

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 52/AT/2021

Coram:

Shri P. K. Pujari, Chairperson

Shri I. S. Jha, Member

Shri Arun Goyal, Member

Shri P. K. Singh, Member

Shri Prakash S. Mhaske, Member (Ex-officio)

Date of Order: 15th April, 2021

In the matter of

Petition under Section 63 of the Electricity Act, 2003 for adoption of tariff for 150 MW grid connected floating solar power projects selected through competitive bidding process as per the Standard Bidding Guidelines dated 3.8.2017.

And

In the matter of

Solar Energy Corporation of India Limited
D-3, 1st Floor, Wing-A, Prius Platinum Building,
District Centre, Saket, New Delhi – 110 017

...Petitioner

Versus

1. Shapoorji Pallonji Infrastructure Capital Company Private Limited
70, Nagindas Master Road, Fort Mumbai,
Maharashtra - 400 023.

2. ReNew Solar Power Private Limited
10th Floor, DLF Square Building,
DLF Phase-II, M Block,
Jacaranda Marg, Gurgaon,
Haryana - 122 002.

3. Rihand Floating Solar Private Limited
SP Centra, 41/44, Minoo Desai Marg,
Colaba, Mumbai, Maharashtra - 400 005.

4. Renew Sun Power Private Limited
138, Ansal Chambers-II, Bhikaji Cama Place,
New Delhi - 110 066.

5. Auxo Sunlight Private Limited



138, Ansal Chambers-II, Bhikaji Cama Place,
New Delhi - 110 066.

6. Uttar Pradesh Power Corporation Limited
Shakti Bhawan, 14, Ashok Marg,
Lucknow, Uttar Pradesh - 226 001.

7. Uttar Pradesh Jal Vidyut Nigam Limited
12th Floor, Shakti Bhawan Extn., 14, Ashok Marg,
Lucknow, Uttar Pradesh-226 001.

....Respondents

Parties Present:

Shri M.G. Ramachandran, Sr. Advocate, SECI
Ms. Tanya Sareen, Advocate, SECI
Ms. Poorva Saigal, Advocate, SECI
Shri Apoorva Misra, Advocate, ReNew Solar
Ms. Nishtha Kumar, Advocate, ReNew Solar
Shri Atulya Kumar Naik, SECI
Shri Mudit Jain, SECI
Shri Apoorva Misra, SECI
Shri Ishan Nagpal, ReNew Solar
Shri Tushar Goyal, ReNew Solar

ORDER

The Petitioner, Solar Energy Corporation of India Limited (SECI), has filed the present Petition under Section 63 of the Electricity Act, 2003 (hereinafter referred to as 'the Act') for adoption of tariff for 150 MW grid-connected floating solar power projects selected through competitive bidding process as per the "*Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects*" (hereinafter referred to as 'the Guidelines') dated 3.8.2017 issued by the Ministry of Power, Government of India. The Petitioner has made the following prayers:

"(a) Admit the present Petition

(b) Adopt the tariff discovered in the tariff based competitive bid process for the individual power projects as stated in Table 5 at para 13 above on the terms and conditions contained in the PPAs with Solar Power Developers being Respondent Nos.3 to 5. In addition, there will be the trading margin of Rs.0.07/kWh (as mutually agreed between the parties) to be recovered from the Buying Utilities/Distribution

Company, namely, UPPCL, Respondent No. 6 in terms of the PSA.”

Submission of the Petitioner:

2. The Petitioner has submitted that on 6.9.2018, at the behest of Uttar Pradesh Power Corporation Limited (UPPCL), it issued Request for Selection (RfS) along with draft Power Purchase Agreement (PPA) and draft Power Sale Agreement (PSA) documents for selection of Solar Power Developers (SPDs) for setting up of 150 MW (Packages A, B and C of 50 MW each) grid-connected floating solar power project at Rihand Dam in the State of Uttar Pradesh in line with the Guidelines and the same were floated on Telecommunication Consultants India Limited (TCIL) e-bidding portal. It has been submitted by the Petitioner that in pursuance to the above, for the Package B, two bids were received from ReNew Solar Power Private Limited and Shapoorji Palloni Infrastructure Capital Company Private Limited, but for Packages A and C, only single bid was received from ReNew Solar Power Private Limited. After approval of competent authority of the Petitioner in terms of Clause B.7.24 of its procurement policy in respect of single bid, techno-commercial evaluation of bids was undertaken and both the bidders (ReNew Solar Power Private Limited and Shapoorji Palloni Infrastructure Capital Company Private Limited) were found to meet the techno-commercial criteria. E-reverse Auction for Package B was conducted on 27.11.2018 on TCIL e-bidding portal and pursuant thereto, Shapoorji Palloni Infrastructure Capital Company Private Limited was awarded 50 MW at the tariff of Rs.3.29/kWh. For Packages A and C, since only single bids were received from ReNew Solar Power Private Limited at Rs.3.31/kWh, there was no occasion for conducting e-reverse auction and subsequently, a Negotiation Committee was constituted for reduction in the quoted price for both of these packages. Pursuant to the negotiations, the final tariff arrived for Packages A and C was Rs. 3.29/kWh (i.e.

reduction from Rs.3.31/kWh to Rs 3.29/kWh). It has been further submitted by the Petitioner that the solar power projects are scheduled to be commissioned in 2021-22 and on commissioning, these projects would help the distribution licensee to meet its Renewable Purchase Obligation (RPO) requirements apart from providing power at very economical rates. The Petitioner has agreed to sell 150 MW solar power to the distribution licensee, UPPCL and the same has agreed to be purchased from SECI at the tariff of Rs. 3.29/kWh plus trading margin of Rs.0.07/kWh. It has been submitted by the Petitioner that since the tariff discovered through competitive bid process is even lesser than the procurement cost of conventional power, procurement of such power would be beneficial for the distribution licensees and the consumers at large. The Petitioner has submitted that no preferential tariff will be sought under Section 86(1)(e) of the Act.

3. The matter was called out for hearing on 19.3.2021 through video conferencing. The learned senior counsel argued that this Commission is the Appropriate Commission within the meaning of the Act. The learned senior counsel has submitted the following on the issue of jurisdiction:

(a) PPAs and PSA entered into by SECI as the nodal agency of Central Government and as an inter-State trading licensee pursuant to the Guidelines dated 3.8.2017, are in the nature of a 'composite scheme' falling within the scope of Section 79(1)(b) of the Act and as elucidated by the Hon'ble Supreme Court in Energy Watchdog v. Central Electricity Regulatory Commission and Ors.

(b) Articles 6.5.5 and 6.8.4 of the PSA permit SECI to sell UPPCL's allocation of solar power to third parties including any licensee under the Act. Also, the PPAs executed with SPDs define the 'Appropriate Commission' as the Central Commission.

(c) SECI is an inter-State trading licensee in terms of the licence granted by this Commission and is entitled to undertake intra-State trading without the need of separate licence from the State Commission.

(d) The parties, namely, UPPCL as well as the power project developer in other cases, including where the PPAs currently provide for generation and sale of electricity only in the State of Uttar Pradesh, have duly acknowledged, accepted, acted upon and implemented various projects on the basis that this Commission has the jurisdiction. In this regard, reliance was placed on the orders of Commission dated 19.9.2018 in Petition No. 52/MP/2018 (Azure Power Venus Pvt. Ltd. v. SECI and UPPCL). Reference was also made to the order of the Commission dated 11.10.2017 in Petition No.95/MP/2017 (Welspun Energy Pvt. Ltd. v. SECI).

(e) SECI and UPPCL have also jointly approached the Uttar Pradesh Electricity Regulatory Commission under Section 63 and Sections 86(1)(b) and (e) of the Act read with Rule 8 of the Electricity Rules, 2005 seeking approval for development of the aforesaid solar power projects.

4. Learned counsel for the Respondents 2, 4 and 5 supported the submissions of the Petitioner, SECI and requested for adoption of tariff at the earliest to ensure viability and continuation of the Projects awarded. It was also submitted that the Commission may also take note of the fact that the Petition for adoption of tariff has been filed with substantial delay which may impact the Respondents' ability to achieve financial closure and subsequently on commissioning timeline. Accordingly, it was further requested that SECI be directed to consider the Respondents' request for seeking time extension for achieving financial closure and Schedule Commercial Operation Date.

5. After hearing the learned senior counsel for the Petitioner and learned counsel for the Respondents, the order was reserved on the issue of jurisdiction as

well as on merits.

RE: Jurisdiction

Analysis and decision

6. Accordingly, we now proceed to examine the instant Petition, firstly on the issue of jurisdiction of the Commission.

7. Section 63 of the Act provides as under:

“Section 63. Determination of tariff by bidding process: Notwithstanding anything contained in Section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.”

Thus, in terms of Section 63 of the Act, the ‘Appropriate Commission’ is required to adopt the tariff, on being satisfied that transparent process of bidding has been followed in accordance with the guidelines issued by the Ministry of Power, Government of India for determination of such tariff.

8. SECI has submitted that the jurisdiction in regard to PPAs and PSA for the adoption of tariff is of the Central Commission in terms of the Section 79 of the Act. It has been submitted that the State Commission exercises the power of approving the price discovered through the competitive bid process under Section 63 of the Act in terms of Section 86(1)(b) of the Act read with Rule 8 of the Electricity Rules, 2005. However, in cases where the generating company/SECI falls within the scope of Section 79(1)(a) or (b) of the Act, approval of the Central Commission is also required for adoption of tariff discovered through the competitive bid process.

9. The relevant extract of Section 79(1) of the Act, which provides for the functions of the Central Commission, reads 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; “

*****”

10. As per the clause (a) of sub-section (1) of Section 79 of the Act, the Commission has been entrusted with the jurisdiction to regulate the tariff of the generating companies owned or controlled by the Central Government. Under clause (b) of sub-section (1) of Section 79 of the Act, the Commission has been entrusted with the jurisdiction to regulate the tariff of generating companies other than those owned or controlled by the Central Government if those companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State.

11. Further, the expression ‘composite scheme’ and the jurisdiction of the Central Commission in regulating the tariff of the project meeting the ‘composite scheme’ has been explained by the Hon'ble Supreme Court vide its judgment dated 11.4.2017 in Civil Appeals titled Energy Watchdog v. CERC & Ors. [(2017 (4) SCALE 580)] (in short, ‘Energy Watchdog Case’) as under:

*“22. The scheme that emerges from these Sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79(1) itself in sub-sections (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression “within the State” in sub-clauses (a), (b), and (d), and “intra-state” in sub-clause (c). **This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be***

governed by the State Commission or the Central Commission. The State Commission's jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. What is important to remember is that if we were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. **This being the case, we are constrained to observe that the expression "composite scheme" does not mean anything more than a scheme for generation and sale of electricity in more than one State.**

23. This also follows from the dictionary meaning [(Mc-Graw-Hill Dictionary of Scientific and Technical Terms (6th Edition), and P.Ramanatha Aiyar's Advanced Law Lexicon (3^d Edition)] of the expression "composite":

(a) 'Composite' – "A re-recording consisting of at least two elements. A material that results when two or more materials, each having its own, usually different characteristics, are combined, giving useful properties for specific applications. Also known as composite material.

(b) 'Composite character' – "A character that is produced by two or more characters one on top of the other."

(c) 'Composite unit' – "A unit made of diverse elements."

The aforesaid dictionary definitions lead to the conclusion that the expression "composite" only means "consisting of at least two elements". In the context of the present case, generation and sale being in more than one State, this could be referred to as "composite".

24. Even otherwise, the expression used in Section 79(1)(b) is that generating companies must enter into or otherwise have a "composite scheme". **This makes it clear that the expression "composite scheme" does not have some special meaning – it is enough that generating companies have, in any manner, a scheme for generation and sale of electricity which must be in more than one State.**

12. As per the above findings of the Hon'ble Supreme Court, the State Commission has jurisdiction where the generation and supply take place within the State. The moment the generation and sale involve more than one State, the Central Commission becomes the Appropriate Commission under the Act. Hon'ble Supreme Court has also ruled that the expression 'composite scheme' does not mean anything more than a scheme for generation and sale of electricity in more than one

State and that it is enough that generating companies have in any manner a scheme of generation and sale of electricity which must be in more than one State.

13. Combined reading of Section 79(1) and Section 63 of the Act and the decision of Hon'ble Supreme Court in Energy Watchdog Case makes it clear that the jurisdiction of the Central Commission can only be invoked in respect of the adoption of tariff under Section 63 of the Act if such generating companies have a composite scheme for generation and sale of electricity in more than one State.

14. SECI has submitted that PPAs (with SPDs) and PSA (with UPPCL) entered into by it, is in its capacity as the nodal agency of the Central Government and as an inter-State trading licensee. Therefore, in pursuance of the Guidelines, the scheme involved in the matter is in the nature of composite scheme falling within the scope of Section 79(1)(b) of the Act. It has been further submitted that under the said Guidelines, SECI is the nodal agency on pan-India basis and can sell power in terms of PSA to procurers in more than one State, both at the time of signing of PPAs, before the commercial operation date of the power projects and for the duration of the PPAs. It has also been submitted that SECI being the nodal agency for implementation of various schemes of the Central Government for setting up of renewable energy based projects, it has been vested with the authority to sell the quantum of power purchased from the solar power developer at any time in other States and, therefore, the jurisdiction will be of the Central Commission under Section 79(1)(b) of the Act.

15. In the instant case, it is at the behest of UPPCL that the bid process has been conducted by SECI in terms of the Guidelines issued by Ministry of Power,

Government of India under Section 63 of the Act. The Guidelines provides for facilitating transparency and fairness in procurement process and also provides for a framework for an 'Intermediary Procurer' as an aggregator/ trader for inter-State/ intra-State sale or purchase of long-term power. The Guidelines envisage the role of 'Intermediary Procurer' as under:

“c) ‘Intermediary Procurer’ & ‘End Procurer’:

i (a) In some cases, an intermediary, between the distribution licensees and the generator (“Solar Power Generator”), may be required either to aggregate the solar power purchased from different Solar Power Generators and sell it to the distribution licensee(s), or to enhance the credit profile. In such cases, the “Procurer” would be a trader, buying power from the Solar Power Generators and selling the same to one or more distribution licensees, such distribution licensees shall be the “End Procurer” and the trader shall be “Intermediary Procurer” for the purpose of these Guidelines.”

16. As per the above provision of the Guidelines, 'Intermediary Procurer' is a trader acting between the distribution licensees and the solar power generators which aggregates the solar power purchased from different solar power generators and sells it to one or more distribution licensees. The Intermediary Procurer may be an inter-State trading licensee like SECI. SECI has argued that the instant matter is a composite scheme for generation and sale of electricity in more than one State in terms of Section 79(1)(b) of the Act. However, in our view, mere involvement of an inter-State trading licensee as an Intermediary Procurer does not render the generating company to qualify as a composite scheme for generation and sale of power in more than one State in terms of Section 79(1)(b) of Act. It is more so, when the facts of the case establish that the generators and the sole end-procurer i.e. the distribution licensees are located in the same State.

17. Perusal of the records reveals that SECI has been roped in as Intermediary Procurer by the end-procurer, UPPCL for conducting the tariff based competitive bidding in accordance with the Guidelines. The bids were called for pre-specified

project site and accordingly, the successful bidders were required to set-up the project at Rihand Dam, Sonbhadra District in the State of Uttar Pradesh. The bid process was initiated by SECI after obtaining consent from UP Jal Vidyut Nigam Limited for setting-up of 150 MW grid-connected floating solar projects which stipulated that the entire power to be generated (i.e.150 MW) from the generating station is provisioned for sale to UPPCL only. Not only these particulars were so specified in the RfS documents beforehand, but the PSA for the entire 150 MW capacity has also been executed between SECI and UPPCL on 4.9.2019. Since all generating companies shall be located in the State of Uttar Pradesh and shall be selling power to the end-procurer, UPPCL, the present arrangement for generation and sale of power fails the test of 'composite scheme' in terms of Section 79(1)(b) of the Act. In our view, the entire transaction is purely intra-State in nature and does not involve any 'composite scheme' of generation and sale of electricity in more than one State.

18. SECI has also relied upon the definition of 'Appropriate Commission' under PPAs with SPDs and Articles 6.5.5 and 6.8.4 of the PSA executed with UPPCL which permits SECI for sale of UPPCL's allocation of solar power to third parties including any licensees under the Act. The relevant provisions as relied upon by SECI are reproduced below:

PPA

"ARTICLE 1: DEFINITIONS AND INTERPRETATION

1.1 Definitions

"Appropriate Commission" Unless otherwise stated, Appropriate Commission shall mean the Central Electricity Regulatory Commission referred to in sub-section (1) of section 76;"

PSA

"6.5.5 In the event of a bill amounting to Rs. 25 Crore is unpaid to the extent of Rs. 10 Crore, SECI would have a right to regulate and sell Buying Utility's allocation of

the solar power third parties to the extent of 40% (i.e. 10/25x100). SECI/SPD shall have the right to divert the Solar Power or part thereof and sell it to any third party namely;

i) Any consumer, subject to applicable law; or

ii) Any licensee under the Act;

SECI shall request the concerned SLDC/RLDC to divert such power to third party as it may consider appropriate”

“6.8.4 Notwithstanding Article 6.8.3, the SECI/SPD is free to sell such power to any third party which is in excess of the quantum of power as per Article 6.8.3 of this Agreement from SCD. Any power which is in excess of the quantum of power agreed to be supplied under this Agreement shall be offered to the Buying utility at the tariff as per Article 5.1.5, and in case the Buying Utility does not accept the same, SECI shall take appropriate action as per PPA.”

19. In terms of Article 6.5.5 of the PSA, in the event of bill amounting to Rs. 25 crore is unpaid to the extent of Rs. 10 crore, SECI will have the right to divert and sale the UPPCL's allocation to third parties, namely, any consumer or any licensee under the Act. Similarly, under Article 6.8.4 of the PSA, SECI or SPD is free to sell surplus power to any third party in case UPPCL refuses to accept the same. SECI has argued that since in terms of the above provisions of the PSA, SECI is entitled to divert the power outside the State of Uttar Pradesh, the Projects in question qualify as 'composite scheme' within the scope of Section 79(1)(b) of the Act as interpreted and decided by the Hon'ble Supreme Court in Energy Watchdog Case wherein it has been observed that the expression 'composite scheme' does not mean anything more than a scheme for generation and sale of electricity in more than one State and that it is enough that generating companies have, in any, manner, a scheme for generation and sale of electricity which must be in more than one State.

20. We are not persuaded by the aforesaid argument of SECI. The scheme that has been agreed upon between the three renewable generating companies, SECI and UPPCL is for generation and sale of power to UPPCL only. The right available to

SECI to regulate or sell the allocation of the buying entity to third parties is only a recourse envisaged to address the incidences of payment default. It only triggers upon occurrence of certain eventualities and not otherwise. These provisions are only supplemental to the main scheme of generation and sale of power to Uttar Pradesh. Further, these articles, in our view, also do not envisage the composite scheme of generation and sale of power in more than one State as the entire capacity is tied up for sale to UPPCL within the State of Uttar Pradesh and the temporary sale of power to any other entity in case of default does not change the ratio of arrangement of sale of power to UPPCL.

21. As regards the Central Commission having been defined as 'the Appropriate Commission' under the PPAs with SPDs, it is well settled principle that the parties cannot confer the jurisdiction on any forum by consent. Unless the jurisdiction of the Central Commission can be traced to the provisions of the Act and the Guidelines, the definition under the PPAs as agreed to between the parties, in our view, will not have any bearing while examining the jurisdiction of the Commission.

22. SECI has also submitted that it is an inter-State trading licensee in terms of a licence granted by this Commission and as per Rule 9 of the Electricity Rules, 2005, SECI is entitled to undertake intra-State trading without the need of separate licence from the State Commission.

23. It is not disputed that SECI is an inter-State trading licensee in terms of the licence granted by this Commission to SECI and that in terms of Rule 9 of the Electricity Rules, 2005, SECI is entitled to undertake intra-State trading without need of separate licence from the State Commission. However, this fact alone does not

oust the jurisdiction of the State Commission for the transactions which are purely of intra-State in nature and are not of the nature of 'composite scheme'. In this regard, the reliance may be placed on decision of the Appellate Tribunal for Electricity in Pune Power Development Private Ltd. v. Karnataka Electricity Regulatory Commission and Ors. in Appeal No. 200 of 2009 and PTC India Limited v. Gujarat Electricity Regulatory Commission and Anr. in Appeal No. 31 of 2012. The relevant extract of the said judgments are reproduced below:

Appeal No. 200 of 2009:

"21. Section 14 deals with licence issued by the Appropriate Commission for undertaking transmission, distribution and trading in Electricity. Having regard to the language of Section 86(1)(f) and Section 2(39) of the Act, there cannot be any distinction between the licences issued by the Commission whether Central or State. The State Commission will have jurisdiction to entertain the dispute and adjudicate the same so long as the part of the cause of action arose within its statutory jurisdiction."

Appeal No. 31 of 2012

"105.the sale by the Gujarat Urja to the PTC within the State amounting to intra State sale would fall within the jurisdiction of the State Commission as the cause of action has taken place within the State of Gujarat.

.....
109. In view of the above reasons, we are to conclude that merely because the PTC, the Appellant is an inter State Trading licensee and the licence was granted by the Central Commission it would not oust the jurisdiction of the State Commission especially when we find that cause of action had taken place within the jurisdiction of the Gujarat State Commission."

24. In the foregoing paragraphs, we have already observed that in the instant case, it is at the behest of the end-procurer, UPPCL that the bid process was conducted by SECI for the Projects to be located at Rihand Reservoir in the State of Uttar Pradesh. Also, the entire power is to be procured by UPPCL in terms of PSA dated 4.9.2019. Thus, entire transaction is of intra-State in nature and does not have any flavor of 'composite scheme'. Therefore, SECI cannot invoke the jurisdiction of this Commission as Appropriate Commission for adoption of tariff merely on the

ground of it being inter-State trading licensee and being entitled to undertake intra-State trading in electricity without obtaining separate licence.

25. It has also been submitted that since SECI is also owned and controlled by the Central Government, the activities undertaken by SECI falls under the scope and ambit of Section 79(1)(a) of the Act. SECI is presently owning and maintaining generating stations in the State of Rajasthan and in Union Territory of Andaman and Nicobar Island and once SECI is a generating company, Section 79(1)(a) of the Act will apply and thus, the Appropriate Commission for matters related to SECI will be the Central Commission.

26. It is pertinent to mention that the instant case neither involves the sale from the generating companies owned or controlled by the Central Government nor the SECI is acting/ functioning in its capacity of Central Government controlled or owned generating company. Further, if a Central Government owned company is declared as a successful bidder in a competitive bidding process conducted under Section 63 of the Act, its tariff shall be regulated under Section 79(1)(a) read with the terms of the PPAs and not under Section 79(1)(b) of the Act. Admittedly, SECI's role in the present proceedings and during the bid process was that of an 'Intermediary Procurer' i.e. a trader between the generating company and the end Procurer/ distribution licensee. In this regard, the relevant extract of the clauses/ articles of RfS and PPAs/ PSA as reproduced below:

RfS

"11.0 Solar Energy Corporation of India Limited (SECI) has issued this RfS in the capacity of 'Intermediary Procurer' as defined in the aforementioned Guidelines.."

PPA

"F. SECI has agreed to purchase such Solar Power from SPD as an Intermediary Procurer and sell it to Buying Utilities on back-to-back basis as per the provisions of

above stated scheme, accordingly SECI has agreed to sign/has signed a Power Sale Agreement with Buying Entity(ies) to sell such power as per the provisions of the above said scheme.”

27. In our view, only in its capacity of Intermediary Procurer as provided in the Guidelines, SECI has initiated a bid process on behalf of UPPCL and entered into PPAs with the Solar Power Generators and PSA with UPPCL. Merely because the Petitioner is a Central Government Company and has set up some generating stations, does not overcast its role as Intermediary Procurer/ trader in terms of the Guidelines. Accordingly, the jurisdiction of this Commission under Section 63 read with Section 79(1)(a) of the Act cannot be invoked in the instant case particularly when SECI has been functioning in its capacity of an Intermediary Trader as provided in the Guidelines.

28. SECI has argued that the parties, namely, UPPCL as well as the power project developer in other cases, including where the PPAs currently provide for generation and sale of electricity only in the State of Uttar Pradesh, have duly acknowledged, accepted and acted upon and implemented various projects on the basis that the Commission has the jurisdiction. The reliance has been placed on the order dated 19.9.2018 of the Commission in Petition No. 52/MP/2018 filed by Azure Power Venus Private Limited wherein the power project is located in the State of Uttar Pradesh and the PSA has been executed by SECI with UPPCL for sale of power from such power project. The relevant extract of the said order as relied upon by the Petitioner is extracted as under:

“48. Azure Power Venus Private Limited (Petitioner) is a generating company and is developing a 40 MW Solar Power Generating System (SPGS) based on Photo Voltaic technology in Dakor, District Jalaun at the UP Solar Park in the state of Uttar Pradesh. It has executed PPA on 21.10.2016 (effective date 08.10.2018) with SECI (Respondent).

50. *The Respondent (SECI) was appointed by the Government of India to purchase and sell solar photo-voltaic power through the Viability Gap Funding (VGF) mode under the Government of India's National Solar Mission, Phase II, Batch III Bidding Guidelines (NSM Guidelines). The NSM Guidelines envisage providing VGF from the National Clean Energy Fund through SECI to the bidders selected through a transparent bidding process to procure solar power. SECI enters into power purchase agreements with the successful bidders with a commitment to purchase power at fixed rate for a period of 25 years. The NSM Guidelines contemplate the sale of 90% of power generated by a solar power developer to buying utilities within the state and the remaining 10% power outside the State.*

51. *The Respondent issued Request for Selection No. SECI/JNNSM/P-2/B-3/RfS/UP/042016 dated 19.04.2016 (RfS) for selection of solar power developers for the development of a cumulative capacity of 315 MW in Uttar Pradesh Solar Power Park under the NSM Guidelines. Azure Power India Private Limited, the parent company of the Petitioner, placed a bid for a 40 MW project in the Uttar Pradesh Solar Park and was selected as the successful bidder. Thereafter, the Petitioner executed the PPA with SECI and undertook the obligation to develop the SPGS and sell the solar power generated at the SPGS to SECI as per the NSM Guidelines."*

29. In addition to the above, during the course of hearing learned senior counsel for the Petitioner also placed its reliance on the Commission's order dated 11.10.2017 in Petition No. 95/MP/2017 (Welspun Energy Private Limited v. SECI) in support of his contention that the Commission has also exercised its jurisdiction in that case wherein the solar power project was located in the State of Maharashtra and the entire power generated from the project was being sold to MSEDCL in terms of the PSA has been executed by SECI with MSEDCL.

30. Undisputedly, in both the above cases as referred to by the Petitioner, the Commission had exercised jurisdiction in dealing with the dispute arising out the contractual arrangement entered into by the generator and SECI. However, it is relevant to note that both the above Projects as referred to were selected and set-up under the Jawaharlal Nehru National Solar Mission (JNNSM) Phase-II, Batch-III State Specific Viability Gap Funding (VGF) Scheme. While examining the provisions of the JNNSM Scheme and upholding its jurisdiction, the Commission in its order

dated 11.10.2017, *inter-alia*, had observed as under:

“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.”

31. Thus, in respect of the Projects under the above JNNSM Scheme, the Commission had observed that as per the provisions of the Scheme, MNRE was 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 and thus, the JNNSM Scheme, itself envisaged that the power from the project developed under the Scheme shall be supplied to more than one State. In the above background, the Commission had exercised its jurisdiction in the said matters.

32. However, the present case is clearly distinguishable from the cases referred to and discussed above. The solar power Projects to be set-up in the present case are not under the JNNSM Scheme, but under the bid process conducted at the behest of UPPCL as per the Guidelines issued by Ministry of Power under Section 63 of the Act. Unlike the JNNSM Scheme and as already observed in the foregoing paragraphs, the provisions of the Guidelines themselves do not envisage any composite scheme for generation and supply of electricity in more than one State. Moreover, we have also examined the provisions of the PSAs as relied upon by SECI to contend the existence of composite scheme and have reached to a conclusion that they do not give rise to the composite scheme as envisaged under Section 79(1)(b) of the Act and as elucidated by the Hon'ble Supreme Court in Energy Watchdog Case. Therefore, the above referred decisions of the Commission are not applicable to the present case.

33. Without prejudice to its foregoing submissions, SECI has also contended that Clause 2.2.1(a) of the Guidelines deals with certain situations, whereas the appropriate provisions to be considered are sub-clauses (b) and (c) of the said Clause 2.2.1 of the Guidelines. It has been submitted that reading of Clause 2.2.1 as a whole will establish that with respect to cases covered within the scope of sub-clauses (b) and (c), the Appropriate Commission will be the Central Commission for adoption of tariff under the Guidelines and not the State Commission.

34. Clause 2.2 of the Guidelines defines 'Appropriate Commission' as under:

"2.2. Appropriate Commission:

2.2.1 Subject to the provisions of the Act:

a) In case of a single distribution licensee being the Procurer, the Appropriate Commission, for the purpose of these bidding Guidelines, shall be the State

Electricity Regulatory Commission of the concerned State where the distribution licensee is located.

b) In case of combined procurement where the distribution licensees are located in more than one State, the Appropriate Commission for the purpose of these bidding Guidelines, shall be the Central Electricity Regulatory Commission.

c) For cases involving sale of power from Central Generating Stations, the Appropriate Commission shall be the Central Electricity Regulatory Commission.”

35. As per the above provisions of the Guidelines, where a procurer is single distribution licensee, the Appropriate Commission for the purpose of these Guidelines, including for adoption of tariffs shall be the State Electricity Regulatory Commission of the concerned State where the distribution licensee is located, whereas in case of combined procurement where the distribution licensees are located in more than one State, the Appropriate Commission is the Central Commission.

36. The present case is not a case of combined procurement where the distribution licensees are located in more than one State as provided in Clause 2.2.1(b) quoted above, where the Appropriate Commission would be the Central Commission. Hence, the aforesaid contention of SECI deserves to be rejected.

37. SECI has also brought to our notice that one of the SPDs, namely, Rihand Floating Solar Private Limited has filed Petition being No. 611/MP/2020 before the Commission for return of the Performance Bank Guarantees on account of termination of the PPA for setting of 50 MW floating solar power project for alleged reasons of force majeure and UPPCL is also a party to the said Petition. We observe that the said Petition is pending for consideration of the Commission and is yet to be admitted by the Commission. Therefore, reliance on the pendency of the said petition before this Commission in support of the jurisdiction of this Commission at

this stage is irrelevant and pre-mature.

38. In view of the above discussions, we are of the opinion that this Commission is not Appropriate Commission within the meaning of the Act. Having held that this Commission does not have jurisdiction, we have not examined merits of the case. The parties are at liberty to approach the 'Appropriate Commission' within the meaning of the Act.

39. The Petition No. 52/AT/2021 is disposed of in terms of the above.

Sd/- (P.S. Mhaske) Member	sd/- (P.K. Singh) Member	sd/- (Arun Goyal) Member	sd/- (I.S. Jha) Member	sd/- (P.K. Pujari) Chairperson
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