

**BEFORE THE GUJARAT ELECTRICITY REGULATORY COMMISSION  
GANDHINAGAR**

**Petition No. 1998 of 2021.**

**In the matter of:**

**Petition seeking extension of Scheduled Commercial Operation Date (SCOD) on (i) account of Force Majeure Events and (ii) delays solely attributable to Gujarat Energy Transmission Corporation and consequential reliefs under Section 86(1)(f) of the Electricity Act, 2003 read with Article 10.4 of Power Purchase Agreement executed between Goodwatts WTE Jamnagar Pvt Limited and GUVNL.**

Petitioner : Goodwatts WTE Jamnagar Pvt. Limited  
10th Floor, Sangeeta Complex,  
Near Parimal Crossing,  
Ellisbridge, Ahmedabad - 380006, Gujarat.

Represented by : Ld. Sr. Adv. Mr. Mihir Thakore alongwith Ld. Advocates  
Ms. Poonam Verma, Mr. Saunak Rajguru, Ms. Gayatri  
Aryan, Mr. Tabish Samdani & Mr. Tarak Damani and Mr.  
Aditya Handa, Mr. Arjun Handa, Mr. Ashish Mehta, Mr.  
Anup Pillai, Mr. Hitesh Shukla, Mr. Kirit Kanjaria, Mr.  
Krutarth Oza & Mr. Vishal Patel

V/s.

Respondent No. 1 : Gujarat Urja Vikas Nigam Limited  
Sardar Patel Vidyut Bhavan,  
Race Course Circle,  
Vadodara - 390 007, Gujarat

Represented by : Ld. Adv. Mr. Anand Ganesan alongwith Ld. Adv. Ms.  
Harsha Manav and Ms. Sailaja Vaccharajani, General  
Manager (IPP & RE), Ms. Girija Dave & Mr. Kandarp  
Mistry

Respondent No. 2 : Jamnagar Municipal Corporation  
Jubilee Garden,  
Jamnagar, Gujarat - 361001

Represented by : Nobody was present.

Respondent No. 3 : Gujarat Energy Development Agency

4<sup>th</sup> Floor, Block No. 11 & 12,  
Udyog Bhavan, Sector -11  
Gandhinagar, Gujarat - 382017

Represented by : Mr. H. S. Silajiya, Senior Project Executive, GEDA and  
Ms. Namrata Bhuptani.

Respondent No. 4 : Gujarat Energy Transmission Corporation Limited  
Sardar Patel Vidyut Bhavan,  
Race Course Circle,  
Vadodara - 390 007, Gujarat

Represented by : Ld. Adv. Mr. Anand Ganesan alongwith Ld. Adv. Ms. Harsha  
Manav and Mr. K. H. Rathod, Addl. Chief Engineer (R&C) and  
Mr. Kanti Bhuva, Addl. Chief Engineer (R&C)

Respondent No. 5 : State Load Despatch Centre  
132 kV Gotri Sub-Station Compound,  
Near T. B. Hospital, Gotri Road,  
Vadodara, Gujarat - 390021

Represented by : Mr. A. B. Rathod, Addl. Chief Engineer, SLDC

**CORAM:**

**Mehul M. Gandhi, Member**

**S. R. Pandey, Member**

**Date: 17/12/2021**

**DAILY ORDER**

1. The present matter was listed for virtual hearing on 15.12.2021 through V.C. on Microsoft teams.
2. Heard Ld. Senior Adv. Mr. Mihir Thakore for the Petitioner. It is submitted that substantial arguments have been earlier made with regard to (i) 'Force Majeure' events, (ii) delay in evacuation facilities and (iii) various other events preventing/hindering and/or delaying the (a) construction, (b) completion, and (c) commissioning of 7.5 MW MSW based Waste to Energy Project within the timelines i.e. achieving Scheduled Commercial Operation Date (SCOD) due to reasons beyond its reasonable control. The Petitioner is therefore, not liable to any financial

implication including (i) levy of liquidated damages, (ii) forfeiture of Bank Guarantee and (iii) any reduction in tariff for supply of power.

- 2.1. It is submitted that although the earlier tariff Order is continuing but in case the said tariff decided therein is modified/changed through an Order giving retrospective effect, the same will not be applicable to the tariff of MSW Project of the Petitioner in view of various events which qualify as Force Majeure. The new tariff Order be with prospective effect only.
- 2.2. It is submitted that the Petitioner and the Respondent GUVNL executed Power Purchase Agreement dated 30.05.2018 for generation and sale of electricity from the proposed 7.5 MW MSW based power project by the Petitioner. Referring to Article 8.2 it is submitted that the said Article provides for qualifying criteria for 'Force Majeure Events' and available relief for a 'Force Majeure Event'. As per said Article, no party shall be in breach of its obligations to the extent that the performance was prevented, hindered or delayed due to Force Majeure event. It is argued that this Article is relevant in respect of liquidated damages and Bank Guarantee although not for protection of tariff.
- 2.3. Referring to Article 2.2 it is submitted that two days prior to signing of the PPA, the Power Producer is required to submit Performance Bank Guarantee (PBG) equivalent to Rs. 5 Lakhs/MW and accordingly, PBG was furnished by the Petitioner. But for any forfeiture of same it needs to be read with above Article.
- 2.4. Also, referring to Article 4.3 of the PPA, it is submitted that if the project is not commissioned by its SCOD due to reasons other than mentioned in the said Article, the Petitioner is required to pay to the Respondent GUVNL liquidated damages for delay at the rate of Rs. 3000 per day per MW. However, it is argued that the said Article contains enabling provisions regarding the extension of the SCOD in case the project cannot be commissioned within the SCOD on account of (a) Force Majeure event as per Article 4.3.(1) or (b) delay in evacuation system for reasons solely attributable to GETCO as per Article 4.3.(3). It is submitted that the liquidated damages cannot be granted on account of non-commissioning of the project by SCOD, if Force Majeure events occur or there is delay in evacuation system by the Respondent GETCO.
- 2.5. It is argued that there is dual implication on the Petitioner for delay in commissioning beyond SCOD i.e. (a) Forfeiture of PBG as per Article 2.2 and (b) levy of liquidated damages as per Article 4.3. But with consideration of provisions of Article 8.2, the same is not leviable particularly in context of Force Majeure events, which are beyond the reasonable control of the party experiencing such delay or failure.

- 2.6. In regard to 'Force Majeure' Ld. Sr. Adv. relied on the judgment of Hon'ble Supreme Court in *Shree Bhagwati Steel Rolling Mills vs. Commissioner of Central Excise & Anr.* [(2016) 3 SCC 643]. It is argued that assuming without admitting and independent of above submissions, that the Petitioner is liable to above financial implications but then there should be some damages suffered by the Respondent GUVNL, which is required to be demonstrated by GUVNL. In case Respondent GUVNL is unable to show that it incurred any damages/loss, the Petitioner is not liable to pay.
- 2.7. According to the Petitioner, if the Respondent has not purchase energy from the MSW project at the agreed tariff of Rs. 7.07 per unit there are two implications viz. (a) Not fulfilling its obligation to purchase generation from MSW project under the PPA and (b) Not fulfilling their RPO obligation for which it is necessary to approach this Commission for carry forward or extending its RPO obligation to next year. In the alternative, Respondent GUVNL may meet its RPO obligation by purchasing REC, which is recognised as compliance as per the GERC (Procurement of Energy from Renewable Sources) Regulations, 2010 as amended. It is submitted that the REC are being traded around Rs. 3 per unit and in that case the Respondent will be benefitted.
- 2.8. Referring to various provisions of the GERC (Procurement of Energy from Renewable Sources) Regulations, it is submitted that Regulation 2.1(e) defines 'Certificate' to mean renewable energy certificate under the provisions of CERC (Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010. It is further submitted that Regulation 2.1(k) defines an 'Obligated Entity' and Regulation 2.1(p) defines 'Renewable Energy Sources' which includes urban/municipal waste. Further, table in Regulation 4.1 provides minimum quantum of purchase in percentage from renewable sources and fourth proviso to Regulation 9 provides regarding breach in license condition of the distribution licensee.
- 2.9. It is argued that the Respondent GUVNL is an obligated entity in terms of above RPO obligations but by way of not purchasing the electricity generation of MSW project no loss or damage has occurred to GUVNL.
- 2.10. It is submitted that levy of liquidated damages is not permitted without proof of actual loss. In this regard reliance is placed on judgment by five judge bench of Hon'ble Supreme Court in *Fateh Chand vs. Balkishan Dass* [AIR (1963) SC 1405]. Referring to para 7, 8, 9 and 10 of said judgment it is submitted that in present case the penalty stipulated (i) As per Article 4.3 Liquidated Damages for delay at the rate of Rs. 3000 per day per MW and (ii) Performance Bank Guarantee of Rs. 5 Lakh/MW, which is the maximum stipulated against which what needs to be considered is 'reasonable compensation' particularly when no legal injury is caused to the Respondent GUVNL but on the contrary by way of non-purchase of electricity generated from MSW project GUVNL is going benefit. Ld. counsel for the Petitioner thereafter, also referred para 14 and 18 of the above judgment and submitted that

mesne profits allowed in said judgment are because possession was continued and are awarded till the date on which possession was delivered/handed over. However, in present case there is no covenant or breach of contract.

2.11. Ld. Sr. Counsel for the Petitioner also referred and relied on following judgments in support of submissions on behalf of the Petitioner:

- (i). *Maula Bux vs. Union of India* [(1969) 2 SCC 554];
- (ii). *Kailash Nath Associates vs. Delhi Development Authority & Anr.* [(2015) 4 SCC 136].

2.12. It is submitted that the present tariff of the Petitioner is required to be protected for which following judgments are referred:

- (i) *Hon'ble APTEL judgment dated 12.08.2021 in Appeal No. 37 of 2019 & allied IAs in matter of Hunsankodilli Solar Power Project LL.P. & Anr. Vs. Bangalore Electricity Supply Co. Ltd. & Anr.;*
- (ii) *Hon'ble APTEL's judgment dated 14.09.2020 in Appeal No. 351 of 2018 and IA Nos. 505 of 2020 and IA No. 1703/2018 & 249/2019 in case of Chennamangathihalli Solar Power Project LL.P. & Anr. Vs. Bangalore Electricity Supply Co. Ltd. & Anr.;*
- (iii) *Hon'ble APTEL's judgment dated 05.07.2021 in Appeal No. 67 of 2021 and & allied IAs in case of Solitaire BTN Solar Pvt. Ltd. Vs. Tamil Nadu Electricity Regulatory Commission & Ors. [(2021 SCC OnLine APTEL 24]*

2.13. Ld. Sr. counsel for the Petitioner submitted that in present case, the Bank Guarantee is already encashed by the Respondent GUVNL which needs to be refunded and concluded submissions/arguments in the matter on behalf of the Petitioner.

3. Mr. Nitin Maadam, submitted that he wants to appear as party having filed an application on affidavit seeking impleadment as party in present matter which is already forwarded through email and had accordingly sought link for present hearing. It is further submitted that the Commission may provide 15 days' time because information sought is not yet provided to him. It is submitted that copy of the Petition, reply, all other documents need to be provided. It is also requested that address of parties to serve copy of impleadment application be provided by the office of the Commission and agreed that on receipt of same, copy of application filed before GERC will be served by the Applicant to all parties and thereafter, affidavit of service will be filed before the Commission. It is also submitted that above application is filed being a consumer of electricity in PGVCL area and wants to point out other relevant issues involved in this matter for which opportunity needs to be provided by the Commission.

4. Ld. Sr. Adv. for the Petitioner submitted that the aforesaid application of Mr. Maadam is not served/received by the Petitioner and in any case the said

application seeking impleadment as party has no relevance because the issue involved in present case is between parties to contract i.e. PPA executed between the Petitioner with the Respondent No. 1 GUVNL. It is submitted that the Petitioners will file reply after service of application.

5. Ld. Adv. Mr. Anand Ganesan, on behalf of the Respondent GUVNL submitted that the Commission may continue with virtual hearing on next date as well which is also agreed by Ld. Sr. Counsel of the Petitioner.
6. We note that an application from Mr. Nitin Maadam is received by the office of the Commission seeking impleadment as party in the present matter on Affidavit alongwith other documents through email and physical copy is also received. However, the same is not served/provided to the Petitioner and the Respondents. Mr. Nitin Maadam has sought 15 days' time because no information is provided with respect to subject matter to him and without the information of the Petition which is not provided he is unable to make his submissions on the subject matter. It is also submitted that address of parties is not available for serving copy of impleadment application. He submitted that on receipt of same, copy of application filed before GERC will be served by the Applicant to all parties and thereafter, affidavit of service will be filed before the Commission. Accordingly, staff of the Commission is directed to provide 'Memo of Parties' in this matter with their respective address as available on record to the Applicant Mr. Maadam including through email. Moreover, copy of this Order to be provided to him. Also, the Applicant Mr. Nitin Maadam is directed to serve copy of Application alongwith relevant documents to the Petitioner and the Respondents mentioned as parties in this Order within 3 days and file affidavit of service before the Commission. The Petitioner and the Respondents are also directed to file their submissions/reply on affidavit to above Application seeking impleadment as party in present matter within 3 days from receipt of same.
7. With joint consent of the parties for virtual hearing, the next date of hearing is on 23.12.2021 at 11:30 A.M. through V.C. on Microsoft teams. Staff of the Commission is directed to provide necessary link to parties in this matter and also to Mr. Nitin Maadam on email ID <maadamnitin@gmail.com>.
8. Order accordingly.

**Sd/-**  
**[S. R. Pandey]**  
**Member**

**Sd/-**  
**[Mehul M. Gandhi]**  
**Member**

Place: Gandhinagar.  
Date: 17/12/2021.