



नई दिल्ली
NEW DELHI

याचिका संख्या./ IA.No. 3 of 2023 in Petition No. 192/MP/2021

कोरम/ Coram:

श्री जिष्णु बरुआ, अध्यक्ष/ Shri Jishnu Barua, Chairperson
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: 05th of June, 2023

IN THE MATTER OF:

Petition under section 79 of the Electricity Act, 2003 read with the Power Purchase Agreement (PPA) dated 20.08.2019 executed between the Petitioner and Solar Energy Corporation of India Limited (SECI), read with the back to back Power Sale Agreements (PSAs) dated 17.06.2019 and 26.06.2019 executed between SECI and BSES Yamuna Power Limited (BYPL) and Tata Power Delhi Distribution Limited (TPDDL), respectively.

AND IN THE MATTER OF:

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

...Petitioner

VERSUS

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

2. Tata Power Delhi Distribution Limited (TPDDL)

NDPL House, Hudson Lines Kingsway Camp Delhi-110 009,
DELHI – 110009

3. BSES Yamuna Power Ltd. (BYPL)

Shakti Kiran Building, Karkardooma,
New Delhi - 110032

...Respondents

Parties Present:

Shri Shri Sanjay Sen, Senior Advocate, SPCEPL
Shri Hemant Singh, Advocate, SPCEPL
Shri Lakshyajit Singh Bagdwal, Advocate, SPCEPL
Ms. Lavarya Panwar, Advocate, SPCEPL
Ms. Roberta Ruth Elwin, Advocate, SPCEPL
Shri M.G Ramachandran, Senior Advocate, SECI
Ms. Anushree Bardhan, Advocate, SECI
Ms. Tanya Sareen, Advocate, SECI
Ms. Surbhi Kapoor, Advocate, SECI
Ms. Anesh Bajaj, Advocate, SECI
Shri Buddy Ranganadhan, Advocate, BYPL
Shri Hasan Murtaza, Advocate, BYPL
Shri Sameer Sharma, Advocate, BYPL
Shri Venkatesh, Advocate, TPDDL
Shri Jatin Ghuliani, Advocate, TPDDL
Shri Anant Singh, Advocate, TPDDL
Shri Mohit Manshranami, Advocate, TPDDL
Ms. Shefali Sobti, TPDDL
Shri Sameer Singh, BYPL
Shri Nishant Grover, BYPL
Shri Ravi Sinha, SPCEPL

आदेश/ ORDER

The Petitioner M/s. SBSR Power Cleantech Eleven Private Limited, is setting up a 300 MW Solar Based renewable energy plant in District Bikaner, Rajasthan.

2. The Respondent No. 1, Solar Energy Corporation of India Limited (SECI), is a designated Nodal Agency for developing and facilitating the establishment of the grid connected solar power capacity in India.

3. The Respondent No.2, Tata Power Delhi Distribution Limited (TPDDL) is a joint venture between Tata Power and the Government of NCT of Delhi with a majority stake being held by Tata Power Company (51%). It distributes electricity in the north & north west parts of Delhi.
4. The Respondent No.3, BSES Yamuna Power Limited, is a distribution company in Delhi and is engaged in power distribution in areas of eastern and central Delhi.
5. TPDDL has filed an I.A. 3 of 2023 in Petition No. 192/MP/2021 on 09.01.2023 in which it has prayed as under:
 - (i) *Direct the Petitioner to supply forthwith the commissioned capacity of 62.5 MW to TPDDL on pro-rata basis under the terms and conditions as stipulated under the PPA dated 20.08.2019 and the PSA dated 26.06.2019;*
 - (ii) *Pass any such other direction (s)/order (s) as may be deemed fit and in the interest of justice and equity.*

6. Brief facts :

- a) The Ministry of Power, Government of India issued guidelines for a tariff based competitive bidding process for the procurement of power generated from the grid connected solar power projects vide Resolution dated 03.08.2017.
- b) SECI initiated a tariff based competitive bid process for procurement of 1200 MW of the power generated from the ISTS connected solar power projects on the terms and conditions contained in the Request for Selection (RfS) dated 10.01.2019.
- c) The Petitioner was selected in the competitive bidding process for development, generation, and supply of electricity from the 300 MW solar power project to be established anywhere in India and for supply of such electricity by SECI as an intermediary agency to the buying utilities under a power sale agreement to be entered into between SECI and such buying utilities.
- d) SECI issued the Letter of Award dated 05.03.2019 in favour of the Petitioner for the development and establishment of a 300 MW Solar Power Project in the State of Rajasthan.
- e) The Petitioner executed the Power Purchase Agreement (PPA) on 20.08.2019. SECI also executed Power Sale Agreement (PSA) on a back to back basis with TPDDL &

BYPL. As per the PPA, the Scheduled Commissioning Date (SCoD) of the project was 03.01.2021 which was later extended to 20.11.2021.

7. In the original Petition, the Petitioner prayed as under:

- a) *Grant extension of Scheduled Commercial Operation Date (SCOD) to the Petitioner in terms of the Power Purchase Agreement dated 20.08.2019, till 02.07.2022, in light of the submissions made in the present petition.*
- b) *Direct the Respondent No. 1/ SECI to issue a formal letter to the Petitioner for extension of SCOD, till 02.07.2022;*
- c) *Consequently, direct the Respondent Nos. 2 and 3 to extend/ defer the operationalization of the Long-Term Access (LTA) granted to the Petitioner vide the LTA Agreement dated 26.11.2019, till the actual SCOD/ COD is achieved by the Petitioner, or till 02.07.2022, whichever is earlier;*
- d) *Quash the letter dated 24.08.2021 (Annexure P-38) issued by the Respondent No. 2 upon the Petitioner;*
- e) *In the interim, direct as follows:*
 - i. *Stay the operation of the letter dated 24.08.2021 issued by the Respondent No. 2, till the pendency of the present petition;*
 - ii. *Direct Respondent Nos. 2 and 3 not to operationalize the LTA of the Petitioner and levy any transmission charges, till the pendency of the present petition;*
 - iii. *Direct the Respondents not to take any coercive actions under the PPA, back to back TPDDL-PSA & BYPL-PSA, and the LTA Agreement against the Petitioner, till the pendency of the present petition; and*
- f) *pass any other order as this Hon'ble Commission may deem fit in the facts and circumstances of the present case and in the interest of justice.*

8. Vide letter dated 30.06.2022, SECI informed the Petitioner that the request for a time extension of SCoD has not been considered by them.

9. As per the minutes of the meeting held on 26.08.2022 between SECI, TPDDL, BYPL and the Petitioner, it was recorded that the maximum period allowed for commissioning of the full capacity with encashment of the Performance Bank Guarantee is up to six (6) months from the extended SCoD i.e., 20.05.2022 (6 months from 20.11.2021), which has lapsed. As of 20.05.2022, the Petitioner had commissioned 150 MW (50 MW on 15.08.2021, 50 MW on

04.04.2022 & 50 MW on 11.04.2022) capacity out of 300 MW PPA capacity, whereas the Petitioner was ready to commission 62.5MW on 20.06.2022. The Petitioner had approached SECI for a time extension in SCoD of the Project on account of delay in approval of PSA and power procurement from the respective SERC under section 86(l)(b) of the Electricity Act, 2003 (the Act), which was not considered by SECI vide its letter dated 30.06.2022. SECI vide its letter dated 31.08.2022, allowed the Petitioner to self-commission the 62.5 MW capacity and decide on the sale of power to third party/open market. BYPL & TPDDL expressed their keenness to offtake the power from 62.5 MW capacity on the same terms and conditions of PPA and PSA through SECI only, without any additional financial implication for them. However, the Petitioner has stated that there are additional financial implications and has hence denied the same.

10. The Petitioner filed I.A. No. 62 of 2022 on 17.10.2022 along with amended petition vide which the Petitioner submitted the following amended prayers:

- a) *Declare that the Petitioner is not liable to pay any liquidate damages or any other penalties corresponding to PPA capacity of 150 MW which stands commissioned, and the balance capacity of 150 MW not commissioned as the delays are not attributable to the Petitioner for both capacities, in terms as stated in the present petition;*
- b) *Direct SECI to return the Performance Bank Guarantee(s) [as detailed in Annexures P-46 and P-47] furnished by the Petitioner on its behalf;*
- c) *In the interim, direct the Respondents not to take any coercive actions against the Petitioner, including taking steps towards encashment/ invocation of the Performance Bank Guarantee No. 2158IGP001515321 dated 16.06.2021 read with Amendment dated 16.06.2022 furnished by the Petitioner on behalf of SECI, till the pendency of the present petition; and*
- d) *Pass any other order as this Hon'ble Commission may deem fit in facts and circumstances of the present case and in the interest of justice.*

11. On 12.12.2022, the Commission allowed the amendment to the petition.

12. On 09.01.2023, TPDDL filed an I.A. 3 of 2023 on 09.01.2023.

13. On 12.01.2023, the Commission directed SECI to convene a meeting of the Petitioner, TPDDL and BYPL within 15 days to explore the possibility of an amicable solution to the

issues involved in the petition and minutes of the meeting to the Commission prior to the next date of hearing. The Commission also directed the parties to file their submissions accordingly.

14. SECI vide its submissions dated 28.02.2023 filed the minutes of the meeting before the Commission. Relevant extracts are as under:

Minutes of meeting-held on 31.01.2023 between SECI TPDDL, BYPL and SBSR Power Cleantech Eleven Private Limited at SECI office, New Delhi

- 1. A meeting was held under the chairmanship of Director (Solar), SECI between SECI, Buying Entities (TPDDL & BYPL) and SPD (SBSR Power Cleantech Eleven Private Limited) in compliance of the direction of Hon'ble CERC direction vide RoP of hearing dated 12.01.2023, to explore the possibility of an amicable solution to the issues involved in the Petition no.192/MP/2021 related to 300 MW ISTS Connected Solar Project being implemented by M/s SBSR Power Cleantech Eleven Pvt. Ltd. under Solar ISTS Tranche-III tender of SECI.*
- 2. On the same issue a meeting was held between the parties on 26.08.2022 & 21.12.2022, wherein no consensus was arrived between the SPD & Buying Entities.*
- 3. To resolve the issue and as per the direction of Hon'ble CERC, Buying entities have again submitted that they are willing to offtake the power from 62.5 MW capacity as per the terms and conditions of the PPA & PSA without any financial liability. In response of this, the SPD has submitted that there will be additional financial implications under change in law event due to imposition of GST and BCD etc.*
- 4. Notwithstanding the above, all the parties agreed that they will abide by the decision of Hon'ble CERC.*
- 5. All the parties agreed that the submission mentioned herein above shall be without prejudice to the rights and contention available to the parties in the pending matter before Hon'ble CERC.*

The meeting concluded with vote of thanks to the participants.

15. The matter again came up for hearing on 06.03.2023 but the matter was adjourned on the request of the Petitioner.

Hearing dated 02.05.2023:

16. The case was called out for hearing on 02.05.2023. As per Record of Proceedings, it was held as under:

“The learned counsel for TPDDL made detailed oral submissions during the course of hearing. He pointed out that SECI has not yet terminated the PPA. He further submitted that the Petitioner's contention that the contracted capacity of the project has been reduced to 150MW as SECI had declined to extend the SCOD of the remaining 150MW out of the total 300MW is misplaced. Referring to the undertaking dated 30.07.2021 given by the Petitioner with respect to extension of time due to 2nd wave of Covid-19, it was submitted that the Petitioner had given an undertaking that

such time extension provided by SECI shall not be used for claiming increase in the Project cost, including IDC or upwards revision of tariff. The Petitioner had further undertaken to commission the project in line with the provisions of PPA and further agreed that the Petitioner shall not use extension granted by SECI as a ground for termination of the PPA. He wanted to place on record that TDPPL is willing to off-take power from the Petitioner's Project and is ready to bear any additional cost due to "change in law" events as decided by the Commission.

2. The learned senior counsel for the Petitioner also made detailed oral submissions during the course of hearing. The Petitioner sought amendment of its prayers through an IA and it was not opposed by the Respondents and the amendments have also been approved by the Commission. He submitted the I.A No.3/IA/2023 filed by TPDDL seeking direction to Petitioner to supply the commissioned capacity of 62.5 MW to TPDDL on prorata basis in accordance with the terms of PPA and PSA is not maintainable as it is outside the scope of the prayers of the amended petition of Petitioner. He submitted that the Petitioner has to amend the petition and would like to file certain additional information and sought permission for the same.

3. The learned counsel for BYPL also stated that BYPL is ready to off-take its quota of the 62.5MW and would bear the additional cost, if any, due to "change in law" events as per the decision of the Commission.

4. The learned senior counsel for the SECI submitted that SECI will agree to extend the SCOD of the Petitioner's Project. Further, TPDDL and BYPL had agreed in the meeting held on 31.3.2023 to off-take the 62.5MW power capacity as per the terms and conditions of the PPA and PSA and have also expressed their willingness to bear any additional financial implications due "change in law" events as decided by the Commission.

5. After hearing the parties, in the changed circumstances, the Commission directed SECI to file on affidavit by 17.5.2023 that it would extend the SCOD of the Petitioner's Project and the beneficiaries – TPDDL and BYPL to submit on affidavit by 17.5.2023 that they would bear additional financial implications, if any due to "Change in Law" as per PPA and PSA as per decision of the Commission, with an advance copy to the other parties. The Commission also directed the Petitioner to make its submissions on affidavit by 17.5.2023 with a copy to the other parties.

6. Subject to the above, the Commission reserved its order on TPDDL's IA No. 3/IA/2023."

Submissions of TPDDL in I.A. 3 of 2023 dated 09.01.2023 and Affidavit dated 17.05.2023:

17. TPDDL has submitted as under:

- a) TPDDL being the beneficiary/end procurer of the power generated by the Petitioner, is being deprived of its total tied up capacity, i.e. 200 MW on account of the Petitioner's third-party sale of 62.5 MW power as also the failure/delay in commissioning the balance remaining capacity.
- b) The overall scheme of a back to back arrangement between the parties is that, whatever obligations are enforced by TPDDL under the PSA against SECI vis-à-vis,

the offtake of the contracted capacity, the Petitioner is bound to fulfil such obligations on a back to back basis towards SECI in terms of the PPA.

- c) The Petitioner has failed to discharge its contractual commitments inasmuch as the Petitioner has failed to commission the entire Project capacity thereby leading to the denial of the allocated contracted capacity i.e. 200 MW tied up with TPDDL.
- d) The Petitioner cannot wriggle out of the terms of the contract at its own whims and fancies without fulfilling the aforesaid objective. Further, in any case, if SECI has acted as a conduit to perpetuate the present illegality, TPDDL reserves its right to seek an appropriate remedy against SECI.
- e) It is on account of the SECI's letter dated 30.06.2022 that the Petitioner was denied further extension as the Petitioner failed to make out a case of Force Majeure, which precluded the Petitioner from commissioning the entire project capacity. The Petitioner cannot be permitted to claim a reduction in the project capacity as a result of SECI's rejection of the request for extension of SCOD, by way of its letter dated 30.06.2022, while on the other hand, asking TPDDL to challenge the same by way of a separate petition.
- f) The Petitioner has itself stated that the subject matter of the present petition now stands confined to as to whether SECI can levy penalty upon the Petitioner for the alleged delay or not. This Commission must appreciate the underlying fact that the question of levy of a penalty in the nature of liquidated damages has arisen only on account of SECI's rejection of the request of the Petitioner for further extension, vide its letter dated 30.06.2022. Considering that the letter dated 30.06.2022 issued by SECI, emanates from the Petitioner's failure to commission the entire project capacity and would lead to the levy penalty (the only issue that now remains as per the Petitioner), has to be adjudicated in the present petition itself.
- g) There is no delay in obtaining the regulatory approval of the PSA by TPDDL/SECI as the petition for approval of the PSA was filed by TPDDL on 19.09.2019 (i.e., merely after 86 days of signing of the PSA) which was subsequently allowed by the Delhi Electricity Regulatory Commission (DERC) vide its order dated 31.12.2020.
- h) The said approval came in furtherance of the in-principle approval granted by DERC on 14.08.2018. It cannot be said that TPDDL/SECI has been in breach of the obligations cast upon it and the rigours of Article 13.1 cannot apply to the Petitioner.
- i) The Petitioner cannot be permitted to contend the reduction of the project capacity to 150 MW in terms of Article 4.6.2 of the PPA and, on the other hand, cannot be

allowed to go scot free from the rigours of SPD's default provision, i.e. Article 13.1 of the PPA, which is the direct and natural consequence of Article 4.6.2 of the PPA.

- j) The Petitioner is under an obligation to generate a minimum threshold of 403.85 Million kWh (corresponding to 200 MW of capacity tied up with TPDDL) in every contract year until the end of 10 years from the SCOD. The Petitioner is responsible for compensating TPDDL for the losses suffered by it on account of the shortfall in generation on the part of the Petitioner, for which TPDDL also reserves the right to initiate appropriate action before the Appropriate Commission.
- k) The corresponding provision of Article 2.11.3 of the PSA i.e., Article 4.4.1 of the PPA shall be applicable "*mutatis mutandis*" to the present arrangement. If any interpretation to the contrary is taken, then the entire back to back arrangement between the parties falls apart.
- l) TPDDL being the ultimate beneficiary is entitled to enforce its rights and avail the entire contracted capacity of 200 MW out of the total Project capacity of 300 MW generated by the Petitioner from its project. Reliance of the Petitioner on SECI's letter dated 31.08.2022 to seek supply of power outside the PPA is *ex-facie* in violation of the very edifice of a back to back contract signed by the Petitioner and TPDDL through SECI.
- m) Inordinate delay in commissioning the total project capacity has not only deprived TPDDL of availing Renewable Energy which is to be ultimately supplied to the end consumers of Delhi but has also prevented TPDDL from fulfilling its RPO. Pertinently, the non-fulfillment of RPO is solely on account of the shortfall in energy to be supplied to TPDDL in every contract year, for which the Petitioner is liable to compensate TPDDL in the manner set out in Article 2.11.3 of the PSA.
- n) On account of the shortfall in supply of energy, TPDDL in order to comply with its RPO, had to resort to the procurement of power through other sources/ purchase of Renewable Energy Certificates, for which TPDDL had to incur additional costs.
- o) TPDDL is willing to off take the 62.5 MW capacity commissioned by the Petitioner (as also sought by TPDDL vide the aforementioned application) as per the terms and conditions of the PPA dated 20.08.2019 executed between the Petitioner and SECI & the back to back PSA dated 26.06.2019 executed between SECI and TPDDL.
- p) TPDDL will bear the additional financial implications, if any *qua* the "*Change in Law*" event, subject to appropriate orders being passed by this Commission as well as subject to its rights available in law.

Submission of SECI:

18. SECI vide affidavit dated 17.05.2023 has submitted as under:

- a) In view of the submissions made on behalf of the respondents- TPDDL and BYPL, SECI will take further course of action with regard to extension of the SCoD of the Petitioner's project in accordance with the decision of the Commission. The buying entities and the Petitioner should confirm to the Commission the date on which the commissioning and commercial operation of 62.5 MW should be considered and the same needs to be approved by the Commission as the commissioning of the said capacity of 62.5 was done by the Petitioner on a self-commissioning basis.
- b) The Petitioner should undertake the commissioning and commercial operation of the remaining 87.5 MW (150 MW-62.5 MW out of total capacity of 300 MW) as per the timeline to be agreed to between the buying entities, the Petitioner and SECI and approved by the Commission.
- c) The maximum period for commissioning of the project (with levy of Liquidated Damages) lapsed on 20.05.2022. The Petitioner has commissioned only 150 MW (out of 300 MW) by 20.05.2022. As per the provisions of the PPA, the contracted capacity shall stand reduced/amended to the capacity commissioned till the maximum time allowed for commissioning of the project i.e. 20.05.2022. In view of the above circumstances, SECI is not in a position to extend the scheduled commissioning date.

Submission of BYPL:

19. BYPL vide affidavit dated 17.05.2023 has submitted as under:

- a) It is willing to off-take its quota of 62.5 MW power capacity as per the terms and conditions of the Power Purchase Agreement and the Power Supply Agreement.
- b) It shall also bear any additional financial implication due to a "Change in Law" event as decided by this Commission, subject to rights in law.

Submission of the Petitioner:

20. The Petitioner has submitted as under:

- a) IA No.03/IA/2023 filed by TPDDL, is *not maintainable*, after TPDDL agreed to the amendment moved by SBSR wherein the scope of the petition (and prayers) was changed. TPDDL can either support the amended prayers of the petition or oppose it.

However, TPDDL cannot seek a prayer which is outside the scope of the prayers of the amended petition of SBSR.

- b) The only option available with TPDDL is to challenge the aforesaid letter dated 30.06.2022 of SECI, by way of filing its own petition. Relief claimed by TPDDL is outside the scope of the prayers of the amended petition of Petitioner.
- c) TPDDL-PSA was approved by DERC on 31.12.2020, i.e., much after the committed date of 03.01.2020 which is clearly a default on the part of SECI/ discoms against the commitments made by SECI under the PSAs and PPA. However, the said approval was stayed by APTEL vide an order dated 23.02.2021 in an appeal filed by SECI (Appeal No. 52 of 2020). APTEL passed a final judgment dated 02.07.2021, whereby the TPDDL-PSA was finally approved. The above judgment of APTEL has now been challenged by DERC before the Hon'ble Supreme Court in CA No. 6310 of 2021, wherein notice was issued by the Hon'ble Supreme Court on 10.12.2021. There is no stay in the aforesaid civil appeal. Hence, there is a delay in 'enforceability' of the TPDDL-PSA. Accordingly, SBSR cannot be made liable for any penalty whatsoever qua any delayed/ un-commissioned capacity under the PPA.
- d) As regards the BYPL-PSA, the same is yet to become enforceable in terms of clause 4.9 as there is no regulatory approval granted by DERC.
- e) SECI vide its submissions dated 09.09.2022 and 16.11.2022 have admitted that the contracted capacity stands reduced/ amended to 150 MW. Once the above position is accepted by the parties (Petitioner and SECI), there cannot be a subsequent U-turn taken unilaterally by SECI to extend the SCOD beyond 20.11.2021.
- f) On account of the categorical stand of SECI of not extending the SCOD which resulted in a restriction/ reduction of PPA capacity up to 150 MW only, the Petitioner proceeded to tie up its power sale with Electricity Department of Goa through a trader viz., *Manikaran Power Limited* under an umbrella arrangement of parent company where 50 MW (*out of the commissioned 62.5 MW power, being beyond the scope of the PPA dated 20.08.2019*) is being supplied to Goa under bilateral arrangement through open access in terms of approval granted by NRLDC/ WRLDC. The present duration of the above agreement is from 01.04.2023 to 01.04.2024, and that periodical standing clearance for this capacity is also being granted by NRLDC. Power has already started flowing to Goa with effect from 01.04.2023 itself in terms of the attached daily implemented schedule punch report issued by WR. The Petitioner also

proceeded to issue a request to CTU on 19.04.2023 for change in its LTA/ GNA beneficiary region from 'firmed up NR' to 'Target NR'.

- g) Since the Petitioner has now entered into a firmed up arrangement for supplying 50 MW of power for a period of one year starting from 01.04.2023, there is a direct/ vested interest involved of a third party, which cannot be negated by this Commission, as such an arrangement was entered into by the Petitioner only after the issuance of the letter dated 30.06.2022 by SECI, and the consequent amendment of the petition allowed by this Commission vide RoP/ daily order dated 12.12.2022. The lenders of the Petitioner have also accepted the position that 150 MW is outside PPA and no provisions relating to any alleged default by the Petitioner qua the said PPA will apply for this capacity.
- h) There cannot be any regulatory intervention beyond the scope of the petition and the PPA. It is now well settled that the Regulatory Commissions cannot exercise their regulatory powers in a situation which is covered by the express provisions of the contract. The principle laid down in the above judgment would squarely apply to the facts and circumstances of the present case. Reliance is placed on the Hon'ble Supreme Court judgement dated in Civil Appeal No. 11826 of 2018 titled as *Haryana Power Purchase Centre v. Sasan Power Limited & Ors* (2023 SCC Online SC 577).
- i) Qua the contention of TPDDL with respect to the undertaking given by the Petitioner, it is submitted that the statement of the undertaking was provided in terms of MNRE notification, being OM No. F. No 283/18/2020-GRID SOLAR dated 15.09.2021 and the same was limited to the impact during the COVID-19 second wave.
- j) TPDDL has also contended that the Petitioner has agreed that it shall not use the extension granted by SECI as a ground for termination of the PPA. PPA termination with respect to 150 MW of short closure of PPA capacity up to 150 MW took place as a consequence of denial of SCoD extension beyond 20.11.2022 by SECI.
- k) The Petitioner had initially offered the capacity and simultaneously pursued for extension of SCoD. However, because of SECI's stand vide its letter dated 30.06.2022, the Petitioner was compelled to accept the short closure of PPA capacity up to 150 MW which consequently led to the filing of the amended petition.

Analysis and Decision:

21. We have heard the learned counsels for the Petitioner and Respondents and have carefully perused the records and considered the submissions of the parties.

22. On the basis of the submissions of the parties, the only issue as raised in the IA that remains for our consideration is *whether the Petitioner is obligated to supply the commissioned capacity of 62.5 MW to TPDDL on a pro-rata basis in terms of the PPA and PSA?*
23. SECI, in its submissions, has averred that, the maximum period for commissioning the project, inclusive of the levy of Liquidated Damages expired on 20.05.2022. As the Petitioner has commissioned only 150 MW (out of 300 MW) by the deadline i.e. 20.05.2022, so as per the terms of the PPA, the contracted capacity will reduce to the capacity commissioned till 20.05.2022. Hence, SECI is not in a position to further extend the SCoD.
24. TPDDL has submitted that, in terms of the direction of the Commission vide ROP dated 02.05.2023, it is willing to off-take the 62.5 MW capacity commissioned by the Petitioner in terms of the PPA dated 20.08.2019 and the back to back PSA dated 26.06.2019 executed between SECI and TPDDL. It will also bear the additional financial implications, if any, *qua* the “*Change in Law*” event, subject to appropriate orders being passed by this Commission as well as subject to its rights available in law.
25. BYPL has also submitted that it is ready to off-take its quota of 62.5 MW as per the terms of the PPA and PSA.
26. ***Per Contra*** the Petitioner has submitted that I.A No.3 of 2023 filed by TPDDL seeking direction to Petitioner to supply the commissioned capacity of 62.5 MW to TPDDL on a *pro-rata* basis in terms of the PPA and PSA is not appropriate as it is outside the purview of the amended prayers sought by the Petitioner. The Petitioner also submitted that the delay in enforceability of the TPDDL PSA was on account of SECI and TPDDL for which the Petitioner cannot be held accountable.
27. We observe that the Hon’ble Supreme Court judgement dated 06.04.2023 in in Civil Appeal No. 11826 of 2018 titled as *Haryana Power Purchase Centre v. Sasan Power Ltd. and other (Sasan judgment)* [2023 SCC OnLine SC 577] has held as under:

90. We are not dealing with a case where the exercise of power of the Commission under Section 63 is under review. In a case where, however, the rates are approved under Section 63 and PPA is entered into, the question would undoubtedly arise as to whether there is a power which can be described in a

manner of speaking to be plenary power with the Commission under Section 79? Can there be a power which can be christened as omnibus? Can the Tribunal, in other words, disregard the express words of the contract? Can it discover a new change in law which the parties have not contemplated as change in law? **In short, can the Tribunal rewrite the contract and create a new bargain?**

91. We are of the view that the Tribunal cannot indeed make a new bargain for the parties. The Tribunal cannot rewrite a contract solemnly entered into. It cannot ink a new agreement. Such residuary powers to act which varies the written contract cannot be located in the power to regulate. The power cannot, at any rate, be exercised in the teeth of express provisions of the contract.

.....
92. ...In a matter where the parties have entered into a contract with express provisions, we are unable to agree with the first respondent that the Tribunal would have power to disregard the express provisions of the contract on the score that as it turns out that with passage of time and even change in circumstances, it is found that the contract cannot be worked except at a loss for the contractor.

.....
95.All that we are holding is that in a case where the matter is governed by express terms of the contract, it may not be open to the Commission even donning the garb of a regulatory body to go beyond the express terms of the contract.

....
96. While it may be open as indicated therein for a regulation to extricate a party from its contractual obligations, in the course of its adjudicatory power it may not be open to the Commission by using the nomenclature regulation to usurp this power to disregard the terms of the contract.”

28. From the above, we find that the Commission cannot exercise its regulatory powers in a situation that is covered by the express provisions of the contract. We, therefore, now examine whether the PPA in the instant case has an express provision dealing with the issues raised in the present I.A. 3 of 2023.

29. We observe that relevant Articles of the PPA dated 20.08.2019 stipulates as follows:

2.1. Effective Date

2.1.1 This Agreement shall come into effect from 03.07.2019 and such date shall be referred to as the Effective Date....”

4.6 Liquidated Damages not amounting to penalty for delay in Commissioning:

4.6.1 If the SPD is unable to commission the Project by the Scheduled Commissioning Date other than for the reasons specified in Article 4.5.1 and 4.5.2, the SPD shall pay to SECI, damages for the delay in such commissioning and making the Contracted

Capacity available for dispatch by the Scheduled Commissioning Date as per the following:

(a) Delay beyond the Scheduled Commissioning Date upto (& including) the date as on 24 months from the Effective Date (as applicable): The total PBG amount shall be encashed on per day basis and proportionate to the balance capacity not commissioned.

4.6.2. The maximum time period allowed for commissioning of the full Project Capacity with encashment of Performance Bank Guarantee shall be limited to 24 months from the Effective Date of this Agreement (as applicable). In case, the Commissioning of the Project is delayed beyond 24 months from the Effective Date, it shall be considered as an SPD Event of Default and provisions of Article 13 shall apply and the Contracted Capacity shall stand reduced / amended to the Project Capacity Commissioned within 24 months of the Effective Date and the PPA for the balance Capacity will stand terminated and shall be reduced from the project capacity.

30. From the perusal of the terms of the PPA, the following emerge:

- a) SCoD shall be counted from the Effective date of the PPA.
- b) Liability of the Petitioner would kick in if the project is commissioned beyond the SCoD and it would be entitled to pay damages to SECI.
- c) If the commissioning of the project is delayed beyond 24 months from the Effective Date, it shall be considered as the Petitioner's event of default, and the contracted capacity shall stand reduced to the project capacity commissioned within 24 months of the Effective Date and the PPA for the balance Capacity will stand terminated and shall be reduced from the project capacity.
- d) The maximum time period allowed for commissioning of the full project capacity with encashment of the Performance Bank Guarantee shall be limited to 24 months from the Effective Date of this Agreement.

31. We observe that the status of the project till date is as under:

Date	Capacity Commissioned (in MW)	Allotment as per PSA TPDDL= 200 MW BYPL= 100 MW
15.08.2021	50	
04.04.2022	50	
11.04.2022	50	
Total	150 MW (out of the total PPA capacity of 300 MW)	
20.05.2022	Long stop date (as per submission of SECI vide submissions dated 17.05.2023)	
20.06.2022	62.5 MW was ready	

32. From the above, we observe that the Power Purchase Agreement is between the Petitioner and the SECI (Respondent No. 1). Vide letter No. 30.06.2022, SECI has already informed the Petitioner that the request for a time extension of SCoD has not been considered by SECI. Further, vide letter dated 31.08.2022, SECI has informed the Petitioner that *“In response to your request dated 23.08.2022, this is to inform that, in so far as SECI is concerned, SBSR may self-commission the 62.5 MW capacity and decide on the sale of power in view of the non-extension of time sought for by SBSR notified by SECI vide its communication dated 30.06.2022 and in the absence of any mutual resolution as mentioned above.”*
33. Further, SECI vide its affidavit dated 17.05.2023 had reiterated that the maximum period for commissioning of the project (with levy of Liquidated Damages) lapsed on 20.05.2022. The Petitioner has commissioned only 150 MW (out of 300 MW) by 20.05.2022. As per the provisions of the PPA, the contracted capacity shall stand reduced/amended to the capacity commissioned till the maximum time allowed for commissioning of the project i.e. 20.05.2022. In view of the above circumstances, SECI has stated that it is not in a position to extend the SCoD.
34. In view of the express provisions in the PPA and denial by SECI to extend the SCoD, and in the light of the *Sasan judgement* dated 06.04.2023 of the Hon’ble Supreme Court holding inter alia that *“in the course of its adjudicatory power it may not be open to the Commission by using the nomenclature regulation to usurp this power to disregard the terms of the contract”*, the Commission will have to go by the provisions of the PPA which stipulate inter alia that *“in case, the Commissioning of the Project is delayed beyond 24 months from the Effective Date, it shall be considered as an SPD Event of Default and provisions of Article 13 shall apply and the Contracted Capacity shall stand reduced / amended to the Project Capacity Commissioned within 24 months of the Effective Date and the PPA for the balance Capacity will stand terminated and shall be reduced from the project capacity”*. Accordingly, we hold that the contracted capacity of 300MW stands reduced to the project capacity commissioned (150MW) before 20.05.2022 in terms of Article 4.6.2 of the PPA. Further, in view of the intimation by SECI that the Petitioner *“may self-commission the 62.5 MW capacity and decide on the sale of power in view of the non-extension of time sought for”* and consequently the Petitioner having entered into a separate contract for the said discharged 62.5 MW capacity, we hold that the Petitioner is not obligated to supply the commissioned capacity of 62.5 MW to TPDDL on a pro-rata basis in terms of the PPA dated 20.08.2019.

However, we clarify that in the present I.A. we have not dealt with the issue regarding the liabilities/penalties arising out of such a reduction of the project capacity and termination of the part PPA, which is the subject matter of the main petition as amended.

35. Hence, I.A. No. 3 of 2023 is disposed of in terms of the above.

Sd/-
पी. के. सिंह
सदस्य

Sd/-
अरुण गोयल
सदस्य

Sd/-
आई. एस. झा
सदस्य

Sd/-
जिष्णु बरुआ
अध्यक्ष