

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 483/MP/2020 and IA No.31/2020

Subject: Petition under Section 79 of the Electricity Act, 2003 along with statutory framework governing procurement of power through competitive bidding and Articles 11 and 13 of the Power Purchase Agreements dated 07.12.2018 executed between ACME Deoghar Solar Power Pvt. Ltd. and Solar Energy Corporation of India, and, ACME Dhaulpur Powertech Pvt. Ltd. and Solar Energy Corp. of India Ltd. and the Tripartite Transmission Agreement dated 28.10.2018 executed between Power Grid Corporation of India Limited, ACME Solar Holdings Ltd and Fatehgarh-Bhadla Transmission Ltd., the Transmission Service Agreement dated 28.01.2019 executed between ACME Solar Holdings Ltd. and Power Grid Corporation of India Ltd. and the Long-Term Access Agreement dated 03.06.2019 executed between Power Grid Corporation of India Ltd. and ACME Solar Holdings Ltd. seeking directions to restrain SECI and Power Grid Corporation of India Limited from invoking bank guarantees and letters of comfort and for return the bank guarantees and letters of Comfort

Petitioners:

1. ACME Deoghar Solar Power Pvt. Ltd.
2. ACME Dhaulpur Powertech Pvt. Ltd.
3. ACME Solar Holdings Ltd.

Respondents: Solar Energy Corporation of India Ltd. and others

Petition No.484/MP/2020 and IA No. 32/2020

Subject: Petition under Section 79 of the Electricity Act, 2003 along with statutory framework governing procurement of power through competitive bidding and Articles 11 and 13 of the Power Purchase Agreements dated 06.12.2018 executed between ACME Phalodi Solar Energy Pvt. Ltd. and Solar Energy Corporation of India, and, ACME Raisar Solar Energy Pvt. Ltd. and Solar Energy Corp. of India Ltd. and the Tripartite Transmission Agreement dated 25.09.2018 executed between Power Grid Corporation of India Limited, ACME Solar Holdings Ltd and Fatehgarh-Bhadla Transmission Ltd., the Transmission Service Agreement dated 28.01.2019 executed between ACME Solar Holdings Ltd. and Power Grid Corporation of India Ltd. and the Long-Term Access Agreement dated 16.05.2019 executed between Power Grid Corporation of India Ltd. and ACME Solar Holdings Ltd. seeking directions to restrain SECI and Power Grid Corporation of India Limited from invoking bank guarantees and letters of comfort along with return of the bank guarantees and letters of comfort.



Petitioners: 1. ACME Phalodi Solar Energy Pvt. Ltd.
2. ACME Raisar Solar Energy Pvt. Ltd.
3. ACME Solar Holdings Ltd.

Respondents: Solar Energy Corporation of India Limited & others

Date of Hearing: 14.5.2020

Coram: Shri P. K. Pujari, Chairperson
Shri I.S. Jha, Member
Shri Arun Goyal, Member

Parties present: Shri Amit Kapur, Advocate for the Petitioner
Shri Vishrov Mukerjee, Advocate for the Petitioner
Shri Yashaswi Kant, Advocate, ACME
Shri M. G. Ramachandran, Sr. Advocate, SECI
Ms. Tanya Sareen, Advocate, SECI
Ms. Suparna Srivastava, Advocate, PGCIL
Ms. Joyti Prasad, PGCIL
Shri Swapnil Verma, PGCIL

Record of Proceedings

The Petitions were listed for hearing through video conferencing.

2. Learned counsel for the Petitioners submitted that the present Petitions have been filed seeking *inter-alia* directions to Solar Energy Corporation of India Ltd. (SECI) and Power Grid Corporation of India Ltd. (PGCIL) not to encash Bank Guarantees and Letters of Comfort submitted by the Petitioners and to return the Bank Guarantees and Letters of Comfort submitted by the Petitioner. Learned counsel submitted that since both the Petitions are similar in nature, it will proceed with the Petition No. 483/MP/2020. Learned counsel for the Petitioners mainly submitted as under:

(a) On 27.2.2018, SECI issued Request for Selection for setting up grid connected solar PV Projects for 3000 MW capacity. Pursuant to submission of bid, the Petitioner was declared as the successful bidder and was issued Letter of Awards for setting up of two 300 MW Solar Power Projects. On 7.12.2018, the Petitioner executed PPAs with SECI.

(b) On 4.5.2020, the Petitioners have terminated the PPAs dated 7.12.2018 executed with SECI on account of the force majeure events, namely, (i) status quo orders by Hon'ble Rajasthan High Court qua land on which Fatehgarh Substation was to be constructed, (ii) outbreak of Covid-19 and its adverse impact on manufacturing facilities of suppliers since December 2019 including lockdown in China and India, and (iii) delay in commissioning of associated transmission network elements by other Transmission Service Providers.

(c) As a consequence of the foregoing, the Projects have already been delayed by 15 months and further delay will continue on account of uncertainty due to Covid-19.

(d) The PPAs entered with SECI provide for maximum extension of 6 months from Scheduled Commissioning Date, i.e. total 30 months from effective date



of the PPAs, for commissioning the entire capacity of the Projects due to any reason whatsoever. Therefore, the entire capacity of the Projects is required to be commissioned by 8.5.2021 considering extension of 6 months from the scheduled commissioning date of 8.11.2020. The PPAs do not permit any extension beyond this point for any reason. However, due to delay on account of force majeure events, the Petitioner is not able to execute the Projects within the time period. Accordingly, performance of obligations under the PPAs has become impossible and thus become void. Therefore, the parties are absolved from their obligations.

(e) As per Article 4.3.5 read with Article 13.5.1 of the PPAs, the Petitioners can terminate the PPAs if Force Majeure event or its effect continues for more than 3 months. Accordingly, Petitioners have validly terminated the PPAs. Since occurrence of force majeure event releases parties from their respective obligations and Article 13.5.1 specifies that no liability shall survive of either party, no amount is due to either SECI or PGCIL. Hence the Bank Guarantees and Letters of Credit ought to be returned. In support of its contention, learned counsel relied upon the judgment of the Hon'ble High Court of Delhi dated 20.4.2020 in OMP (I) (Comm) 3697 of 2020 in the case of M/s Halliburton Offshore Services Inc. v. Vedanta Limited &Anr.

3. Learned senior counsel for the Respondent, SECI accepted the notice and sought time to file reply to the Petition. Learned senior counsel further submitted that buying entities/distribution licensees, namely, BSES Rajdhani Power Limited, Tata Power Delhi Distribution Limited, BSES Yamuna Power Limited, Government of Puducherry, Haryana Power Purchase Center and South Bihar Power Distribution Company Limited (SBPDCL) should also be impleaded as party to the Petition. Learned senior counsel further submitted as under:

(a) The issue relates to the unilateral termination of the contract by the Petitioners on alleged grounds of force majeure. However, termination has not been accepted by SECI.

(b) SECI is disputing that there has been an event of force majeure or that even if there is such an event, its effect is continuing for a period of more than three (3) months. Further the Petitioners did not claim sustained force majeure for termination of PGCIL connectivity and the delay in construction of sub-station until after the event was already over. The stay order by Hon'ble High Court of Delhi has been vacated and therefore, the same can no longer be relied to claim termination. There was no such event which prevented the Petitioners from implementing the power projects.

(c) Without prejudice to the rights and contentions of the parties, SECI is actively considering the request of grant of extension to the Petitioners and will be communicating the decision to the Petitioners with regard to the above aspect at the earliest. This is to evolve the agreed methodology for implementation of the power projects awarded to the Petitioners and as per the terms of the PPA.

(d) The most important aspect is that the project as envisaged under the PPA and in the light of the policy of Government of India is implemented and SECI has no intent to encash or appropriate the bank guarantee if the issues can be resolved by mutual discussion without going into the rival contentions.



(e) SECI has replied in detail vide its letters dated 11.5.2020 to the termination letter dated 4.5.2020. However, this has not been placed on record by the Petitioner.

(f) During the pendency of the present Petition, the Bank Guarantees and Letters of Comfort furnished by the Petitioners in favour of SECI in terms of the PPA should be kept alive.

4. Learned counsel for PGCIL accepted notice and submitted as under:

(a) By way of the present Petitions, the Petitioners are trying to agitate the same causes of action which are pending before this Commission in Petition Nos. 108/MP/2019 and 109/MP/2019. Since the issues regarding extension of time for achieving milestones due to delay in commissioning of Fatehgarh sub-station are pending adjudication in the said Petitions, the same cannot be re-agitated in the present Petitions. Further, during the proceedings before this Commission on 5.3.2020, it was stated by the Petitioners that since the status quo orders had been vacated by the Hon'ble High Court of Rajasthan, they had applied to SECI for grant of four months extension for achieving the financial closure, land procurement and Scheduled Commercial Operation Date, which have now been granted by SECI.

(b) Despite serving force majeure notice dated 26.2.2020 to PGCIL, the Petitioners willfully represented to this Commission on 5.3.2020 that commissioning of the projects was under progress, although with the extended timeline. Thus, the only cause of action which can be agitated in the present Petition is with respect to the outbreak of COVID-19 and its impact on the performance of the Petitioners' obligations under the LTAA, TTA and TSA. Considering that the "force majeure" clause provides temporary amnesty, their decision in commercial wisdom to terminate the PPAs could not be considered as a ground of frustration of contract. In this background, the Petitioners cannot be allowed to escape the liabilities under the contracts entered into it and the Regulations of this Commission with regard to abandonment/exit from the project under the guise of force majeure.

(c) It is on the representation of the Petitioners and the transmission licensee (Fatehgarh Badla Transmission Limited) and a specific submission regarding their decision to not to shift the location of the project and the connectivity at Fatehgarh Pooling Station, that this Commission directed the Respondents not to take any coercive measures against the Petitioners till further orders. It is only on the status represented by the Petitioners and considering that PPA and back to back PSAs had been executed with SECI that the Commission in its order dated 9.5.2020 directed PGCIL to return the application BG or construction phase BG furnished by the Petitioners. Accordingly, since the issues arising before outbreak of COVID-19 are pending adjudication in Petition Nos. 108/MP/2019 and 109/MP/2019, PGCIL may be allowed to file reply restricted to that extent only.

5. In its rebuttal, learned counsel for Petitioners submitted that Petition Nos. 108/MP/2019 and 109/MP/2019 were filed seeking inter-alia extension of time. The issue and relief sought were entirely different. In the present Petitions, the Petitioners have terminated the PPAs. Learned counsel submitted that formal application would



be filed by Petitioners seeking withdrawal of Petition Nos. 108/MP/2019 and 109/MP/2019.

6. In response to the Commission`s query regarding scheduled date of the project, learned counsel for the Petitioners submitted that scheduled date of commissioning of the Project is 8.11.2020. In response to the Commission`s further query regarding expected date of commissioning of Fatehgarh transmission system, the representative of PGCIL stated it as October 2020.

7. In response to the Commission`s query as to how the Petitioners were adversely affected due to delay from scheduled date in availability of sub-station, since sub-station was still expected to be commissioned prior to Scheduled date as sought by the Petitioners, learned counsel for the Petitioners submitted that Article 13.5.1 of the PPAs permits the Petitioners to terminate the PPA if a Force Majeure Event or its effect continues for a period exceeding 3 months and the Petitioners have only exercised the said right.

8. After hearing the learned senior counsels for the Petitioner and the Respondents, SECI and PGCIL, the Commission admitted the Petitions.

9. The Commission directed the Petitioners to implead BSES Rajdhani Power Limited, Tata Power Delhi Distribution Limited, BSES Yamuna Power Limited, Government of Puducherry, Haryana Power Purchase Center and South Bihar Power Distribution Company Limited (SBPDCL) as parties to the Petition and file revised memo of parties by 28.5.2020. The Commission further directed the Petitioners to serve copy of the Petition on the Respondents including the impleaded distribution licensees immediately. The Respondents including the distribution licensees were directed to file their reply by 3.6.2020, with an advance copy to the Petitioner, who may file its rejoinder, if any, by 20.6.2020. The Commission directed that the due date of filing of reply and rejoinder should be strictly complied with.

10. Learned counsel for the Petitioners submitted that the Petitioners have also filed IA No. 31/2020 and IA No. 32/2020 restraining the Respondents, SECI and PGCIL from invoking/encashing the Letter of Comfort and Bank Guarantee respectively and to return the same to the Petitioners. The Commission directed the Respondents, SECI and PGCIL not to take any coercive measure against the Petitioners till the next date of hearing and the Petitioners were directed to keep the Letter of Comfort and Bank Guarantee valid. Accordingly, the Commission disposed of the IA No. 31/2020 and IA No. 32/2020.

11. The Petitions shall be listed for hearing in due course for which separate notice will be issued.

By order of the Commission

**Sd/-
(T.D. Pant)
Deputy Chief (Legal)**

