

**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
Represented by : Ld. Senior Counsel Mr. Mihir Thakore and
Advocates Mr. Saunak Rajguru, Ms. Gayatri Aryan,
and Mr. Tabish Samdani

V/s.

Respondent No. 1 : Gujarat Urja Vikas Nigam Limited
Represented by : Ld. Advocate Mr. Anand Ganesan and Mr. Kandarp
Mistry

Respondent No. 2 : Jamnagar Municipal Corporation
Represented by : Nobody was present.

Respondent No. 3 : Gujarat Energy Development Agency
Represented by : Nobody was present.

Respondent No. 4 : Gujarat Energy Transmission Corporation Limited
Represented by : Ld. Advocate Mr. Anand Ganesan and Mr. Dipak Patel

Respondent No. 5 : State Load Despatch Centre - Gujarat
Represented by : Mr. D. N. Shah

CORAM:

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

Date: 03/12/2021

DAILY ORDER

1. The present matter was listed for hearing on 24.11.2021.
2. Heard Ld. Senior Adv. Mr. Mihir Thakore for the Petitioner arguing on various events preventing/hindering and/or delaying the construction, completion, commissioning of 7.5 MW MSW based Waste to Energy Project within the timelines due to reasons beyond its reasonable control which qualify as Force Majeure events while citing & referring relevant judgments/orders in the present matter.
 - 2.1. 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 in case of failure to achieve the Commercial Operation by SCOD, in that case the Respondent is entitled to encash the PBG. Also, referring to Article 4.3 of the PPA, it is argued that the PPA executed between the parties contains enabling provisions regarding the extension of the SCOD in case the project cannot be commissioned within the SCOD on account of (i) Force Majeure event or (ii) delay in evacuation system for reasons solely attributable to GETCO. It is submitted that the liquidated damages cannot be granted, if the Force Majeure event occurs on account of non-commissioning of the project by SCOD or delay in evacuation system by GETCO.
 - 2.2. Further, referring to Article 8.1 (a) it is submitted that anything beyond the reasonable control of the Party experiencing delay or failure is Force Majeure and its language is wide. Referring to clauses of Article 8.1 (a) regarding (i) Acts of God, (ii) typhoons, floods, lightning, cyclone hurricane, drought, famine, epidemic, plague or other natural calamities, (v) inability to obtain required licenses or Legal Approvals, (x) exceptionally adverse weather conditions it is argued that these clauses are preceded by 'including the occurrence of any of the following'.
 - 2.3. Moreover, referring to Article 8.1 (b) of the PPA, it is submitted that although it refers to Force Majeure Exclusions but even if any of the conditions mentioned therein is consequence of an event of Force Majeure then it is Force Majeure event. As per Article 8.1 (c), a generator who is affected by an event of force majeure is construed as an aggrieved party in terms of the PPA and the aggrieved party shall give notice to other party of any event of Force Majeure event to other party.
 - 2.4. It is submitted that the word "Force Majeure" is an inclusive definition under the PPA, which can be seen from the phrase "including any of the following" in the Article 8.1 (a) of the PPA. The scope of the Force Majeure clause under the PPA is

not exhaustive and will include all events which are beyond the reasonable control of the Petitioner.

2.5. It is further submitted that following events were elaborated during previous hearing as to whether the same has to be considered as 'Force Majeure event' leading to delay in commissioning of the WtE project or not:

- (i) Delay in availability of approach road for the project
- (ii) Delay in raising the heights of overhead lines on the road posing as an obstruction for transport of equipment to the project site
- (iii) Delay in granting of statutory clearances
 - (a) Delay caused in construction of Chimney on account of belated approval granted by Ministry of Defence;
 - (b) Delay in RTU connectivity
 - (c) Delay on part of GETCO to provide S/S for the project
- (iv) Delay due to heavy floods on the project site
- (v) Delay due to law and order issues faced by sub-contractor hindering civil construction work at the project
- (vi) Delay caused due to COVID-19
 - (a) Delay due to lack of man power, re mobilisation, covid positive cases
 - (b) Delay caused due to disruption in supply of equipment

2.6. In support of its arguments, Ld. Sr. counsel of the Petitioner has relied upon the following judgments:

- (i) *Industrial Finance Corporation of India Vs. Cannanore Spinning & Weaving Mills Limited [(2002) 5 SCC 544];*
- (ii) *Dhanrajmal Gobindram Vs. Shamji Kalidas & Co., [(1961) SC 1285]*

2.7. It is submitted that Force Majeure Event need not always be invoked in a scenario of impossibility but also part performance of works being hindered by a supervening event would trigger the 'Force Majeure' clause. In support of this, reliance is placed on the judgment of the Hon'ble Supreme Court in *Energy Watchdog & Ors. Vs. CERC & Ors. [(2017) 14 SCC 80]*; wherein it was held that that a party can be said to have been hindered, if there is something which partly prevents the performance of the obligation under the contract.

2.8. It is submitted that the impact of the delay in grant of various statutory clearances also prevented the Petitioner from achieving SCOD and therefore delay due to grant of statutory approvals amounts to Force Majeure under the PPA executed between the parties. In support of this, following judgments are relied:

- (i) *Naihati Jute Mills Ltd. vs. Khyaliram Jagannath, [AIR 1968 SC 522];*
- (ii) *Hon'ble APTEL's judgment dated 04.02.2014 in GUVNL & Anr. vs. M/s. Cargo Solar Power Gujarat Pvt. Ltd., in Appeal No. 123 of 2012, [(2014) SCC Online APTEL 23].*

2.9. It is argued that GETCO was not able to charge the substation in view of certain pending railway crossing approvals and considering the inordinate delay on the part of GETCO in providing the substation for evacuation of power, the Petitioner has offering financial assistance to GETCO to ensure expedited grant of railway crossing approvals and charging of substation by GETCO. Therefore, delay in inter-connection facilities /evacuation facilities qualifies as a Force Majeure event. He relied upon the following judgements:

- (i) *Gujarat Urja Vikas Nigam Ltd. vs. ACME Solar Technologies (Gujarat) Private Limited [(2017) 11 SCC 801];*
- (ii) *Hon'ble APTEL's judgment dated 21.03.2018 in Appeal No. 176 of 2015 and IA Nos. 364 and 368 of 2015 in case of Chamundeswari Electricity Supply Co. Ltd. vs. Saisudhir Energy (Chitradurga) Pvt. Ltd. & Anr., [(2018) SCC Online APTEL 65].*

2.10. It is submitted that there is a delay on part of Ministry of Defence in granting the NoC for purposes of the Chimney height required to be erected at the Project site by the Petitioner and without the Chimney being erected and operational, the WTE Plant cannot be commissioned. The Petitioner had applied for the grant of NoC to the Ministry of Defence on 28.09.2018 and the same was granted by Ministry of Defence only on 11.03.2020. It is submitted that the said NoC was necessary as the Project is located within 8 KMs from the Jamnagar Airbase. It is submitted that such delay is not attributable to the Petitioner and therefore, it qualifies as an Force Majeure in terms of Article 8.1 of the PPA. It is argued, that the Petitioner is relying on two more judgements/orders, which will are yet to be placed on record and will be filed by the Petitioner within few days.

2.11. It is submitted that delay due to law and order issues faced by sub-contractor(s) which hindered civil construction work at the Project, also constitute Force Majeure event. The reliance being placed upon the judgment dated 31.10.2007 in Appeal Nos. 159, 162 and 167 of 2005 in case between North Eastern Electric Power Corporation Limited vs. Assam State Electricity Board, [(2007) SCC Online APTEL 120], wherein Hon'ble APTEL has held that law-and-order issues faced by Project developers qualifies as a Force Majeure event.

2.12. It is submitted that PPA provides that a party affected by an epidemic or other natural calamities will not be responsible or liable for breach of any delay in performance of its obligations. It is submitted that the Project execution works was

'hindered' at different stages due to the outbreak of the COVID-19 and said pandemic event unfolded over several months and made it impossible to predict and plan project development activity due to constant and unprecedented disruptions, including disruptions in operations and construction leading to demobilization at site related work, disruption in supply chain and impacting availability of work force and labour etc. Moreover, even MNRE declared COVID-19 as Force Majeure event and accordingly vide Notification dated 13.08.2020 has granted 5 months' blanket extension of SCOD to all renewable energy projects and in view of this Notification, the Respondent GUVNL had already extended the SCOD until 30.11.2020. It also submitted that the Petitioner's power plant has already been commissioned on 15.11.2021. In support of this, reliance being placed upon the Hon'ble High Court of Delhi's Judgment dated 29.05.2020 in O.M.P (I) (COMM.) No. 88/2020 & I.As. 3696-3697/2020 in case of M/s. Halliburton Offshore Services Inc. vs. Vedanta Ltd. & Anr., wherein it was held that there is no doubt that COVID-19 is a Force Majeure event.

- 2.13. Ld. Senior Counsel for the Petitioner requested the Commission to give another date for completing the arguments in the present matter. Moreover, the Commission is also requested to continue its decision regarding no coercive action by Respondent GUVNL till next hearing.
3. Ld. Adv. Mr. Anand Ganesan, on behalf of the Respondent GUVNL submitted that the Commission may decide the next date of hearing to be virtual hearing in the present matter. Ld. Sr. Counsel of the Petitioner also agreed for next hearing to be virtual.
4. With joint consent of the parties for virtual hearing, the next date of hearing is on 15.12.2021 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. We also note that Ld. Sr. Adv. Mr. Thakore appearing on behalf of Petitioner requested that till next hearing the decision regarding no coercive action by the Respondent GUVNL may be continued which is not objected by Respondent GUVNL, accordingly the same stand continued till next hearing.
5. Order accordingly.

Sd/-
[S. R. Pandey]
Member

Sd/-
[Mehul M. Gandhi]
Member

Place: Gandhinagar.
Date: 03/12/2021.