

Rajasthan Electricity Regulatory Commission

Petition No. RERC/1966/2021& I.A.No.1/2021/1966/2021

Petition under Section 86(1)(f) of the Electricity Act, 2003 read with Article 9.1, 9.2, 10.3.3, and 16.3 of the Power Purchase Agreement dated 04.06.2019 executed between the Petitioner and the Respondent No. 1 read with relevant provisions of the Power Sale Agreement dated 27.06.2019 executed between Respondent No. 1 and Respondent No. 2 seeking recovery of balance payment of 25% of the per unit charge of Rs. 2.49 per kWh for the energy supplied from the Petitioner's 110 MW solar power project.

Coram:

Dr. B.N. Sharma, Chairman

Shri Hemant Kumar Jain, Member

Dr. Rajesh Sharma, Member

Petitioner : M/s ReNew Solar Energy (Jharkhand Five) Pvt. Ltd.

Respondents : 1. Solar Energy Corporation of India. ('SECI')
2. Rajasthan Urja Vikas Nigam Limited ('RUVNL')

Dates of hearing : **09.02.2022, 18.10.2022 & 29.11.2022.**

Present : Sh. Aniket Prasoon, Advocate for Petitioner.
Ms. Tanya Sareen, Advocate for Respondent No.1 (SECI).
Sh. Sandeep Pathak, Advocate for Respondent No.2 (RUVNL).

Date of order

21.12.2022

Order

1. M/s ReNew Solar Energy (Jharkhand Five) Pvt. Ltd. (hereinafter called as 'Petitioner') had filed this Petition on 01.12.2021 under Section 86(1)(f) of the Electricity Act, 2003 read with Article 9.1, 9.2, 10.3.3 and 16.3 of the Power Purchase Agreement dated 04.06.2019 executed between the Petitioner and the Respondent No. 1 read with relevant provisions of the Power Sale Agreement dated 27.06.2019 executed between Respondent No. 1 and Respondent No. 2 seeking recovery of balance payment of 25% of the per unit charge of Rs. 2.49 per kWh for the energy supplied from the Petitioner's 110 MW solar power project.

2. Petitioner also filed an IA on 02.12.2021 for seeking urgent listing of the accompanying petition.

3. Solar Energy Corporation of India (SECI) (hereinafter called as 'Respondent no. 1') filed their reply on 08.03.2022 and Rajasthan Urja Vikas Nigam Limited (RUVNL) (hereinafter called as 'Respondent no. 2') filed their reply on 01.04.2022. Petitioner filed rejoinders to the replies on 10.05.2022.

4. The matter was heard finally on 29.11.2022. Aniket Prasoon Advocate appeared for the Petitioner, Ms. Anushree Bardhan, Advocate appeared for the Respondent, SECI and Sh. Sandeep Pathak, Advocate appeared for the Respondent, RUVNL. SECI filed written submission on 28.11.2022 and Petitioner filed the written submission on 05.12.2022.

5. In the present case SECI, as an intermediary procurer and in line with the provisions of the competitive bidding guidelines, issued the Request for Selection for selection of Solar power developers for setting up of grid connected solar projects in the State of Rajasthan on Build Own Operate ('BOO') basis for an aggregate capacity of 750 MW.

6. Petitioner participated in the aforesaid bidding process and was selected as the successful bidder for developing the grid connected solar Project for 110 MW capacity. Consequently, the Petitioner and SECI entered into a Power Purchase Agreement ('PPA') on 4.06.2019 for sale of the above 110 MW of solar power for a period of 25 years from the commercial operation date (COD) of the solar project. SECI also entered into a Power Sale Agreement ('PSA') on 27.06.2019 with RUVNL for the supply of power.

6.1. The Petitioner had developed the 110 MW solar power project located in Village Sangram Ki Dhani, Bhainsada Tehsil, District Jaisalmer in the State of Rajasthan ("Solar Project"), to supply power as per Lol & PPA with Respondent No. 1, SECI.

7. The SCD as per the PPA was initially 02.12.2020, however, due to spread of COVID-19, a force majeure event, the SCD was got revised to 04.05.2021. Petitioner commissioned its 110 MW solar project in two phases- 50 MW got commissioned on 26.02.2021 and balance 60 MW on 12.03.2021 thereby achieving early full commissioning of the solar projects, i.e., 110 MW as on 12.03.2021, which was fifty three (53) days prior to the revised SCD of 04.05.2021.

8. In the instant case the limited issue for consideration of the Commission is the tariff payable for the electricity supplied from the petitioner's 110 MW Solar project

from the date of early full commissioning date 12.03.2021 till the date of SCD 04.05.2021.

9. Petitioner in its petition, IA, rejoinders, during hearing and written submissions mainly submitted as under:

9.1. In the context of present dispute, the Petitioner's case is that there are only two relevant scenarios envisaged under the PPA read with tender document/Request For Selection dated 03.08.2018 ("**RFS**") and more particularly, the "Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power From Grid Connected Solar PV Power Projects" issued by the Ministry of Power on 03.08.2017 & as amended ("**Competitive Bidding Guidelines**") which are as follows:

- (i) Scenario I - Date of early part commissioning of the project till the date of early full commissioning or SCD - tariff payable is 75% of the PPA tariff;
- (ii) Scenario II - Date of full commissioning of the project till the date of SCD - 100% of the PPA tariff is payable.

The third scenario being Scenario 3 which covers supply of power post the Solar Project getting commissioned by SCD, however, the same is not relevant in the context of the present matter.

9.2. It is the Petitioner's case that the tariff payable in both Scenario I and Scenario II, is clearly specified and/or envisaged under the PPA and is required to be adhered to, i.e., 75% of PPA tariff is to be paid under Scenario I and 100% of the PPA tariff is to be paid under Scenario II. The procurer/RUVNL has the discretion to consent as to whether it wants to buy power from the date of early part commissioning or early full commissioning or not, however, it does not have the discretion/authority to change the tariff payable in either of these scenarios.

9.3. In the event, as is being contended by RUVNL, if it is allowed to pay 75% of the PPA tariff (i.e., 75% of Rs. 2.49 per unit = Rs. 1.86 per unit) even in the second scenario, then the difference between Scenario-I and Scenario-II will be obliterated which can never be intent and object of the provisions under the PPA, tender documents/RFS and the Competitive Bidding Guidelines.

9.4. It is to be noted that the Petitioner commissioned Solar Project in the following two phases:

- (i) 50 MW on 05.02.2021; and

- (ii) the remaining 60 MW on 12.03.2021, thereby successfully achieving early full commissioning of the Solar Project, i.e., 110 MW.

9.5. For the period from 05.02.2021 (early part commissioning) till 12.03.2021 (early full commissioning) which is covered under Scenario-I, RUVNL paid at 75% of the PPA, i.e., Rs. 1.86 per unit for around 35 days and therefore, there is no dispute between the parties. However, the dispute only pertains to Scenario-II which covers the period from 12.03.2021 till 04.05.2021 for around 53 days wherein as per the Petitioner, it is entitled to 100% of the PPA tariff of Rs. 2.49 per unit, however, as per the Respondents, even under Scenario II, tariff payable would be 75% of the PPA tariff i.e., Rs. 1.86 per unit considering RUVNL has the right to consent to the tariff of procurement as well.

9.6. Petitioner vide another email and letter dated 15.02.2021, requested SECI to share the consent of RUVNL for off-take of the entire 110 MW power from the Solar Project stating that the Petitioner would be entitled to 100% PPA tariff, i.e., Rs. 2.49/kWh, post full commissioning of the entire 110 MW project capacity and in this regard, sought SECI's confirmation

9.7. However, for off taking power from the Petitioner's Solar Project from the date of early full commissioning, RUVNL while doing so, contrary to the terms of Articles 9.1 and 9.2 of the PPA, unilaterally added that such procurement of solar power will be at 75% of PPA Tariff (i.e., 75% of Rs. 2.49/kWh = Rs. 1.86/kWh). This as per the Petitioner is completely de hors the provisions of the PPA, specifically in terms of Article 9.1.

9.8. In terms of Article 9.1 of the PPA read with Article 9.2 of the PPA, in case of early part-commissioning of the Solar Project, SECI was entitled to purchase power at 75% of the PPA Tariff till SCD, i.e., 75% of Rs. 2.49/kWh = Rs. 1.86/kWh, provided that RUVNL consented to buy such power. In addition to the same, in case the entire Solar Project capacity is commissioned prior to SCD, SECI may purchase energy supplied till SCD at Rs. 2.49/kWh. The relevant extracts of Articles 9.1 and 9.2 are excerpted hereinbelow:

ARTICLE 9: APPLICABLE TARIFF

- 9.1 *The SPD shall be entitled to receive the Tariff of Rs. 2.49/kWh, fixed for the entire term of this Agreement, with effect from the SCD, for the power sold by the Buyer to the Buying Entity for the scheduled energy as reflected in the Energy Accounts. **In case of early part - commissioning, till SCD, subject to the consent for such purchase by the Buying Utility, SECI may purchase the generation @ 75% (seventy-five per cent) of the PPA Tariff.***

However, in case the entire project capacity is commissioned prior to SCD, SECI may purchase energy supplied till SCD at Rs. 2.49/kWh. In both the cases of early part commissioning or full commissioning of the Project, the Applicable Tariff for the commissioned Project shall be Rs. 2.49/kWh from and including the SCD.

9.2 Any energy produced and flowing into the grid before SCD shall not be at the cost of SECI. **SECI may agree to buy such power provided Buying Entity consents to purchase such energy.** However, the SPD will not be allowed to sell energy generated prior to SCD or excess energy during any Contract Year to any other entity other than SECI (unless refused by SECI).
(Emphasis Supplied)

9.9. In terms of the above, in case the entire Solar Project capacity is commissioned prior to SCD, SECI may purchase energy supplied till SCD at Rs. 2.49/kWh. Therefore, in case RUVNL consents to the purchase of power in the event of early commissioning of the full capacity of the Project, then it is obliged to pay the PPA tariff of Rs. 2.49/kWh, as per the express terms of the PPA.

9.10. However, neither the PPA nor the PSA permits the parties to modify the tariff in either scenario, and it only envisages discretion on part of RUVNL in deciding whether to procure or not to procure. The discretion is limited to the extent as to whether RUVNL wants to procure power or not from the date of early part commissioning or early full commissioning and RUVNL does not have the flexibility to decide the tariff at which it can buy power generated prior to SCD Or, in effect, unilaterally modify the tariff and terms of the PPA

9.11. From the SECI letter dated 12.03.2021 sent to RUVNL, it is clear that during the contemporaneous period, even SECI's understanding was that from the date of early commissioning till SCD, the tariff applicable for procurement is 100% of the PPA Tariff being Rs. 2.49/kWh. The relevant excerpt from SECI's letter dated 12.03.2021 is reproduced hereinbelow:

"...in view of the above and considering that the project has achieved full commissioning and PPA tariff of Rs. 2.49/kWh shall be applicable for full commissioning instead of Rs. 1.86/kWh (75% of Rs. 2.49/kWh), which is nowhere defined in the PPA. Therefore, it is requested to issue the consent letter without this anomaly as unilateral reduction in tariff will be contrary to PPA/PSA."

(Emphasis Supplied)

9.12. In context of the tariff for the purchase of power even Article 4.4.2 refers to Article 9 which is the overarching and specific provision dealing with tariff to be paid in different scenarios. The term 'tariff' has been defined in the PPA as having the same meaning as provided for in Article 9 of the PPA. Therefore, selective reliance

on Article 4.4.2 of the PPA without giving meaning and effect to Article 9 of the PPA by the Respondents is meaningless.

9.13. In the case of early part commissioning, whilst providing its consent to off take such power, RUVNL never stated that the purchase of such energy shall be at a tariff as agreed to between the RUVNL and SECI in terms of Article 4.4.2 of the PPA, and not as per the terms of Article 9.1 of the PPA. Instead, RUVNL provided its consent to off take power from the Petitioner's Solar Project at 75% of the PPA tariff, i.e., at Rs. 1.86/kWh, which is clearly provided in Article 9.1 of the PPA.

9.14. However, for off taking power from the Petitioner's Solar Project in case of early full commissioning, RUVNL in a complete *volte face*, referred to and relied upon Article 4.4.2 of the PPA, thereby contending and stating that the purchase of such energy will be at a tariff as agreed to between RUVNL and SECI, which is completely *de hors* the provisions of the PPA, specifically Article 9.1.

9.15. Any interpretation of the provisions of the PPA has been done in a manner that that same remains in consonance with the specific provisions of the Competitive Bidding Guidelines as the tender/bid has been conducted and PPA & PSA have been signed in terms of these Guidelines.

9.16. Article 4.4.2 of the PPA has to be read in conjunction with Article 9.1 and 9.2 of the PPA and more particularly Clause 14.2 of the Competitive Bidding Guidelines which reads as under:

"14.2. Early Commissioning: The Solar Power Generator shall be permitted for full commissioning as well as part commissioning of the Project even prior to the SCD. In cases of early part-commissioning till SCD, the Procurer may purchase the generation at 75% of the PPA tariff. However, in case the entire capacity is commissioned prior to SCD, the Procurer may purchase the generation at PPA Tariff".

(Emphasis Supplied)

9.17. Respondents also did not seek any deviation in terms of Clause 18 of the Competitive Bidding Guidelines. In absence of this, at this stage, the Respondents and more particularly RUVNL cannot be allowed to contend to the contrary against the letter and spirit of the Competitive Bidding Guidelines.

9.18. In this regard, it is apparent from the Hon'ble Supreme Court's judgement dated 11.04.2017 titled *Energy Watchdog vs. Central Electricity Regulatory Commission & Ors (2017)14 SCC80* that when the competitive bidding Guidelines cover a particular

scenario/situation, then the powers are to be exercised by the Appropriate Commission in accordance with such guidelines. Any interpretation of PPA cannot go contrary to the specific clause of competitive bidding guidelines which are binding in nature. The relevant para of the Judgement is reproduced as under:

*"20. It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This regulatory power is a general one, and it is very difficult to state that when the Commission adopts tariff under Section 63, it functions de hors its general regulatory power under Section 79(1)(b). **For one thing, such regulation takes place under the Central Government's guidelines.** For another, in a situation where there are no guidelines or in a situation which is not covered by the guidelines, can it be said that the Commission's power to "regulate" tariff is completely done away with? According to us, this is not a correct way of reading the aforesaid statutory provisions. The first rule of statutory interpretation is that the statute must be read as a whole. As a concomitant of that rule, it is also clear that all the discordant notes struck by the various Sections must be harmonized..... **It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines.** As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used."*

(Emphasis Supplied)

9.19. If SECI/RUVNL is allowed to procure power at a cheaper rate i.e., Rs. 1.86 per unit despite full commissioning being achieved from 12.03.2022 to revised SCD of 04.05.2021, the same will be against the clear provision of Clause 14.2 of the Competitive Bidding Guidelines. Therefore, what cannot be done directly (as no deviation was sought from the Competitive Bidding Guidelines), the same cannot be done indirectly. For this, Hon'ble Supreme Court's judgement dated 17.01.2000 titled *Mahanagar Telephone Nigam Ltd. & Ors. Vs. Telecom Regulatory Authority of Delhi (2000 SCC Online Del 19; AIR 2000 Del 208)* may be relied.

9.20. Clause 16.c of the RFS also specifically states that in case the entire capacity of the Solar Project is commissioned prior to SCD, SECI may purchase the generation at PPA tariff, which is reproduced as under:

"16.c EARLY COMMISSIONING

*The SPD shall be permitted for full commissioning as well as part commissioning of the Project even prior to SCD. In cases of early part-commissioning till the SCD, SECI may purchase the generation @75% of the PPA tariff. **However, in case the entire capacity is commissioned prior to the***

scheduled commissioning date, SECI may purchase the generation at PPA Tariff. However, early part/full commissioning of the Project and subsequent energy procurement from the same shall be subject to the approval of SECI”.

(Emphasis Supplied)

9.21. Interpretation of the contract has to be seen in the light of the surrounding circumstances such as competitive Bidding Guidelines, and the contemporaneous understanding of SECI of the provisions of the PPA (specifically Article 9.1 of the PPA) as stated in its letter dated 12.03.2021 prior to the ingenuity introduced by RUVNL. SECI vide various communications more particularly letters dated 30.12.2020, 16.02.2021, 12.03.2021 has specifically communicated to RUVNL while relying upon Articles 9.1 and 9.2 of the PPA to pay tariff of Rs.2.49/kWh instead of Rs. 1.86/kWh in case of the early full commissioning

9.22. The nature and import of the provisions of the RfS, PPA and more particularly the Competitive Bidding Guidelines are clear where two different rates are specified for two different scenarios, i.e., 75% of PPA in case of early part commissioning till SCD and 100% of PPA tariff in case of full part commissioning till SCD. By allowing the Respondents an option to reduce the tariff in the name of having discretion to buy such power or not on the pretext of usage of word “may” is like completely obliterating the difference of envisaging two specific rates under two specific scenarios which ought not to be allowed.

9.23. The principle of business efficacy ought to be adopted so as to give meaning to the provisions of the PPA in a businesslike manner. The intent is clearly to allow the generator to be able to earn full PPA tariff from the date of full commissioning if the same is achieved prior to SCD and earn 75% of the PPA tariff in case early part commissioning is achieved. There is no purpose and/or meaning left, the reduced tariff of 75% of the PPA tariff is paid despite the Project having achieved full early commissioning.

9.24. Article 1.2.13 of the PPA stipulates that different Articles of the PPA are to be construed harmoniously if there is any inconsistency or ambiguity, which reads as under :

1.2.13. Different parts of this Agreement are to be taken as mutually explanatory and supplementary to each other and if there is any inconsistency between or among the parts of this Agreement, they shall be interpreted in a harmonious manner so as to give effect to each part;

In this context, reliance in this regard is also placed upon Hon'ble Supreme Court's judgement dated 19.10.2001 titled *Anwar Hasan Khan vs. Mohd. Shafi & Ors. (2001) 8 SCC 540*.

9.25. There arises no occasion for RUVNL to contend that it had the option or the prerogative to choose the tariff at which it would purchase the energy from the Petitioner's Solar Project. In effect what RUVNL is contending goes against the specific provisions of the RFS, PPA and more particularly the Competitive Bidding Guidelines.

9.26. Both SECI and RUVNL are liable to jointly and severally make payment of Rs. 2,73,49,468/- towards the balance 25% of the per unit charge of Rs. 2.49/kWh for the energy supplied by the Petitioner from the date of early full commissioning till SCD, i.e., from 12.03.2021 to 04.05.2021 along with late payment surcharge.

9.27. In light of the above, the Petitioner prays as under:

- a) Declare that the Respondent No. 2 is liable to pay 100% of the PPA tariff for the power procured from the Petitioner's Solar Project, from the date of early fully commissioning till the Scheduled Commission Date, i.e., from 12.03.2021 to 04.05.2021, as per Article 9.1 and Article 9.2 of the PPA;
- b) Declare that the Respondent No. 2's consent letter dated 26.02.2021 to procure entire 110 MW from the Solar Project from the date of early full commissioning till Scheduled Commissioning Date, to the extent it reduces the tariff to 75% of the PPA tariff, is *de hors* the provisions of the PPA and is untenable and bad in law;
- c) Consequently, direct the Respondent No. 1 and Respondent No.2 to jointly and severally make payment of Rs. 2,73,49,468/- (*Rupees Two Crores Seventy Three Lakhs Forty Nine Thousand Four Hundred Sixty Eight Only*), towards balance 25% of the per unit charge of Rs. 2.49 per kWh for the energy supplied by the Petitioner from the date when the early full commissioning was achieved till SCD i.e., from 12.03.2021 till 04.05.2021 along with late payment surcharge to the Petitioner within two weeks from the date of order;
- d) Direct the Respondents to reimburse the legal and administrative costs incurred by the Petitioner in pursuing the instant Petition ;
- e) Any errors/ omissions may kindly be condoned, and opportunity

be kindly given to rectify the same and also submit additional pleadings at a suitable later date, if required; and

- f) Grant such order, further relief (s) in facts and circumstances of the case as this Hon'ble Commission may deem just and equitable in favour of the Petitioner.

Submissions of the SECI-Respondent No.1:

10. Respondent SECI In its reply has mainly submitted as under:

10.1. SECI submitted the following factual aspects:-

(a) The Petitioner vide communications dated 15.02.2021 requested SECI to provide the consent of RUVNL for procurement of solar power from 110 MW Power Project;

(b) On 16.02.2021, SECI informed RUVNL that the Petitioner is about to commission the remaining 60 MW capacity (out of total 110 MW) and requested RUVNL to provide consent for off-take of 110 MW Solar Power.

(c) RUVNL vide communication dated 26.02.2021 gave its consent for off-take of 110 MW Solar Power as under:

"RUVNL vide letter No. 538 Dated 01.01.2021 gave its consent for procurement Solar Power from early part commissioning of Solar Power Project of 50 MW (against 110 MW) by M/s. ReNew Solar Energy (Jharkhand Five) Private Limited at 75% of PPA tariff (75% of Rs. 2.49/kWh i.e. Rs. 1.86/kWh).

RUVNL hereby further gives its consent for procurement of Solar Power from early part commissioning of remaining 60 MW i.e. early commissioning of 110 MW Solar Power Projects by M/s. ReNew Solar Energy (Jharkhand Five) Private Limited at 75% of PPA tariff (75% of Rs. 2.49/kWh i.e. Rs. 1.86/kWh) till SCD on the same terms and conditions of PPA/ PSA."

(d) SECI informed the Petitioner on 01.03.2021 and thereafter again on 22.04.2021 about the consent accorded by RUVNL for the off-take of 110 MW Solar Power at tariff of Rs 1.86/kWh (75% of PPA tariff) as intimated by RUVNL vide communications dated 26.02.2021 and 20.04.2021.

10.2. The power was supplied by Petitioner for the period from 12.03.2021 (Date of early commissioning) to 04.05.2021 (SCD of the project) knowing fully well about the consent accorded by RUVNL for off take of 110 MW capacity at the tariff of Rs 1.86/kWh. Therefore, at this stage, the Petitioner should not seek recovery of any

amount to be payable towards the recovery of the remaining 25% of the Tariff of Rs 2.49/kWh. Accordingly, the Petitioner is also not entitled to any Late Payment Surcharge as alleged or otherwise.

10.3. The duration of the PPA is 25 years from SCD for the supply of electricity, which this is also recognized in Article 2.2 of the PPA dealing with the term of the PPA as being until the expiry date. The Supply of electricity as provided, inter-alia, in Article 4.1.1(d) of the PPA, commences from the SCD and continuance of such supply throughout the term of the agreement, i.e. until the expiry of PPA (25 years). The said Article reads as under:

4.1 SPD's Obligation

d) the commencement of supply of power up to the Contracted Capacity to SECI no later than the Scheduled Commissioning Date and continuance of the supply of power throughout the term of the Agreement;

10.4. From the above, the basic provisions of the PPA is abundantly clear that the obligation to procure power from the Petitioner for supply to buying entity- RUVNL under the PSA is effective from the SCD, i.e., 04.05.2021.

10.5. The procurement of electricity from the project prior to SCD is provided differently in Competitive Bidding Guidelines dated 03.08.2017, RFS and PPA dated 04.06.2019 at Article 4.4.2 - Articles 9.1 and 9.2. In the PSA (signed between SECI and RUVNL) provisions the Article 1 applies the tariff provision of PPA with the addition of trading margin of Rs.0.07/kWh.

10.6. In terms of the above provisions, in case of commissioning of full project capacity, SECI may purchase power supplied during the period of early commissioning namely prior to the SCD (04.05.2021) at the tariff of Rs.2.49/kWh (100% of PPA tariff) subject to the consent of RUVNL for purchase of such power.

10.7. The Petitioner is selectively reading some words in the PPA, without considering all the relevant aspects and is trying to take advantage of the correspondence of SECI to RUVNL dated 12.03.2021 where SECI did recommend to RUVNL for payment of full tariff of Rs.2.49/kWh for the period 12.03.2021 till 04.05.2021. There was, however, no acceptance by RUVNL and therefore, no acceptance conveyed from SECI to the Petitioner to pay Rs.2.49/kWh for the period from 12.03.2021 till 04.05.2021.

10.8. The letter dated 12.03.2021 of SECI has to be seen in the context of the provisions of the PPA read with PSA as well as the communication prior and after the said date between the parties.

10.9. In terms of the bidding documents, Article 4.4.2, 9.1 and 9.2 of the PPA it is the discretion of the procurer to purchase the quantum prior to SCD at PPA tariff even if there is pre-commissioning of the full capacity prior to SCD. The expression used in the relevant clauses is "may" and not "shall". This discretion is exercised by SECI provided the buying entity (RUVNL) which is procuring the same quantum of electricity on back-to-back basis, consents to the same. Article 4.4.2 of the PPA, inter-alia, specifically deals with energy produced and flowing into the grid before SCD as under:

Any energy produced and flowing into the grid before Scheduled Commissioning Date shall not be at the cost of SECI. SECI may agree to buy such power at a tariff as agreed to between SECI and the Buying Entity (including SECI's trading margin), provided the Buying Utility consents for purchase of such power.

10.10. Article 9.1 and Article 9.2 have to be read together with Article 4.4.2 of the PPA. Accordingly, the acceptance to procure power and pay for full PPA tariff for full commissioned capacity (110 MW) prior to SCD (04.05.2021) is subject to the consent of RUVNL. The expression 'may buy such power' has to be read with the consent of the buying entity (RUVNL).

10.11. The summary of events clearly brings about the absence of consent to pay the full tariff of Rs 2.49/kWh for the supply of energy prior to SCD on 04.05.2021. As far as back on 26.02.2021, RUVNL had categorically stated it is willing to pay only 75% of the PPA tariff (Rs.2.49/kWh) for 110 MW. It is the Petitioner who chose to produce and inject the electricity into the grid despite RUVNL having expressed its categorical stand that it would purchase electricity (110 MW) at 75% of tariff prior to SCD. The letter dated 11.10.2021 of SECI deals with the entire issue clearly and the fact that RUVNL had not consented to procure power at more than 75% of the PPA tariff.

10.12. The manner of reading the scope of discretion by the Petitioner namely by splitting the discretion to purchase the power and not in regard to tariff is patently erroneous if the sequence of events is considered.

10.13. There cannot be any claim of legal prejudice to the Petitioner where the Petitioner will get the PPA tariff of Rs.2.49/kwh for the 25 years duration of supply envisaged under the PPA effective from SCD.

10.14. If the tariff is held to be payable based on 100 % of the tariff payable under the PPA, then the Commission may direct RUVNL, to pay to SECI such tariff plus trading margin under the PSA. The above is in view of the fact that the Petitioner has supplied power to RUVNL prior to the SCD (04.05.2021) based on the consent received from RUVNL. Further, as per Article 1 of the PSA, the Tariff applicable for the sale of Solar Power by SECI to RUVNL under PSA is the Tariff as applicable for payment by SECI to SPD (Petitioner in the present case) under the PPA be and the SPD and in addition thereto a trading margin of Seven (7) paisa/kWh.

10.15. Claim for Late Payment Surcharge would have to be considered only after decision on the admissibility of the claim of Petitioner for the recovery of amount towards the remaining 25% of the Tariff of Rs 2.49/kWh for the power supplied for the period from 12.03.2021 to 04.05.2021. The payment of Late Payment Surcharge (if any) is governed by Article 10.3.3 of the PPA.

10.16. In the facts and circumstances mentioned above, the Commission may decide the admissibility of the claim of Petitioner for the recovery of amount towards the remaining 25% of the Tariff of Rs 2.49/kWh for the power supplied for the period from 12.03.2021 to 04.05.2021 and the Late Payment Surcharge (if any) with respect to such amount.

Submissions of RUVNL -Respondent No.2:

11. RUVNL in their submissions have mainly submitted as under:

11.1. The payment for the energy purchased has been made strictly as per the provisions of the PPA dated 04.06.2019 and PSA dated 27.06.2019. Article 4.4.2 of the PPA clearly lays down that in the event energy is produced before the commissioning date, the purchase of such energy by Respondent No. 1 shall be at a tariff as agreed to between the Respondent No. 1 and Respondent no 2. Clause 4.4.2 of the PPA states as under:

“4.4.2- Any excess generation over and above as per Article 4.4.1, may be purchased by SECI at the tariff in terms of Article 9, provided the Buying Entity consent to purchase such power. While the SPD would be free to install the DC solar field as per its design of required output, including its requirement of auxiliary consumption and to reconfigure and repower the Project from time

to time during the term of the PPA, it will not be allowed to sell any excess power to any other entity other than SECI (unless refused by SECI). The SPD shall be required to intimate SECI about the proposed excess quantum of energy likely to be generated from the Project within any Contract Year, at least 60 days prior to the proposed date of commencement of excess generation. The SECI shall be required to intimate its approval / refusal to the SPD, for buying such excess generation not later than 30 days of receiving the above offer from the SPD. In the event the offer of the SPD is not accepted by the SECI within the said period of 30 days, such right shall cease to exist and the SPD shall, at its sole discretion, may sell such excess power to any third party. However, in case at any point to time, the peak of capacity reached is higher than on contract capacity and causes disturbance in the system at the point where power is injected, the SPD will have to forego the excess generation and reduce the output to the rate capacity and shall also have to pay the penalty / charges (if applicable) as per applicable regulations / requirement / guidelines of CERC/SERC/SLDC or any other competent agency.

Any energy produced and flowing into the grid before Scheduled Commissioning Date shall not be at the cost of SECI. SECI may agree to buy such power at a tariff as agreed to between SECI and the Buying Utility consents for purchase of such power."

11.2. The relevant clause of PPA along with other Article 9 clearly confers discretion to the Buying Entity to decide the purchase of excess power before the Scheduled Commissioning Date and at such price as decided between Respondent No. 1 and Respondent no. 2. The Petitioner by way of this Petition is trying to rewrite the terms of the Agreement.

11.3. By way of the Consent Letter issued by Respondent no. 2 dated 1.1.2021 and 26.2.2021, it has categorically consented to the procurement of Solar Power from early commissioning @ 75 % of the Power Purchase Agreement i.e. @Rs. 1.86/- till the Scheduled Commissioning Date. The power supplied to the respondent has been as per the terms of the consent letter and now at this juncture, the petitioner is trying to create and raise the dispute regarding the quantum of payment completely based on the misinterpretation of the provision of the PPA and in contravention to the spirit of the letter of consent for procurement of power by the RespondentNo.2.

11.4. Article 9 of the PPA relied upon by the Petitioners clearly spells out that in case the entire project is commissioned prior to the sanctioned SCD, SECI may purchase energy supplied till SCD at Rs. 2.49/kWh till the commissioning date, however, this is subject to the consent of the Buying utility. The word may in itself depict the intention of the Parties, that it is discretionary in nature. Moreover, several other provisions of the Bidding Guidelines, PSA, and PPA have all used the word

"may" which gives the discretionary power and right to the Respondent No. 2 to purchase the electricity as per the rates prescribed therein. The word 'may' basically manifests the intention of the parties to the contract i.e. to depict a mere possibility or a discretionary element that the Buying Entity in the present case, which is Respondent No.2.Hon'ble Supreme Court has in plethora of judgements highlighted the difference between 'may' and 'shall' to appreciate the intention of the parties.

11.5. The energy cannot be stored once it is generated and the Respondent by purchasing the energy from the date of early commissioning has tried to balance the equities to save the losses to the Petitioner subject to the rates and at such terms and conditions as prescribed in the PPA and PSA. Petitioner cannot compel Respondent No.2 to purchase the power before the SCD at the terms and quantum of the tariff as decided by it.

11.6. The invoices generated by the Petitioners are in gross violation of the terms and conditions of the PPA, PSA, and in excess of the rates provided therein. Once consent has been given for the purchase of power prior to the commissioning date, i.e., @ 1.86/kWh, the invoices were supposed to be generated at the consented rate. The Petitioner by raising the invoices are trying to coerce Respondent No. 2 into paying an amount that is over and above the consented rate of power purchase.

11.7. Petitioner is also not entitled to receive any late payment surcharge as the payment by Respondent No.2 @ 75% of the PPA Tariff i.e. @ Rs. 1.49/kWh is as per Article 4.4.2 and Article 9 of the PPA.

Commission's View

12. Commission has considered the submission of Petitioner, Respondents SECI and RUVNL.

13. The submission of the petitioner is that SECI is liable to pay 100% of the PPA tariff from the date of full early commissioning to the schedule commissioning date i.e from 12.03.2021 to 04.05.2021 and the conditional consent given by SECI for purchasing the energy at 75% of the PPA tariff is de hors the PPA and is bad in laws. Per contra SECI submitted that the acceptance to purchase power is subject to consent of RUVNL which has consented only purchase the power at only 75% of PPA rate and RUVNL submitted that the word "may" appearing in various documents give it discretion to purchase the power or not to purchase. As per RUVNL the petitioner has raised the invoices in gross violation of the PPA/PSA.

14. Before proceeding further, we look into the relevant clause of RFS, Articles of PPA and provisions of the competitive Bidding Guidelines issued by MoP.

(a) Provision of PPA:

Article 4.4: RIGHT TO CONTRACTED CAPACITY & ENERGY

4.4.2.....

Any energy produced and flowing into the grid before Scheduled Commissioning Date shall not be at the cost of SECI. SECI may agree to buy such power at a tariff as agreed to between SECI and the Buying Utility consents for purchase of such power.

ARTICLE 9: APPLICABLE TARIFF

9.1 *The SPD shall be entitled to receive the Tariff of Rs. 2.49/kWh, fixed for the entire term of this Agreement, with effect from the SCD, for the power sold by the Buyer to the Buying Entity for the scheduled energy as reflected in the Energy Accounts. In case of early part - commissioning, till SCD, subject to the consent for such purchase by the Buying Utility, SECI may purchase the generation @ 75% (seventy-five per cent) of the PPA Tariff. However, in case the entire project capacity is commissioned prior to SCD, SECI may purchase energy supplied till SCD at Rs. 2.49/kWh. In both the cases of early part commissioning or full commissioning of the Project, the Applicable Tariff for the commissioned Project shall be Rs. 2.49/kWh from and including the SCD.*

9.2 *.....Any energy produced and flowing into the grid before SCD shall not be at the cost of SECI. SECI may agree to buy such power provided Buying Entity consents to purchase such energy. However, the SPD will not be allowed to sell energy generated prior to SCD or excess energy during any Contract Year to any other entity other than SECI (unless refused by SECI).*

(b) Provision of Competitive Bidding Guidelines:

14.2 EARLY COMMISSIONING

The Solar Power Generator shall be permitted for full commissioning as well as part commissioning of the Project even prior to SCD. In cases of early part commissioning till the SCD, the procurer may purchase the generation till SCD, at 75% (seventy five percent) of the PPA tariff.. However, in case the entire capacity is commissioned prior to the scheduled commissioning date, the procurer may purchase the generation at PPA Tariff.

(c) Provision of RFS:

"16.c EARLY COMMISSIONING

The SPD shall be permitted for full commissioning as well as part commissioning of the Project even prior to SCD. In cases of early part-commissioning till the SCD, SECI may purchase the generation @75% of the PPA tariff. However, in case the entire capacity is commissioned prior to the scheduled commissioning date, SECI may purchase the generation at PPA Tariff. However, early part/full commissioning of the Project and subsequent energy procurement from the same shall be subject to the approval of SECI".

15. We have looked into the rival submissions and as well as the provisions of PPA, PSA, and Bidding Guidelines issued by MoP relevant to the present controversy. It is observed from the above that the sale of the energy injected during the period of early full commissioning to the SCD, i.e., 12.03.2021 to 04.05.2021 by the Petitioner was not as a matter of right allowed to the Petitioner. In fact, it could have only matured when the procurer, i.e, SECI and buying entity, i.e, RUVNL would have consented for the same. Article 9.1 and Article 9.2 of the PPA have to be read together with Article 4.4.2 of the PPA. Accordingly, the acceptance to procure power and pay for full PPA tariff for full commissioned capacity (110 MW) prior to SCD (04.05.2021) is subject to the consent by RUVNL. The expression 'may buy such power' has to be read with the consent of the buying entity RUVNL.

16. From the material placed before Commission, we observe that RUVNL vide its communication dated 26.02.2021 had categorically stated its willingness to pay only 75% of the PPA tariff i.e., Rs.1.86/kWh for 110 MW for the period of controversy, which it could do by virtue of discretion emanating from its explicit right of consent. The Petitioner was free to supply its power at RUVNL's consent having the condition of 75% PPA Tariff or not. However, Petitioner chose to produce and inject the electricity into the grid despite RUVNL having expressed its categorical stand that it would purchase electricity (110 MW) at 75% of PPA tariff prior to SCD. The letter dated 11.10.2021 of SECI dealing with the entire issue also clearly stated the consent of RUVNL was not to procure power at more than 75% of the PPA tariff.

17. We have also perused the communication dated 12.03.2021 of SECI addressed to RUVNL relied upon by the Petitioner, It is observed that SECI did recommend to RUVNL for payment of the 100% of PPA Tariff i.e., Rs.2.49/kWh for the period 12.03.2021 till 04.05.2021, however, the fact remains as that there was no categorical acceptance by RUVNL and in turn, no acceptance was also conveyed from SECI to the Petitioner to pay 100% of PPA Tariff i.e., Rs.2.49/kWh for the period 12.03.2021 to 04.05.2021 as nothing has been placed on the record before us by the Petitioner to negate this.

18. In view of the foregoing, in terms of the bidding guidelines issued by the Ministry of Power and PPA, for the period 12.03.2021 to 04.05.2021 the buying entity can procure the power from the Petitioner's 110 MW plant at the PPA tariff if the buying entity gives its consent. When the buying entity had given its consent with certain conditions and Petitioner also choose to generate and supplied the power

with such condition very much in its knowledge, then such conditional consent cannot be overlooked. The buying entity vide its communication dated 26.02.2021 has categorically given its consent for availing solar power from early commissioning 110 MW capacity from the Petitioner at tariff of Rs. 1.86/kWh till SCD as under:

"RUVNL vide letter No. 538 Dated 01.01.2021 gave its consent for procurement Solar Power from early part commissioning of Solar Power Project of 50 MW (against 110 MW) by M/s. ReNew Solar Energy (Jharkhand Five) Private Limited at 75% of PPA tariff (75% of Rs. 2.49/ kWh i.e. Rs. 1.86/kWh).

RUVNL hereby further gives its consent for procurement of Solar Power from early part commissioning of remaining 60 MW i.e. early commissioning of 110 MW Solar Power Projects by M/s. ReNew Solar Energy (Jharkhand Five) Private Limited at 75% of PPA tariff (75% of Rs. 2.49/kWh i.e. Rs. 1.86/kWh) till SCD on the same terms and conditions of PPA/ PSA."

19. If the argument of the Petitioners is considered that there is no flexibility vested with RUVNL with regards the tariff at which it would purchase power, and in their opinion, the consent given by RUVNL was not in accordance with PPA, then the Petitioner could have discontinued supplying power to RUVNL or would have approached the Commission. However, on the contrary petitioner chose to supply power and raised invoices at higher price and has filed the instant petition after a passage of approximate Nine months, as an afterthought.

20. Thus, in the case in hand the buying entity RUVNL had given consent to procure power during the above period at 75% of the PPA tariff, i.e., Rs 1.86/kWh, therefore, we cannot ignore the condition which forms the integral part of the consent given by the buying entity. The Petitioner cannot claim the 100% PPA tariff of Rs 2.49/kWh once the Petitioner had supplied the power on the basis of this conditional consent given by the respondent(s). The petitioner himself continued to supply without even raising a whisper or refusing to supply. The petitioner by his own conduct has acted upon the consent and supplied the power. The Petitioner cannot now argue that the Respondent had discretion of purchase of the power and not with regard to tariff.

21. In view of the above, we are not inclined to accept the prayer of the Petitioner regarding declaring liability of Respondent No.2 RUVNL to pay 100% of the PPA tariff from the date of early commissioning till SCD i.e., 12.03.2021 to 04.05.2021. Accordingly, Petitioner is not entitled for any other consequential relief. The Petitioner

is also not entitled to any Late Payment Surcharge in terms of Article 10.3.3 of PPA. Petition is accordingly liable to be dismissed and hence, dismissed.

22. In terms of the above, the Petition and pending I.A. is disposed of with no order as to cost.

(Dr. Rajesh Sharma)
Member

(Sh. Hemant Kumar Jain)
Member

(Dr. B.N. Sharma)
Chairman