

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

Present: **Shri S C Mahapatra, Chairperson**
 Shri G Mohapatra, Member
 Shri S K Ray Mohapatra, Member

Case No. 59/2023

M/s. GRIDCO Ltd.	Petitioner
Vrs.		
M/s. S. N. Mohanty & Others	Respondents

In the matter of: **Application under Section 86 (1) (f) of the Electricity Act, 2003 and other enabling provisions along with direction of Hon'ble Commission vide Order dated 20.12.2021 in Case No.58 of 2021 regarding seeking direction of Hon'ble Commission for amendment of the Power Purchase Agreements (PPA) dated 21.08.2010 executed with 8 nos. of Solar PV project developers of 1 MW each commissioned in the State of Odisha under RPSSGP scheme.**

For Petitioner: Shri B. K. Das, Sr.GM and Ms. Shaswati Mohapatra, Manager (RE),
GRIDCO Ltd.

For Respondents: Shri R. P. Mahapatra, Authorized Representative of M/s. Molisati Vinimay Pvt. Ltd., M/s. Vivacity Renewable Energy Pvt. Ltd., M/s. S. N. Mohanty, M/s. Shri Mahavir Ferro Alloys Pvt. Ltd. and M/s. Jay Iron and Steel; Ms. Sasmita Patjoshi, Joint Director, OREDA; Shri Ritwik Mishra, TPCODL; Shri K. C. Nanda, GM (RA &Strategy), TPWODL; Representative of SLDC; and Ms. Sonali Pattnaik, ALO(I/c), DoE, GoO. None appears on behalf of remaining Respondents.

ORDER

Date of Hearing: 25.07.2023

Date of Order: 14.08.2023

1. The Petitioner- M/s. GRIDCO Ltd. has filed the present petition under Section 86 (1) (f) of the Electricity Act, 2003 and other enabling provisions along with direction of this Commission, vide Order dated 20.12.2021 in Case No.58 of 2021, regarding seeking direction of the Commission for amendment of the Power Purchase Agreements (PPA) dated 21.08.2010 executed with 8 nos. of Solar PV project developers of 1 MW each commissioned in the State of Odisha under RPSSGP scheme.
2. The Petitioner has prayed before this Commission to issue appropriate direction for amendment of the PPAs dated 21.08.2010.

3. The Petitioner- M/s. GRIDCO Ltd. has submitted the following:
- (a) GRIDCO has executed Power Purchase Agreement (PPA) with 8 nos. of Solar PV Developers (each of 1 MW capacity) for procurement of solar power on 21.08.2010, under “Rooftop PV & Small Solar Power Generation Programme” (RPSSGP) Scheme of MNRE, GoI.
 - (b) The Commission, in its Order dated 09.07.2010 in Case Nos.58/2010 – 105/2010, has determined the tariff @ Rs.18.52/- per kWh with specified technical parameters and financial parameters for the Solar Power Developers (SPDs) for procurement of power under the RPSSGP Scheme. GRIDCO is paying the approved tariff to all 8 nos. of SPDs since FY 2011-12.
 - (c) The Commission has approved 8 nos. of PPAs executed by GRIDCO with the SPDs under the RPSSGP Scheme as per Section 86 of EA 2003, vide Order dated 04.04.2012 in Case No.84/2011.
 - (d) As per the direction of OERC’s Order dated 20.12.2021 passed in Case No. 58/2021, a draft amendment PPA dated 21.08.2010 was prepared by GRIDCO and shared, vide GRIDCO’s letter dated 26.09.2022, with all the 8 nos. of Solar Developers under RPSSGP Scheme for their views to include Penalty Provision & Billing on the basis of energy export statements instead of Joint Meter reading data at para 20 & 21 respectively.
 - (e) Only 6 nos. of SPDs submitted their views, out of which, M/s Vivacity Renewables, M/s Shri Mahavir, M/s. Molisati Vinimay and M/s Jay Iron did not agree to the proposed amendment of the PPAs for inclusion of any Clause for penalty due to shortfall in generation. Whereas, M/s S. N. Mohanty & M/s Raajratna Energy Holdings Pvt. Ltd. submitted that the PPA does not stipulate minimum generation or minimum CUF.
 - (f) A meeting was conducted with 8 nos. of SPDs to discuss on the amendment to the PPA as per the directives of the Commission. In the meeting dated 11.01.2023, it was agreed by the parties that the term “Joint Meter Reading” shall be replaced with “Certified Energy Account issued by SLDC/EBC” in Clause 5 (a) (I) and (II) & Clause 5 (b) (iv) of the existing PPA dated 21.08.2010. The draft amendment to the PPA dated 21.08.2010 will be filed before OERC for approval and the decision of the Commission on the new

Clause 'Penalty for Shortfall' in the draft amendment to the PPA will be abided by all the parties.

- (g) It was also decided to enclose all the comments received from the SPDs on the draft amendment to the PPA dated 21.08.2010 along with the Application to be filed by GRIDCO before OERC. The draft Record note of Discussion of the meeting dated 11.01.2023 was shared with all the 8 nos. of SPDs vide mail dated 20.01.2023 for comments.
- (h) In response, the SPDs commented that, "Para 2 of the draft Record Notes of discussion may be deleted and replaced with the following: *"The Solar Developer did not agree to the inclusion of any Clause for Penalty for Shortfall"*. The SPDs also mentioned that Para 3 of the draft Record Notes of discussion may also be deleted as there is no justification or necessity of intimating the Commission about the proceedings of the meeting.
- (i) Due to the disagreement between the parties the amendment to the PPAs dated 21.08.2010 could not be signed as directed by the Commission vide Order dated 20.12.2021 passed in Case No.58/2021. In view of this, GRIDCO has approached the Commission for intervention in the matter to carry out the directives as mentioned in the Order dated 20.12.2021 and issue appropriate direction in this regard.

4. Shri R. P. Mohapatra on behalf of the Respondents M/s. Shri Mahavir Ferro Alloys Pvt. Ltd., M/s. Vivacity Renewable Energy Pvt. Ltd., M/s. Jay Iron and Steel, M/s. Molisati Vinimay Pvt. Ltd. and M/s. S. N. Mohanty has submitted the following:

- (a) The Commission in Para 20 of its Order dt.20.12.2021 in Case No.58/2021 has stated that:

"20. The Commission observed that GRIDCO had filed the present petition in view of the aforesaid directions of the Commission in its orders dated 05.02.2018 and 09.04.2019. However, from the submissions made by the respondent SPDs in the present case, it is observed that none of them have agreed for inclusion of proposed penalty clause in the PPA for shortfall in generation. The Commission observed that now solar power is available at much cheaper rate than the tariff of Rs.18.52/Kwh fixed for the subject 1 MW solar plants. In case of supply of less power by the SPDs it is a loss to the SPDs and not to GRIDCO. It is a fact that the normative CUF of 18.5% is not available to the solar generators uniformly throughout the State. That was accepted in absence of recorded data for tariff purpose only at that point of time. It has no relationship with the actual generation which gradually slides over time

due to deterioration of the solar cells. However, it will be justified to consider compensation to GRIDCO for shortfall in generation by the SPDs when GRIDCO pays any penalty for not meeting the RPO target for any contract year. In case GRIDCO pays any penalty for not meeting its RPO target, then the developer should compensate GRIDCO and this compensation shall be equal to the penalty payable (including RECs) by GRIDCO. It shall be proportional to the shortfall in solar energy generation during the Contract Year. Thus, GRIDCO may claim such compensation for shortfall in solar generation only when penalty is levied on it for such shortfall. The parties are directed to incorporate the above compensation provision in the PPA and submit the amended PPA for the approval of the Commission.”

- (b) The Commission has also passed orders previously on the submissions of GRIDCO relating to penalty for shortfall in generation. Order dt.05.02.2018 in Case.No.44 & 45 of 2016 filed by Shri Mahavir Ferro Alloys Pvt. Ltd. & Vivacity Renewable Energy Pvt. Ltd. states that:

“14. XXXXXXXX

Regarding deduction of Rs.0.61/ Kwh, for not maintaining 1 lakh units per month generation standard, GRIDCO stated that the same has been agreed in a meeting between the parties subsequent to the signing of PPA. The Petitioner stated that in that meeting it was decided that average annual generation would be 12 lakh units and not one lakh unit per month. The Commission observes that this modification is outside PPA and has not been approved (by Commission) yet. Therefore, in case it has been agreed by parties, the same is to be included in PPA with appropriate amendment/ inclusion and placed before Commission for approval.”

Order dated 09.04.2019, in Case No.28 & 29 of 2018 states that:

“13. *But now in the present cases, on the above issue of deduction from the bills towards lesser generation, the petitioners have submitted that the record note of discussions in the meeting held on 05.04.2013 is not an accepted notes of discussion, as it has been unilaterally prepared and not signed by the solar PV developers.*

14. *As per law any power purchase by GRIDCO is to be proceeded by approval of the Commission under Section 86 (1) (b) of Electricity Act, 2003. Thus the transactions till date, between parties has not sanctify of law. Therefore, as per our order dated 05.02.2018 the parties were advised to bring about changes in the PPA on this issue and place the same before the Commission for its approval. However, till date this has not materialised. In absence of a legally bound agreement unilateral deduction for lesser generation is not permissible. However, once the PPA is approved GRIDCO shall act upon the same. We direct parties to file the PPA before the Commission within three months for approval.”*

Order dt.22.06.2021, in Case No.53 & 54 of 2020 states that:

“57. *The petitioners in the present petitions have again raised the same issues which were raised first time in the year 2016 and again in 2018. The*

Commission has also given various directions again and again to resolve these issues in their orders. The onus of implementing those orders mostly lie on GRIDCO. Let us examine our orders in this regard on 05.02.2018 and 09.04.2019. The summary is as follows:

(a) XXXXXXXX

(b) XXXXXXXX

(c) In absence of a legally bound agreement unilateral deduction for lesser generation is not permissible. However, once the PPA is approved GRIDCO shall act upon the same. GRIDCO is directed to file the PPA before the Commission within three months for approval.

60. *Lastly, the GRIDCO's unilateral action of deducting penalty for lesser generation without incorporating relevant provisions in the PPA with our approval is a gross violation of our order. The Commission has categorically in Para 14 of their order has directed that "in absence of legally bound agreement unilateral deduction for lesser generation is not permissible. However, once the PPA is approved GRIDCO shall act upon the same. We direct parties to file the PPA before the Commission within three months for approval". Our order had been issued on 09.04.2019 which was more than two years ago. But GRIDCO has failed to take any action for approval of the revised PPA but rather has started unilateral deduction of penalty. This tantamounts to defiance of our order."*

(c) There was no condition for penalty for lesser generation in the guidelines of MNRE, GoI for execution of 1 MW Solar PV Projects under RPSSGP Scheme and the PPA was also approved by the Commission in its order dt.04.04.2012, without any remarks regarding penalty for lesser generation. The Commission have also accepted in Para 20 of its order dt.20.12.2021 in Case No.58/2021 that the CUF of 18.5% is not available to these 8 nos. Solar Generators uniformly throughout the state but was accepted in the absence of recorded data. Accordingly, the observations of the Commission at the end of Para 20 above are not logical.

(d) In addition, the direction of the Commission regarding payment of penalty/ compensation is also not justified in view of the following:

i. In the year 2010, when the SPVs were considered under the RPSSGP Scheme of MNRE, GoI, there was no penalty clause for lesser generation and no such provision was made in the PPAs executed with GRIDCO Ltd.

ii. There was no data available relating to the solar insolation in the different parts of the state and the assumption of 18.52% CUF and

annual generation of 1.621 MU is not based on any field data for Odisha and therefore could not be achieved.

- iii. GRIDCO Ltd. has already agreed to consider Annual Generation of 1.2 MU for the 1 MW SPVs (9.6 MU for 8 nos. SPDs) and unilateral deductions towards penalty was being made (without approval) accordingly for lesser generation.
- iv. The technology available for solar panels in 2010 was in the nascent stage. These panels are in use and will continue to be used for a period of 25 years from the date of commissioning, facing annual deterioration and therefore the generation was less compared to the modern thin film technology.
- v. Therefore, no guaranteed generation can be provided from these SPVs. Accordingly, there was no provision of penalty for lesser generation in the PPAs between GRIDCO Ltd and the SPDs. The question of penalty came with the installation of SPVs after due investigation of Solar Insolation and use of panels with modern thin film technology.
- vi. The Commission, while approving the PPAs executed on 21.08.2010 with the Respondents, passed orders on 04.04.2012 wherein the following observations were made in Para 14 & 15:

“14. Commission in view of such a scenario observes that both GRIDCO and Developers have not shown any disagreement in the PPA signed between them. It may, therefore, be presumed that executants of PPA have no problem with the PPA and they foresee no legal hassle in the future. However, it is seen that the PPAs are mostly of generic nature and there ought to be clarity on project specific points in each PPA such as name and details of interconnection point, delivery point and metering drawing. GRIDCO and project proponents are therefore advised to have a limited amendment of PPAs incorporating the specific details as mentioned above.

15. The Commission approves the 8 PPAs in question with the stipulations that modifications which are not in clarificatory in nature be carried out by GRIDCO and the respective developers without further reference to the Commission.”

Therefore, the direction to include a penalty clause for lesser generation after a lapse of long duration, based on generation of SPVs with new improved technology and against the objection of the SPDs is not valid.

- (e) In table 25 of the Para 312 of the Order dt. 23.03.2023, in Case No.78 & 79 of 2022 of the Commission determining the ARR & BSP of GRIDCO Ltd. for the FY 2023-24, the drawl from renewable sources during FY 2023-24 has been tabulated. As per the table, the requirement of energy from solar sources to meet the RPO is 2625 MU and accordingly, there is a shortfall of 465 MU. Inspite of sharp increase in the demand of power in the state, GRIDCO Ltd. has not taken adequate steps to meet its RPO and therefore should be liable to pay penalty. This cannot be shared by the 8 nos. of SPDs whose total generation is only 9.6 MU as accepted by GRIDCO Ltd.
 - (f) It has already been submitted that there will be huge loss to be borne by it in case of lesser generation for certain reasons which are beyond its control and the same was also accepted by the Commission, in Para 20 of its order dt.20.12.2021 in Case No.58 of 2021. Therefore, the Commission may provide for compensation to these SPDs rather than penalty, for lesser generation not due to any reasons attributable to the SPD.
 - (g) In view of the above submissions, the Respondents have prayed to reject the application of GRIDCO Ltd.
5. Another Respondent TPCODL has submitted that the Commission may direct M/s. GRIDCO and the generating parties to confirm acceptance of the terms and conditions of amended PPA.
6. Another Respondents TPWODL has submitted the following:
- (a) While allowing the electricity purchase, the Commission ensures that such an electricity purchased including the price, safeguards consumer's interest in consonance with the criteria laid down under section 61(d) of the Electricity Act, 2003. The purpose of cost-plus determination is to ensure that the tariff to the consumers is as low as possible, while covering all the reasonable costs and expenses.
 - (b) In addition to the direction of the Commission vide order dated 20.12.2021, the Applicant had prepared a draft amendment to the PPA dt.21.08.2010 and shared with 8 nos SPDs for their views vide letter dt.26.09.2022. Views of only 6 nos SPDs were received by the applicant and whilst disagreeing with the proposed amendment of the PPAs for inclusion of penalty clause for shortfall in

generation and that the PPA does not stipulate the minimum generation or minimum CUF.

- (c) A meeting was fixed with the 8 nos. SPDs by the applicant on 11.01.2023 to discuss the amendment to the PPA dt.21.08.2010. Subsequently, a draft Record Note of Discussion of the meeting dt.11.01.2023 was shared vide email dt.20.01.2023. The meeting was attended by members from GRIDCO and SPDs only, however, officials of concerned DISCOMs were not called for. In response, only 6 nos. Solar Power Developers have replied to the Applicant's email containing the draft Note of Discussion and had not agreed for inclusion of Penalty Clause for Shortfall and intimation to the Commission about the proceedings of the meeting.
- (d) In the absence of a minimum assured CUF or a minimum generation below which there should be a penalty, the Commission is requested to decide the matter safeguarding consumer's interest and the contractual obligations alike.

7. Heard the Petitioner and Respondents through hybrid mode and considered their oral arguments & written submissions. The Commission observes that:

- a) GRIDCO had executed PPA on 21.08.2010 with 8 numbers of Solar Power Developers (SPDs), each having installed capacity of 1 MW, for procurement of power under RPSSGP Scheme of MNRE, Government of India.
- b) The Commission, in its Order dated 09.07.2010, had determined the tariff at the rate of Rs.18.52/kWh for the SPDs for procurement of power under RPSSGP scheme and accordingly, GRIDCO has been paying the approved tariff to SPDs since FY 2011-12. Subsequently, the Commission has approved the PPAs executed by GRIDCO with the SPDs vide Order dated 04.04.2012 in Case No.84/2011.
- c) In terms of directions of the Commission and imported in the Order dated 20.12.2021 in Case No.58 of 2021, GRIDCO has filed the present petition seeking directions for amendment of the PPAs dated 21.08.2010 signed with 8 numbers of Solar Power Developers.
- d) The Commission, vide its Order dated 20.12.2021 in Case No.58/2021, had also directed GRIDCO to amend PPA to include penalty provision for shortfall in generation and billing on the basis of Energy Billing Centre (EBC) instead of

Joint Metering Reading (JMR) and to submit the amended PPA for approval of the Commission. Based on the amended PPA, GRIDCO may claim compensation for shortfall in solar generation from the 8 SPDs only when penalty is levied on GRIDCO for shortfall in meeting its RPO target in a year.

- e) A draft amendment to the PPA dated 21.08.2010 was prepared by GRIDCO and shared with all the 8 numbers of SPDs. The SPDs have agreed for inclusion of provision for billing on the basis of EBC (instead of JMR data). But, the SPDs disagreed for inclusion of penalty for shortfall in generation in the matter of amended PPAs.
- f) Due to disagreement between the parties, amended PPAs could not be executed and therefore GRIDCO has approached this Commission for intervention in issuance of appropriate directions to the parties in accordance with Order of the Commission dated 20.12.2021 in Case No.58 of 2021.

8. Section 61 (b) of the Electricity Act, 2003 mandates that generation, transmission, distribution and supply of electricity are conducted on commercial principles. Similarly, Section 61 (e) of the Act cast the responsibility on the Commission to ensure that while determining tariff the efficiency in performance of entities should be rewarded. The purpose is to ensure that tariff of consumers should be rational while covering all reasonable costs and expenses. The Commission, considering the importance of having a penalty provision in agreements relating to power purchase, did pass the Order dated 20.12.2021 in Case No 58/2021 to ensure fair play and bringing about efficiency in the performance. As submitted by the Petitioner, the SPDs have not agreed to the inclusion of penalty provision for shortfall in generation. Moreover, during the hearing, GRIDCO has also stated that all the PPAs executed till date have penalty provisions for less generation except the PPAs executed with 8 numbers of SPDs.

9. In view of the above observations and considering the submissions of the Petitioner & the Respondents, we find that in the instant case, the matters for adjudication had already been adequately deliberated in Case No.58/2021 and the Commission in its Order dated 20.12.2021 passed in Case No.58/2021 had directed as under:

“20. XXXXX.

XXXXX

XXXXX

However, it will be justified to consider compensation to GRIDCO for shortfall in generation by the SPDs when GRIDCO pays any penalty for not meeting the RPO target for any contract year. In case GRIDCO pays any penalty for not meeting its RPO target, then the developer should compensate GRIDCO and this

compensation shall be equal to the penalty payable (including RECs) by GRIDCO. It shall be proportional to the shortfall in solar energy generation during the Contract Year. Thus, GRIDCO may claim such compensation for shortfall in solar generation only when penalty is levied on it for such shortfall. The parties are directed to incorporate the above compensation provision in the PPA and submit the amended PPA for the approval of the Commission.”

10. Neither the Petitioner nor the Respondents have stated that the above Order of the Commission has been challenged in any higher forum. Further, as per the Petitioner, they had sent the amended draft PPA to all the SPDs in tune with the above directions of the Commission. But the SPDs did not agree for incorporation of the penalty clause in the PPA, for which the above directions of the Commission could not be materialized. Therefore, now we reiterate the earlier Orders dated 20.12.2021 of this Commission passed in Case No. 58 of 2021 and direct the Solar Power Developers to incorporate the compensation provision in the PPA along with the provision relating to billing on the basis of EBC and submit the amended PPA through GRIDCO for the approval of the Commission.
11. The case is accordingly disposed of.

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

Sd/-
(G. Mohapatra)
Member

Sd/-
(S. C. Mahapatra)
Chairperson