

**In the Appellate Tribunal for Electricity,
New Delhi
(Appellate Jurisdiction)**

**Appeal No. 343 of 2016 and
IA No. 752 of 2016 & IA No. 995 of 2017**

Dated: 27th March, 2018

**Present: Hon'ble Mr. I.J. Kapoor, Technical Member
Hon'ble Mr. N K Patil, Judicial Member**

In the matter of :-

**Balarch Renewable Energy Pvt. Ltd.
House No. 528, Sector 10,
Chandigarh**

... Appellant

Versus

- 1. Haryana Electricity Regulatory Commission
Bays No.33-26, Sector-4,
Panchkula-134109. ...Respondent No.1**
- 2. Haryana Power Purchase Centre
Shakti Bhawan, Sector-6,
Panchkula- 134108. ...Respondent No.2**

Counsel for the Appellant(s): Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Neha Garg
Mr. Siddhant Kant
Mr. Sujoy Chatterjee
Mr. Sandeep Rajpurohit

Counsel for the Respondent(s): Mr. Nishant Ahlawat for R-1

Mr. Aditya Singh
Mr. Aamir Zafar Khan
Ms. R. Mekhala for R-2

JUDGMENT

PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER

1. The present Appeal is being filed by M/s. Balarch Renewable Energy Pvt. Ltd. (hereinafter referred to as the “**Appellant**”) under section 111 of the Electricity Act, 2003 against the Impugned Order dated 12.09.2016/04.10.2016 passed by the Haryana Electricity Regulatory Commission (hereinafter referred to as the “**State Commission**”) passed in Petition No. HERC/PRO-6 of 2016 whereby the Chairman of the State Commission has in exercise of casting vote held that the competitive bidding process and the Power Purchase Agreement entered into by the Haryana Power Purchase Centre (“**Respondent No.2**”) with the Appellant is not in line with the purported competitive bidding guidelines for renewable energy generators under Section 63 of the Electricity Act, 2003 and the deviations were not approved by the State Commission and hence the power purchases are not valid.
2. The Appellant is a company incorporated under the provisions of the Companies Act, 1956 as a Special Purpose Vehicle to establish a 1 MW Solar Power Plant (Project) in the State of Haryana, pursuant to Appellant being selected as the successful bidder in the tender process initiated by the Respondent No. 2 for solar power projects in State of Haryana.
3. The Respondent No.1 is the Electricity Regulatory Commission for the State of Haryana, exercising powers and discharging functions under the provisions of the Electricity Act, 2003.

4. The Respondent No. 2 is the power procurement agency established for the purpose of procuring electricity from various sources for its onward supply to the Distribution Licensees and the consumers at large in the State of Haryana.
5. The Appellant submitted that the Impugned Order passed by the State Commission is perverse and has the effect of the entire Project established by the Appellant pursuant to being selected under a competitive bidding process becoming stranded asset wherein the Appellant has invested a huge amount and the Appellant is also incurring monthly losses which are getting accumulated.
6. Since the Impugned Order dated 12.09.2016 was signed by the Chairman of the State Commission, Member of the State Commission expressed his difference of opinion as per his dissenting note vide its Order dated 04.10.2016 and approved the draft Power Purchase Agreements (PPAs) submitted by the Appellant, pursuant to being selected through the competitive bidding. Though the Member vide its dissenting note dated 04.10.2016 passed order with difference of opinion but the Chairman of the State Commission had by casting vote proceeded to reject the Power Purchase Agreement pursuant to the said competitive bidding process.
7. Letter of Intent (LoI) was issued to the Appellant by the Respondent No. 2 on 27.3.2015 for procurement of 1 MW solar power. PPA was entered into between the Appellant and Respondent No. 2 on 15.6.2015. The Appellant vide letter dated 8.1.2016 intimated Respondent No. 2 about the sanction of the grid connectivity.

8. We have heard learned counsel for the Appellant and the Respondents at considerable length of time and we have carefully perused their respective written submissions. The principle submissions on issues raised for our consideration in the instant appeal by the learned counsel for the Appellant and the Respondents are as follows-
- a) The State Commission vide order dated 13.8.2014 has fixed the levelized tariff for solar projects at Rs. 7.45/kWh for FY 2014-15. The Respondent No. 2 issued a Notice Inviting Tender (NIT) for procurement of 50 MW \pm 10% of solar power on long term basis from grid connected solar PV power projects through a tariff based competitive bidding process in the month of April, 2014. In terms of the tender documents, the tariff determined by the State Commission for the FY 2014-15 has to be the ceiling tariff.
 - b) The Appellant stated that by virtue of Impugned Order, the substantial investments made by it were left stranded which are affecting the financial position of the Appellant when the generating station was fully complete and ready to generate. The Appellant filed an Application being IA No. 371 of 2017 before this Tribunal seeking interim directions to be issued to Respondent No. 2 so that the Appellant could start the supply of electricity which was granted by us vide our Order dated 10.10.2017 allowing thereby the Appellant to inject electricity in the grid for supply to Respondent No.2 at the tariff approved by the Central Commission for such quantum for the year 2016-2017.

- c) Pursuant to the issuance of the Impugned Order by the State Commission, the construction of the evacuation line has been delayed by DHVBNL which was to be carried out on behalf of the Respondent No.2 from delivery point to the Appellant's switchyard and that too without appreciating that its plant was virtually ready to generate.
- d) The tariff as determined by the Central Commission for the year 2016-17 is Rs. 5.68 per kWh (without accelerated depreciation).
- e) The Appellant purchased the land for the project way back in October, 2015. The Appellant has submitted that there was delay in connectivity to the project by the distribution licensee i.e. Dakshin Haryana Bijli Vitran Nigam Ltd. (DHBVNL) in the area of the project. As per the PPA, DHBVNL who was to construct transmission line for the project took initial steps towards construction of the transmission line in October 2015. Thereafter there was no action by DHBVNL towards construction of the said transmission line. The Appellant followed up the matter vide various letters dated 1.6.2016, 16.6.2016, 12.7.2016, 22.7.2016. The Appellant awarded EPC contract to M/s Sunsure Energy Pvt. Ltd. on 23.12.2015 and the orders for solar panels, transformer, inverter etc. were placed by February, 2016 with intention for completion by June, 2016. The solar panels were received at site in January, 2017 and the Project was complete in all aspects by about 7.3.2017 but could not be commissioned due to unavailability of transmission line/ evacuation facility. In response to the letter dated 15.2.2017 of DHBVNL, the Appellant under letter dated 22.2.2017 deposited actual cost of line

demanded by the licensee. Evacuation line being less than 1 km takes about 10 days to construct. The actual construction began around 5.5.2017 and was completed around 18.5.2017.

- f) The Appellant while placing some documents on record has submitted that it has progressively carried out various works at the project site. The Appellant further submitted that despite inverter and solar panels ready for dispatch has to delay their dispatch due to issues related to transmission line. Had the solar panels/ inverters received at site it would have resulted in their degradation and deterioration in absence of evacuation line to generate and supply electricity. The Appellant vide letter dated 7.11.2016 also informed the Respondent No. 2 that the project was 95% complete and was only waiting for evacuation line to be completed. The Appellant had undertaken all activities and had irretrievably invested in the project at the time of passing of the Impugned Order. The delay in commissioning of the project is only due to delay in construction of evacuation line by DHBVNL on behalf of the Respondent No. 2.
- g) The Respondent No. 2 has submitted that the Appellant is not meeting the condition of 80% completion of the project and it cannot claim the benefit as envisaged in the Impugned Order. The Appellant has received the solar panels at site only on 14.1.2017 and 18.1.2017 and as per the orders of the CERC the cost of solar PV modules is more than 50%, hence the Appellant cannot contend that it has reached 80% project completion mark at the time of passing of the Impugned Order. The Appellant has also not placed on record when it has placed the orders for purchase of the solar panels.

- h) The Appellant in response to the letters dated 15.6.2016 & 15.2.2017 of the Respondent No. 2 deposited the cost of new 33 kV lines only on 21.2.2017. The Respondent No. 2 has further submitted that it was the responsibility of the Appellant to pay the amount for the construction of the transmission line and the Respondent No. 2 cannot be called into question to construct such transmission line at its own cost. The Respondent No. 2 on this issue has relied on terms of NIT, third amendment to the HERC (Terms and conditions for determination of tariff from Renewable Energy Sources, Renewable Purchase Obligation and Renewable Energy Certificate) Regulations, 2010 passed on 14.7.2014 and date of signing of PPA in June, 2015 before the fourth amendment to the said regulations which came on 12.8.2015. Accordingly, the Respondent No. 2 has submitted that the contention of the Appellant that the completion of its solar project is delayed due to delay in construction of transmission line is unjustified and incorrect. There is no relationship between construction of transmission line and construction of solar power project which could be taken up independently without depending of construction of transmission line. Further, they also submitted that it was the responsibility of the Appellant to pay for the transmission line in time so that it could be constructed in time. The delay was only attributable to the Appellant and not to Respondent No.2.
- i) The learned counsel for the Respondents further reiterated their stand that in the light of solar tariff getting lower, they would find it commercially unviable to procure power from the said generating station at the tariff derived through the competitive process.

9. After having a careful examination of principle submissions of the rival parties on various issues raised in the instant Appeal, we hold as follows:-

9.1 We have dealt with the issues raised in the instant Appeal in detail in a similar matter relating to the same Impugned Order in Appeal No. 278 of 2016 and batch in the matter of JBM Solar Power Pvt. Ltd. Vs. Haryana Electricity Regulatory Commission & Anr. The relevant extracts of our judgment dated 09.03.2018 in Appeal No. 278 of 2016 and batch is given below:

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While deciding the fate of power purchase/PPAs in the Impugned Order the State Commission has held that in terms of the Section 63 of the Act, the tariff-based bidding guidelines have not been followed by the Respondent No. 2 and also the deviations with respect to SBD have not been

duly approved by the State Commission. There was no Evaluation Committee in terms of the guidelines to evaluate whether the tariff is aligned to the market prices or not. Further, the State Commission has held that the tariff so determined is not aligned to the market rates.

However, the State Commission while emphasising the need to procure solar power and to be equitable to the parties has held that in the case of the successful bidders who have already commissioned their plants or are nearing completion (more than 80% complete) under the PPAs executed by the Respondent No. 2, may explore the possibilities for arriving at an equitable and reasonable solution to arrive at a tariff aligned to the prevailing market conditions subject to the ceiling of the project cost determined by CERC for the FY 2016-17 as the projects are likely to be commissioned during FY 2016-17.

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The Member of the State Commission in the dissenting order has held that there were no guidelines/ SBD notified by Gol for procurement of power by discoms from renewable energy sources. Hence there is no question of adoption of tariff under Section 63 of the Act by the State Commission. The documents available were only draft in nature based on

which the Respondent formulated the bidding process. The State Commission vide order dated 8.8.2014 has also allowed the Respondent No. 2 to go ahead with the bidding process. The Member while comparing the tariff set by CERC and other Regulators has also held that the rates are aligned to the market prices and approved the PPA. The Member has also held that the tariff compared by the Chairman of the State Commission were based on various factors and cannot be compared to the present case and justified the tariff of Rs. 6.44/kWh.

- (iii) We observe that the whole issue of power purchase/PPAs is hovering around the application of Section 63 of the Act which says that the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guideline issued by the Central Government. In the present case, actually no guidelines/ SBD have been issued/notified by Gol at that point of bidding and till completion of the bid process and even up to the Impugned Order date. The Respondent No. 2 initiated the bidding process on draft guidelines only and informing the State Commission the same at a later stage when the bidding process was completed and approached the State Commission for the approval of the PPAs it entered into with the selected bidders. The State Commission has also not gone into the details by checking whether such guidelines /SBD has been notified by Gol. The State Commission vide letter dated 8.8.2014 has also given go*

ahead for the bidding process to the Respondent No. 2. The relevant extract of the letter is reproduced below:

“Subject: NIT for Purchase of 50 MW solar & 100 MW non-solar power to meet RPO – approval thereof.

kindly refer to your memo no Ch-43/HPPC/SE/C&R –I/PPA – 136 dated 16.06.2014 and Ch-46/HPPC/SE/C&E-I/PPA-67 dated 1.07.2014 vide which approval of the Commission was sought to be deviations in the bid documents vis-a-vis the Case – 1 RE Bidding Procedure of the Government of India. The Commission has considered your application/petition and observes that the NIT No. 51 & 52 for inviting competitive bids purchase of 50 MW for Solar Power and 100 MW of Non- Solar (renewable energy) were issued on 16.04.2014 and the approval of the Commission to the deviations were sought on 1.07.2014 i.e. ex post facto.

The Commission observes that the Discoms have not fulfilled their RPO including by way of purchase of REC. Consequently, the accumulated shortfall allowed to be carried forward from FY 2011-12 up to FY 2013-14 (up to December 2013) is about 720.83 Mus and the total RPO target set for FRY 2014-15 is 1463.41 Mus. On several occasions the Commission has observed that HPPC/HAREDA may invite bids/ reverse bids for purchase of renewable energy in order to meet with the RPO targets and the fact that the bidding process is already under way, HPPC may proceed with the same. Once the bids are opened

HPPC shall analyze the same and submit the details to the Commission for its order and approval of the PPA with the successful bidders.”

The State Commission while observing the shortfall in meeting RPO obligation by the Respondent No. 2 has given go ahead with the bidding process. The letter also says that at many occasions the State Commission has observed that HPPC/HAREDA may invite bids/ reverse bids for purchase of renewable energy in order to meet with the RPO targets. The State Commission further directed that after the bids are opened the Respondent No. 2 should analyze the same and submit the details to the Commission for its order and approval of the PPA with the successful bidders. However, it is not clear from the order that whether the signed PPAs are to be submitted before the State Commission or only draft PPA was to be submitted for the approval.

- (iv) *After going through the various aspects of the case we find that both the State Commission and the Respondent No. 2 had made mistake. The Respondent No. 2 making its bid process on non-existent guidelines/SBD and the State Commission passing the Impugned Order on premise of Section 63 as if guidelines/ SBD existed. The issue is between the State Commission and the Respondent No. 2. The sufferers are the Appellants who have already installed the solar power plants based on Lol issued and PPAs signed with them for no fault of them.*

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This Tribunal based on the technicalities involved due to idling of the solar power projects and based on the decision of the State Commission that the generators would be entitled to supply electricity at a tariff determined by CERC for the year FY 2016-17 which works out to Rs.5.68 per kWh (without accelerated depreciation) allowed the Appellants to supply power to the Respondent No. 2 as an interim measure.

- (vi) *In view of the foregoing discussions, we observe that the whole exercise of the bidding was premised and based on the wrong notion that competitive bidding guidelines/ SBD do exist which was not true. Solar Power purchase was initiated by the Respondent No. 2 based on repeated directions from/observations of the State Commission in various ARR orders as well as in the letter dated 8.8.2014. It is also observed that the Respondent No. 2 has followed the bidding documents which it had submitted to the State Commission and the State Commission too has given go ahead with the bidding process. Negotiations too were carried out by the Respondent No. 2 in accordance with the bidding documents. PPAs too were signed after completion of the bidding process and the Appellants have already set up the solar power plants. The State Commission in the Impugned Order has also allowed the Respondent No. 2 to procure power from these plants based on the tariff determined*

by CERC for FY 2016-17, the year in which these plants were commissioned. This Tribunal as an interim allowed the said CERC tariff of FY 2016-17 to the Appellants.

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(vii) The basic issue which merits consideration is that there was a competitive bid process initiated by the Respondent No. 2 for selection of solar power developers to supply solar power to the Respondent No. 2. Irrespective of whether such competitive bid process was undertaken under Section 63 of the Act based on the guidelines issued by Gol or not, the fact that such a competitive bid process was initiated, solar power developers were invited to participate and give their bids and the PPA was finalised between the Respondent No. 2 and the selected bidders cannot be denied. Further, the State Commission was also informed of the bidding process being undertaken by the Respondent No. 2 and the State Commission did not stop the process at the relevant time by stating that Respondent No. 2 should wait until the guidelines are issued under Section 63 of the Act or on the ground that there exists guidelines of Gol which need to be followed. The entire process was allowed to be implemented without the State Commission exercising its regulatory powers to either stop or otherwise provide the course of action to be adopted for Respondent No. 2 to complete the bidding process. It is not for the State Commission to have raised all these issues at a later stage when the approval of

PPAs with tariff discovered and negotiated downwards was placed. The Appellants have referred to the procurement of power in another case (M/s Siwana Solar Power Projects) wherein the State Commission has approved the PPA with a tariff of Rs. 6.44/kWh. However, there is no allegation in regard to the issue of guidelines being followed or not in the said decision.

(viii) Further, the PPA executed by the Respondent No. 2 with M/s Siwana Solar Power Projects on 21.2.2014 was prior in point of time as compared to the PPAs with the Appellants and the approval was granted vide order dated 20.1.2016. The PPAs in the present case were executed on a subsequent date during June 2015 and the approval to the PPAs was sought from the State Commission on 16.7.2015. The price of the solar panels are falling progressively as indicated by various bidding process cannot be ignored. At the same time the absence of finalised guidelines by Gol cannot be considered as a ground for not approving the PPAs, particularly in the context of Section 63 of the Act which states that the bidding has to be “in accordance with the guidelines” in case of Energy Watchdog v. CERC decided by the Hon’ble Supreme Court on 11.4.2017 in Civil Appeal Nos. 5399-5400 of 2016. The relevant extract from the said judgement is reproduced below:

“19. It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This regulatory power is

a general one, and it is very difficult to state that when the Commission adopts tariff under Section 63, it functions de hors its general regulatory power under Section 79(1)(b). For one thing, such regulation takes place under the Central Government's guidelines. For another, in a situation where there are no guidelines or in a situation which is not covered by the guidelines, can it be said that the Commission's power to "regulate" tariff is completely done away with? According to us, this is not a correct way of reading the aforesaid statutory provisions. The first rule of statutory interpretation is that the statute must be read as a whole. As a concomitant of that rule, it is also clear that all the discordant notes struck by the various Sections must be harmonized. Considering the fact that the non-obstante clause advisedly restricts itself to Section 62, we see no good reason to put Section 79 out of the way altogether. The reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways – either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act, (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding. In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with "determination" of tariff, which is part of "regulating" tariff. Whereas "determining" tariff for inter-State transmission of

electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to “regulate” tariff. It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission’s general regulatory powers under Section 79(1)(b) can then be used.

From the above it is clear that in case where there are no guidelines, regulatory powers under Section 79 (1) (b) and under Section 86 (1) (b) of the Act empowers the CERC and the State Commission respectively to provide for necessary approval for bidding process and approve the PPA including the price at which the electricity should be procured by or on behalf of the distribution licensees.

- (ix) *Considering the circumstances of the case equitably and the fact that the Solar Power Projects have been established by the Appellants and in terms of Section 86 (1) (e) of the Act, the power generation from renewable sources of energy need to be promoted, it would be appropriate to approve the PPAs between the Appellants and the Respondent No. 2 for procurement of solar power at the tariff of Rs. 5.68/kWh (without*

accelerated depreciation) as allowed in the interim Orders dated 13.12.2016 and 29.3.2017 of this Tribunal.

- (x) *In view of the facts and circumstances of the case, we are of the considered opinion that the PPAs signed between the Appellants and Respondent No. 2 be allowed by the State Commission at the tariff of Rs. 5.68/kWh (without accelerate depreciation) determined by CERC for FY 2016-17.”*

10. In the instant Appeal, we vide Order dated 10.10.2017 in IA No. 371 of 2017 have decided as follows:-

“17. We have observed that as per the Impugned Order of the State Commission, while the generators are claiming higher tariff derived through the competitive bidding, the State Commission has made a provision for the generators which are in the advanced stage of commissioning by making them to supply electricity at a tariff which would not exceed the tariff determined by the Central Commission for the year 2016-17.

18. *We have also gone through the communications between the Appellant and Respondent No. 2 regarding delay in construction of evacuation line and dispute regarding associated costs related to its execution, the Appellant and its EPC Contractor regarding keeping on hold the despatch of solar panels and inverters etc., provisions of the PPA & other documents placed on record. We have also noticed that the cost of land is substantial i.e. about 50% of the cost of the Project as submitted by the Appellant. Respondent No. 2 quoted that cost of solar panels as per CERC orders is more*

than 50% to substantiate that the work of the Project was not completed to the extent of more than 80% as per the requirement of the Impugned Order. After going through the Impugned Order we find that the State Commission has not specified any parameter i.e. either financial or physical regarding more than 80% completion of works. This Tribunal earlier vide order dated 25.5.2017 has also allowed the Appellant to inject power into the grid without raising any bill on the Respondent No. 2.

19. *We are of the considered opinion that the solar panels could not have been allowed to be left idling as it would result in technical degradation which would result in irreparable loss to the generators who have invested huge sum in the projects.*
 20. *Under the circumstances of the present case and the fact that such a relief has already been granted to the similarly placed generators vide our Orders dated 13.12.2016 & 29.3.2017, we direct that as an interim measure, the Appellant shall be entitled to inject electricity in the grid for supplying to Respondent No. 2 at the tariff approved by the Central Commission for such plants for the year 2016-17.*
 21. *This interim arrangement shall be without prejudice to the rights and obligations of the parties and subject to the outcome of this Appeal. We make it clear that we have not expressed any opinion on the merits of the case.”*
11. Since the issues involved in the instant Appeal are quite similar in nature to that already dealt with by us in Appeal No. 278 of 2016

and batch vide judgment dated 9.3.2018, we are of the considered view that the PPA signed between the Appellant and the Respondent No.2 be allowed by the State Commission at the tariff of Rs. 5.68 per kWh (without accelerated depreciation) determined by the Central Electricity Regulatory Commission for FY 2016-2017.

12. Hence issues are decided accordingly,

ORDER

For the ongoing reasons as stated above, we are of the considered opinion that the principle laid down by this Tribunal in Appeal 278 of 2016 and batch in the matter of JBM Solar Power Pvt. Ltd. Vs. Haryana Electricity Regulatory Commission & Anr. vide judgment dated 9.3.2018 would apply to the instant case as well. Hence, the instant Appeal is hereby allowed.

The Impugned Order (Common Order dated 12.09.2016/ 4.10.2016) on the file of the Haryana Electricity Regulatory Commission is hereby set aside to the extent stated above and is remanded to allow the PPA signed between the Appellant and the Respondent No. 2 in the interest of justice and equity.

The IA No. 752 of 2016 and IA No. 995 of 2017 are disposed of as such.

No order as to costs.

Pronounced in the Open Court on this **27th day of March, 2018.**

(Justice N. K. Patil)
Judicial Member

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(I.J. Kapoor)
Technical Member

REPORTABLE/NON-REPORTABLE

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