

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No. 50 of 2014

Dated: 16th April, 2015

Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member

In the matter of:

SM Environmental Technologies Pvt. Ltd. ...Appellant(s)
DLF City Court, 10th floor
Unit no. 1010, Sikanderpur
Gurgaon – 122 004

Versus

- 1. Rajasthan Electricity Regulatory Commission ...Respondent(s)**
Vidyut Viniyamak Bhawan
Near State Motor Garage
Sahakar Marg, Jaipur – 302 001
- 2. Jodhpur Vidhyut Vitran Nigam Limited**
New Power House, Industrial Area
Jodhpur, ('JdVVNL' or 'Jodhpur Discom)
- 3. Jaipur Vidhyut Vitran Nigam Limited**
Vidhyut Bhawan, Jan path
Jaipur. ('JVVNL' or 'Jaipur Discom)
- 4. Ajmer Vidhyut Vitran Nigam Limited**
Old Power House, Hathi Bhata
Ajmer. ('AVVNL' or 'Ajmer Discom)
- 5. Rajasthan Renewable Energy Corporation**
Electricity-166, yudhister Marg
C-Scheme, Jaipur – 302 001

Counsel for the Appellant (s) : Ms. Swapna Seshadri
Mr. Anand K. Ganesan
Ms. Mandakini Ghosh

Counsel for the Respondent(s): Mr. Bipin Gupta and
Mr. S.K. Bansal for R-2 to 4

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

This Appeal has been filed by SM Environmental Technologies Pvt. Ltd. against the order dated 27.11.2013 passed by the Rajasthan Electricity Regulatory Commission (“State Commission”) whereby the State Commission has held that the biomass based power plant developed by the Appellant is not eligible to get incentivised tariff as per the State Commission’s tariff order dated 17.08.2009.

2. The Appellant is a biomass generator having an 8 MW biomass based power plant in Rajasthan. The State Commission is the Respondent no.1. The Distribution Licensees are Respondent nos.2 to 4. Rajasthan Renewable Energy Corporation, the State Government agency for development of renewable energy projects is the Respondent no.5.
3. The brief facts of the case are as under:-

- a) A Power Purchase Agreement ("PPA") was executed between M/s. Kalpataru Energy Ventures Pvt. Ltd. and Rajasthan Vidyut Prasaran Nigam on 19.03.2003 for development of a biomass project in District Bharatpur. The generating company was taken over by SM group from the original promoters in November 2004. SM group identified and acquired land in Bharatpur District to set up the project. Later SM group changed the name of the entity from M/s. Kalpataru Energy Ventures Pvt. Ltd. to M/s. SM Environmental Technologies Pvt. Ltd. However, in view of local disturbances and resistance SM group decided to shift the plant location and was granted to shift the site from District Bharatpur to District Baran vide letter dated 07.08.2006 by the Respondent no.5.
- b) There was no progress in the project and the Respondent no.5 cancelled registration of the project on 10.08.2006.
- c) The parent company of the Appellant, M/s. Orient Green Power Company Limited which was formed in the year 2007 took over the entire biomass power project assets of SM Group by purchasing 100% of its shares.

- d) On 16.01.2008 after taking over the shares of SM Group the Orient Green Power took steps to implement the project.
- e) On 23.01.2008 work order was placed on M/s. Shriram EPC Ltd. for supply of the power plant equipments at completely renegotiated and new prices.
- f) On 15.02.2008, land at the new site was allotted to the Appellant by the District Collector, Baran.
- g) On 08.03.2008, the Lease Deed was obtained from the Collector and on 15.04.2008 Lease Deed was executed by the District Collector and the State Government.
- h) On 28.04.2008 revised Lease Deed was registered by the District Collector, Baran.
- i) On 25.06.2008 work order was placed by the Appellant on M/s. Cheema Boilers Ltd. for supply of the balance items of boilers.
- j) On 23.01.2009, the State Commission notified the Tariff Regulations, 2009.
- k) On 17.08.2009, the State Commission passed the tariff order for biomass based power plant. The State Commission provided for an incentivised tariff for the plants being commissioned in the

year 2009-10 subject to a time interval of 15 months between the financial closure and commissioning of the project.

- l) On 19.02.2010, the project was commissioned and on 23.02.2010 Certificate of Commercial Operation was issued to the Appellant.
 - m) Since the Distribution company was not applying the incentivized tariff to the Appellant in terms of the order dated 17.08.2009, the Appellant filed a petition before the State Commission claiming that it is entitled to the incentivized tariff. By the impugned order dated 27.11.2013, the State Commission dismissed the petition. Aggrieved by the impugned order declining to apply the incentivised tariff to its plant, the Appellant has filed the present Appeal.
3. The Appellant has made the following submissions to emphasize that incentivised tariff would be applicable to its power plant:
- a) The State Commission in the Tariff Regulations, 2009 had determined a particular tariff for biomass plants commissioned upto 31.03.2007 and also for plants commissioned between 01.04.2007 and 31.01.2009. However, the State Commission

only fixed the norms for plants due to be commissioned with effect from 01.04.2009 but did not determine any tariff.

- b) In the memo of statement of objects and reasons of the Tariff Regulations, 2009, the State Commission opined that it would be appropriate to consider base year for tariff determination of biomass project as FY 2010-11 i.e. second year of the Control Period as base year for the purpose of tariff determination. Further the fixed charge component of tariff determined for FY 2010-11 shall also be applicable in case project is commissioned during FY 2009-10 which can act as incentive for early commissioning.
- c) In the tariff order dated 17.08.2009 the State Commission stipulated the granting of an incentivised tariff to biomass power plants commissioned in the year 2009-10 subject to a time interval of 15 months between the financial closure and commissioning of the project and the fixed cost determined for the year 2010-11 would apply to such projects commissioned in 2009-10 itself.
- d) The Appellant had taken up the project by acquiring the shares of SM Group in the year 2008 to whom the project land had not

been allotted. Apart from the above, the Appellant did not use any other asset of the original project. The Appellant acquired fresh land, renegotiated for the plant and machinery at the latest prices and funded the project from its own equity. The Appellant also obtained a fresh registration dated 12.06.2009 from the renewable agency and entered into a new Power Purchase Agreement dated 21.12.2009 for sale of power from its biomass plant to the distribution companies.

- e) With regard to financial closure, the Appellant did not wait even for funding from the Banks. The Appellant invested its own equity and completed the project within the year 2009-10. The term loan was sanctioned by the Federal Bank and Bank of India to the original promoter and after taking over the project the Appellant contacted the said Banks to fund the project at the new location at revised project cost. However, the Federal Bank and Bank of India did not respond. The Appellant invested its equity and constructed and commissioned its project. Since the Appellant shares had been purchased by the Orient Green Power Company Ltd. from the SM Group, the loans of Federal Bank and Bank of India remained in the books of the Appellant.

However, after commissioning of the project, Tata Capital agreed to takeover part of the funding. At this stage the outstanding loans of Federal Bank and Bank of India were paid back and NOC was obtained from each of the Banks. Accordingly a post facto financial closure was obtained by the Appellant on 08.06.2010 when Tata Capital approved the funding pattern and agreed to finance a part of the project.

- f) Regarding land acquisition, the Appellant applied for a fresh land in April, 2008. Acquisition of land is the first step in setting up of project and no developer would have waited for the State Commission's order dated 17.08.2009 and then take up the steps for acquiring land to commission the project by 31.03.2010 to obtain the incentivised tariff.
- g) Merely because land is acquired in the advance would not disentitle the Appellant to incentivised tariff in terms of the order dated 17.08.2009.
- h) The Appellant after acquiring the shares of SM Group in the project company had to place revised order for equipment at renegotiated prices and this had nothing to do with the costs negotiated by the earlier developer.

- i) The State Commission has wrongly come to the conclusion that loan was earlier sanctioned by the Federal Bank and Bank of India in December, 2005 which was subsequently taken over by Tata Capital after commissioning of the project. The Appellant had invested its equity and constructed and commissioned its project. After commissioning of the project, Tata Capital had agreed to takeover a part of the funding and at this stage the outstanding loans of Federal Bank and Bank of India were paid back.
 - j) It is wrong that the financial closure had taken place in the year 2005 itself. In so far as the 15 months gap between financial closure and commissioning of the project is concerned, in case of the Appellant, when the project was constructed by investing equity and commissioned by 19.02.2010, there was no question of financial closure. In fact in the present case a post facto financial closure was obtained by the Appellant on 08.06.2010.
4. In reply Respondent nos. 2 to 4 have the following submissions:
- a) For the project to be entitled to the incentivised tariff two conditions are required to be fulfilled namely the project should be commissioned in the FY 2009-10 and the project should have

been commissioned within time interval of 15 months between the period of financial closure to commissioning of the plant.

- b) The chronology indicates that the project which has been shown to have been commissioned on 19.02.2010 is the same project which stood started under implementation stage since 2002. The stage of project if at all could also be reckoned from the year 2006 when the project was permitted to shift the site to District Baran. Thereafter the land was allotted to SM Environmental Technologies Pvt. Ltd. on 15.02.2008 and prior to allotment of the land the project was purchased by Orient Green Power Pvt. Ltd. as is evident from MOU dated 16.01.2008. From the documents on record it is clear that the project which has either shown to be belonging to Kalpataru and thereafter to SM Environmental Technologies Pvt. Ltd. and now by Orient Green Power Pvt. Ltd is the same which had started way back in the year 2002.
- c) The financial closure is the stage when the funds are available for implementation of project. In the present case the project achieved financial closure in 2005 which would be evident from the sanction of loan by Bank of India and Federal Bank. By using the said funds of Bank since 2005 the project started itself

implementing and machines were purchased and land was purchased. The disbursement statements of the Banks indicate that loan benefit have been taken by the project and loan amount to the tune of Rs. 5.14 lakhs was disbursed on 31.03.2009. Thus, the present promoter namely Orient Green Power Ltd has also utilized the funds sanctioned to SM Environmental Technologies formerly known as Kalpataru Ventures Ltd. Thus, there is no scope for the Appellant to claim incentivised tariff.

5. On the above issues we have heard Ms. Swapana Seshadri, Learned Counsel for the Appellant and Mr. Vipin Gupta, Learned Counsel for the Respondent no.2 to 4. The only question that arises for our consideration is **whether the Appellant is entitled for incentivised tariff as per the State Commission's order dated 17.08.2009?**

6. We find that the State Commission in the order dated 17.08.2009 has determined the tariff of biomass power projects for the period 2010-11 to 2012-13 on the basis of the Tariff Regulation 2009. The State Commission in this order decided that the projects to be commissioned during the remaining part of FY 2009-10 i.e. from August 2009 to March 2010, the fixed charges prescribed for 2010-11 shall be allowed

to those projects which have made special efforts to commission the project in advance of their scheduled commissioning i.e. within 15 months of financial closure to qualify for this preferential tariff as an incentive. However, if a plant is commissioned in FY 2009-10 in a normal way then it would be governed with the normal indexing mechanism for determination of tariff for FY 2009-10. Accordingly, the State Commission determined the tariff for projects which are commissioned in a normal way and the incentivised tariff from the projects which are commissioned early i.e. within 15 months of the financial closure. Tariff order dated 17.08.2009 was not challenged by the Appellant and has since attained finality.

7. Let us examine the impugned order. The relevant findings of the State Commission are as under:-
 - a) The intent of the State Commission in the tariff order dated 17.08.2009 has been to incentivise early commissioning of the projects and it would not be appropriate to provide any additional incentive to a plant which gets commissioned within the normal schedule. Therefore, the plant will have to satisfy two conditions viz. the project should get commissioned during FY 2009-10 and

time interval between the financial closure and commissioning should not exceed 15 months.

- b) There is no dispute that the plant was commissioned during FY 2009-10. The Commission has therefore to examine whether the second criteria was fulfilled.
- c) Typically, project reach the stage of starting implementation only after financial closure is achieved, which usually entails appraisal of the project by a financial institution followed by sanction of loan.
- d) The financial closure could be taken as a starting milestone for laying down commissioning schedule of a project from this milestone upto COD. In the tariff order dated 17.08.2009, the Commission prescribed a period of 15 months from financial closure to COD as a test of early commissioning.
- e) In the present case earlier PPA was executed on 16.02.2002 and as per the PPA, financial closure had to be achieved within 12 months of signing of the PPA. Similar provision was made in the PPA executed in the year 2003, where financial closure was to take place upto 30.06.2003. Though a fresh PPA was entered into on 21.12.2009, but no provision in this was included in

respect of financial closure as the project was already at advanced stage of implementation by then as it achieved COD within two months thereof.

- f) For ascertaining early commissioning in this case we have to use yardstick from a milestone earlier than the last milestone i.e. COD. The contention of the petitioner that the gap between financial closure and COD is only 5 months is misplaced as the petitioner is referring to date of financial sanction of loan granted by Tata Capital after the project was commissioned. Such post facto sanction of loan by a bank has no relevance in assessing the speed of commissioning of the project.
- g) The land was allocated way back in the February 2008 and even the revised land allocation was made in April, 2008. Loan was earlier sanctioned by Federal Bank and Bank of India in December, 2005 which was subsequently taken over by Tata Power Capital after commissioning of the project.
- h) In light of the said events it transpires that the implementation of the project has started much ahead of the fresh registration of the project given on 12.06.2009. Therefore, it is incorrect to say that

the project commissioning was achieved ahead of normal schedule.

- i) Even if one ignores the financial closure in the present case achieved in 2005, the sequence of events clearly established that the project in no way could be said to have been commissioned in an expeditious manner.
 - j) On the basis of above, the State Commission rejected the claim of the Appellant for incentivised tariff.
8. We are in full agreement with the findings of the State Commission for the following reasons:-
- a) The project in question is the same which was initiated by M/s. Kalpataru and for which loan was sanctioned by Federal Bank and Bank of India in December, 2005. 100% share of M/s. Kalpataru were taken over by SM Group on 04.12.2006 and the name of the company was changed to SM Group Environmental Technologies Pvt. Ltd. The entire assets of SM Group were acquired by Orient Green Power Company i.e. present promoter of the project on 16.01.2008.
 - b) MOU dated 16.01.2008 between SM Environmental Technologies and Orient Green Power Company Ltd clearly

indicates that the project was the one established at the new site where the project has been developed. The MOU indicates that the project is under the implementation stage. The MOU indicates that from 16.12.2007 the day to day expenses, interest on outstanding loan and other liabilities exclusively be on the account of Orient Green Power Company Ltd., the present promoters. The Bank statements of Bank of India and Federal Bank for the period 2006-10 indicate disbursement of loan to SM Environmental Technologies.

- c) The terms and conditions given in letter dated 08.06.2010 regarding loan taken by the Appellant from Tata Capital also indicates that the first tranche would be disbursed to Bank of India and Federal bank to the tune of outstanding amount and the balance will be disbursed to Appellant after obtaining no dues certificates form the said Banks. Therefore, loan taken by the Appellant post commissioning of the project is refinancing of the project loans. Therefore, financing of the project by Tata Capital is of no consequence for deciding early commissioning of the project.

- d) Even if it is assumed that the project had not made any physical progress before the takeover of the company by the present promoter, the time taken from the date of registry of revised lease deed for new site in District Baran in April, 2008, the total time taken for commissioning of the project is more than 15 months. The revised lease deed was registered by District Collector Baran on 28.04.2008 and the project was commissioned on 18.02.2010 i.e in a period of about 22 months.
- e) Even if the commissioning period is reckoned from the date of award of supply order for power plant equipment in January 2008, the period is more than 15 months for commissioning of the project.
- f) The reckoning of the time from the date of financial closure has been considered by the State Commission in the order dated 17.08.2009 for early commissioning of the project as it is expected that after financial closure the work on the power project begins with full force. In the present case even if it is assumed that the Appellant did not avail any finances and completed the project from its own equity, the time period for commissioning of the project has to be considered form the date

of registration of lease deed of land or from the date of placement of order for equipment. If the time period is reckoned from date of registration of lease deed of project land or date of placement of order for main plant and equipment, then also the project could not be held as commissioned early.

9. We do not find any infirmity in the findings of the State Commission in the impugned order.
10. In view of above, we do not find any merits in the case of the Appellant.
11. The Appeal is dismissed as devoid of any merits and the State Commission's order is upheld.
12. Pronounced in the open court on this **16th day of April, 2015.**

(Rakesh Nath)
Technical Member

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REPORTABLE/NON-REPORTABLE

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(Justice Ranjana P. Desai)
Chairperson