

**BEFORE THE GUJARAT ELECTRICITY REGULATORY COMMISSION
GANDHINAGAR**

Petition No. 2136 of 2022.

In the matter of:

Petition under Section 86(1) (f) of the Electricity Act, 2003 read with Articles 11 of the Power Purchase Agreement dated 08.07.2020 read with Supplementary PPA dated 25.04.2022 executed between Juniper Green Three Private Limited and Gujarat Urja Vikas Nigam Limited seeking refund of Rs. 31,23,372/- unilaterally and illegally deducted by GUVNL

And

IA No. 19 of 2022 in Petition No. 2136 of 2022.

In the Matter of:

Interlocutory Application on behalf of the Petitioner seeking interim relief for a direction to the Respondent GUVNL by the Commission to pay to the Petitioner Juniper 85% of the purportedly disputed amount i.e., Rs. 31,23,372/- on immediate basis pending adjudication of the Petition.

Applicant/Petitioner : M/s Juniper Green Three Pvt. Limited
F-9, First Floor, Manish Plaza - 1 Plot No. 7
MLU, Sector 10, Dwarka, New Delhi - 110075.

Represented By : Ld. Adv. Gayatri Aryan along with Mr. Jay Pandya
V/s.

Respondent : Gujarat Urja Vikas Nigam Limited
Sardar Patel Vidyut Bhavan, Racecourse Circle,
Vadodara - 390007.

Represented By : Ld. Adv. Ms. Ranjeeta Ramchandran alongwith Mrs.
Manisha Gajjar.

CORAM:

**Anil Mukim, Chairman
Mehul M. Gandhi, Member
S.R. Pandey, Member**

Date: 03/04/2024.

DAILY ORDER

1. The matter was kept for hearing on 23.02.2024.

2. Learned Advocate on behalf of Petitioner submitted that Petitioner is a power producer company having Solar Photovoltaic Grid Interactive power station of 190 MW capacity. The Solar Power Project is having two units, one is of 40 MW (Village: Kesardi) commissioned on 19.03.2022 and other having a 150 MW capacity at (Village: Choraniya) commissioned on 24.03.2022. The electricity generated from the above Solar Power Project is supplied to the Respondent GUVNL. It is further submitted that from the date of commissioning of the projects, the Petitioner is supplying power to the Respondent.
 - 2.1. It is further submitted that as per the Article 6 of the PPA, the Respondent has raised the invoices for the month of March 2022 and April 2022. The Respondent deducted Rs. 31,23,372/- from the invoices dated 17.05.2022 without providing justification for such deductions. It is further submitted that the Respondent did not respond to the Petitioner's queries regarding the deduction of amount from the said invoices raised. The Respondent thereafter orally conveyed that the deduction has been made on account of shortfall generation in the year 2021-22 due to reduced (CUF) Capacity Utilisation Factor.

 - 2.2. It is further submitted that Power Purchase Agreement was executed on 8th July 2020, read with supplementary PPA dated 25th April 2022 between the Petitioner and Respondent. Considering the capacity utilisation factor recorded during the period of (8) eight days, the Respondent had imposed penalty to the Petitioner for shortfall in the generation.

- 2.3. It is submitted that the deduction of amount of ₹31,23,372/- from the invoice in the month of April 2022 is untenable. Referring to Article 6.6 of the PPA executed between the parties, the Petitioner submitted that the Respondent is required to notify the Petitioner of the amount in dispute and is obligated to pay 85% of the disputed amount within a due date. As the notice has not been issued by the Respondent and thereby, violates the provisions of the PPA.
- 2.4. Ld. Adv. on behalf of the Petitioner submitted that incorrect interpretation of provisions of the PPA has been made by the Respondent. On the shortfall in generation based on the minimum CUF for the financial year 2021-22, the Respondent allegedly deducted the amount from the invoices though Article 3.1(iv) of the PPA state that calculation of CUF has to be done on yearly basis, pro rata based calculation of CUF is incorrect and contrary to the provisions of PPA.
- 2.5. It is further submitted that the dispute in the present Petition is related with calculation of CUF, which, according to article 3.1(iv)(a) of the PPA must be the “annual CUF” based on data collected over a period of year and not merely for 8 days as done by the Respondent. The provisions of PPA ought to be interpreted harmoniously in order to give efficacy and reasonableness. In the present case, the power plant has achieved COD nearly 8 days before the end of the fiscal year 2021-22. The calculation made by the Respondent for CUF is impractical to consider which is based on merely (8) eight days.
- 2.6. It is further submitted that the annual performance of Solar Power Plant is defined by Capacity Utilisation Factor (CUF) which is the ratio of actual electricity

output from the Power Plant to the maximum possible output during the year.

Referring to the Request for Selection (RFS) for the project dated 07.02.2020

read the definition of CUF as under :

*“Capacity Utilisation Factor” shall have the same meaning as provided in CERC (terms and condition for determination from renewable energy sources) Regulations, 2009 as amended from time to time. For illustration, CUF shall be calculated based on the annual energy, injected and metered at the delivery point. In any contract year if X MWh of energy has been metered out at the delivery point for Y MW Project capacity. $CUF = (X \text{ MWh} / (Y \text{ MW} * 8760)) * 100\%$.*

Referring to capacity utilisation factor as provided in the RFS, it is submitted that the capacity utilisation factor shall have the meaning as provided in CERC's Regulations, 2009 and therefore, reference to CERC Regulations is imperative and relevant for the whole issue under consideration.

- 2.7. It is further submitted that the Article 3 Obligation of the PPA provides for calculation of annual CUF i.e., on yearly basis.

Article 3.1 (iv) (a) provides the “criteria for generation” of power. The power producers shall maintain generation so as to achieve annual CUF within +10% and -15% of the contracted CUF till the end of 10 years from the COD, subject to the annual CUF of remaining minimum of 15% and within 10% and -20% of the contracted annual CUF till the end of the PPA duration of 25 years. The annual CUF will be calculated every year from 1st April of the year to 31st March next year.

Article 3.1,(iv)(b) provide “shortfall in generation” explicitly state that calculation of CUF will be on yearly basis.

- 2.8. It is submitted that the conceptually and practically CUF ought to be determined for duration of one year since the one year is appropriate time period to analyse the performance of the projects while taking all favourable and unfavourable

conditions in consideration to give the correct assumption of the projects. It is not just impractical but also impossible to clearly determine the performance of the projects on base of nearly 8 days from the date of commissioning of the project. The purported determination of CUF by the Petitioner for eight days period is incorrect. CUF determined for 8 days is unreliable as the performance of a Solar PV projects is highly susceptible to unfavourable conditions in a short period.

2.9. It is submitted that Article 1 of the PPA provides the “Contracted CUF” shall mean the % Capacity Utilisation Factor for the project mentioned in schedule 3 of the PPA and shall be allowed to be modified until one year from the commercial operation date and thereafter it shall remain unchanged for the balance term of the PPA. As per the Schedule 3, % CUF is 26.70 for the project location of the Petitioner.

2.10. It is further submitted that in this case the Respondent has failed to provide any proof of such injury in the form of loss or damage sustained on account of alleged shortfall in the annual CUF. Therefore, the Respondent is not entitled to levy penalty in absence of proof of loss suffered for alleged shortfall in generation for the financial year 2021-22.

3. Learned Advocate Ms. Ranjeeta Ramchandran on behalf of the Respondent GUVNL submitted that the present matter in which issue relates to the interpretation of shortfall in generation clause under the power purchase agreement (PPA) dated 8th July 2020, read with the supplementary PPA dated 25th April 2022.

- 3.1. It is submitted that the Respondent GUVNL had issued Request for Selection(RFS) on 07.02.2020 for purchase of 500 MW, Solar Power through Competitive Bidding Process. The RFS inter-alia provides definition of Capacity Utilisation Factor(CUF) under Section 2, Power Purchase Agreement under Section 3, Clause 3.9.3 (i) states about Criteria for Generation and Clause 3.9.3(ii) states Shortfall in Generation. It is further submitted that for the initial contract year, there is a shortfall in generation from the Solar Power Plant commissioned by the Petitioner. The Petitioner failed to achieve the contracted CUF of 26.7% or even minimum CUF of 22.70% and therefore in term of Article 3.1(iv)(b) of the PPA, in case there is shortfall in generation by the Petitioner, the Respondent GUVNL is entitled to compensation which is applicable on the shortfall in generation in a contract year. Thus, the Respondent has deducted Rs.31,23,372/- from the invoice of April 2022 raised by the Petitioner.
- 3.2. It is submitted that in terms of PPA, the initial contract year would be from 24th March 2022 to 31st March 2022, and thereafter all ensuing contract years will each fiscal year from post April 2022 onwards and compensation for shortfall in generation is calculated in terms of the shortfall for generation in a particular contract year. The deduction made by the Petitioner is in terms of the PPA.
- 3.3. It is further submitted that in terms of the PPA, the contract start from the date of COD of the project i.e., 24.03.2022 and ends at midnight on 31st March 2022 of that fiscal year. In case the Petitioner fails to achieve the minimum CUF in a contract year, the same shall be treated as a shortfall in generation for the

particular contract year. The Petitioner in the initial contract year had achieved CUF of 9.67 % for the period of 8 days.

3.4. It is further submitted that the judgements relied on by the Petitioner are misplaced and contrary to the settled principles of Law. She further submitted that there is no requirement to prove damage or loss, once parties have agreed on a particular amount. Proof of loss defeats the very purpose of providing for liquidated damages. In fact the Petitioner has to prove that the Respondent has not incurred losses. It is well settled principle of law that terms and conditions of the agreement are binding and it is not open to parties to subsequently wriggle out of the terms of the agreement because it is not convenient to do so.

3.5. Ld. Adv. for the Respondent submitted that the Respondent would file written submissions on reply to the arguments made by the Petitioner and sought two weeks' time for same.

4. Heard the parties. We have considered the submissions made by the Ld. Counsels appearing on behalf of the parties. The Petitioner is claiming the refund on amount of Rs. 31,23,372/- under the provisions of the PPA executed between the parties. According to the Respondent GUNVL the aforesaid amount is deducted as per shortfall in generation during the contract year by not achieving the contracted CUF of 26.70% or minimum CUF of 22.07%. We also note that the Petitioner has filed its rejoinder to reply filed by the Respondent in the main Petition.

4.1. We note that the Petitioner and the Respondent have requested for 2 weeks-time to file their written submission is allowed.

5. The matter is reserve for Order.

6. Order accordingly.

Sd/-
[S.R. Pandey]
Member

Sd/-
[Mehul M. Gandhi]
Member

Sd/-
[Anil Mukim]
Chairman

Place: Gandhinagar.
Date: 03/04/2024.

