

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 259/MP/2021

Coram:

**Shri I. S. Jha, Member
Shri Arun Goyal, Member
Shri P. K. Singh, Member**

Date of Order : 17th August, 2022

In the matter of:

Petition under Section 79(1)(c), Section 79(1)(f) and Section 79(1)(k) of the Electricity Act, 2003, seeking deferment of operationalization of Long-Term Access (LTA) granted by the Central Transmission Utility of India Limited to the Petitioner.

And in the matter of:

SBSR Power Cleantech Eleven Private Limited,
First floor, Worldmark-02, Asset Area-8,
Hospitality District, Aerocity, NH-8
New Delhi-110037.

...Petitioner

Versus

1. Central Transmission Utility of India Limited,
CTU-Planning (1st Floor-A Wing)
Saudamini, Plot No. – 2, Sector- 29,
Near IFFCO Chowk Metro Station,
Gurugram – 122 001, Haryana

2. Powergrid Corporation of India Limited,
Saudamini, Plot No. 2, Sector- 29,
Gurugram- 492 001, Haryana.

3. Solar Energy Corporation of India Limited,
6th Floor, Plate-B, NBCC Office Block,
Tower-2, East Kidwai Nagar,
New Delhi-110023.

,,,,,Respondents

Parties Present

Shri Hemant Singh, Advocate, SPCEPL
Shri Lakshyajit Singh Bagdwal, Advocate, SPCEPL
Ms. Lavanya Panwar, Advocate, SPCEPL
Shri Rajeev Lochan, SPCEPL
Shri Ravi Shankar Sinha, SPCEPL
Shri Kashish Bhambhani, CTUIL
Shri Yatin Sharma, CTUIL
Shri Swapnil Verma, CTUIL

Shri Siddharth Sharma, CTUIL
Shri Ranjeet Singh Rajpur, CTUIL
Shri Akshayvat Kislay, CTUIL

ORDER

The Petitioner, SBSR Power Cleantech Eleven Private Limited, has filed the present Petition seeking direction for extension/ deferment of operationalization of Long-Term Access (LTA) granted by the Central Transmission Utility of India Limited (CTUIL), in terms of the Long Term Access (LTA) Agreement dated 26.11.2019. The Petitioner has made the following prayers:

“direct the Respondent Nos. 1 and 2 to extend/ defer the operationalization of the Long-Term Access (LTA) granted to the Petitioner vide the LTA Agreement dated 26.11.2019 and Supplementary LTA Agreement dated 21.09.2021, till the actual SCOD/ COD is achieved by the Petitioner, or till 02.07.2022, whichever is earlier;

a) in the interim, direct Respondent Nos. 2 and 3 not to operationalize the LTA of the Petitioner and levy any transmission charges, as stated in the present Petition, till the pendency of the same;

b) pass any other and further order or orders as this Hon'ble Commission may graciously deem fit and proper under the peculiar facts and circumstances of the present case and in the interest of justice.”

Submissions of the Petitioner

2. The gist of the submissions made by the Petitioner is as under :

(a) In response to Request for Selection (RfS) dated 10.01.2019 issued by Solar Power Corporation of India Limited (SECI) for procurement of 1200 MW of the power generated from the ISIS connected Solar Power Project, the Petitioner participated in the bid and was declared as the successful bidder for supply of 300 MW to be established by the Petitioner anywhere in India, and for supply of such electricity by SECI as an Intermediary Agency to the Buying Utility(ies) under a Power Sale Agreement to be entered into between SECI and such Buying Utility(ies). Thereafter, SECI issued a Letter of Award (LOA) dated 05.03.2019 in favour of the Petitioner for development and establishment of 300 MW Solar Power Project in the State of Rajasthan.

(b) SECI executed Power Sale Agreement (PSA) dated 17.06.2019 with BSES Yamuna Power Limited (BYPL) for supply of 150 MW (wherein 100 MW is to be procured from the Petitioner). In terms of the PSA, the Scheduled Commercial Operation Date (SCOD) of the power project was 18 months from the effective date of the PPA (which was to be executed between SECI and the solar project developer). Further, as per Article 4.9 of the PSA, the said agreement was to become enforceable from the date of approval granted by the Delhi Electricity Regulatory Commission (DERC).

(c) Further, SECI executed another Power Sale Agreement (PSA) dated 26.06.2019 with Tata Power Delhi Distribution Limited (TPDDL) for supply of 200 MW. As per the PSA, the SCOD of the project was 18 months from the effective date of the PPA. Further, as per Article II of the TPDDL-PSA, the said agreement was to become 'enforceable' within six (6) months of the above effective date, i.e. on 03.01.2020, or after due regulatory approval by DERC obtained by SECI (and TPDDL), whichever is earlier.

(d) Based on the aforesaid LOA and the PSAs, the Petitioner executed a back-to-back Power Purchase Agreement (PPA) dated 20.08.2019 with SECI for supply of 300 MW solar power, for a period of 25 years from SCOD. The said power was to be supplied to TPDDL and BYPL in terms of the PSAs as mentioned hereinabove. Article 2.1 of the said PPA provides the effective date as 03.07.2019. Further, the SCOD was mentioned as 03.01.2021.

(e) Accordingly, for the purpose of evacuating 300 MW solar power, the Petitioner applied to CTUIL for grant of LTA, which was granted by CTUIL vide its letter dated 29.10.2019. Subsequently, the Petitioner executed an LTA Agreement dated 26.11.2019 with CTUIL.

(f) During the months of February-March 2020, the outbreak of Covid-19 disrupted functioning of all the businesses, including the Petitioner. Subsequently, Government of India announced a nationwide lockdown w.e.f. 23.03.2020. The said lockdown continued for a substantial period of time. In fact, even when the lockdown was lifted by the Government of India, there still

existed various restrictions, which hampered the functioning of the business across the country.

(g) On account of the outbreak of COVID-19, and consequently various restrictions imposed by Government of Rajasthan, such as imposition of Section 144, declaration of the Bikaner district as containment zone, the Petitioner vide its letter dated 27.04.2020 invoked force majeure notice to SECI and requested for extension in SCOD. In continuation to the aforesaid letter, the Petitioner vide its letter dated 07.05.2020 further requested SECI to grant overall time extension towards the commissioning of the project

(h) SECI vide its letter dated 11.09.2020 extended the SCOD of the project from 03.01.2021 to 05.06.2021. CTUIL vide its letter dated 16.12.2020 granted extension of 5 months towards operationalization of LTA, in view of the Ministry of Power, Government of India's letter dated 27.07.2020. Accordingly, based on the above extension, the revised date of operationalization of LTA was 03.06.2021 or the date of commissioning of the transmission system, whichever is later. The aforesaid extension/ deferment of operationalization of LTA was also in line with the statutory mandate of planning and coordination envisaged under Section 38(2)(c) of the Electricity Act, 2003 ('the Act').

(i) The Petitioner vide its letters dated 26.04.2021 and dated 20.05.2021 apprised SECI about difficulties faced by it on account of 2nd wave of the Covid-19 pandemic. The Petitioner also issued a letter dated 19.06.2021 to CTUIL/PGCIL demonstrating the difficulties faced by it on account of 2nd wave of Covid-19 pandemic, which was worsened by the outbreak of black fungus, the ongoing 'Patwari Strike' in the State of Rajasthan, imposition of Section 144 and weekend lockdowns, etc., thereby immensely impacting the progress of the Petitioner's solar project.

(j) TPDDL-PSA was initially approved by DERC on 31.12.2020 However, the said approval was stayed by the Appellate Tribunal for Electricity (APTEL) vide order dated 23.02.2021 in Appeal filed by SECI (Appeal No. Appeal No. 52 of 2021). As such, there was no 'enforceability' of the TPDDL-PSA in the eyes

of law, and that the Petitioner, which was closely monitoring the said developments, was unsure as to the status of the TPDDL-PSA. APTEL vide its judgment dated 02.07.2021 finally approved TPDDL-PSA.

(k) The aforesaid delay in 'enforceability' of the TPDDL-PSA was clearly on account of the contracting parties therein, i.e., SECI (and TPDDL), thereby attracting Article 4.5(a) of the PPA which means that the timelines of fulfillment of obligations by the Petitioner (solar power developer) are required to be extended till such event of default is rectified by SECI. Accordingly, the timeline of 12 months for fulfillment of obligation by the Petitioner to achieve commissioning (i.e., SCOD) of the solar power plant, starts from the date of the regulatory approval of TPDDL-PSA (i.e., 02.07.2021) and the same is supposed to end only on 02.07.2022.

(l) As regards BYPL-PSA, the same is yet to become enforceable as there is no regulatory approval granted by the DERC. The non-approval/ delayed approval of the TPDDL-PSA and BYPL-PSA has to necessarily be construed as a default on the part of SECI, in terms of Article 4.5(a) of the PPA, which automatically amounts to extension of timelines of the Petitioner qua fulfilment of obligation to achieve SCOD under the PPA.

(m) CTUIL vide its letter dated 10.08.2021, while allowing extension of operationalization of LTA, granted such extension only till 03.09.2021, or the date of commissioning of the transmission system, whichever is later. However, CTUIL/ PGCIL vide the said letter completely failed to appreciate the ground realities qua non-approval of PSAs and granted extension for a period which cannot at all be considered to be reasonable or feasible

(n) As per Clause 11.2 of the Detailed Connectivity Procedure issued by the Commission for renewable generating stations on 20.02.2021, a generator is permitted extension of timelines to lay down its dedicated transmission network till the pooling station of CTUIL, on account of extension of SCOD/ COD by competent authorities.

(o) From a reading of clause 11 of the Detailed Procedure dated 20.02.2021, it is clear that if a generator is permitted extension in timelines qua the COD of the project by the Commission, then the principle is that CTUIL will not start imposing transmission charges by deferring the operationalization of LTA. Similar material consideration needs to be made in the facts of the present case, under the ambit of “coordination” to be carried out by CTUIL in terms of Section 38 of the Act.

(p) Ministry of Power, Government of India vide its order dated 15.01.2021 had acknowledged that renewable power projects are eligible for waiver of inter-State transmission charges and losses, which have their scheduled commissioning date on or before the June 2023 and are granted extension on account of inaction/ delays on the part of Government Agency.

(q) Regulation 13(3) is silent on the aspect wherein there has been an extension of SCOD/ COD and the treatment to be done with respect to transmission charges.

(r) It is settled position of law rendered in *Energy Watchdog Judgment [(2017) 14 SCC 80]* by the Hon'ble Supreme Court, which mandates exercise of regulatory powers by the Commission where the regulations or statutory documents are silent qua a particular issue. Accordingly, the Commission has absolute powers to regulate the electricity industry, either through regulatory orders or through laying down regulations. In the present case, the Commission can pass an order for implementing the directions issued by the Central Government or providing for a protocol where the extant regulations are silent.

(s) It is a fit case for relaxing the provisions of Regulation 13(3) of the Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2020, so that the Petitioner is not imposed any transmission charges in the event of LTA operationalization despite extension of SCOD by the Commission.

(t) For the purposes of granting LTA, CTUIL is required to undertake planning and coordination relating to the development of the ISTS network. For

the said purposes, CTUIL, as per Section 38(2)(b) of the Act, is mandated to coordinate with various entities including CEA, licensees and the generating companies.

(u) In pursuance of mandate of Section 38(2)(b) of the Act, CTUIL conducts various coordination meetings with all stakeholders for the purposes of implementing a new transmission system as well as augmentation of the existing Inter-State Transmission System (ISTS) network, apart from granting and operationalizing LTA, MTOA and STOA. Further, CTUIL also considers the inputs provided by the CEA and the generating companies. This is required for fulfilling the mandate of Section 38(2)(c) of the Act which requires that CTUIL has to ensure the development of an efficient, “coordinated” and economical system of ISTS lines for smooth flow of electricity from generating stations to the load centers.

(v) The development of the transmission corridors has to necessarily be done by CTUIL in consonance with the statutory mandate contained in Section 38(2)(b) and Section 38(2)(c) of the Act, inasmuch it has to take a holistic view and ensure that the transmission system to be developed would be efficacious or purposeful and commensurate with the ground realities concerning generating companies, amongst others.

3. The Petition was listed for hearing on admission on 24.5.2022 through virtual hearing. In response to the specific query of the Commission with regard to the relevant provisions of LTA agreement under which the relief(s) has been sought by the Petitioner and consequently the admissibility of the Petition, the Petitioner relied upon the Section 38 of the Act under which CTUIL is required to discharge the functions of planning and co-ordination relating to ISTS with the generating companies, amongst others. The Petitioner also relied upon the Notification issued by the Ministry of Power in regard to deferment of the LTA operationalization in the event of extension of SCOD of the Project on account of force majeure events. After hearing the parties, the

Commission directed the parties to file their arguments and reserved the order on admissibility.

4. The Petitioner, in its written submission dated 01.06.2022 on the admissibility of the Petition, has submitted as under :

(a) The Commission has already admitted a catena of cases wherein a similar issue of deferment LTA was the subject matter of the said cases. As such, the Petitioner in the present case, is a similar placed solar power generator, and there cannot at all be any differential treatment to the case of the Petitioner.

It is a settled principle of law that a court is bound by its own earlier orders. The reliance is placed on the judgment of the Hon`ble Supreme Court in the cases of Sub-Inspector Rooplal v. Lt. Governor, reported in [(2000) 1 SCC 644], and Govt. of A.P. v. A.P. Jaiswal, reported in [(2001) 1 SCC 748].

It is settled principle of law that a court has to grant parity/ similar treatment to the cases involving similar/ identical issues. In this regard, reference is made to the judgments of the Hon`ble Supreme in the cases of Birla Corpn. Ltd. v. CCE, reported in [(2005) 6 SCC 95] and Indian Oil Corpn. Ltd. v. CCE, reported in [(2007) 13 SCC 803]

(b) The Commission, being a court of first instance, is bound under law, to decide the present case on merits, as both jurisdiction and jurisdictional fact are in existence. Accordingly, this Commission needs to admit the present petition, and provide opportunity to the parties to file their respective pleadings.

(c) In the present case, the issue relates to deferment/ extension of operationalization of Long Term Open Access (LTA) granted to the Petitioner by CTUIL for the purpose of use of 'inter-State transmission system' of electricity. This means that this Commission has to 'regulate' the 'usage' of inter-State transmission system of CTUIL, which is a deemed transmission licensee, in terms of 2nd proviso of Section 14 of the Act.

Further, the Petitioner has alleged a dispute against CTUIL, that the said Authority is not deferring/ extending the operationalization of LTA and that it

cannot levy any transmission charges, as the Scheduled Commercial Date (SCOD) of the Petitioner is to be extended. Such extension is being sought based on the default committed by SECI [and the Distribution Licensees (TPDDL and BYPL)] in seeking necessary regulatory approval of the PSAs. As such, CTUIL, has to necessarily perform its functions of planning and coordination envisaged under Section 38 of the Act. Whether CTUIL has performed the said functions or not, is a matter which can only be decided upon adjudicating the present petition on merits, and that the same cannot be a ground of denial of admission or maintainability. Thus, the aforesaid means that there is a 'dispute' raised by the Petitioner, based on facts, which fulfils the existence of "jurisdictional fact" / valid cause of action for adjudicating the present petition on merits, under section 79(1)(f), read with section 79(1)(c) of the EA, 2003. In this regard, reliance has been placed on the judgment of the Hon`ble Supreme Court in the cases of Liverpool & London S.P. & I Assn. Ltd. v. M.V. Sea Success I, [reported in (2004) 9 SCC 512] and Ponnala Lakshmaiah v. Kommuri Pratap Reddy,[reported in (2012) 7 SCC 788]

(d) The Commission vide order dated 28.05.2022 in Petition No. 205/MP/2021, in the case of NTPC Ltd. v. Uttar Pradesh Power Corporation Limited & Ors., held that when a 'cause of action' is established in a petition, then the same is maintainable/ admissible before this Commission.

(e) Whether there exists a provision under the LTA Agreement for deferment/ extension of the operationalization of LTA, is 'immaterial' as far as jurisdiction of this Commission is concerned. The jurisdiction is conferred by the Act, which under Section 79(1)(c) grants enough regulatory powers to this Commission for deferring/ extending the operationalization of LTA, despite there being no provision under the Agreement.

(f) Surely, CTUIL or anyone else cannot argue that since the LTAA does not have any provision for deferment/ extension, even this Commission does not have the power to grant the said relief, when Section 79(1)(c) of the Act has been inserted by the Parliament/ legislature. A narrowly worded contract cannot prevent exercise of regulatory powers by this Commission in a dispute involving inter-State transmission.

(g) Initially, the Petitioner filed a combined petition [seeking extension of SCOD and deferment / extension of the operationalization of LTA], being Petition No. 192/MP/2021. Vide ROP dated 06.10.2021, this Commission granted liberty to the Petitioner to file a separate petition seeking aforesaid deferment of LTA, thereby resulting into filing of the present Petition. Pursuant to the said liberty granted by the Commission, once the present Petition is filed, it cannot be held that the same is not maintainable/ not admissible. Whether, finally the Petitioner succeeds or loses in the present case, the same cannot deny the right to be heard on merits, especially by a court of first instance, such as this Commission.

(h) The Petitioner relies upon a settled tenet of law that a quasi- judicial body being a creature of a statute, is bound to exercise its jurisdiction in conformity with the said statute. In this regard, the judgments of the Hon'ble Supreme Court are relevant in the cases of N.C Dhoundial v. Union of India reported in [(2004) 2 (SCC) 579], and Kuntesh Gupta v. Hindu Kanya Mahavidyalaya, [(1987) 4 SCC 525].

5. CTUIL, in its written submission dated 14.06.2022 has submitted as under :

The issue regarding synchronisation/alignment of date of LTA with SCOD has been deliberated and adjudicated by this Commission in its Order dated 23.05.2022 in Petition No. 525/MP/2020 (*Spring Renewable Energy Private Limited v. Central Transmission Utility of India Limited & Anr.*).

(a) Previous similar Petitions seeking deferment/alignment of LTA were admitted because the issue of deferment/alignment of LTA was under the considerate adjudication of the Commission. However, consequent to final adjudication on the issue by the Commission in Petition No. 525/MP/2020, the issue stands settled and the contention of the Petition regarding parity is misplaced and does not survive.

(b) During the hearing dated 24.05.2022, the Petitioner had sought to rely upon the provisions of Sections 38 Act to justify the admissibility of the Petition contending that under Section 38 of the Act, CTUIL is required to discharge the

functions of planning and co-ordination relating to ISTS with the generating companies, amongst others.

(c) CTUIL is obligated to administer the LTA and its grant (including LTA start date) as per the provisions of the Act/Connectivity Regulations and Detailed Procedure.

(d) In the entire regulatory scheme of connectivity and LTA grant, the relevant consideration, *inter alia*, was the transmission system availability as per the LTA commencement date indicated in the LTA application. The power purchase arrangements of the LTA grantee and the project SCOD i.e. the date from when the power sale/purchase obligations and arrangements under the executed PPA are to commence, are not the underlying considerations and CTUIL has no privity of contract whatsoever with the power purchaser and/or the project implementing agency, if any. Any request for extension of SCOD by the Petitioner made to SECI is an issue inter-se between the Petitioner and its beneficiaries. As per the terms of the LTA Agreement and the Regulations of this Commission, there is no provision to extend the start date of LTA on any such account.

Analysis and Decision

6. We have considered the submissions of the parties. The Petitioner has primarily sought extension/ deferment of operationalization of the Long-Term Access (LTA) granted to the Petitioner vide LTA Agreement dated 26.11.2019 and Supplementary LTA Agreement dated 21.09.2021, till the actual SCOD/ COD is achieved by the Petitioner.

7. During the hearing dated 24.5.2022, the Commission reserved the order on admissibility of the Petition. In support of the admissibility of the Petition, the Petitioner has contended that the Commission has already admitted a catena of cases wherein a similar issue of deferment LTA was the subject matter of the said cases is bound

under law, to treat the Petitioner similarly. Therefore, there cannot at all be any differential treatment to the case of the Petitioner as it is a settled principle of law, a court is bound by its own earlier orders.

8. The Petitioner has contended that there is a 'dispute' raised by the Petitioner, based on facts, which fulfils the existence of "jurisdictional fact" / valid cause of action for adjudicating the present Petition on merits, under Section 79(1)(f), read with Section 79(1)(c) of the Act.

9. *Per contra*, CTUIL has submitted that earlier, similar Petitions seeking deferment/alignment of LTA were admitted, because the issue of deferment/alignment of LTA was under the considerate adjudication of the Commission. However, consequent to the final adjudication on the issue by the Commission in Petition No. 525/MP/2020, the issue stands settled and the contention of the Petitioner regarding parity is misplaced and does not survive. CTUIL has further stated that it has no privity of contract whatsoever with the power purchaser and/or the project implementing agency, if any. Any request for extension of SCOD by the Petitioner made to SECI is an issue inter-se between the Petitioner and its beneficiaries. In the LTA Agreement and the Regulations of Commission, there is no provision to extend the start date of LTA on any such account.

10. Based on the submissions made by the Petitioner, as also endorsed by CTUIL, it is apparent that the Commission has admitted similar matters pertaining to deferment of LTA in the past. The Petitioner has furnished the details of such cases, namely ,Petition No. 79/MP/2022 - Masaya Solar Energy Private Limited (MSEPL) v. Solar Energy Corporation of India Limited (SECI) and Ors., Petition No. 107/MP/2021 - AP Avikiran Solar India Private Limited v. Power Grid Corporation of India Limited, Petition No. 21/MP/2019 - Adani Renewable Energy Park Rajasthan Limited v. Fatehgarh-Bhadla

Transmission Limited (FBTL) and Anr., Petition No. 107/MP/2021-AP Avikiran Solar India Private Limited v. Power Grid Corporation of India Limited, Petition No.269/MP/2017- Korba West Power Company Limited v. Power Grid Corporation of India Limited and Ors., Petition No. 21/MP/2019- Adani Renewable Energy Park Rajasthan Limited v. Fatehgarh-Bhadla Transmission Limited (FBTL) and Anr.,Petition No. 103/MP/2021- ACME Deoghar Solar Power Pvt. Ltd. & Ors. v. Power Grid Corporation of India Ltd. & Ors. and Petition No. 525/MP/2020 - Sprng Renewable Energy Private Limited (SREPL) v. Power Grid Corporation of India Limited and Anr

11. CTUIL has contended that consequent to the final adjudication on the issue by the Commission in Petition No. 525/MP/2020, the issue stands settled and the contention of the Petitioner regarding parity is misplaced and does not survive. We have considered the rival submissions. We are of view that the petition needs to be heard on merit as well.

12. Accordingly, the Petition is 'admitted'. The Respondents are directed to file their replies on merits, on or before 31.8.2022, after serving copy to the Petitioner who shall file its rejoinders, by 15.9.2022. The parties shall ensure the completion of pleadings within the due date mentioned. No extension of time shall be granted for any reason.

13. The Petition shall be listed for hearing 'on merits', in due course for which separate notice will be issued.

Sd/
(P. K. Singh)
Member

Sd/
(Arun Goyal)
Member

Sd/
(I. S. Jha)
Member