

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 95/MP/2017

Coram:

Shri Gireesh B. Pradhan, Chairperson

Shri A.K. Singhal, Member

Shri A.S. Bakshi, Member

Dr. M.K. Iyer, Member

Date of Order: 11th of October, 2017

In the matter of

Petition under Section 79 of the Electricity Act, 2003 for dispute arising out of the Power Purchase Agreement dated 26.07.2016 between Petitioner herein, i.e. M/s Welspun Energy Private Limited and Solar Energy Corporation of India Limited.

And

In the matter of

M/s. Welspun Energy Private Limited
3rd Floor, PTI Building,
4, Parliament Street,
New Delhi – 110001

...Petitioner

Versus

Solar Energy Corporation of India
1st Floor, D-3, A – Wing, District Centre
Religare Building, Saket, New Delhi – 110017

...Respondent

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

ORDER

The Petitioner, Welspun Energy Pvt. Ltd., has filed the present petition under Section 79 of the Electricity Act, 2003 for resolution of disputes arising out of the



Power Purchase Agreement dated 26.7.2016 between the Petitioner and the Respondent, Solar Energy Corporation of India Limited (SECI).

Facts of the Case:

2. On 4.8.2015, The Ministry of New and Renewable Energy (MNRE) issued a scheme for setting up of 2000 MW Grid-connected Solar PV Power Projects under Batch-III of Phase-II of the Jawaharlal Nehru National Solar Mission (JNNSM) with Viability Gap Funding support from National Clear Energy Fund. On 27.8.2015, SECI, the nodal agency for implementation of the MNRE Scheme, issued Request for Selection (RfS) document for the selection of Solar Power Developer (SPD) for the development of 500 MW grid on Build, Own and Operate (BOO) basis in the State of Maharashtra. Welspun Renewable Energy Pvt. Ltd. (WREPL), a subsidiary of the Petitioner, was awarded the project of 100 MW by SECI and in this regard Letter of Intent (LOI) was issued to it on 10.3.2016.

3. The Petitioner has submitted that WREPL requested SECI to allow its parent company, namely the Petitioner to execute the PPA with SECI and to make provision for signing of the PPA with its Parent company. However, there was no provision in the RfS or the Guidelines which dealt with the issue of execution of PPA and implementation of the project by parent company of a bidder. MNRE referred the matter to the Empowered Committee. The Empowered Committee in its meeting dated 18.4.2016 recommended for a change in the provisions of signing of the PPA by the way of amendment to the Guidelines. Accordingly, MNRE issued amendment to Guidelines on 19.7.2016. On 7.4.2016, the Petitioner furnished Performance Bank Guarantees amounting to Rs.30 crore and made an application to Maharashtra State Electricity Transmission Company Limited (hereinafter referred to as

'MSETCL') on 30.4.2016 for grant of grid connectivity. On 26.7.2016, the PPA was executed between the Petitioner and the Respondent which was effective from 10.4.2016. As per Article 2.1 of the PPA, the Petitioner is required to fulfil the Conditions Subsequent (CS) activities within seven months i.e. by 10.11.2016. Article 3.2.5 of the PPA provides that if the SPD is unable to fulfil any CS activities due to force majeure, the time period for fulfilment of CS activities is required to be extended for the period of such force majeure event.

4. The Petitioner has submitted that the following facts have led to filing of this petition:

(a) Despite best efforts, certain Conditions Subsequent (CS) activities could not be completed within seven months from the effective date due to reason not attributable to the Petitioner. Therefore, on 11.11.2016, SECI issued notice under Article 3.2 of the PPA to the Petitioner to comply with the terms of the PPA by 17.11.2016 failing which it will be liable for action as per the provisions of the PPA.

(b) MSETCL, vide its letter dated 28.11.2016 granted permission to the Petitioner for connectivity to the Grid. Subsequently, on 29.11.2016, SECI informed the Central Bank of India to invoke the Bank Guarantees issued by the Petitioner. However, on the same day, the Petitioner vide its letter informed SECI that with respect to financial closure requirement, it has adequate funds for the purpose of equity infusion and shall execute the project entirely through internal sources as per the terms and conditions of the PPA. The Petitioner further informed that it was in process of filing demerger scheme before the National Company Law Tribunal and it would remit Rs 1.9 crore for extension

from 11.11.2017 to 29.11.2017 and submitted a letter holding land registration due to on-going digitization process. Subsequently, on 7.12.2016, the Petitioner remitted extension charges of Rs.1.9 crore along with interest. On 15.12.2016, SECI put on hold the Encashment of Bank Guarantee.

(c) The Petitioner vide its letter dated 28.2.2017 requested the MNRE to allow the assignment of the PPA from WEPL to Giriraj Renewables Energy Private Limited (hereinafter referred to as 'GRPL') which is going to be Resultant Company pursuant to the demerger and shall be successor to undertake all the obligations and liabilities of the Petitioner. The Petitioner further informed that various safeguards would be put in place to ensure the transfer of the PPA to GRPL till the issuance of final order of demerger by NCLT. SECI vide its letter dated 1.3.2017 informed the Petitioner that it was not satisfied with the documentation regarding title of the land and arrangement of funds and advised the Petitioner to pay the extension charges within seven days failing which SECI will take further necessary action. In response, the Petitioner vide its letter dated 2.3.2017 informed SECI that it is serious about execution of its project and requested to suspend the notice dated 1.3.2017 till decision is taken by the MNRE on demerger and to allow assignment of the PPA to GRPL in terms of Article 15 of the PPA.

(d) Subsequently, on 19.4.2017, SECI wrote to the Central Bank of India for invocation of the Bank Guarantees of the Petitioner. Aggrieved by the said action of SECI, the Petitioner filed a Petition under Section 9 of the Arbitration and Conciliation Act, 1996 before the Hon'ble High Court of Delhi for restraining SECI from invoking the Bank Guarantees.

(e) The Petitioner has submitted that since it has undertaken substantial completion of the CS activities pertaining to the arrangement of land as required under the PPA and has reached advance stage of completion of the project, engineering and procurement activities and construction activities have commenced at site, extension for completing the CS activities on payment of charges ought to be permitted by SECI. The Petitioner has submitted that SECI is a Central Public Sector Undertaking under the administrative control of MNRE, to facilitate the implementation of JNNSM and achievement of targets set therein and therefore, it should not be allowed to terminate the PPA. The Petitioner has submitted that it has already incurred and contractually committed substantial amounts on the project on irreversible basis and would suffer irreparable loss if the PPA is terminated.

5. The Petitioner has submitted that the Commission has the jurisdiction in the present case to adjudicate the dispute between the generating company and a trading licensee. The Petitioner, in support of its contention, has relied upon the judgments of the Hon`ble Supreme Court in the case of Gujarat Urja Vikas Nigam Limited Vs. Essar Power Ltd. and the Hon`ble High Court of Delhi in the case of PTC India Ltd Vs. Jai Prakash Power Ventures Ltd. and has submitted that in the above cases, it has been clearly held that in respect of all disputes between licensees and a generating company, CERC or SERC or an arbitrator appointed by them will have the jurisdiction. Therefore, the present dispute between the Petitioner and SECI falls within the jurisdiction of the Commission.

6. In the light of the submissions made, the Petitioner has made the following prayers, namely:

- (i) Restrain the Respondent from terminating the PPA;
- (ii) Direct the Respondent to permit the assignment of the PPA to GRPL in terms of Articles 15 of the PPA;
- (iii) Direct the Respondent to extend the Scheduled Commissioning Date and the time-period for Conditions Subsequent for the Force Majeure like period; or
- (iv) In the alternate to prayer (iii), direct the Respondent to allow extension of time to complete the Conditions Subsequent in terms of Article 3.2.2 of the PPA and the consequent extension of the Scheduled Commissioning Date;
- (v) During pendency of the proceedings, grant ad-interim injunction against the Respondent from taking any action towards terminating the PPA.”

7. Notice was issued to the Respondent to file its reply on the maintainability of the petition. The Commission also directed SECI not to take any coercive measure till further order. Reply to the petition has been filed by SECI. The Petitioner has filed rejoinder thereof.

8. SECI in its reply has challenged the maintainability of the petition before the Commission. The main contentions of SECI are as under:

- (a) The present dispute does not fall within the purview of Section 79 or any other provision of the 2003 Act. The disputes sought to be raised by the Petitioner have nothing to do with regulation or determination of tariff. The Petitioner has

failed to discharge its onus to demonstrate as to how the disputes sought to be raised by it in the present petition are covered under Clause (a) to (d) of Section 79 (1) of the Act.

(b) The Commission under Section 79 (1) (f) of the Act has the 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 the 2003 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.

(c) Neither the Petitioner is a generating company nor is SECI a transmission licensee. The term 'generating company' is defined in Section 2 (28) of the 2003 Act and it applies to any company that owns or operates or maintains a generating station. Since, SECI is only a trading licensee, the present petition is outside the purview of Section 79 of the 2003 Act.

(d) The Petitioner and SECI, at the time of execution of the PPA, were aware of the jurisdiction of this Commission in relation to regulation/determination of tariff as stipulated in Section 79 of the Act. Article 16.3.1 of the PPA provides that all disputes pertaining to change/determination of tariff shall be adjudicated by this Commission and other contractual disputes shall be referred to arbitration. As per Clause 16.3.2 of the PPA, a dispute that arises out of or in connection with any claims not covered in clause 16.3.1 of the PPA shall be resolved by arbitration under Section 9 of the Arbitration and

Conciliation Act, 1996. Since, the Petitioner is relying on Clause 16.3.2 of the PPA and has filed the Petition under Section 9 of the Arbitration and Conciliation Act, 1996 before the Hon'ble High Court of Delhi, it is clear that even the Petitioner has knowledge that the present dispute fall under the ambit of arbitration. Subsequently, the Petitioner filed the present petition before this Commission in relation to same disputes. Since, the Petitioner is only indulging in forum-shopping, its conduct amounts to abuse of process of court. Article 16.3.1 of the PPA is entirely in conformity with Section 79 of the Act.

- (e) It is a settled position of law that jurisdiction can only be conferred by statute. It can neither be conferred by consent of the parties or even by orders of the court. In this regard, SECI has relied upon the judgment of the Hon'ble Supreme Court in Jagmittar Sain Bhagat Vs. Health Services Haryana [(2013) 10 SCC 136].
- (f) The reliance placed by the Petitioner on Clause 9 of the PPA is misconceived. Clause 9 comes into force after the setting up the unit and if the commissioning is delayed. Clause 3.13 of the Scheme Guidelines lays down the conditions for financial closure which *inter-alia* stipulates that the SPD shall report tie-up of Financing Arrangements for the projects within seven months from the date of signing of the PPA. It has also been stipulated that at this stage, the project developer would furnish within the period of seven 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. In other words, the Petitioner has failed to comply with the conditions subsequent at the initial stage itself. There is no question of operating the PPA with reduced tariff.

(g) The Power Supply Agreement entered by the Respondent with MSEDCL is for intra-State sale and transmission of electricity within the State of Maharashtra. SECI in support of its contention has relied upon the Commission's order dated 18.4.2017 in Petition No. 223/MP/2015 (Tata Power Delhi Distribution Ltd. Vs. NTPC Limited and Others).

9. The Petitioner has filed a rejoinder rebutting the objections of SECI. The Petitioner has submitted that it is a case of inter-State transmission of electricity and therefore, this Commission has the jurisdiction to deal with the matter. The Petitioner, vide its affidavit dated 17.8.2017 has submitted that Application filed by it under Section 9 of the Arbitration and Conciliation Act, 1996 before the Delhi High Court has been withdrawn.

10. Learned counsel for the SECI during the hearing submitted that 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. Learned counsel for SECI argued that 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 No. OMP (I) Comm No.163 of 2017 under Section 9 of the Indian Arbitration and Conciliation Act, 1996 before the Hon'ble High Court of Delhi, it is clear that even the Petitioner has knowledge that the present dispute falls under the ambit of arbitration. Learned counsel further submitted that 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. Learned counsel for SECI argued that 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.

11. Learned senior counsel for the Petitioner submitted that the present petition is maintainable both under the law and the PPA. Learned senior counsel further submitted that the Commission has jurisdiction over all disputes arising between a generating company and trading licensee where sale of power is ultimately being made to consumers outside the State where project is located through Discoms of such State. Learned senior counsel submitted that 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 by 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 the Appropriate Commission, such disputes shall be submitted for adjudication by the Central Commission. Learned senior counsel submitted that the claim in the

present petition partly relates to tariff. However, determination of this claim could result in change in tariff. Therefore, under Article 16.3.1 (i) of the PPA, the present dispute ought to be adjudicated by the Commission. In support of his claim, learned senior counsel relied upon the judgments of the Hon`ble Supreme Court in the cases reported as Gujarat Urja Vikas Nigam Limited vs. Essar Power Ltd. [(2008) 4 SCC 755] and Adani Power Limited Vs. Energy watchdog [Civil Appeal Nos. 5399-5400 of 2016] and judgment of the Hon'ble High Court of Delhi in the case of PTC India Limited vs. Jai Prakash Power Ventures Ltd. [OMP 677 of 2011]. Learned senior counsel further submitted that since the power from the projects covered under the JNNSM 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 the light of inter-State sale of power from the Petitioner's project.

Analysis and Decision

12. We have gone through the pleadings and oral submission of the parties during the hearing. The Petitioner has filed the present petition under Section 79 (1) (f) of the Act. Section 79 of the Act provides for specific functions of the Commission as under:

“Section 79. Functions of Central Commission: (1) The Central Commission shall discharge the following functions, namely:-

- (a) to regulate the tariff of generating companies owned or controlled by the Central Government;
- (b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;
- (c) to regulate the inter-State transmission of electricity ;

- (d) to determine tariff for inter-State transmission of electricity;
- (e) to issue licenses to persons to function as transmission licensee and electricity trader with respect to their inter-State operations;
- (f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;
- (g) to (k).....”

13. As per clause (a) of sub-section (1) of Section 79 of the Act, the Central Commission has the power to regulate the tariff of the generating companies owned or controlled by the Central Government. Clause (b) of Section 79(1) provides that the Commission shall have the jurisdiction if the sale of electricity shall be from a generating company to more than one State under a composite scheme. Section Under Clause (c) of Section 79 (1), the Commission has the jurisdiction to regulate inter-State supply of electricity and under Clause (d) of Section 79 (1), the Commission has the power to determine the tariff for inter-State transmission of electricity. Under Clause (f) of Section 79 (1) of the Act, the Commission has the power to adjudicate the dispute involving generating company or transmission licensee in respect of Clauses (a) to (d) of sub-section (1) of Section 79 of the Act. The word used is “involving” a generating company or a transmission licensee for a case to be brought before the Commission for adjudication of dispute under Section 79 (1) (f) of the 2003 Act. In other words, if one of the parties to the dispute is a generating company or transmission licensee and the dispute can be relatable to any of the functions under Clauses (a) to (d) of sub-section (1) of the Section 79 of the Act, the case for adjudication of such dispute shall lie before the Commission.

14. SECI has submitted that neither the Petitioner is a generating company nor SECI is a transmission licensee and therefore, clause (f) of sub-section (1) of

Section 79 of the Act is attracted. It is not in dispute that SECI is not a transmission licensee. Then we have to consider whether the Petitioner is a generating company. The Petitioner is the holding company of WREPL, which has been selected as a Solar Power Developer and awarded to develop a generation project of 100 MW through the tariff based competitive bidding carried out by SECI under the Jawaharlal Nehru National Solar Mission. WREPL requested SECI to permit its parent company, the Petitioner herein, to execute the project. After amendment to the Competitive Bidding Guidelines, the Petitioner has been permitted to execute the project. The Petitioner has furnished the Bank Performance Guarantee and has entered into the PPA dated 26.7.2016 with SECI. Therefore, the Petitioner has stepped into the shoes of WREPL after signing the PPA with SECI for execution of the project. SECI disputes the status of the Petitioner as a generating company on the ground that the Petitioner does not satisfy the definition of generating company. The term “generating company” has been defined in Section 2(28) of the Act to mean “any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person, which owns or operates or maintains a generating station.” In our view, the Petitioner is a company and after entering into PPA, it has assumed all the responsibilities of a generating company i.e. to own, operate and maintain the generating station. The Petitioner is in the process of developing the generating station and therefore, is considered as a generating company. Since the dispute should involve a generating company in order to invoke the jurisdiction of the Commission under Section 79(1) (f) of the Act, the Petitioner satisfies the said requirement.

15. The dispute must relate to Section 79 (1) (b) of the Act. Therefore, two conditions which are required to be satisfied are: (a) whether the Petitioner has a

composite scheme for generation and supply of power in more than one State; and
(b) whether the dispute relates to regulation of tariff.

16. In order to consider whether the Petitioner fulfills the condition for generation and supply of power to more than one State, let us consider the JNNSM scheme under which the solar projects are developed. Clause 1.6 of the JNNSM Scheme provides as under:

“1.6 Phase-II, Batch-III: State Special Viability Gap Funding (VGF) in the Scheme:

The Solar Projects of 2000 MW capacity under the State Specific VGF Scheme will be set up in the solar Parks of various States, to be developed through coordinated efforts of Central and State Agencies. As implementation of solar parks have begun recently, it could possible that Solar Parks in some of the State do not become available soon. For such States, Solar Projects would be allowed to be located outside solar parks with land being provided either by the State Government, or arranged by the Solar Power Developers (SPDs).

These guidelines shall form the basis for selection of Grid Connected Solar PV projects under this scheme. Out of total capacity of 2000 MW, a capacity of 250 MW will be earmarked for bidding with Domestic Content Requirement (DCR).

MNRE shall specify the total State-wise Capacity of the projects (both “open Category” and “DCR Category”) based on commitments from the State for off take of not less than 90% of the capacity to be invited by SECI before issue of Request of Selection (RfS). SECI shall tie up for the remaining capacity with the other Buying Entities for which the Host State shall facilitate inter-State transfer of power.”

As per the above provisions of JNNSM Scheme, MNRE is required to specify the total State-wise capacity for the projects based on commitments from the State for off-take of not less than 90% of power and for the remaining 10% of power, the host State is required to facilitate inter-State transfer of power to sell to other buying entities. Therefore, the JNNSM scheme envisages that the power from the projects developed under the scheme shall be supplied to more than one State.

17. In the present case, pursuant to the bidding by SECI, the Petitioner is setting up a 100 MW solar power project in the State of Maharashtra for supply of power to SECI. SECI, which has been granted inter-State trading licence by the Commission, has been designated by the MNRE as the nodal agency for implementation of MNRE schemes for developing grid connected solar power capacity and has been assigned the work for purchase and sale of solar power to the States. Accordingly, SECI has entered into a back to back PPA with MSEDCL. It is observed that pursuant to the issuance of LOI to the Petitioner by SECI, the Petitioner entered into a PPA with SECI for implementation, generation and sale of 100 MW solar power under the JNNSM scheme. As per the PPA, SECI has agreed to purchase such power from SPD as an intermediary seller and sell it to buying utilities on back-to-back basis and has agreed to sign a Power Sales Agreement with the buying entities to sell such power as per the provisions of the JNNSM. Learned senior counsel argued that 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 licensee, 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 in accordance with the JNNSM scheme. Relevant portion of the PPA is extracted as under:

“E. The SPD has agreed to sign this Power Purchase Agreement with SECI to sell Solar Power to SECI as per the terms and conditions of this Agreement.

F. SECI has agreed to purchase such solar power from SPD as an intermediary seller and sell it to Buying Utilities back to back basis as per the provisions of JNNSM.

G. SECI has agreed to sign a Power Sales Agreement with the Buying Utilities to sell such power as per the provisions of JNNSM”

It appears from the above that SECI is taking power from various sources and after bundling the same is supplying power to more than one State.

18. The issue whether the supply of power by a generating company to a trading licensee and supply of the said power by the trading licensee to the distribution companies shall be subject to the regulatory jurisdiction of the Regulatory Commission arose for consideration in Appeal No.15/2011 (Lanco Power Limited v Haryana Electricity Regulatory Commission) before Appellate Tribunal for Electricity and in OMP 677 of 2011 {PTC India Limited Vs. Jaiprakash Power Ventures Ltd.} before Hon'ble High Court of Delhi. In Appeal No.15/2011, Lanco Power Limited raised a preliminary objection that since power was supplied by the generator to PTC India Limited which is a trader, the Haryana Electricity Regulatory Commission would not have jurisdiction to determine the tariff. The Appellate Tribunal after considering the provisions of Sections 79, 86 and 66 of the Act has in its judgment dated 4.11.2011 has observed as under:

“21. So, the combined reading of the above provisions brings out the scheme of the Act. A trader is treated as an intermediary. When the trader deals with the distribution company for re-sale of electricity, he is doing so as a conduit between generating company and distribution licensee. When the trader is not functioning as merchant trader, i.e. without taking upon itself the financial and commercial risks but passing on the all the risks to the Purchaser under re-sale, then there is clearly a link between the ultimate distribution company and the generator with trader acting as only an intermediary linking company.

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61. It cannot be debated that the whole scheme of the Act is that from the very generation of electricity to the ultimate consumption of electricity by the consumers is one interconnected transaction and is regulated at each level by the statutory Commissions in a manner so that the objective of the Act are fulfilled; the electricity industry is rationalized and also the interest of the consumer is protected. This whole scheme will be broken if the important link in the whole chain i.e. the sale from generator to a trading licensee is to be kept outside the regulatory purview of the Act. If such a plea of the Appellant is accepted, the same would result in the Act becoming completely ineffective and completely failing to serve the objective for which it was created.”

In OMP No. 677/2011 (PTC India Limited v Jaiprakash Power Ventures Limited), PTC India Limited had challenged the Arbitral Award dated 28.4.2011 in the dispute between PTC India Limited and Jai Prakash Power Ventures Limited under Section 34 of the Arbitration and Conciliation Act, 1996. One of the issues framed by the Hon'ble High Court of Delhi was whether the decision of the majority of the Tribunal that CERC had no power to determine the tariff for electricity supplied by a generating company to a trading licensee suffered from patent illegality or was otherwise opposed to public policy. The Hon'ble High Court after examining the relevant provisions of the Act, the Statement of Reasons of the Act and the various decisions of the Hon'ble Supreme Court and Appellate Tribunal observed in its judgment dated 15.5.2012 as under:

“52. In order to examine the above issue, first the relevant portion of the SOR of the EA requires to be referred to. Paras 4(ix) and (x) of the SOR acknowledge that under the EA, trading in electricity was for the first time being recognized as a distinct activity. The said clauses read as under:

“(ix) Trading as a distinct activity is being recognized with the safeguard of the Regulatory Commissions being authorised to fix ceilings on trading margins, if necessary.

(x) Where there is direct commercial relationship between a consumer and a generating company or a trader the price of power would not be regulated and only transmission and wheeling charges with surcharge would be regulated.”

53. A careful reading of Clause 4(x) of the SOR shows that it talks of direct commercial relationship between (i) a consumer and a generating company; (ii) a consumer and a trader. In the chain of supply of electricity, it is possible that a generating company makes a direct supply to a consumer. Sometimes, a trader could also be an intermediary in the supply by the generating company to the consumer. Such supplies would not be regulated by the appropriate Commission. Where there is a direct transfer of electricity from either the generating company to the consumer or from a trader to the consumer then the tariff would not be subject to regulation. However, where a trader or trading licensee sells electricity to a distribution licensee which in turn supplies to the consumer, the tariff would be subject to regulation.

.....

55. The words "supply of electricity by a generating company to a distribution licensee" occurring in Section 62 would, in the above context, envisage apart from a direct supply from a generating company to a distribution licensee, also a supply from a generating company to a trading licensee who in turn sells to a distribution licensee. The trader could intervene either in the supply by a generating company to a consumer or he could intervene in the supply by a generating company to the distribution licensee. The latter transaction would certainly form the subject matter of regulation by the appropriate Commission within the meaning of Section 62 read with Para 4 (x) of the SOR.

56. It appears inconceivable that where a trading licensee is selling to a distribution licensee and not directly to a consumer, the tariff for such a supply by the generating company to the trading licensee would not be amendable to the regulatory jurisdiction of CERC or SERC under Section 62 of the EA. An interpretation to the contrary would defeat the rights of the consumers which are intended to be protected by the CERC and SERCs. The only freedom was given to the direct commercial relationship between a generating company and consumer where presumably there would be bulk consumption by such consumer. However, in cases like the present one where the trader is selling electricity to a distribution licensee who is eventually selling or supplying electricity to the consumer, the tariff would necessarily have to be regulated. Otherwise, every generating company would route the sale of electricity through a trading licensee to evade the applicability of the regulatory framework EA.

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64. The Tribunal in the present case did not discuss the changed legal position as a result of the decisions of the APTEL subsequent to Gajendra Haldea and Lanco I in light of the altered decisions of the Supreme Court including the one in the GUVNL case. It went by only a literal and not a purposive and contextual interpretation of Section 62 EA. The majority of the Tribunal was, therefore, in error in holding that the transaction involving supply by a generating company to a trading licensee was outside the purview of regulation by the CERC under Section 79 (1) (f) read with Section 62 of the Act."

The above judgement was challenged before the Division Bench of the Hon'ble High Court of Delhi in FAO (OS) No. 244/2012 (Jaiprakash Power Venture Pvt Limited v PTC India Limited). Subsequently, the said FAO was withdrawn and there was no further challenge to the judgement dated 15.5.2012 in OMP No. 677/2011 has attained finality.

19. The issue of jurisdiction of the Commission to determine the tariff of the generating companies for supply of power to the traders and from the traders to the distribution licensees has received judicial attention from time to time as noted

above. The Appellate Tribunal in Lanco Power Ltd v Haryana Electricity Regulatory Commission has taken the view that when power is supplied to a trading licensee which has back to back arrangement for supply of the same power to the distribution licensees, the appropriate Commission has the power to determine the tariff. The Hon'ble High Court of Delhi in PTC India Ltd v Jai Prakash Power Ventures Ltd has categorically held that when the trading licensee intervenes in the process of supply of electricity by a generating company to the distribution licensee, the transaction would be subject matter of regulation under Section 62 of the Act. In the context of JP Power Venture Ltd, the High Court has held that the transactions involving the supply of power by the generating company to PTC would be regulated by CERC since PTC is selling the power to the distribution licensees for eventual supply to the consumers. It is pertinent to mention that this Commission relying on the judgement of Hon'ble High Court had decided the jurisdiction of this Commission in case of supply of power by GMR Kamalanga Ltd to Haryana Utilities through PTC India Limited. The jurisdiction of the Commission was upheld by the Appellate Tribunal in its judgement dated 7.4.2016 against which GRIDCO filed Civil Appeal No. 5415/2016. The Hon'ble Supreme Court in its judgement dated 11.4.2017 upheld the jurisdiction of the Commission.

20. It is further pertinent to mention that Article 16.3.1(ii) requires SECI to substitute the buying utilities in the proceedings before the Commission. The said provision is extracted as under:

“(ii) SECI shall be entitled to co-opt the buying utilities and/or the lenders (if any) as a supporting party in such proceedings before the Central Commission.”

The above provision unambiguously established the nexus between the generating company and the distribution licensees even though power is supplied through SECI which is a trading licensee.

21. In the light of the above discussion, it is held that even though SECI which is an inter-State trading licensee has PPA with the Petitioner, SECI has also PPAs with the distribution companies for sale of such power. Since power is ultimately meant for supply to the consumers through the distribution licensees, intervention of a trading licensee (SECI) will not come on the way of jurisdiction of the Commission to regulate the tariff of the Petitioner.

22. SECI has taken an objection that since the dispute involved in the present petition does not relate to tariff or any tariff related matter, such dispute cannot be subject matter of adjudication by the Commission. SECI has submitted that Article 16.3.1 of the PPA provides that all disputes pertaining to change/determination of tariff shall be adjudicated by this Commission and other contractual disputes shall be referred to arbitration and Article 6.3.2 of the PPA provides that a dispute that arises out of or in connection with any claims not covered in clause 16.3.1 of the PPA shall be resolved by arbitration under Section 9 of the Arbitration and Conciliation Act, 1996. SECI has submitted that the Petitioner relying on Article 16.3.2 of the PPA filed the Petition under Section 9 of the Arbitration and Conciliation Act, 1996 before the Hon'ble High Court of Delhi which shows that even the Petitioner had the understanding that the present dispute fall under the ambit of arbitration. However, the Petitioner withdrew the said petition subsequently and has filed the present petition. The Petitioner has argued that determination of the claim raised in the present petition could have impact on tariff, and therefore, under Article 16.3.1 (i) of

the PPA, the present dispute ought to be adjudicated by the Commission. Learned Senior counsel for the Petitioner argued during the hearing that if the SCOD of the project is extended on account of force majeure event which has been claimed in the petition, it will have impact on tariff and therefore, the dispute is relatable to tariff and is covered under Article 16.3.1(i) of the PPA.

23. Article 16.3.1 of the PPA which deals with the dispute resolution mechanism is extracted as under:

“16.3.1 Dispute Resolutions by the Appropriate Commission:

- (i) Where any Dispute(s) arise from a claim made by any Party for any change in or determination of the Tariff or any matter related to tariff or claims made by any party which partly or wholly relate to any change in the Tariff or determination of any of such claims could result in change in the Tariff, or (b) relates to any matter agreed to be referred to the Appropriate Commission, such Dispute shall be submitted to adjudication by the Central Commission.
- (ii) SECI shall be entitled to co-opt the buying utilities and/or the lenders (if any) as a supporting party in such proceedings before the Central Commission”

As per the above provisions, where any dispute arises for any change in or determination of tariff or any matter related to tariff or relates to any matter agreed to be referred to the Appropriate Commission, such dispute is required to be submitted for adjudication by the Central Commission. The Petitioner amongst other reliefs has sought extension of the SCOD on account of delay by the Government and force majeure event. Since, the issues of delay and force majeure event are related to tariff, the Commission is the Appropriate Commission to resolve the present dispute such as terminating the PPA and extension of SCOD, etc.

24. Learned Senior Counsel for the Petitioner has submitted that as per the judgement of the Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Limited Vs.

Essar Power Limited [(2008) 4 SCC 755], the appropriate Commission may either adjudicate the dispute itself or refer the dispute to arbitration. Relevant portion of the judgment is extracted as under:

“58. In the present case we have already noted that there is an implied conflict between Section 86(1)(f) of the Electricity Act, 2003 and Section 11 of the Arbitration and Conciliation Act, 1996 since under Section 86(1)(f) the dispute between licensees and generating companies is to be decided by the State Commission or the arbitrator nominated by it, whereas under Section 11 of the Arbitration and Conciliation Act, 1996, the Court can refer such disputes to an arbitrator appointed by it. Hence on harmonious construction of the provisions of the Electricity Act, 2003 and the Arbitration and Conciliation Act, 1996 we are of the opinion that whenever there is a dispute between a licensee and the generating companies only the State Commission or Central Commission (as the case may be) or arbitrator (or arbitrators) nominated by it can resolve such a dispute, whereas all other disputes (unless there is some other provision in the Electricity Act, 2003) would be decided in accordance with Section 11 of the Arbitration and Conciliation Act, 1996. This is also evident from Section 158 of the Electricity Act, 2003. However, except for Section 11 all other provisions of the Arbitration and Conciliation Act, 1996 will apply to arbitrations under Section 86(1)(f) of the Electricity Act, 2003 (unless there is a conflicting provision in the Electricity Act, 2003, in which case such provision will prevail.)”

In the above judgment, the Hon`ble Supreme Court has held that on harmonious construction of the provisions of the Electricity Act, 2003 and the Arbitration and Conciliation Act, 1996, whenever there is a dispute between a licensee and generating company, only the State Commission or Central Commission (as the case may be) or the arbitrator or arbitrators nominated by them can resolve such disputes. Since we have held that dispute raised in the petition will have implication for tariff, the dispute can be either adjudicated by the Commission or the Commission may refer the dispute to arbitration in terms of Section 79 (1) (f) of the Act.

25. SECI has relied upon the judgments of the Hon`ble Supreme Court in the cases of SEBI V Saikala Associates Ltd. [(2009) 7 SCC 432], Jagmittar Sai Bhagat

Vs. Health Services, Haryana [(2013)10 SCC 136] and the Commission's order dated 18.4.2017 in Petition No. 223/MP/2015 (Tata Power Delhi Distribution Ltd. Vs. NTPC Ltd. and others). In our view, the judgments of the Hon'ble Supreme Court are not relevant in the present case. As regards the order of this Commission in Petition No.223/MP/2015, Tata Power Delhi Distribution Ltd.(TPDDL) was seeking a direction/advice in exercise of powers under the Electricity Act, 2003 to the Central Government to allocate TPDDL's entire firm share of power from the NTPC, NHPC and THDC power stations to other power deficient states/utilities. The Commission in its order dated 18.4.2017 disallowed the prayer as under:

“24. The Petitioner has sought directions to Central Government to re-allocate the power allocated to the Petitioners to other States. MoP has made its position clear about the policy of allocation and re-allocation of power from the Central Generating Stations including NTPC, NHPC and THDC. It is entirely within the purview of the Central Government to allocate or reallocate power from the Central Generating Stations to the beneficiaries and the same being not covered under regulation of tariff under Section 79 (1) (a) of the Act cannot be subject to adjudication under Section 79 (1) (f) of the Act by this Commission. Therefore, the prayer of the Petitioner for issue of directions to the Central Government to allocate the Petitioner's entire share of power from the generating stations of NTPC, NHPC and THDC to power deficit States/Utilities cannot be entertained as the same is beyond the scope of the power vested in the Commission under Section 79 (1) (a) and (f) of the Act. However, the Petitioner may approach the Central Government with its grievance for redressal.”

The prayers in the present case are completely different from the prayers in Petition No. 223/MP/2015. The Petitioner in the present petition has sought extension of SCOD and the time period for achievement of the conditions subsequent for the period of force majeure or in the alternative has sought a direction to allow extension of time to complete the conditions subsequent and extension of SCOD. Since the prayer is extension of SCOD which has relation to tariff, we are of the view, the Commission has the jurisdiction to adjudicate the dispute.

26. In the light of the above discussion, it is held that the petition is maintainable and the Commission has the jurisdiction to adjudicate the dispute under Section 79 (1) (f) of the Act.

27. We direct SECI to supply to the Petitioner the names of buying entities in terms of Article 16.3.1(ii) of the PPA within one week. The Petitioner is directed to amend the memo of parties to implead such entities and serve copies on such entities. The Respondent and the buying entities are directed to file their replies on merit by 15.11.2017 with an advance copy to the Petitioner who may file its rejoinder, if any on or before 8.12.2017.

28. The Petition is listed for hearing on 12.12.2017.

sd/-
(Dr. M. K. Iyer)
Member

sd/-
(A. S. Bakshi)
Member

sd/-
(A. K. Singhal)
Member

sd/-
(Gireesh B. Pradhan)
Chairperson