

BEFORE THE GUJARAT ELECTRICITY REGULATORY COMMISSION
GANDHINAGAR

Petition No. 2143 of 2022.

In the Matter of:

Petition under section 86 (1) (f) of the Electricity Act, 2003 read with Clause 10 of the PPA dated 30.04.2010 and amended PPA dated 07.08.2010 for adjudication of dispute between the Petitioner and the Respondent regarding Solar power generation at its fullest installed capacity of 11.5 MW as per the terms of the PPA by repairing Solar power plant to achieve full potential utilization.

And

IA No. 07 of 2023 in Petition No. 2143 of 2022.

Application filed on behalf of the Petitioner seeking amendment of the Petition No. 2143 of 2022.

Petitioner : Astonfield Solar(Gujarat) Pvt. Ltd.
Represented by : Ld. Sr. Adv. Saurabh Soparkar along with Adv. Shalin
Jani and Adv. Aahsha Sajnani
V/s.
Respondent : Gujarat Urja Vikas Nigam Ltd.,
Represented By : Ld. Adv. Ranjitha Ramchandran along with Mr.
Kishor Lakhani

CORAM:

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

Daily Order

Date: 02/05/2024.

1. The matter was listed for heard on 22.02.2024.

2. The Office of the Commission has received the emails dated 27.12.2023 and 20.02.2024 from Shri Gopal Lakhani requesting him to implead in the present Petition. In the said email, it is mentioned that some of the solar power plant developers are intended to change/replace the solar modules/inverter in their existing solar power plant and by doing so, i.e., replacement of the new solar modules they get benefited for higher energy generation and by that way they avail the higher tariff as per their earlier agreements with the GUVNL. Such activities are against the interest of public. The objector is also affected by way of such act of solar plant developer. The objector had requested to implead him in the present matter so that the objector can plead before the Commission. The objector has also requested to direct the Petitioner and Respondent to submit the documents to the objector for filing its submissions.
3. Ld. Sr. Adv. Saurav Soparkar on behalf of the Petitioner submitted that there is an IA filed for seeking amendment in the present Petition for (1) change in Name of applicant, (2) Factual averments and grounds with supporting documents highlighting the Force majeure event and (3) Amendment in prayer in the Petition No. 2143 of 2022. The Applicant had entered into a PPA on 30.04.2010 with the Respondent. Pursuant to the said PPA dated 30.04.2010, the Applicant commissioned an 11.5 MW Solar PV Power Project at Village: Loria.Ta : Bhuj.
 - 3.1. It is further submitted that the PPA was signed on 30.04.2010 and the supplemental PPA was executed on 16.02.2023 between the Kundan Solar (Astonefield) with the Respondent. He further submitted that the Solar Power Plant was commissioned on 11.12.2012. Thereafter, due to the uncontrollable facts, the Solar Power Plant was not functional from the year 2015 owing to floods which damaged the solar modules at the Solar Power Plant site. Accordingly, the Solar Power Plant was not operational for significant numbers of years starting from 2015 and the same was brought to the notice of the Respondent vide letter dated 10.09.2015.

3.2. Ld. Sr. Adv. of the Petitioner further referred the prayers sought in the IA. Referring to the rejoinder filed by the Petitioner on reply filed by the Respondent in the IA No. 07 of 2023, reiterated the prayers as:

“(iv) Passed an order extending the first block of 12 years contained in articles 5.2 of the PPA till the date of the modules are replaced and the plant is fully operational with 11.5 MW capacity appropriately in addition to that delay caused by the Respondent challenging the order of NCLAT to SC”

By way of present IA, the Applicant/Petitioner seeking to substitute the above relief with the amended prayers as under:

“(iv) Passed an order extending the first block of 12 years contained in articles 5.2 of the PPA till the date modules are replaced and the plant is fully operational with 11.5 MW capacity from the effective date of 31st July 2015 to till the date of replacement of Solar modules alternatively exclude the same period i.e., 31st July 2015 to till date of replacement of Solar modules,”

3.3. Ld. Sr. Adv. further submitted that the entire controversies and disputes revolves around due to the refusal on part of the Respondent with respect to request made by the Applicant/Petitioner due to the damages caused by the floods in the years 2015, 2017 and 2020 and later on in 2020 replacement of the said all modules were denied by the Respondent. It is submitted that the Respondent has not objected to the change in name of the Petitioner.

3.4. The Applicant/Petitioner, vide letter dated 31.07.2015 invoked the Force Majeure under Article 8 of PPA as solar modules installed at the Plant suffered accelerated degradation due to floods. The Applicants vide letter dated 15.02.2018, provided the details of the damages caused in the year 2015 and 2017 due to floods and rainfall which prevent the Applicant from fulfilling its obligations under PPA.

- 3.5. It is submitted that the Petitioner vide letter dated 10.09.2015 apprised the Respondent regarding the reduction in generation of units at power plant due to floods and requested to allow them to change solar modules, since same were damaged due to it being submerged in water. However, the Respondent orally denied the request and threatened with termination of the PPA if such action was taken by the Applicant. It is further submitted that aforesaid letter was inadvertently left to be placed on record by at time of filling the Petition. However, the same neither changes the nature of the case nor introduces a new cause of action, since the foundation facts of the said letter have already been pleaded in the Petition at Para 10, 11, 12 and 14. The aforesaid letter substantiates the case of the Petitioner/ Applicant and does not result into change the nature of dispute. It neither changes the nature of the case nor introduces a new cause of action. Thus, the amendments ought to be allowed with permitting above facts and letters to be brought on record of the Petition.
- 3.6. Ld. Sr. Adv. further submitted that as per Article 5.2 of the PPA, the tariff determined for the Applicant/Petitioner in view of the Tariff Order was Rs. 9.98/- per unit for first 12 years and Rs. 7/- per unit for the next 13 years, for the power produced by the Applicant/Petitioner. However, due to circumstances beyond control of Applicant/Petitioner, such as floods damaging the solar modules, rendered the Power Plant non-operational from 2015. This was compounded by insolvency proceedings that began in November 2018 and subsequent legal disputes over termination of the PPA, which concluded in March 2021 before the Hon'ble Supreme Court.
- 3.7. It is submitted that in August 2020, there were floods which stopped the operation of the Power Plant, leading several months of inactivity. The Applicant notified the Respondent about the issue and requested replacements for the solar panels since 2015. However, the Respondent did not take any action. As a result, the power generation capacity of the Plant got reduced.
- 3.8. It is submitted that the Applicant has incurred significant financial losses due to delays in replacing solar modules. The Power Purchase Agreement (PPA)

requires the applicant to collect tariffs for the first 12 years as per Article 5.2 of the PPA. However, a Force Majeure event has prevented the Applicant from fulfilling its obligations under the PPA. As a result, the Applicant is requesting that the period for collecting tariffs be extended until the solar modules are replaced and the plant is fully operational. This would extend the total term of the PPA beyond 25 years.

- 3.9. The Petitioner argues that the flooding of the plant in 2015 caused significant damage and financial loss. It is further submitted that letter dated March 19, 2022, was forwarded to the Respondent highlighting the deficit in generation. As the foundation facts are already submitted in the Petition, hence the amendment sought does not change the nature of the case or introduce a new cause of action.
- 3.10. The aforesaid facts along with a copy of computation of estimated loss that is to be recovered by the Respondent is sought to be brought on record by adding Paragraph No. 37 (a) to 37(d) to the Petition.
- 3.11. Ld. Sr. Adv. of the Petitioner contends that the amendments sought are already included in the Petition, therefore the argument of the Respondent that Application is filed too late and should not be allowed is incorrect. It is further submitted that an amendment is allowed before the trial begins and should be considered in the context of the commencement of final arguments. The Petitioner sought permission from the Commission to file the present application at the stage of interim relief. The amendment should be allowed freely before the commencement of the final hearing because it does not cause any harm or injustice to the Respondent. The Respondent has already been given enough opportunity to respond to the application before the final arguments of the main matter.
- 3.12. Ld. Sr. Adv. of the Petitioner contends that the Applicant invoked the Force Majeure clause under Article 8 of the PPA vide letter dated 31 July 2015, intimating the Respondent regarding invocation of the same. Therefore, the Respondent was given notice well within the stipulated period under the PPA. It

is further submitted that the Respondent's objection about the proposed amendment for extending the PPA is contrary to Clause 5.2 of the PPA is unfounded. They are attempting to challenge the merits of the proposed amendments requested in the Petition, which is not permitted by law. The only important factor to consider when evaluating an amendment application is whether the proposed amendment introduces a new cause of action that fundamentally alters the nature of the dispute.

3.13. In response to the submission of the Respondent that the Petitioner has not substantiated any alleged claim of the Force Majeure, Ld. Sr. Adv. of the Petitioner contended that the Plant was significantly damaged due to immense rainfall in the year 2015, which was intimated for the first time to the Respondent vide letter dated 31 July 2015 in terms of Article 8 of the PPA which was also recorded in the Petition. It was also stated that reduction in the power generation caused financial loss to the Applicant. Further vide, letter dated 10th September 2015 whereby the Applicant apprised the Respondent about the reduction of power generation due to floods in 2015. Hence, the proposed amendments pertaining to the year 2015 including letter dated 10th September 2015, do not introduce a new case or a fresh cause of action. He further submitted that the Applicant is not changing the scope of the Petition or nature of pleading by putting the above facts on record. The foundation of the amendments sought in the Application and the supporting documents are already filed in the Petition and shall not change the nature of the dispute. He further submitted that the Respondent cannot raise the objection pertaining to limitation at this stage and same may be rejected.

3.14. In response to the submission of the Respondent that the Petitioner has not pleaded anything for execution of PPA in the main Petition, Ld. Adv. of the Petitioner submitted that for extension in PPA was pleaded in the main Petition at Paragraph No. 31 and in prayer clause (iv). It had at Prayer (iv) specifically inter alia sought relief for extension of the first block period of 12 years contained in Article 5.2 of the PPA till the date the modules are replaced.

3.15. The calculation of estimated financial loss which is sought to be placed on record by the Applicant is a calculation of estimated loss till December 2022. It is submitted that due to lesser units generated at the power plant as compared to the actual generation the applicant faced considerable amount of loss in terms of money and time. Vide letter dated 19.03.2022, addressed to the Respondent highlighting the deficit unit generation from the power plant and the request was rejected by the Petitioner. It is further submitted that the applicant has not placed any fresh prayer but only sought to mould the original prayer providing the certain specifications. The proposed amended prayer clarifies the time duration for which extension of first block period under Article 5.2 of the PPA is sought from 31.07.2015 to September 2023. The Petitioner reiterated that the proposed amendments do not amount to any fresh cause of action or enlargement of scope of the Petition. Pursuant to the interim Order passed by the Commission, the process of replacement of solar panel has been completed in September 2023.

3.16. Ld. Sr. Adv of the Petitioner relied on the following Judgements in support of its argument for amendment sought in the main Petition.

- (i) IA NO. 288 of 2020 IN IA NO. 2183 OF 2019 IN APPEAL NO. 201 of 2014 Order dated 17.11.2020.
- (ii) IA NO. 1766 OF 2022 IN APPEAL NO. 334 OF 2021 APTEL Order dated 23.03.2023
- (iii) *(2009) Supreme Court cases 84: (2009) 4 SCC (civ) 37:2009 SCC Online SC1709*
- (iv) *(2012) 5 Supreme Court Cases 337(2012) 3 Supreme Court Cases (civ) 92 2012 SCC Online SC313*
- (v) *(2006) 4 Supreme Court Cases 385: 2006 SCC Online SC320*

Relying upon the aforesaid Judgements, Ld. Sr. Adv. of the Petitioner argued that in the main Petition at Para 10, the Petitioner has pointed out the reference of Letter dated 31.07.2015 addressed to the Respondent mentioning the situations like rainfall causing floods at power plant site and not generating electricity from the power plant. Further, he submitted that today's

claim is not a new case or new cause of action; it is already pleaded earlier. The prayers sought vide amendments in the main Petition to be granted.

- 3.17. He further referred various letters of the Petitioner addressed to the Respondent such as change in the name of the Petitioner which is not disputed. It is also submitted and opposed the filing of the Respondent where it is mentioned that the Petitioner has sought leave to raise additional grounds, raise new issues, seeking additional relief in the Petition in regard to the extension of the term of the PPA. It is submitted that no such new cause of action nor any new case is brought. The solar modules got damage due to the floods and were required to be replaced and hence there is no new cause arisen before the Commission.
- 3.18. It is submitted that the reliefs were pleaded by the Petitioner on the ground that power plant got affected and replacement of solar modules were done in the year 2023. There is no change in the prayers as compared to the original prayer clause.
- 3.19. The Petitioner has tried to clarify that the period is not different as compared to the cause of action as mentioned in the Petition.
- 3.20. Ld. Sr. Adv. of the Petitioner submitted that the Petitioner has not received the copy of email and representation filed by Shri Gopal Lakhani in this matter and requested the Commission to provide the said details to file its submissions in regard to the said impleadment requested by Shri Gopal Lakhani. He further sought time to file its submissions after receiving the copy of the objections filed by the Objector.
4. Ld. Adv. appearing on behalf of the Respondent submitted that Reply to the IA is filed by the Respondent. The Respondent has objected to other amendments as sought by the Petitioner except the change of name of the Petitioner. She further submitted that there are two major issues, (1) the relief sought by the Petitioner is barred by law of limitation, as the Petitioner is seeking to raise its claim in 2023 based on the events which took place in 2015 and (2) the relief sought by the Petitioner for extension of

time is a new cause of action and a new case and changes the scope of the Petition which cannot be permitted by way of amendment.

- 4.1. She further submitted that the Petition relates to replacement of solar panels and the terms of such replacement, if any. The extension of time as per the provisions of the PPA cannot be raised. In fact, there is not even a communication on record in relation to the year 2015 for Force Majeure as sought now by the Petitioner.
- 4.2. It is further submitted that amendment sought by the Petitioner is contrary to the Agreement entered into by the Petitioner. It is submitted that the successful Resolution application of the Petitioner after took over had proceeded the subject issue of extension of PPA dated 30.04.2010 executed between the Petitioner and the Respondent, which was later on withdrawn by him with liberty to take appropriate steps in accordance with the law.
- 4.3. It is further submitted that there is no communication related with the Force Majeure claim filed by the Petitioner in the year 2015. The claim of Force Majeure at such belated stage is contravention of the provisions of the PPA. The said event was brought to the notice to the Respondent with delayed and even than no Force Majeure notice was served. Therefore, any such claim of Force Majeure event is time bared as on date under the law of limitation.
- 4.4. She further submitted that despite the alleged damage in 2015 the Power Plant and deficit generation continue from 2015 to 2021, the request for replacement of solar panels was received only in January 2022 from the company which was not authorised entity entitled to communicate on behalf of the original Petitioner company who has signed PPA, and such communication was not accepted by the Respondent. Now, the Petitioner seeking the relief after a period of 8 years of such event.
- 4.5. It is submitted that the Petitioner is claiming that it is bringing on record the estimated financial loss till December 2022 but the same was not part of the main Petition. The Petitioner has in 2023 sought to include the calculation of loss for

the period which is time barred. Such amendment cannot be allowed as it is an attempt to demand new prayers by way of amendment in original Petition. In any case, that there cannot be any compensation for any alleged loss of time. It is not correct that any foundation has been laid down in the Petition. The Petitioner cannot be entitled and eligible to add new facts and prayers and enlarge the scope of the original Petition after obtaining interim Order from the Commission, wherein the Petitioner was permitted to replace only defective/damaged modules by the Petitioner without deciding the matter on merits which was opposed by the Respondent. The Petitioner by way of amendment desires to enlarge the scope of the Petition at this belated stage, which is not legal and valid.

- 4.6. Referring to Para 3 and Para 4 of the IA No. 7 of 2024, It is submitted that the Petitioner is seeking to introduce a new case/cause of action through an amendment, which is contrary to the settled principles of law. The Power Plant of the Petitioner was not functional in 2015 and no arguments for replacement of modules was referred to that time to the Respondent, as of this is a new case/cause of action. She further denied the formal communication alleged by the Petitioner.
- 4.7. She further submitted that on the issue of bonafide the Petitioner has not placed any reason why the Petitioner didn't record such issues in the main Petition filed by it. The amendment sought by the Petitioner is contrary to the PPA executed between the parties, therefore the amendment sought by the Petitioner may not be entertained. She further submitted that even if IA be decided by the Commission with the consideration that it is in violation of provisions of law and after thought once interim Order is passed by the Commission subject to final decision decided by the Commission. The demand of amended prayers of the Petitioner are contrary to the provisions of the PPA and documents on record and against public interest.
5. Heard the Parties. We note that the Applicant has filed Application praying to grant application leave to amend its Petition. The Applicant prays to amend the cause title and add Para 1(a) in the main Petition along with to add Para 12(a), 37(a), 37(b)

37(c) and 37(d). Further the Applicant requested to add ground at Para (AB) in the main Petition. In addition to that the Applicant requests to amend the Prayer clause (iv) in the main Petition.

- 5.1. We note that the Respondent has filed its reply objecting to the amendments sought by the Petitioner in the main Petition. Further, the Respondent contended that the Petitioner has raised additional grounds and new issues, seeking additional relief in the Petition in regard to the extension of the term of PPA. The Respondent has also contended that relief sought by the Petitioner is barred by limitation as the Petitioner is seeking to raise claim in 2023 based on events that took place in 2015.
- 5.2. We note that the office of the Commission has received an email dated 27.12.2023 and 20.02.2024 from Shri Gopal Lakhani requesting him to implead in the present Petition. We direct the staff of the Commission to provide the copy of the objections received from Shri Gopal Lakhani to the Petitioner. We also note that to implead the Objector Shri Gopal Lakhani in the present Petition and staff of the Commission is directed to serve the notice to the Objector for next hearing. The Petitioner and the Respondent are directed to file their submissions to the objections raised by the Objector Shri Gopal Lakhani with the copy to the Respondent and Objector. The Petitioner is also directed to file its rejoinder in reply to the Reply filed by the Respondent. We also note that the Respondent has objected the amendment sought by the Petitioner in the present Application being IA No. 07 of 2023 and also sought one weeks time to file its further submissions, hence, let it be filed, with the copy to other parties.
6. The next date of hearing would be intimated separately.
7. Order accordingly.

Sd/-
(S. R. PANDEY)
MEMBER

Sd/-
(MEHUL M. GANDHI)
MEMBER

Place: Gandhinagar
Date: 02/05/2024.