



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No. 10/MP/2021

कोरम/ Coram:

श्री आई .एस .झा, सदस्य /Shri I. S. Jha, Member
श्री अरुण गोयल, सदस्य /Shri Arun Goyal, Member
श्री पी .के .सिंह, सदस्य / Shri P. K. Singh, Member

आदेश दिनांक/ Date of Order: 24th August, 2022

IN THE MATTER OF:

Petition under Section 79 of the Electricity Act, 2003 read with Article 16 of the Power Purchase Agreement dated 29th December 2017 entered into between the Petitioner and the Respondents seeking extension of Scheduled Date of Commissioning of the project without the levy of the penalty.

AND IN THE MATTER OF:

Adani Green Energy (MP) Limited (AGEMPL)

Adani Corporate House, Shantigram,
Near Vaishno Devi Circle, S. G. Highway,
Khodiyar, Ahmedabad – 382421, Gujarat, India.

...Petitioner

VERSUS

1. Solar Energy Corporation of India Limited (SECI)

1st Floor, D-3, A Wing,
Prius Platinum Building District Centre,
Saket, New Delhi - 110017

2. Punjab State Power Corporation Limited (PSPCL)

The Mall, PSEB Head Office,
Patiala, Punjab – 147001

...Respondents

Parties Present: Shri Sourav Roy, Advocate, AGEMPL
Shri Prabudh Singh, Advocate, AGEMPL
Shri M. G. Ramachandran, Sr. Advocate, SECI
Ms. Tanya Sareen, Advocate, SECI
Shri Dipak Panchal, AGEMPL
Shri Shreedhar Singh, SECI
Shri Shubham Mishra, SECI
Ms. Neha Singh, SECI

आदेश/ ORDER

The Petitioner, Adani Green Energy (MP) Limited is in the business of generation and sale of renewable energy in the country. The Petitioner has filed the petition under Section 79 of the Electricity Act, 2003 read with Article 16 of the Power Purchase Agreement (PPA) dated 29.12.2017 and is seeking extension of Scheduled Date of Commissioning (SCoD) of the project from 03.01.2020 to 05.03.2020 without levy of Liquidated Damages by the Respondent No.1.

2. The Respondent No.1, Solar Energy Corporation of India Limited (SECI) is a Central Public Sector Undertaking (CPSU) under the administrative control of the Ministry of New and Renewable Energy (MNRE) and is nominated as nodal agency to facilitate the implementation of Jawaharlal Nehru National Solar Mission (JNNSM).
3. The Respondent No.2, Punjab State Power Corporation Limited (PSPCL) is the distribution licensee in Punjab.
4. The Petitioner has made the following prayers:

a. Admit the Petition.

b. Hold and declare that the Petitioner had commissioned the Project on 3rd January 2020 itself and grant consequential reliefs as per the PPA.

In alternative-

Direct that the Scheduled Date of Commissioning of the project be extended to 5th March 2020 without the levy of the Liquidated Damages by the Respondent.

- c. *Direct the Respondent to refund the Liquidated Damages of Rs. 3,44,44,444 (Rs. Three Crores Forty Four Lacs Forty Four Thousand Four Hundred Forty Four Only) imposed upon the Petitioner.*
- d. *Pass such other and further order or orders as this Hon'ble Commission deems appropriate under the facts and circumstances of the present case.*

Background:

5. MNRE vide No. 53/14/2106-WE dated 04.05.2017 issued *Scheme for setting up of 1000MW ISTS connected Power Projects* (Guidelines). On 31.05.2017, SECI issued Request for Selection (RfS) for setting up 1000 MW ISTS Connected Wind Projects under Tranche – II. The Petitioner was declared successful and issued Letter of Award (LoA) on 03.11.2017 by SECI for development of ISTS Connected 50 MW Wind Power Project at Village Dayapar, District Kutch, Gujarat, generation and sale of wind power under the Guidelines at a tariff of Rs. 2.65/kWh for a period of 25 (twenty-five) years. SECI has agreed to purchase wind power from the Petitioner as an intermediate seller and sell it to PSPCL on back to back basis as per the provisions of the above Guidelines and accordingly executed Power Sale Agreement (PSA) with PSPCL. On 29.12.2017, the Petitioner and SECI entered into PPA for setting up 50 MW Wind Project.

Submissions of the Petitioner:

6. The Petitioner has submitted as under:
- a) As per PPA dated 29.12.2017, the SCoD of the project was 03.05.2019 which was subsequently extended by SECI to 03.01.2020 on account of delay in operationalisation of Long-Term Access (LTA) by the Central Transmission Utility (CTU).
- b) On 03.01.2020, it had fulfilled all parameters for commissioning as the equipment as per rated project capacity had already been installed and power had flown to the Grid by that date. Therefore, there was no delay in commissioning the Project. Under the PPA, physical verification was not required in order to establish that the Project had been commissioned, yet SECI insisted on physical verification of all the Wind Turbine Generators (WTGs).
- c) The physical verification could not take place due to certain Right of way (RoW) issues and the agitation by the local villagers during the first (09.12.2019-12.12.2019) site visit and second (03.01.2020 & 04.01.2020) site visit by SECI.

- d) SECI is taking refuge in the fact that as the site visit could not take place and is refusing to acknowledge that the Petitioner had met all the parameters for commissioning on the 03.01.2020 itself. According to SECI, the Project was commissioned on 05.03.2020 and therefore, levied liquidated damages for the period between 03.01.2020 and 05.03.2020

Re: Developments till 21.11.2019

- e) The LoA was issued on 03.11.2017. As per the LoA, the Petitioner had to meet financial closure within 9 (nine) months of issue of LoA and had to achieve the commissioning of the project within 18 (eighteen) months of issue of LoA. On 19.06.2017, the Petitioner applied for LTA through an application. On 05.03.2018, a No Objection Certificate (NOC) for the same was granted. On 03.08.2018, the Petitioner achieved Financial Closure. On 20.09.2018, PGCIL requested SECI for extension of time in SCoD till PGCIL's transmission system at Bhuj Power Station was ready. The Petitioner intimated that the 50 MW wind power project will be ready for commissioning by 15.12.2019, and requested PGCIL to operationalize the LTA for 50 MW wind project from 15.12.2019.
- f) On 07.11.2019, the Petitioner issued an advance notice of synchronization under Article 5.1.1 of the PPA informing the Respondent No. 1 and the Gujarat Energy Development Agency (GEDA), the State Nodal Agency (SNA), that they intend to commission the project around 27.11.2019. On 15.11.2019, the approval for energisation was granted by Chief Electrical Inspector to the Government (CEIG).
- g) On 21.11.2019, SECI informed the Petitioner that on account of delay in operationalisation of LTA by CTU, the SCoD of the Project has been revised to 03.01.2020 or actual COD, whichever is earlier.

Re: Developments post 21.11.2019

- h) **First site visit of SECI (09.12.2019 and 12.12.2019):** The Petitioner had shown 18 WTGs to SECI. The Petitioner *vide* its email dated 12.12. 2019 informed SECI that it would not be able to show them the remaining WTGs (despite police help) due to Right of Way (RoW) issues and local problems.
- i) **Second site visit of SECI (03.01.2020 to 04.01.2020):** The following events occurred -
- i. According to the Minutes of the meeting of the Commissioning Committee dated 04.01.2020, it is clear that the Commissioning Committee could verify 19 (nineteen) WTGs, i.e. (17 (seventeen) during the first visit and additional 2 (two) WTGs during

the second visit) out of the proposed 26 (twenty-six) WTGs. The power had flown to the Grid from the Project on 03.01.2020.

- ii. The physical verification of all the WTGs could not take place due to local law and order problems-some individuals did not allow the vehicles (which were ferrying the inspecting team) to pass near Paneli village. The Petitioner immediately lodged a formal report with the police as a result.
- j) On 12.02.2020, SECI asked the Petitioner to produce certain documents which would establish if the commissioning parameters were met by the Petitioner.
- k) The Petitioner submitted the documents and answered all the relevant queries raised by SECI between 15.02.2020 and 18.02.2020.
- l) **Third site visit of SECI (19.02.2020):** The Minutes of the meeting of the Commissioning Committee dated 19.02.2020 were placed on record.
- m) On 06.03.2020, the Petitioner notified SECI about data validation of all 25 WTGs by WRLDC. SECI ultimately issued the Commissioning cum COD Certificate to the Petitioner, declaring the Project as being commissioned on 05.03.2020 and COD to be considered from 00:00 hrs of 07.03.2020. On the same day, the Petitioner wrote to SECI stating that they should not be saddled with levy of Liquidated Damages as the physical verification of the WTGs was delayed due to RoW issues and local agitation and these events were beyond control of the Petitioner.
- n) On 13.04.2020, the Petitioner asked SECI not to levy Liquidated Damages on account of the following difficulties faced by the Petitioner during the implementation of the Project:
 - (i) Damage of 220 kV transmission tower by local villagers.
 - (ii) Stoppage of construction work at Project site ordered by the District Collector of Kutch due to Vayu cyclone.
 - (iii) Stoppage of work due to abnormally heavy rainfall at the Project construction site.
 - (iv) Stoppage of construction / commissioning activities due to Right of Way issues.
 - (v) Delay in regulatory approvals of the Project.
- o) On 24.13.2020, SECI imposed Liquidated Damages on the Petitioner for the delay in commissioning from 03.01.2020 to 05.03.2020 [62 (sixty two) days].
- p) On 30.04.2020, SECI confirmed that the applicable penalty amount, as per Article 4.6 of PPA, is, Rs. 3,44,44,444/- (Rs. Three Crores Forty Four Lacs Forty Four Thousands Four Hundred Forty Four). The Petitioner has already paid the said amount (without prejudice to its right to litigate).

q) In the present Petition, the Petitioner is seeking refund on following grounds:

The PPA criteria for 'commissioning' the Project was fulfilled by the Petitioner on 03.01.2020 itself:

- (i) The Petitioner had achieved commissioning of the project on 03.01.2020 in terms of the PPA definition, as on that date both the parameters stated above were met-
 - (a) The Petitioner had installed all equipment as per the rated Project Capacity prior to 03.01.2020 itself.
 - (b) Energy had flown into grid from the Project on 03.01.2020.
- (ii) The Petitioner had completed its compliance on the GEDA front towards Synchronization-
 - (a) The Petitioner had complied with the synchronisation process as mentioned in Article 5.1 of the PPA.
 - (b) On 07.11.2019, the Petitioner issued an advance notice of synchronization under Article 5.1.1 of the PPA intimating SECI and GEDA that it intended to commission the project around 27.11.2019.
 - (c) GEDA provided the GEDA Id (marked on each WTG) as well.
- (iii) The equipment as per rated Project Capacity were installed and energy had flown into the Grid on 03.01.2020 itself. On 15.11.2019, the CEIG granted its Approval for energisation to all 26 (twenty-six) Wind Turbine Generators (WTG), 33 kV USS and Associated 33 kV lines of the Petitioner.
- (iv) Pursuant to this inspection, approval for energization was granted. This approval proves beyond doubt, that equipment as per rated Project Capacity were installed, as the CEIG certified them. Moreover, the Commissioning Committee has admitted in its Minutes of Meeting dated 04.01.2020 that they had recorded energy meter readings at the 33 kV level at Pooling Substation.
- (v) From the aforesaid meter readings, it is clear that energy had flown into the grid from the WTGs of the Petitioner as was the requirement under the PPA to establish that the Project had been commissioned.
- (vi) Pursuant to the prior notice of synchronisation, the Petitioner, in compliance with the Commissioning Procedure had also submitted the following documents to the Respondent *vide* its email dated 22.11. 2019:
 - (a) CEIG Approvals
 - (b) Board Resolution

- (c) Transmission Agreement
 - (d) LTA Approval
 - (e) Financial Closure Achievement Letter
- (vii) Article 17.1 of the PPA states that it can only be amended by a written agreement between the parties which evidently means that any party to the PPA cannot amend it unilaterally. Any other commissioning procedure notified by SECI, without the consent of the Petitioner amounts to unilateral amendment of the terms of the PPA, is therefore not binding. In other words, SECI's insistence on site-visit was not a mandatory requirement under the PPA to establish that commissioning has been achieved as the PPA did not contain a provision that the Project will be taken to have been commissioned only after the Respondent's site visit.

The Petitioner has substantially complied with the terms of the Commissioning Procedure dated 04.05.2018:

- (viii) SECI's refusal to consider that the Project stood commissioned on 03.01.2020 as the physical verification could not be completed is frivolous and nothing but an eye wash. In fact, presently, it is no longer SECI's own policy that a project can be considered commissioned only after a physical site visit.
- (ix) The Petitioner has complied with substantial terms of the Commission Procedure. In the event, the said procedure is considered binding.

Force Majeure:

- (x) The delay in the physical verification of the project occurred due to certain Force Majeure events which were beyond the reasonable control of the Petitioner.
- (xi) On conjoint reading of Articles 11.7.1 (b) and 4.5.1 of the PPA, it is evident that in case the Petitioner is prevented from performing its obligations in relation to the Scheduled Commissioning Date due any Force Majeure event affecting it, the Scheduled Commissioning Date shall be deferred till the said Force Majeure event lasts.
- (xii) The physical verification of the project could not occur because the employees of the Petitioner and the officials of SECI could not reach the project site on account of the RoW issues and the agitation by the local villagers, which were beyond the control of the Petitioner. The Petitioner, to the best of its abilities

(including taking assistance from the local police), tried to show the WTGs to SECI, however it could not show the same due to the events which were beyond its control. Therefore, the Petitioner is entitled to an extension of the SCoD from 03.01.2020 to 05.03.2020.

The Petitioner should be granted time extension for the delay in filing of the Petition for Adoption of Tariff by the Respondent:

- (xiii) The Respondent had delayed in filing Tariff Adoption Petition before this Commission.
- (xiv) SECI had filed the Tariff Adoption Petition being ***Petition No. 369/AT/2019*** under Section 63 of the Act for adoption of tariff for 1000 MW under Tranche-II of Wind Power Projects connected to the ISTS selected through competitive bidding process only in 2019. The said Petition was filed after a delay of almost two years of issuing the RfS, and the LoA to the Petitioner.
- (xv) The aforesaid petition came before this Commission on 03.10.2019 and the final tariff order was passed by this Commission on 03.12.2019, which was just one month prior to the revised SCoD of the project.
- (xvi) In the absence of tariff adoption, no lender is willing to come forward. Despite all the hurdles and delays caused by SECI, PGCIL and the Force Majeure events, the Petitioner completed its work expeditiously. The Petitioner ought to get the benefit of time extension on account of this delay as well.

Hearing dated 28.05.2021:

- 7. After hearing the learned counsel for the Petitioner, the Commission admitted the petition and directed the Petitioner to array PSPCL as party and serve copy of the petition on the Respondents including PSPCL, if not already served and the Respondents, including PSPCL to file their reply, if any, by 25.6.2021 after serving to the Petitioner, who may file its rejoinder, if any, by 16.7.2021.

Submissions of the Respondent No.1 (SECI):

- 8. SECI in its reply dated 06.08.2021 has submitted as under:

Re: Delay in Commissioning from 03.01.2020 to 05.03.2020

- a) SECI had communicated the amended commissioning procedure to WPDs on 16.04.2020 and the same is applicable with effect from date of notification. The said

amended commissioning procedure is not applicable to the Petitioner's power project which was commissioned on 05.03.2020.

b) On receipt of the notice prior to synchronization dated 07.11.2019 from the Petitioner stating that it intended to commission the project around 27.11.2019, SECI vide email dated 18.11.2019 sought for certain documents from the Petitioner before visiting the Project site for inspecting commissioning of the power project:

- i. *CEIG/CEA Certification of Proposed WTGs (as applicable)*
- ii. *CEIG/CEA approval for 33 KV Transmission Line(s) and Feeders*
- iii. *Synchronization details of WTGs for a cumulative capacity of 50+ MW*
- iv. *Letter from SNA with regards to approval of WTGS Locations*
- v. *The readiness of SCADA in all aspects;*
- vi. *Board Resolution for the nomination of GIWEL's representative pertaining to Commissioning*
- vii. *Copy of Transmission Service Agreement along with Permission for LTA/MTOA*
- viii. *Clearance from FC Committee*

c) SECI vide email dated 02.12.2019 informed the Petitioner that SECI officials may witness commissioning of the Petitioner's project on 04-05.12.2019.

d) The Petitioner vide email dated 03.12.2019 requested SECI to postpone their visit to 09.12.2019 due to unforeseen circumstances.

e) Since, the permission for 06 WTGs was issued by GEDA on 06.12.2019, the Petitioner had called the commissioning committee without obtaining necessary land clearance from State Nodal Authority (SNA), GEDA.

f) SECI vide email dated 07.12.2019 informed the Petitioner that SECI's officials will witness the commissioning of the Petitioner's project on 09.12.2019 to 10.12.2019.

g) **First site visit of Commissioning Committee on 09.12.2019:** SECI vide email dated 12.12.2019 stated that the Petitioner has shown only 18 sites of WTGs in three days and the Petitioner informed SECI that on account of some RoW issues, it will not be possible to visit other sites. SECI requested the Petitioner to resolve the RoW issues immediately to enable inspection of other sites. The Petitioner vide email dated 12.12.2019 stated that '*Due to persistence of RoW issues, we are not able to show further turbine locations (inspite of police help).*'

h) **Second site visit of Commissioning Committee on 03.01.2020 & 04.01.2020:**

- (i) The Commissioning Committee visited the Project site on 03.01.2020 and 04.01.2020. The Petitioner showed only 19 nos. of WTGS [17 WTGS on