

CENTRAL ELECTRICITY REGULATORY COMMISSION

NEW DELHI

IA No. 91/2019 in Petition No. 108/MP/2019

&

I.A. No. 92/2019 in Petition No.109/MP/2019

Coram:

Shri P. K. Pujari, Chairperson

Shri I. S. Jha, Member

Date of Order: 09.05.2020

In the matter of

Interlocutory Application under Regulation 33B – Power to Remove Difficulties of Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009 read with Regulation 111, 112, 113 & 115 of CERC (Conduct of Business) Regulations, 1998 & Regulation 6(3) of Central Electricity Regulatory Commission (Payment of Fees) Regulations, 2012 regarding exemption of construction phase bank guarantee for an applicant who fulfils the exemption eligibility criteria post-submission of LTA application.

And

In the matter of

Power Grid Corporation of India Limited
Saudimini, Plot No.2,
Sector 29, Gurgaon
Haryana-122 001

... Applicant

Versus

1. ACME Solar Holdings Limited
Plot no. 152, Sector 44
Gurugram -122002
Haryana
2. ACME Deoghar Solar Power Private Limited
Plot no. 152, Sector 44
Gurugram -122002
Haryana
3. ACME Dhaultpur Powertech Private Limited
Office: 104, Munish Plaza,
20 Ansari Road, Darya Ganj,
New Delhi- 110 002

.....Respondents

ORDER

Power Grid Corporation of India Limited (PGCIL), has filed the instant Interlocutory Application (IAs), with the following prayers:

(i) *issue clarification or appropriate directions on the issue that whether exemption from submission of construction phase bank guarantee can be extended to phases between the making of LTA application to LTA grant or to signing of LTA Agreement or further to the last due date for submission of construction phase bank guarantee in the ordinary course; keeping in view of its implications on ISTS Licensees and beneficiaries (Discoms) as brought out in light of the submissions made in the present IA.;*

(ii) *issue directions for treatment of construction phase bank guarantee submitted by some LTA applicants pending adjudication of the present Petition; and*

(iii) *any other relief that may be granted in the facts and circumstances of the case*

Background

2. ACME Solar Holdings Private Limited (hereinafter to be referred as ACME) has filed Petition No. 108/MP/2019 and Petition No. 109/MP/2019 seeking direction to PGCIL to provide definitive timeline for commissioning of the ISTS or the system for evacuation of power from the project being developed by the Solar Power Developers (SPDs) and grant of extension of time to achieve milestones as provided under PPA-I and PPA-II dated 7.12.2018 and Tripartite Transmission Agreement dated 24.10.2018. In the aforesaid Petitions, the Petitioner has sought further direction to PGCIL not to demand construction phase bank guarantee (BG) for Long Term Access (LTA) since beneficiaries are already firm up by virtue of the Power Purchase Agreements (PPAs) (PPA-I and PPA-II) dated 7.12.2018. PGCIL has filed its reply to these Petitions.

3. PGCIL/CTU has filed instant IAs requesting for clarification as to whether requirement to provide construction phase BG be waived off for an applicant who signs a PPA post submission of LTA application.

Submissions of PGCIL

4. PGCIL/CTU has submitted that ACME had applied for LTA through four separate LTA applications for quantum of 300 MW each for its Fatehgarh-III & IV solar projects on target region basis. The details of LTA Applications submitted by ACME are as under:

Application No.	Date	Quantum (MW)	Target Region	Copy of PPA or SPA
1200001737	23.10.2018	300	Haryana/ NR	No
1200001742	23.10.2018	300	Haryana/ NR (100 MW) Uttar Pradesh/ NR (200 MW)	No
1200001764	27.8.2018	300	Delhi/ NR	No
1200001769	29.8.2018	300	Delhi/ NR	No

5. PGCIL/ CTU has submitted that LTA applications as stated above were taken up for grant of LTA through the consultative process in the 15th and 17th Meeting of Northern Region constituents regarding Connectivity/ LTA Applications in NR held on 11.09.2018 and 26.11.2018 respectively and it was agreed to grant LTA on target region basis.

6. PGCIL/CTU has submitted that ACME submitted copies of two PPAs of 300 MW each (without corresponding copies of PSAs or required NOCs at drawl ends) vide letter dated 21.12.2018 against its LTA applications and requested PGCIL/CTU for consideration of the two PPAs as part of LTA application and to consider the same for grant of LTA.

7. PGCIL/CTU has submitted that in response to Petitioner's letter dated 21.12.2018, PGCIL/CTU issued a letter dated 10.01.2019 wherein it was duly highlighted that corresponding copies of Power Sale Agreements (PSAs) are also required along with the PPAs submitted by ACME. In response to PGCIL/CTU

letter dated 10.01.2019, the Petitioner issued a letter dated 21.1.2019 requesting PGCIL/CTU for revision of connectivity approvals for execution for 1800 MW solar power projects, pertaining to instant petitions, from Fatehgarh-I to Bhadla-II on account of delay in acquisition of land by FBTL (Fatehgarh-Bhadla Transmission Line) for construction of sub-station/ evacuation system.

8. PGCIL/CTU has submitted that it, vide LTA intimations dated 17.1.2019, granted LTA to ACME for its four LTA applications of 300 MW each as agreed in the 15th and 17th Meeting of Northern Region constituents regarding Connectivity/ LTA Applications in NR held on 11.09.2018 and 26.11.2018 respectively.

9. PGCIL/CTU has submitted that subsequently, ACME vide its letter dated 12.2.2019, sought extension of timeline in execution of LTA Agreements against the LTAs granted. The principal reason stated for seeking this extension was its request for shifting the Connectivity and LTA grants to other location.

10. PGCIL/CTU has submitted that Regulation 12 of the Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009 (hereinafter referred to as the 2009 Connectivity Regulations) inter alia provides that an LTA applicant which has been granted LTA with system augmentation shall be required to submit a construction phase BG as per the provisions of the Detailed Procedure notified under Regulation 27 of the 2009 Connectivity Regulations.

11. PGCIL/CTU has submitted that in view of provisions of Regulation 12 and Regulation 27 read with Detailed Procedure notified under the 2009 Connectivity Regulations, the applicant is under an obligation to submit construction phase BG

since the LTA has been granted to the applicant that involves system augmentation. As per 2009 Connectivity Regulations, there are only three specific circumstances in which the submission of construction phase BG may be exempted, which are as under:

- a) entire quantum of LTA is tied up through firm PPAs;
- b) entire power has been duly allocated to beneficiaries in case of Central Sector Generating Station; and
- c) entire power has been duly allocated from an Ultra Mega Power Projects coming through the initiative of Central Government.

12. PGCIL/CTU has submitted that as per the standard-form LTA Agreement, there are only four circumstances in which construction phase BG may be encashed by it:

- a) Failure in construction of generation project/ dedicated transmission line;
- b) Making an exit;
- c) Abandonment of project; and
- d) Adverse progress.

13. PGCIL/CTU has submitted that the Commission in Orders in Petition No. 315/MP/2013 and Petition No. 55/MP/2015 has observed that the construction phase BG may additionally also serve as a security against payment of relinquishment charges (wherever applicable).

14. PGCIL/CTU has submitted that the construction phase BG is mainly required to cover risk of inter-State transmission licensee during construction phase of generators (for which transmission system is being constructed) since PPA (with beneficiaries) is operative only after generation project is commissioned. Thus, signing of PPA does not in any way mitigate the risk of inter-State transmission licensees during construction phase of generators for its delay, failure, exit, abandonment or relinquishment of LTA. Thus, if the requirement of construction phase BG is to be waived consequent upon signing of

PPAs, the liabilities during construction phase of generators needs to be assumed by both the generator and signatory of PPA (intermediary agency in the present case since PPA is not directly with the Discoms) jointly and severally to safeguard the interest of inter-State transmission licensee/ Discoms.

15. PGCIL/CTU has submitted that the exemption from the requirement of submission of construction phase BG had so far been exercised in only such cases where the applicant was fulfilling the exemption criteria under Para 24.1(b) (ii) (vi) of the Detailed Procedure at the time of making the LTA application and thus fulfilling the exemption criteria as a condition precedent.

16. PGCIL/CTU has submitted that ACME has sought review of the requirement of submission of construction phase BG by an LTA applicant who had tied-up power sale through firm PPA(s) or PPA & back-to-back PSAs. Accordingly, PGCIL/CTU is seeking a resolution of the situation through the instant applications. In its Petitions i.e. 108/MP/2019 and 109/MP/2019, the Petitioner has sought that the conditions for seeking exemption from submission of construction phase BG may not necessarily be treated as condition precedent.

17. PGCIL/CTU has submitted that a number of other LTA applicants are placed similar to ACME in the sense that they had also made LTA applications without firm beneficiaries and were granted LTA with the requirement to submit construction phase BG. However, subsequently the said LTA applicants have been able to firm-up their beneficiaries.

Analysis and Decision

18. We have heard the submissions of PGCIL. The present Interlocutory Applications have been filed by PGCIL in context of prayers of ACME in Petition

No. 108/MP/2019 and Petition No. 109/MP/2019 wherein ACME has sought extension of timelines of various milestones provided in the Power Purchase Agreement and Transmission Service Agreement. In the above Petitions (108/MP/2019 and 109/MP/2019), it is the case of ACME that it has entered into the PPA-I and PPA-II on 7.12.2018 and that the copies of these PPAs have been submitted to PGCIL/CTU vide letter dated 21.12.2018, prior to LTA intimation. Therefore, it has submitted that as per Clause 24b.ii(vi) of the Detailed Procedure, it is exempted from furnishing construction phase BG. It is also the case of ACME that the PPAs were submitted to PGCIL/CTU prior to the grant of the LTA approval and in spite of the same, PGCIL has not considered the said PPAs to be a part of the said LTA Application but has not responded to the Petitioner as to why the said PPAs cannot be taken to be a part of its LTA application. On the other hand, PGCIL/CTU has submitted that ACME has submitted PSAs for only 400 MW vide letter dated 06.06.2019 (against PPAs for 600MW). Also, the requisite STU NOCs are also still to be submitted by the Petitioners. Pending submission of these requisite documents, the exemption from submission of construction phase BG cannot be claimed by the Petitioners.

19. PGCIL has filed instant Interlocutory Applications seeking appropriate directions as to whether exemption from submission of construction phase BG *“can be extended to phases between the making of LTA application to LTA grant or to signing of LTA Agreement or further to the last due date for submission of construction phase bank guarantee in the ordinary course; keeping in view of its implications on ISTS Licensees and beneficiaries (Discoms)”*.

20. The Regulation 12(6) of the 2009 Connectivity Regulations provides as follows:

“ The aforesaid bank guarantee will stand discharged with the submission of bank guarantee required to be given by the applicant to the Central Transmission Utility during construction phase when the augmentation of transmission system is required, in accordance with the provisions in the detailed procedure.”

21. The relevant portions of Para 24 (v) and (vi) of the Detailed Procedure under Regulation 27(1) of the 2009 Connectivity Regulations are reproduced as under:

“(v) Applicant shall submit construction phase bank guarantee of Rs. 5 lakh per MW for the quantum of long-term access sought.

In case application for Grant of Connectivity and Grant of Long Term Access are made concurrently or after a time gap, and construction of dedicated line is not required to be constructed by the applicant but by the CTU/inter-State transmission licensee(for a thermal generating station of 500 MW and above and a hydro generating station of 250 MW and above, other than a captive generating plant), as per provisions of the Regulations, then the total BG required to be submitted for both the construction of dedicated line as well as for augmentation of transmission system shall together, at any time, not exceed Rs. 5 Lakhs per MW.

“(vi) In case of applicants who have already firmed up the entity or entities to whom electricity is proposed to be supplied or from whom electricity is proposed to be procured for the entire quantum of power for which LTA has been sought through signing of PPA or, in the case of Inter-State Generating Stations owned by the Central Government or Ultra Mega Power Projects coming up through the initiative of the Central Government, allocation of power to various beneficiaries as notified by it, then the applicant shall not be required to submit Bank Guarantee(BG) with the application form or the Construction Stage BG. In such cases, however, the augmentation of the transmission system as identified for grant of LTA shall be undertaken only after agreement of the beneficiaries in Standing Committee on Power System Planning/Regional Power Committee for bearing its transmission charges. The applicant shall submit a copy of PPA or notification made by Govt. of India, whichever is applicable. The long-term access agreement, may, in such cases be directly signed by the beneficiaries with the CTU or tripartite agreement with the CTU and ISTS, as the case may be.”

22. Perusal of the above provisions makes it clear that an applicant who has firmed up the entity or entities for supply of entire quantum for which LTA has been sought by signing the PPA is not required to submit Bank Guarantee either with the application form (Application BG, in short) or the construction phase BG subject to fulfilment of the following conditions:

(a) Augmentation of the transmission system as identified for grant of LTA shall be undertaken only after agreement of the beneficiaries in the

Standing Committee on Power System Planning/Regional Power Committee for bearing the transmission charges;

(b) The Long Term Access Agreement in such cases shall be directly signed by the beneficiaries with CTU or tripartite agreement with CTU and inter-State transmission licensee.

The above two conditions are to be fulfilled in case of signed PPAs for exemption from submitting the application bank guarantee or construction phase bank guarantee, or both, where augmentation of transmission system is required.

23. Both requirements i.e. (a) the beneficiaries have to agree to bear the transmission charges in the meeting of Standing Committee on Power System Planning/ Regional Power Committee and (b) the LTA agreements or tripartite agreements have to be signed with beneficiaries, lead to the conclusion that the PPAs are necessarily required to be signed by the beneficiaries with the LTA Applicant.

24. In several cases of wind and solar projects awarded through competitive bidding, PPAs are signed by the Generator/ Project Developer with intermediary agencies such as Solar Energy Corporation of India Limited (SECI) or National Thermal Power Corporation Limited (NTPC) who in turn enter into back to back PSAs with the beneficiaries. It follows that in such cases where the PPA has been signed by an intermediary agency like SECI or NTPC with the LTA Applicant, it should be supported by the back to back Power Sale Agreement with the beneficiaries so that a clear connection is established for supply of power by the generating station to the beneficiaries.

25. Signing of PSAs assumes greater significance in view of cancellation of PPAs on few occasions on account of non-signing of PSAs. In order of the Commission dated 18th March 2020 in Petition No. 188/AT/2020, it was intimated

by NTPC (the intermediary agency therein) that out of 1150 MW for which PPAs were signed after completion of the bidding process, as much as 950 MW was subsequently cancelled. Relevant portion of the order is quoted as under:

*“2. ----- The Petitioner has submitted that the capacity allotted after the completion of bidding process was 1150 MW. However, certain successful bidders have terminated the PPAs on account of failure of Buying Utilities/Distribution Licensees to obtain requisite approvals from the respective State Electricity Regulatory Commission within a stipulated time in terms of PPA and PSA. Accordingly, the Petitioner is seeking adoption of tariff in respect to 250 MW Wind Power Projects. --
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4. Subsequent to reserving order in the Petition on 12.2.2020, the Petitioner vide its affidavit dated 18.2.2020 has submitted that PPA dated 25.3.2019 entered into with one of the successful bidders, namely, Srijan Energy Systems Private Limited (through its Project Company-Kutch Windfarm Development Private Limited) was terminated by it on account of non-fulfilment of the condition precedent under the PPA/PSA by Uttar Pradesh Power Corporation Ltd. Therefore, the PPA dated 25.3.2019 entered into between NTPC and Wind Power Developer, namely, Kutch Windfarm Development Private Limited for sale and purchase of 50 MW of power stands terminated and cancelled. The Petitioner has prayed to adopt the tariff only in respect of the PPA dated 27.3.2019 entered into between Sprng Vayu Vidyut Private Limited and NTPC for generation and sale of 200 MW of power.”

26. Similarly, it was brought to notice of the Commission in Petition No. 57/AT/2020 that full capacity for which PPA was signed with intermediary agency did not lead to commensurate signing of PSA with the beneficiaries. Relevant portion of the order dated 24.02.2020 is as under:

“2. ----- The Petitioner has submitted that pursuant to bidding, 2000 MW capacity was allotted to the successful bidders. However, certain successful bidders have terminated the PPAs on account of failure of Buying Utilities/Distribution Licensees to obtain requisite approvals from the respective State Electricity Regulatory Commissions within the stipulated time, a Condition Precedent, in terms of PPA and PSA. Accordingly, the Petitioner is seeking adoption of tariff in respect of only 600 MW Solar Power Projects. -----

20. The Petitioner has submitted that out of 2000 MW, 1100 MW allocated to Telangana Distribution Companies did not materialize since Telangana Discoms did not obtain requisite approval from Telangana Electricity Regulatory Commission within the time stipulated and accordingly, ACME Solar Holdings Limited (600 MW) and Shapoorji Pallonji Infrastructure Capital Company Private Limited (500 MW) have terminated the PPAs entered into in respect thereof on account of not meeting the Condition Precedent, i.e. due to not fulfilment of the provisions of the PPA and PSA. Similarly, in case of Bihar Distribution Licensees, Azure Power India Private Limited (300 MW) has also terminated the PPA on the above ground. Accordingly, NTPC is seeking adoption of tariff in respect of 600 MW to be established by SB Energy Six Private Limited (600 MW) and to be sold to Punjab State Power Corporation Limited, North Bihar Power Distribution Company Limited and South Bihar Power Distribution Company Limited. According to the Petitioner, Punjab

State Power Corporation Limited has already filed an application before the PSERC seeking approval under Section 86(1)(b) of the Act and Bihar Discoms are in the process of filing the Petition before BERC.”

27. From the above Petitions, we note that despite PPAs having been signed between generators and intermediary agency, PSAs have not become a reality in several cases. Therefore, a PPA between generator (LTA applicant) and beneficiary cannot be placed at the same footing as a PPA between generator (LTA applicant) and intermediary agency for the purpose of construction phase BG. If the PPAs signed by SECI with the LTA applicant are not supported by back to back PSAs with the beneficiaries, there is no firm commitment of beneficiaries and the conditions of waiver from furnishing BGs (application BG/ construction phase BG) as envisaged in the Detailed Procedure is not fulfilled. Therefore, in our view, in absence of PSAs between intermediary agency with beneficiaries, the LTA applicant cannot avail the benefit of non-submission of Bank Guarantee under paragraph 24(vi) of the Detailed Procedure, subject to fulfilment of other requirements of the said paragraph.

28. An important aspect of non-requirement of construction phase BG is that augmentation of the transmission system as identified for grant of LTA shall be undertaken only after agreement of the beneficiaries in Standing Committee on Power System Planning/ Regional Power Committee and that transmission charges shall be borne by them and the LTA Agreement shall be signed directly by beneficiaries with CTU. In case of competitively bid projects through intermediary agencies, fulfilling these conditions may not be possible at the time of making LTA application, since in such cases PPA is signed by the intermediary agency with generators first on basis of bidding and then it is followed up by PSA with beneficiaries. There could be and often there is time lag between signing

PPA and PSA due to requirement of getting approval of PSA by respective State Electricity Regulatory Commissions.

29. In view of the above, we are of the opinion that in terms of the Detailed Procedure, construction phase BG cannot be waived off for an LTA applicant, where (a) augmentation of the transmission system is identified for grant of LTA and (b) there is no PPA with beneficiaries or PPA exists only with intermediary agency without back to back PSA with beneficiaries. However, taking into consideration the process of competitively bid projects through intermediary agencies and observations made in paragraph 28 above, we direct that if PPA gets signed between LTA applicant and beneficiaries or between LTA applicant and intermediary agency with back to back PSA with the beneficiaries, the construction phase BG shall not be required to be furnished for the quantum for which such PPA or PPA with back-to-back PSA has been signed with beneficiaries. Consequently, if any application BG or construction phase BG has been furnished by the LTA applicant, BG corresponding to the quantum, for which PPA or PSA with beneficiaries has been signed and submitted to CTU , shall be returned to such LTA applicant.

30. Accordingly, 91/IA/2019 and 92/IA/2019 are disposed of.

sd/-

(I. S. Jha)
Member

sd/-

(P. K. Pujari)
Chairperson