

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Petition No. 95/MP/2017
alongwith I.A. No. 35/2017**

Subject : Petition under Section 79 of the Electricity Act, 2003 in relation to disputes arising out of the Power Purchase Agreement dated 26.7.2016 between petitioner herein i.e. Welspun Energy Private Limited and Solar Energy Corporation of India Limited.

Date of hearing : 10.8.2017

Coram : Shri Gireesh B. Pradhan, Chairperson
Shri A.K. Singhal, Member
Shri A.S. Bakshi, Member
Dr. M.K. Iyer, Member

Petitioner : Welspun Energy Private Limited.

Respondent : Solar Energy Corporation of India Limited.

Parties present : Shri Vikash Singh, Senior Advocate, WEPL
Ms. Pragya Ohri, Advocate, WEPL
Ms. Kanika Kumar, Advocate, WEPL
Shri Rajeevan Nair, Advocate, WEPL
Shri Ankit Roy, Advocate, SECI
Shri Kushal Gupta, Advocate, SECI
Shri Prabhas Bajaj, Advocate, SECI

Record of Proceedings

At the outset, learned counsel for the Solar Energy Corporation of India Limited (SECI) submitted that the present petition that has been filed under Section 79 of the Electricity Act, 2003 (the Act) is neither maintainable nor sustainable in law. Learned counsel further submitted as under:

a). The Commission, under Section 79(1)(f) of the Act, has jurisdiction to adjudicate disputes between parties falling under clauses (a) to (d) of Section 79. In the present case, the dispute is neither related to tariff nor inter-State transmission of electricity and does not fall under clauses (a) to (d) of Section 79 of the Act. The dispute sought to be raised in the present petition does not fall within the purview of Section 79 of the Act and is beyond the scope of the Commission's jurisdiction and therefore, is ex-facie not maintainable before the Commission.

b). As per Article 16.3.2 of the PPA, a dispute that arises out of or in connection with any claims not covered in Article 16.3.1 of the PPA shall be resolved by

arbitration under the Indian Arbitration and Conciliation Act, 1996. Since, the petitioner has already filed an Application bearing No. OMP (I) Comm No. 163 of 2017 under Section 9 of the Arbitration Act before the Delhi High Court, it is clear that even the petitioner has knowledge that the present dispute falls under the ambit of arbitration.

c). An essential condition under Section 9 of the Arbitration and Conciliation Act, 1996 is that a party must have manifest intention to arbitrate the matter. The petitioner has obtained an interim order from the Delhi High Court in the said application on the premise that it would arbitrate. The said order was passed four months back and till date, the petitioner has not invoked the arbitration. Instead, the petitioner has filed the present petition under Section 79 of the Act and has resorted to forum shopping.

d). The petitioner has committed continuing defaults and material breaches of the most fundamental clauses of the PPA executed between the petitioner and SECI for setting up a 100 MW Solar Power Project.

e). Clause 3.13 of the Scheme Guidelines lays down the conditions for Financial Closure which *inter alia* stipulates that the Solar Power Developer shall report tie-up of Financing Arrangements for the projects within 7 months from the date of signing the PPA. It has also been stipulated that at this stage, the project developer would furnish within the period of 7 months, the necessary documents to establish that the required land for project development is in clear possession of the project developer. Complying with the conditions for financial closure is the most fundamental and crucial condition in the contract which has been breached by the petitioner.

f). SECI vide various letters requested the petitioner to meet the requirements of Financial Closure. Despite that, the petitioner did not take any steps to fulfil the conditions subsequent before the stipulated date i.e.10.11.2016. The petitioner wilfully and deliberately committed breach of its obligations under the binding and mandatory terms of the contract. It has been admitted by the petitioner itself in the petition that even as on date, the petitioner has not complied with the conditions subsequent, which were required to be fulfilled before 10.11.2016. The petitioner has itself admitted that the compliance with these mandatory and crucial conditions, even as on date, is at an “advanced stage”.

g). SECI had issued notices to the petitioner under Clause 3.2.1 of the PPA on 11.11.2016 and 1.3.2017 and had given a period of 7 days in terms of Clause 3.2.1 of the PPA. On the expiry of the said period of 7 days, the automatic termination of the contract was to take place. The petitioner did not comply with the requirements under the Notices and therefore, In terms of Clause 3.2, the agreement had automatically stood terminated by efflux of time.

h). The petitioner, in its rejoinder has mentioned that the present case is a case of inter-State transmission of electricity. However, the title of the RfS document

indicates that it is only for the State of Maharashtra and therefore, it is a case of intra-State transmission of electricity in the State of Maharashtra. In support of his contentions, learned counsel relied upon the Commission's order dated 18.4.2017 in Petition No. 223/MP/2015 [Tata Power Delhi Distribution Limited Vs. NTPC Limited and Others].

2. In his rebuttal, learned senior counsel for the petitioner submitted as under:

a). The present petition is maintainable both under the law and PPA. As per the definition of the terms 'Buying Utilities' and 'Power Sales Agreement' as provided in the PPA, it becomes clear that SECI, as an inter-State trading licence is going to purchase solar power under the PPA and is going to sell such power *inter alia* to Discoms outside the State of Maharashtra. Since, the power from the projects covered under the MNRE scheme under which the petitioner's project is being developed, is to be sold to consumers in different States outside the State of Maharashtra through transaction between SECI and Discoms of such State, the jurisdiction will vest with the Commission in light of the inter-State sale of power from the petitioner's project.

b). The Commission has jurisdiction over all disputes arising between a generating company and trading licensee where in sale of power is ultimately being made to consumers outside the State where project is located through Discoms of such State, even as per the terms of the PPA, the Commission has jurisdiction.

c). Article 16.3.1 of the PPA provides that where any dispute arises from a claim made by any party for any change on or determination of the tariff or any matter related to tariff or claims made any party which partly or wholly relate to any change in tariff or determination of any such claims could result in change in Tariff, or relates to any matter agreed to be referred to Appropriate Commission, such dispute shall be submitted to adjudication by the Central Commission.

d). In the present petition, the petitioner amongst other reliefs has sought extension of the Scheduled Commissioning Date (SCOD) on account of delay by the Government and Force Majeure events. If the plea of force majeure like event or delay by Government is not accepted and the SCD is not extended, then the Commission may consider reducing the tariff for such delay and for such units in terms of Article 9.2 of the PPA.

e). The claim in the present petition partly relates to tariff. Moreover, determination of this claim could result in change in tariff, thus, under Article 16.3.1 (i) of the PPA, the present dispute ought to be adjudicated by the Commission. In support of his contentions, learned senior counsel relied upon the judgments of the Hon'ble Supreme Court in Union of India Vs. Tata Teleservices Ltd., [(2007) 7 SCC

517] and Adani Power Limited Vs. Energy Watchdog, [Civil Appeal Nos. 5399-5400 of 2016].

3. In response to the Commission's query with respect to the relief sought by the petitioner under the Arbitration Application filed before the Hon'ble Delhi High Court, learned senior counsel for the petitioner submitted that the petitioner had approached the Delhi High Court for relief against the bank as SECI had invoked the Bank Guarantees given by the petitioner under the PPA and the petitioner had amongst other prayers primarily sought an injunction against the Bank from releasing payment against such invocation by SECI. Learned senior counsel for the petitioner submitted that the petitioner would withdraw the Arbitration Application filed by it before the Delhi High Court.

4. After hearing the learned senior counsel for the petitioner and learned counsel for SECI, the Commission directed the petitioner to file an affidavit with regard to the withdrawal of the Arbitration Application filed by it before the Delhi High Court , by 11.9.2017 with an advance copy to the respondent who may file its response by 18.9.2017. The Commission directed the parties that due date of filing the affidavit and response should be strictly complied with. No extension shall be granted on that account.

5. Subject to the above, the Commission reserved the order in the petition and I.A on maintainability.

By order of the Commission

**Sd/-
(T. Rout)
Chief (Legal)**