (represented by EIC) on 28.10.2014 for implementation, operation and maintenance of the 18 MW Saphthdharma SHEP. The Power Purchase Agreement (PPA) was executed with GRIDCO on 29.10.2014 which is the State Designated Entity for signing PPA with Generating Company(ies). The said PPA was approved by

Commission, vide order dated 04.07.2015 in Case No.75 of 2014. As per IA, the scheduled period of completion was 24 months from the date of signing of IA. However, as per PPA the project was to be completed within 36 month from the date of signing of IA. The final extension of time for completion of the project was granted up to December 2021 by Department of Energy, Govt. of Odisha (GoO) vide letter No.5899 dated 02.07.2021 without any escalation in the approved project cost. GRIDCO is purchasing power from this SHEP @ Rs.4.26 per unit i.e. at the levelised generic tariff determined in OERC order dated 15.01.2014 in Case No.80/2013 for the 2nd control period i.e. from FY 2013-14 to 2017-18.

2. The Petitioner through this Petition seeks the applicability of 3rd control period for determination of tariff in terms of the PPA instead of 2nd control period and prays to direct GRIDCO to pay @ Rs.5.07 per unit instead of Rs.4.26 per unit towards the energy generated and supplied to the Respondent-GRIDCO and prays further to direct GRIDCO to pay the differential amount of Rs.18,60,975.97 (i.e. 1,16,48,331.08 – 97,87,335.11) for the month of October, 2021 immediately.
3. The petitioner has submitted that the Force Majeure Conditions as per the Implementation Agreement (IA) which are beyond the control of Developer are as follows:

“12. Force Majeure:

12.1. In the event of either party being rendered unable by Force Majeure to perform any of its obligation required to be performed by them under this agreement, the relative obligations shall upon notifications to the other party be suspended for the period of Force Majeure.

12.2. The term ‘Force Majeure’ as employed herein shall mean (A) Act of God, War, revolt, riot, fire, flood and typhoon and (B) in its application to the company, Act of State being any Act omission restraint, delay or refusal of any of the Governmental agencies, in giving confirming, extending any or all the permits, licenses, clearances, way leaves, approvals, sanctions and the like, necessary for the construction, operation and maintenance of the project, or the procurement, transport, storage and use of any spares, manpower, etc., for the project.”

4. The Petitioner- M/s. SAPP has stated that the commissioning of the project was delayed upto October 2021 (beyond 2nd control period) due to the following reasons:
 - (a) Koraput and Malkangiri districts are very sensitive zones in terms of socio & political, law & order situation leading to local disturbances and stoppage of work. The sensitive socio political environmental around the site, compulsory

employment of the local labourers, stoppage of work due to large no. of local festivals etc. derailed the efforts to complete the project on time.

- (b) Delay in getting the Blasting licensees from Government agency.
- (c) The site witnessed continuous rains in the monsoon months for couple of years, thereby halting site access & associated site handling, inspection, supply and construction activities.
- (d) Flooding of major areas like power house despite completion of initial dewatering activities and construction of protection wall to safeguard against it.
- (e) Lockdown during Covid-19 affected progress of project.

5. The Petitioner-M/s. SAPP has further submitted that the blasting licenses from the Collector & District Magistrate of Koraput was received on 27.11.2017. In absence of such permission, work could not be started. As per IA, such delay in getting permission from Govt. agency is covered under Force Majeure Condition. Hence, the effective date of the construction of the project would actually start only after getting blasting permission (i.e. on 27.11.2017) and the schedule date of completion would be 36 month from thereon i.e. 26.11.2020 as per PPA.
6. The petitioner stated that the PPA with GRIDCO outline the terms of power sale. The relevant portion of the PPA is reproduced hereunder:

“1 (b) (32): OERC Tariff Regulations-shall mean the OERC Generic Tariff of Renewable Energy Sources for the second control period (2013-14 to 2017-18) Order dated 15.01.2014 on Suo Moto Petition No. 80 of 2013 and subsequent orders/amendments as applicable in this respect from time to time.

x x x x x

6.1.1 The tariff for sale of power by Shri Avantika Power Projects Pvt. Ltd. to GRIDCO shall be determined by the OERC as per the tariff norms notified by OERC vide its Order dated 15.01.2014 in Suo Moto Petition in Case No. 80 of 2013 and any amendment thereto from time to time.

x x x x x

6.1.6 The tariff and financial norms notified by OERC vide its Order dated 15.01.2014 in Suo Moto Petition in Case No. 80 of 2013 or any amendment thereto shall be applicable to this project (for determination of projects specific tariff) provided the same will be commissioned during the second control period i.e. 2013-14 to 2017-18. Or else, the tariff norms as decided by OERC for subsequent control period shall be applicable.”

7. The petitioner has further submitted that the project cost has increased from the approved estimated cost of Rs.126.97 Crore to Rs. 165 Crore (approximately) on

account of carrying cost due to the force majeure events not attributable to the petitioner. Even though the petitioner has suffered losses in terms of the carrying costs, still then petitioner is confining the present petition for the tariff as applicable for the 3rd control period as per the PPA and is not seeking the actual carrying cost of the project. However, the petitioner has stated that they are in the process of filing petition for project specific tariff as per the stand taken by the respondent-GRIDCO.

8. The Petitioner-M/s. SAPP has stated that delay in execution of the project was beyond its control and the project could be commissioned in October, 2021, which is falling well within the 3rd control period in accordance with clause 6.1.6 of the PPA. Hence, the project is entitled to get generic tariff @ Rs.5.07 per kWh as per Commission's order dated 16.02.2019 in Case No.46 of 2018 for the 3rd control period 2018-19 to 2022-23. Accordingly, the petitioner had raised bills to GRIDCO, but GRIDCO has paid the tariff @ Rs. 4.26 per kWh considering the project completion in the 2nd control period.

9. The Respondent GRIDCO has following submissions:

(a) The PPA was executed with the petitioner for supply of power from the subject SHEP as per tariff norms notified by the Commission, vide its order dated 15.01.2014 in Suo Moto petition No.80 of 2013 & any amendment thereto from time to time by the Commission. The PPA was approved by the Commission, vide order dated 04.07.2015 in Case No.75 of 2014, with a direction to the petitioner to commence its project work at site within March, 2016 failing which the approval of the PPA shall be withdrawn.

(b) The Clause No.6.1.5 of the PPA dated 29.10.2014 stipulates as follows:

“6.1.5. The developers shall file before OERC for the project specific tariff on annual basis or for the block period of 5 years as the case may be so as to be decided by OERC”

In accordance with the aforesaid clause of the PPA dated 29.10.2014, admittedly the petitioner has not yet filed its application for the project specific tariff on an annual basis without any rhyme and reason even after commencement of its extended Commercial Operation Date (COD) i.e. 03.11.2021 before this Commission. As per IA, the project was to be completed within a period of 24 months and as per PPA dated 29.10.2014, the completion date of project was 36 month from the date of execution of PPA i.e. by 28.10.2017 which comes under

2nd control period (i.e. 2013-14 to 2017-18). Delay in execution of project is due to various events/reasons attributable to its own action, but not within the realm of Force Majeure. The COD of the project was delayed and pursuant to request of petitioner for extension of time for completion of the project it was granted from time to time and final extension was granted upto December 2021 without any escalation of the project cost.

- (c) As per Clause No.9.0 (iii) of the PPA, in case of delay in commissioning, petitioner shall be liable to pay to GRIDCO for less energy which could not be generated or exported to GRIDCO due to delayed commissioning. This shall be compensated at the rate of actual market price of non-solar RECs during that period.
 - (d) Since the schedule completion of the project of the petitioner falls within the 2nd control period i.e. 2013-14 to 2017-18 in view of the Commission's order dated 10.12.2013 in Case No.80 of 2013, the petitioner is entitled to get the levellised Generic Tariff for the 2nd control period i.e. @Rs.4.26 per kWh towards the energy generated & transmitted and after completion of the project in terms of PPA. The petitioner is required to file its Project specific tariff petition now.
 - (e) The final time extension for completion of the project was approved by DoE, GoO vide its letter dated 02.07.2021 upto December, 2021 without any project cost escalation. In view of above, the project specific tariff of the developer needs to be decided based on actual project cost limiting to the project cost so approved by Government of Odisha.
 - (f) The petitioner is also not otherwise eligible to get the levellised Generic Tariff for the 3rd control period solely because of its delay in commissioning of the project and increase of its project cost from Rs.126.97 crores to Rs.165 crores (approx.) in absence of any approval of the Implementing Agency.
10. Heard the parties through virtual mode of hearing. Considering the submissions of petitioner and respondent-GRIDCO, the Commission has observed the followings:
- (a) The construction could not commence due to delay in getting permission from Govt. agency for blasting, which is also covered under Force Majeure condition as per Clause 12 of IA. This is considered to be beyond the control of the petitioner.

- (b) The challenges in execution of project in Koraput district & other reasons mentioned by the petitioner are considered to be cause of further delay in commissioning of the SHEP.
- (c) On account of the above difficulties, Department of Energy, GoO has considered the request of the petitioner and granted extension of time for completion of the project from time to time and final extension was granted upto December, 2021 without any escalation of the project cost and the SHEP was commissioned during October, 2021 i.e. before final extension date.
- (d) The petitioner has sought for applicability of the relevant control period for determination of tariff and the project escalation cost is not the subject matter of the present petition and the petitioner has further submitted that the project is entitled to get the Generic Tariff as per the control period during which the project has been actually commissioned.
- (e) As per PPA, the project was to be implemented in 36 month from the date of signing of the Implementation Agreement excluding any delay due to force majeure conditions.
- (f) The Commission vide its order dated 16.02.2019 in Case No. 46/2018 has considered the normative capital cost of Rs.707 Lakh/MW for determination of tariff for SHEPs having capacity between 5 MW and 25 MW. In this order, the Commission has also fixed all the operating and financial norms for calculation of tariff of SHEPs.
- (g) The State Technical Committee has approved the project cost at Rs.126.97 Crore for the subject 18 MW SHEP. Accordingly, per MW project cost comes as Rs.705.39 Lakh.
- (h) As per Clause (1) (b) (7) of the PPA the capital cost shall mean the actual completed cost of the project as on the cutoff date as per the audited accounts of the company certified by the Chartered Accountants and approved by STC or the normative/benchmark capital cost as fixed by OERC whichever less. The same shall be the basis for determination of project specific tariff.
- (i) Though the petitioner has stated that the project cost has been increased from Rs.126.97 Crore to Rs. 165 Crore (approximately) on account of carrying cost due to the force majeure events, the same has not been approved by the STC.

11. In view of the above observations, the Commission found that the commissioning of the subject SHEP has been delayed due to force majeure conditions and various other reasons mentioned above which were beyond the control of the petitioner. Therefore, as per Clause 6.1.6 of the PPA, the tariff norms as decided by the Commission in its order dated 16.02.2019 in Case No. 46/2018 for the 3rd control period shall be applicable for the subject SHEP of M/s. SAPP as the project has been commissioned during the 3rd control period. However, in the PPA there is no mention about applicability of generic tariff for the subject SHEP. Therefore, considering the approved project cost of Rs.126.97 Crore and applying the operating and financial norms for calculation of tariff of SHEPs, the computed tariff for the subject SHEP of M/s. SAPP works out to be Rs.5.06 per kWh and the Commission approves the tariff of Rs.5.06 per kWh for Saphthdhara SHEP of the petitioner M/s. SAPP and the same shall be applicable w.e.f. the date of commercial operation. The Commission directs GRIDCO to settle the bills of the petitioner accordingly. It is further to mention that, in the BSP order of the Commission for the current FY 2022-23, while computing the ARR of GRIDCO, the tariff for the Saphthdhara SHEP of the petitioner has been considered @ Rs.4.26 per kWh based on the submission of GRIDCO. The shortfall in ARR of GRIDCO on account of such revision of tariff for Saphthdhara SHEP in the present petition shall be considered in the ARR for the next year or in the Truing Up of GRIDCO's account. The Petitioner is at liberty to file petition for project specific tariff in future if there is any change in the approval of the project cost by State Technical Committee.
12. The case is accordingly disposed of.

Sd/-
(S. K. Ray Mohapatra)
Member

Sd/-
(G. Mohapatra)
Officiating Chairperson