

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No.43/MP/2021 along with IA No.9/2021**

- Subject : Petition under Section 79 of the Electricity Act, 2003 read with Articles 11 and 13 of the Power Purchase Agreements dated 28.6.2018 executed between the Petitioner and Solar Energy Corporation of India Limited.
- Date of Hearing : 10.5.2023
- Coram : Shri Jishnu Barua, Chairperson  
Shri I. S. Jha, Member  
Shri Arun Goyal, Member  
Shri P. K. Singh, Member
- Petitioner : Adani Wind Energy Kutchh One Limited (AWEKOL)
- Respondents : Solar Energy Corporation of India Limited (SECI) and 5 Ors.
- Parties Present : Shri Saunak Rajguru, Advocate, AWEKOL  
Shri Shubham, Advocate, AWEKOL  
Shri M. G. Ramachandran, Sr. Advocate, SECI  
Ms. Tanya Sareen, Advocate, SECI  
Shri Aneesh Bajaj, Advocate, SECI  
Ms. Srishti Khindaria, Advocate, SECI  
Ms. Surbhi Kapoor, Advocate, SECI  
Ms. Suparna Srivastava, Advocate, CTUIL  
Ms. Astha Jain, Advocate, CTUIL  
Ms. Tejasvita Dhawan, Advocate, CTUIL  
Shri Swapnil Verma, CTUIL  
Shri Ranjeet Rajput, CTUIL  
Ms. Kavya Bharadwaj, CTUIL

**Record of Proceedings**

Learned counsel for the Petitioner submitted that the present Petition has been filed *inter-alia* for seeking directions that the Petitioner be relieved from performing its obligations under the Power Purchase Agreements on the ground of force majeure, without any financial implication and for restraining Respondent No.1, SECI, from encashing the Performance Bank Guarantee (PBG). Learned counsel further referred to the Petition and submitted that due to the occurrence of various force majeure events, viz. delay in commissioning of the transmission system through which the Petitioner was to evacuate the power, outbreak of Covid-19, delay in construction of dedicated transmission line due to RoW and Law & order issues, etc. as detailed in the petition, it became impossible on the part of the Petitioner to commission the Project within the timelines as per the PPAs. Learned counsel also submitted that the PPAs, at Article 13.5, specifically enables the Petitioner to terminate the PPAs if a force majeure event subsists beyond a period of 12 months without any further liability to the Petitioner and since, in the present case, the force majeure events have lasted for a period beyond 12 months, no financial implication

including encashment of PBG can lay against the Petitioner. Learned counsel further added that the Petitioner is yet to file its rejoinders to the reply of SECI & CTUIL and be permitted to file its rejoinders in the matter. The Commission, however, noted that the filing of rejoinder has been inordinately delayed by the Petitioner itself.

2. Learned senior counsel for the Respondent, SECI pointed out that, vide Record of Proceedings for the hearing dated 5.3.2021, the Commission had directed SECI not to invoke/encash the PBG furnished by the Petitioner till the next date of hearing and the said interim protection has continued till date, i.e. for period of approximately two years. Learned senior counsel submitted that the matter regarding the stay on encashment of BG has been dealt in a number of decisions by the Hon'ble Supreme Court as well as the Appellate Tribunal for Electricity. Learned senior counsel further placed its reliance on the judgments of APTEL dated 24.2.2023 in Appeal No. 292 of 2022 (Inox Green Energy Service Ltd. and Ors. v. CERC and Ors.) and 22.12.2022 in IA No. 1467 of 2022 in Appeal No. 378 of 2022 (Arian Solar Private Ltd. v. CERC and Ors.) and submitted that beneficiary cannot be restrained from encashing the bank guarantee even if a dispute between the beneficiary and the person at whose instance the bank guarantee was given by the bank, had arisen in the performance of contract. Learned senior counsel also added that the Civil Appeals filed before the Hon'ble Supreme Court against the aforesaid judgments of APTEL have also been dismissed. Learned senior counsel accordingly submitted that SECI is entitled to revoke the PBG legitimately and that the interim direction dated 5.3.2021 ought to be vacated.

3. In response, learned counsel submitted that the issue qua encashment of PBG is intrinsic to the force majeure reliefs as prayed for by the Petitioner in the Petition. Learned counsel submitted that while granting the interim relief by Record of Proceedings for the hearing dated 5.3.2021, the Commission already acknowledged the *prima facie* case in favour of the Petitioner, and no application seeking vacation of the said order has been filed by SECI and no change in circumstances has been demonstrated requiring alteration of the said direction.

4. The Commission noted the respective submissions of learned counsel for the Petitioner and learned senior counsel for SECI, including the settled position of law, as vehemently put forth by the learned senior counsel, that BG is an independent and distinct contract between the bank & the beneficiary and is not qualified by the underlying transaction or validity of the primary contract between the person at whose instance BG was given and unless fraud & special equity is pleaded and *prima facie* established by strong evidence as a triable issue, the beneficiary cannot be restrained from encashing the BG even if there is a dispute between the beneficiary & the person at whose instance the BG was given by the bank. The Commission observed that there is no case of egregious fraud pleaded by the Petitioner in IA and insofar as special equities & irretrievable injustice is concerned, the contentions, to this effect, cannot be sustained in light of the clear findings of the APTEL's judgments dated 22.12.2022 and 24.2.2023 as referred to & relied upon by SECI. Accordingly, the Commission deemed it appropriate not to extend the interim protection granted vide Record of Proceedings for the hearing dated 5.3.2021 any further. However, keeping in view the submission of the learned senior counsel for SECI during the hearing on 5.3.2021 that the Petitioner vide its letter dated 26.12.2020 itself had proposed to deposit the amount corresponding to PBG with SECI in lieu of encashment, the Commission deemed it appropriate to allow the

Petitioner such an alternative and accordingly directed the Petitioner to deposit with SECI the amount equivalent to PBG by 15.5.2023 failing which SECI may take appropriate action(s) towards encashment of PBG in accordance with law. However the above PBG encashment or deposit of amount in lieu of PBG shall be subject to the outcome of decision on the main Petition. Accordingly, IA No.9/2021 was disposed of.

5. The Commission also permitted the Petitioner to file its rejoinder(s), if any, within two weeks.

6. The Petition shall be listed for hearing on merits on 8.6.2023.

**By order of the Commission**

**Sd/-  
(T.D. Pant)  
Joint Chief (Law)**