

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 346 of 2019

Case of Maharashtra State Electricity Distribution Company Limited Seeking Compensation as per Power Sale Agreement Executed with Solar Energy Corporation of India Limited (Intermediary Procurer) and compensation on account of delay in achieving the Scheduled Commercial Operation Date as per Power Purchase Agreement executed between Solar Energy Corporation of India Limited (Intermediary Procurer) and Solar Power Developer

Maharashtra State Electricity Distribution Company Limited Petitioner

Solar Energy Corporation of India Limited Respondent

Coram

I.M. Bohari, Member
Mukesh Khullar, Member

Appearance

For the Petitioner : Sh. Ashish Singh (Adv.)
For the Respondent : Sh. MG Ramchandran (Adv.)

ORDER

Date: 12 February, 2021

1. Maharashtra State Electricity Distribution Company Limited (**MSEDCL**) has filed the present Petition on 21 December 2019 seeking compensation as per Power Sale Agreement (**PSA**) executed between MSEDCL and Solar Energy Corporation of India Limited (**SECI**) (Intermediary Procurer) under Section 86 (1) (f) of the Electricity Act, 2003 (**EA**) and

compensation on account of delay in achieving the Scheduled Commercial Operation Date (SCoD) as per Power Purchase Agreement (PPA) executed between SECI and Solar Power Developers (SPD).

2. MSEDCL's main prayers are as follows:

- a) *Hold and declare that SECI has been unable to perform its timely commitments under the PSA's for delivery of the agreed quantum of power:*
- b) *Direct SECI to compensate MSEDCL to the tune of Rs. 131.72 Crs. as losses on account of short-supply by SECI thereby forcing MSEDCL to fulfill its RPO targets through other mechanism/sources:*
- c) *Direct SECI to reimburse the payment of Rs.13.74 Crs. towards the amount for reduction of tariff from CoD to 31.03.2019 for the solar projects as mentioned at Sr. No. 3 (viii) of the Petition.*
- d) *Direct SECI to raise future invoices with respect to Batch-III and Batch-IV projects at the revised tariff rates as mentioned at Sr. No. 3 (viii) of the Petition.*

3. As the SECI had objected to the jurisdiction of this Commission to entertain the Petition, the Commission heard this matter on the issue of jurisdiction on 18 August 2020. After hearing both the parties, the Commission vide its Order dated 14 September 2020 ruled that it had jurisdiction in the matter and directed SECI to file its submission on merits of the matter. As detailed submission of both parties on the jurisdiction of the Commission and Commission's analysis and rulings have been covered under Order dated 14 September 2020, for the sake of brevity, the said submissions are not repeated here. Order dated 14 September 2020 issued on jurisdiction issues shall be treated as part and parcel of this Order.

4. MSECL in its Petition has stated as follows:

- 4.1. The Government of India (GoI)/Ministry of New and Renewable Energy (MNRE) announced Jawaharlal Nehru National Solar Mission (JNNSM) in 2009. Under Phase-II, Batch-III of JNNSM, MNRE announced a Scheme for "Setting up of 2000 MW Grid-connected Solar PV Power Projects-State Specific VGF (Viability Gap Funding) Scheme" which was proposed to be implemented by SECI.
- 4.2. MNRE vide its letter dated 19 December 2014 sought consent of the State utilities about participation in VGF (State Specific) scheme to be implemented by SECI under JNNSM

Phase-II as Batch-III. The power procured under the said scheme could be utilized for fulfilment of Solar RPO target.

- 4.3. MSEDCL had given consent to MNRE to participate in the proposed JNNSM for procurement of solar power from SECI which was available at cheaper rate.
- 4.4. SECI carried out two separate competitive bidding for selection of solar power developers for 500 MW projects in each case to be set up in Maharashtra for sale to MSEDCL based on the RfS dated 27 August 2015 and dated 24 February 2016. This makes total capacity of projects to 1000 MW.
- 4.5. SECI and MSEDCL entered into two (2) Power Sale Agreements (PSA) on 4 November 2016 and 1 December 2016 wherein SECI undertook to sell “Solar Power” to MSEDCL as per the terms of the PSA by buying the same from the selected Solar Power Developers (SPDs) on back-to-back basis.
- 4.6. Under the PSAs, SECI was mandated/accountable to Power Purchase Agreements (PPA) and VGF Securitization Agreements (VGFSAs) with the selected SPDs.
- 4.7. The definition of PSA clearly specifies that PPA shall mean including its recitals and Schedules, amended or modified from time to time in accordance with the terms thereof. The SECI-SPD PPA is the schedule to PSA; it means it is an integral part of PSA. Also, SECI itself has agreed that PSA is back-to-back arrangement.
- 4.8. The scheduled commissioning dates for Batch-III projects were 10 May 2017 for Open content category (450 MW) and 16 August 2017 for Domestic Content category requirement (DCR) (50 MW) category projects, respectively. Also, the scheduled commissioning dates for 500 MW Batch-IV projects was 23 December 2017.
- 4.9. The agreed capacity of power to be sold by SECI to MSEDCL under both the PSAs dated 4 November 2016 and 1 December 2016 was 500 MW each, respectively.
- 4.10. The Commission vide its Order dated 20 February 2017 in Case No. 109 of 2016 approved the procurement of 1000 MW of solar power by MSEDCL from SECI for fulfilment of its RPO.
- 4.11. SECI started supplying power to MSEDCL from June 2017 in phased manner. However, the commissioning of some of the projects which SECI had tied up for sale of power to MSEDCL got delayed which led to shortfall in supply of power as agreed under the PSA executed between MSEDCL and SECI. Further as per terms of Power Purchase Agreement

(between SECI and SPD), there are penalty provisions for delay in commissioning of projects such as encashment of PBG, reduction in tariff etc.

- 4.12. SECI has failed to fulfill its material obligations, which resulted into additional shortfall for meeting the solar RPO target by MSEDCL and compelled MSEDCL to procure RECs.
- 4.13. On 21 February 2018, MSEDCL issued first notice regarding SECI's failure to comply with the material obligations under PSA as per Article 9 and Article 10.
- 4.14. On 12 April 2019, MSEDCL wrote letter to SECI claiming compensation in view of short supply of power by SECI and other applicable compensations due to delay in Commissioning of projects. On 29 April 2019, SECI vide its letter denied all claims made by MSEDCL asking for compensation on account of delayed commissioning.
- 4.15. On 4 October 2019, MSEDCL wrote another letter intimating to SECI that it shall pay to SECI as per the revised tariff (reduced tariff) in view of its material breach of obligations under the PSA. On 11 October 2019, again SECI denied all claims raised by MSEDCL towards compensation.

5. SECI in its submission dated 28 September 2020 has stated as follows:

- 5.1. Present reply is being filed on the merits of the dispute and without prejudice to SECI's right to seek appropriate legal remedy against the order dated 14 September 2020.
- 5.2. SECI has been functioning as the implementing agency and has been designated Nodal Agency for implementation of Jawaharlal Nehru National Solar Mission (JNNSM). It is procuring electricity from Solar Power Developers (SPDs) under the PPA and reselling the same to the Buying Entity/ Distribution Licensee namely MSEDCL under the Power Sale Agreements dated 4 November 2016 and 1 December 2016 under PSA.
- 5.3. In the PPAs and PSAs, SECI is acting only as an intermediary nodal agency (as appointed by the Central Government) utilizing its trading license to facilitate such purchase and resale of electricity. SECI is not acting as a merchant trader.
- 5.4. The obligations and liabilities of SECI to the SPDs, in the facts and circumstances pertaining to such dealing, are on a back-to-back basis to the obligation to be performed and liabilities to be discharged by Buying Entities/ Distribution Companies to SECI.

- 5.5. MSEDCL is alleging that SECI is liable to pay compensation amounting to Rs. 131.72 crores for supplying less power than the minimum energy as stipulated in Article 6.8.2 of the PSAs.
- 5.6. A harmonious reading of various provision of PPA, PSA, Definitions of 'Effective Date', 'Commercial Operation Date' and 'Contract Year' as provided in the PPA demonstrate that SECI's liability to pay MSEDCL any compensation for shortfall in supply of minimum energy under the PSAs arises after the actual commercial operation date of the solar power project. Accordingly, any claim for the shortfall in supply of minimum energy for the period prior to the date of actual commissioning and commercial operation of the solar power projects is erroneous in terms of the PSAs read with the provisions of the PPAs executed on back-to-back basis. Further, non-compliance of Renewable Purchase Obligation (RPO) as alleged by MSEDCL is not on account of any reason attributable to SECI.
- 5.7. The delay in commissioning and commercial operation of the solar power projects by the SPDs which in turn lead to delay in commencement of supply of power is for reasons not attributable to SECI.
- 5.8. SECI being an intermediary nodal agency, is able to supply power to the Buying Entity/ Distribution Company namely MSEDCL under the PSAs only on generation and commencement of supply of power from solar power project established by the SPDs in terms of the PPAs.
- 5.9. SECI's liability to pay compensation for not supplying minimum energy arises only after receiving the said compensation from the SPDs under the PPAs in terms of Article 4.4.1 of the PPAs read with Article 6.8.2 of the PSAs.
- 5.10. MSEDCL, by its letter dated 18 January 2019 has purported to terminate the PSA dated 4 November 2016 to the extent of 100 MW capacity to be procured by SECI from Welspun Energy Private limited (now known as Avaada Energy Private Limited) and PSA dated 1 December 2016 to the extent of 50 MW capacity.
- 5.11. SECI has disputed the termination of 100 MW capacity by MSEDCL in respect of PSA dated 4 November 2016 by its letter dated 1 February 2019. In the said letter SECI had also stated about the proceedings had been initiated by Welspun Energy Private Limited (Welspun) namely Petition No.95/MP/2017 for extension of scheduled commissioning date and other consequential reliefs and the Order dated 17 December 2018 passed by the Central Electricity Regulatory Commission (CERC) was in favor of Welspun.
- 5.12. On 30 January 2019, SECI filed Review Petition being No.2/RP/2019 in respect of CERC's Order dated 17 December 2018 in Petition No.95/MP/2017. MSEDCL was a party to the

said proceedings. On 11 April 2019, SECI terminated the PPA executed with Welspun on account of failure of Welspun to commission the power project even during the extended time as granted by the CERC. On 24 April 2019, Avaada Energy Private Limited (Avaada) filed Petition No.125/MP/2019 seeking extension of time for commissioning of 78 MW capacity and subsequently amended the Petition to dispute the termination of PPA by SECI. MSEDCL was a party to the said proceedings.

- 5.13. CERC, by its Order dated 11 December 2019 rejected the prayer of SECI for review and recall of the Order dated 17 December 2018. By the Order dated 13 January 2020, CERC decided Petition No.125/MP/2019, rejecting the prayer of Avaada for further extension of time for commissioning of the power project.
- 5.14. Presently, appeals bearing No. 23 of 2020 filed by Avaada against the CERC Order dated 13 January 2020 in Petition No.125/MP/2019 and DFR No.51 of SECI filed by SECI against the Order dated 18 December 2018 of CERC in Petition No. 95/MP/2017 are pending before the APTEL.
- 5.15. MSEDCL has alleged that SECI is liable to pay Rs.13.74 crores for reduction in the tariff payable by SECI to the SPDs under the PPAs from the Commercial Operation Date of the Solar Power Projects till 31 March 2019.
- 5.16. The aspect of reduction in tariff has been provided for in Article 4.6 and Article 9 of the PPAs which expressly provide that the pre-fixed tariff payable by SPDs shall be reduced at the rate of half paisa per kWh per day of delay in case the commissioning of the power project is delayed beyond three months from the Scheduled Commissioning Date. The Applicable Tariff under the PSAs has been dealt with in Article 5 which provides that the tariff payable by MSEDCL for the procurement of solar power under the PSAs shall be the tariff determined in the reverse auction process in pursuance of the RfS document plus the trading margin of Rs.0.07/kWh and that the same is fixed for the entire duration of the PSA. The said payable tariff under the PSAs is therefore not subject to any condition or qualification.
- 5.17. There is no avenue available to MSEDCL to seek reduction in the applicable tariff of Rs. 4.50/kWh as alleged or otherwise. It is not permissible for MSEDCL to claim any relief contrary to express provisions of the PSAs which is the final and governing document with regard to the rights and obligations of the parties.
- 5.18. The relief admissible to MSEDCL, if any, has to be considered within the confines of the PSAs. It is also well-settled that when the terms of the Agreements are clear and

unambiguous, the same have to be applied and there cannot be assumption of any implied terms. In this regard, the following decisions are relevant:

- a. Alopi Parshad and Sons Ltd. -v- Union of India, (1960) 2 SCR 793 : AIR 1960 SC 588;
- b. Naihati Jute Mills Ltd. -v- Khyaliram Jagannath, (1968) 1 SCR 821 : AIR 1968 SC 52; 25
- c. Food Corpn. of India -v- Chandu Construction, (2007) 4 SCC 697;
- d. Gujarat Urja Vikas Nigam Limited -v- EMCO Limited and Another (2016) 11 SCC 182;
- e. Gujarat Urja Vikas Nigam Limited -v- ACME Solar Technologies (Gujarat Pvt) Ltd and Ors (2017) 11 SCC 801;
- f. Gujarat Urja Vikas Nigam Limited -v- Solar Semi Conductor Power Co. (India) P. Ltd (2017) 16 SCC 498;
- g. Rajasthan State Industrial Development & Investment Corpn. -v- Diamond & Gem Development Corpn. Ltd., (2013) 5 SCC 470 : (2013) 3 SCC (Civ) 153 : 2013 SCC OnLine SC 143; and
- h. Nabha Power Ltd -v- Punjab State Power Corporation Ltd , decision dated 17.05.2018 passed by the APTEL in Appeal No. 283 of 2015

5.19. Any sum of Liquidated Damages [comprising of Bank Guarantees amount or from reduction of tariff (if any)] recoverable by SECI from the Solar Power Developer(s) under the PPAs is not intended for payment to distribution company/ Buying Entity namely MSEDCL under the PSAs. It is required to be deposited in a separate fund under Payment Security Mechanism to be maintained by SECI under the guidance of Ministry and New and Renewable Energy (MNRE) for utilization as decided by the MNRE Government of India. In this regard, Clause 4.5 of the Guidelines dated 4 August 2015 notified by the Central Govt. provides as under:

“4.5 Payment Security Mechanism

SECI shall set up a payment security mechanism in order to ensure timely payment to the developers. This fund will have a corpus to cover 3 months payment. The money received from encashment of BGs, interest earned on this fund, incentives for early payment and the grants from Government/ NCEF will be used to build this fund. The Ministry of New and Renewable Energy will frame Rules to operate this fund. Any charges incurred by SECI on account of litigation related to implementation of the Scheme shall be charged to this account. The expenses on account of short term open access charges, UI charges, fund requirements for furnishing security deposits in the form of Bank Guarantee/ LCs to STUs in accordance with BPTA or associated charges etc. may be utilized from PSM.”

5.20. Similarly, Clause 4.4.5 of the Guidelines dated March 14, 2016 notified by the Central Govt. provides as under:

4.5 Payment Security Mechanism

SECI will establish a payment security fund to cover delays/defaults in payments to SECI by buying entities (DISCOMs/State utilities/bulk consumers), so that timely payment to developers could be ensured. This fund will be gradually enhanced to cover three months payment for the projects set up under three VGF schemes i.e. 750 MW, 2,000 MW and 5,000 MW. National Clean Energy Fund (NCEF) will provide Rs. 500 crore to operationalize the payment security mechanism. The money received from encashment of BGs, interest earned on this fund, incentives for early payment and the grants from Government/ NCEF will be used to build this fund. MNRE will decide the amount to be given to the Payment Security Fund in each Financial Year from 2015-16 to 2019-20. Any charges incurred by SECI on account of litigation related to implementation of the Scheme shall be charged to this account. The expenses on account of short term open access charges, UI charges, fund requirements for furnishing security deposits in the form of Bank Guarantee/ LCs to STUs in accordance with BPTA or associated charges etc. may be utilized from PSM. The guidelines for utilization of the Fund are as follows:

1) Payment security fund will be utilized for the following purposes:

(a) To make timely payment to Solar Project Developers in case of delay in realizing the payment from the buying utilities.

(b) For providing security in the form of Letter of Credit/ Bank Guarantee for the purpose of obtaining long-term open access, transmission charges, etc. not envisaged at the time of signing of PSA/PPA and applicable charges as per Bulk Power Transmission Agreement (BPTA) signed with CTU/STU in line with the applicable regulations.

(c) To make the differential payment to the developers from the agreed PPA rate in case of short recovery of tariff from the buying utilities based on average pool pricing due to policy/regulatory issues and transmission-evacuation/open access constraints etc.

(d) To make the payment on account of short-term open access charges, Deviation Settlement Mechanism (DSM) charges, as per applicable regulations.

(e) Any charges on account of litigations and arbitration awards, etc. related to implementation of the scheme including issues arising out of operational difficulties of PPA/PSA/VGF Securitization.

2) Operation Mechanism: SECI shall open a separate flexi bank account and the funds shall be deposited and operated as per MNRE approved guidelines. SECI shall utilize the funds for the purpose defined in the guidelines and utilization details shall be reported to MNRE on quarterly basis”

5.21. Accordingly, the sums of such Liquidated Damages and reduction in tariff provided for in the PPAs is not required to be remitted to MSEDCL as sought for or otherwise and the

PSAs executed do not provide for the same despite the fact that PPAs and PSAs are otherwise back-to-back agreements. These sums have been provided for adjustment for other specific purposes as stated in the relevant Guidelines.

- 5.22. SECI, by its letters dated 29 April 2019 and 11 October 2019 has rejected the claims of MSEDCL.
- 5.23. There is no monetary remedy provided under the PSAs for delay in commissioning of the projects. It is submitted that MSEDCL is mixing the nature of compensation which it is entitled to for shortfall in generation after actual commercial operation date of the solar power projects with other aspects such as delay in commissioning of the projects by the SPDs, liquidated damages payable thereof including reduction in tariff for delay in commissioning beyond three months from the scheduled commissioning date. The compensation due to MSEDCL has to be in accordance with the terms and conditions contained in the PSAs.
- 5.24. It is wrong and denied that SECI has failed to fulfil its material obligations under the PSAs as alleged or otherwise. There cannot be any claim for shortfall in generation and supply of power prior to actual commercial operation of the solar power projects. The same is consistent with the express provisions of the PPAs read with PSAs.
- 5.25. MSEDCL is entitled to compensation only after the commercial operation of the Project and not for any deemed generation or non-supply of power for the period prior to actual date of commercial operation. There is no remedy provided in the PSA for delayed commissioning of the solar power project. The intention of the parties at the time when the PSAs were entered into was not to provide for any such compensation as claimed by MSEDCL.

6. MSEDCL, in its rejoinder dated 19 October 2020 made the following submissions:

- 6.1. SECI being an “Electricity Trader” cannot earn anything more than 7 Paise which is the margin fixed not only by the CERC but also under the PSA. SECI acting as a “Trader” cannot be the owner of the power and decide the outcome/fate of compensation payable. It has to collect, compensate and pay what is payable strictly in accordance with the terms of the PSA and PPA. It is admitted and undisputed that PSA and PPA are enforceable on back-to-back basis.
- 6.2. Article 6.8.2 of the PSA which is a document entered into between MSEDCL and SECI states as under:

*“The Buying Utility, at any time during a **Contract Year**, shall not be obliged to purchase any additional energy from the SECI beyond 1040.303 Million kWh (MU) as per PPAs signed by SECI with the SPD for solar PV projects. If for any Contract Year, it is found that the SECI has not been able to supply minimum energy of 803.87 Million kWh (MU) till the end of 10 years and 756.584 Million kWh (MU) for the rest of the Term of the Agreement, as per PPAs signed by SECI with the SPDs for Solar PV Projects, on account of reasons solely attributable to the SECI, the such non-compliance shall make SECI liable to pay such compensation and SECI shall duly recover such compensation from the SPDs under the SECI -SPD PPAs to enable the buying Utilities to pay such amount. This compensation shall be equal to the compensation payable (including (RECS) by the Buying Utility towards non-meeting of RPOs, if such compensation is ordered by the State Commission and proportional to the amount of shortfall of solar energy during the **contract Year**. This compensation shall be subject to the adjustment made in energy generated in case of non-availability of grid for evacuation which is beyond the control of SPD and for Force Majeure identified under PPA with SECI affecting supply of solar power by SPD.”*

6.3. The above clause of the PSA clearly provides for the following reliefs available to MSEDCL:

- i. SECI would be liable to pay compensation to MSEDCL if SECI fails to supply the agreed quantum of power to MSEDCL.
- ii. SECI shall recover this amount from the SPD under SECI’s PPA with the SPD’s.
- iii. This compensation would also include the compensation for buying REC’s by MSEDCL.

6.4. There is no dispute w.r.t operation and applicability of Article 6.8.2 of the PSA. It is also not in dispute that SECI has not been supplying the guaranteed quantum of power. Once these facts are admitted and undisputed then Article 6.8.2 of the PSA would surely have applicability for which SECI would be liable to pay compensation.

6.5. The term “Contract year is defined as under in the PSA:

“Shall mean the period beginning from the Effective Date and ending on the immediately succeeding March 31 and thereafter each period of 12 months beginning on April 1 and ending on March 31 provided that the last contract year of this Agreement shall end on the last day of the term of this Agreement.”

Further, “Effective Date” is defined under Article 2.1 of the PSA which is reproduced as under:

“This agreement shall come into effect from the date of its execution by both the Parties and such date shall be referred to as the Effective Date.”

- 6.6. The above clause when read harmoniously with the definition of “Contract Year” and Article 6.8.2 leave no room for doubt that MSEDCL is entitled to compensation for “Short Supply of Power” which has to be compensated by SECI.
- 6.7. MSEDCL’s has also claimed certain amounts towards “Reduction in Tariff” (Article 4.6 and 5 of PPA) in accordance with the terms available under the PPA between SECI and Solar Generators.
- 6.8. The PSA and PPA are enforceable on back-to-back basis. This is an admitted and undisputed fact and hence needs no further explanation. SECI in its response has stated that “Amount received on account of reduction in Tariff is kept in the Fund” as envisaged under the JNNSM Scheme.
- 6.9. As per the Clause 4.5 of the JNNSM Scheme, “Fund” has to be created for the following purposes:
 - i. Purpose of the Fund:
 - a. Timely payment to Developers.
 - ii. Maximum amount to be retained in the Fund:
 - a. Corpus to cover 3 months payment security mechanism.
 - iii. What all money can go in the Fund/utilized for building the Fund:
 - a. money received from encashment of BGs,
 - b. interest earned on this fund,
 - c. incentives for early payment and
 - d. the grants from Government/ NCEF
 - iv. What all purposes can the Fund be utilized/Spent:
 - a. Payment to Developers; and/or
 - b. expenses on account of short term open access charges, UI charges,
 - c. fund requirements for furnishing security deposits in the form of Bank Guarantee/ LCs to STUs in accordance with BPTA or associated charges etc.
 - d. SECI’s litigation expenses related to implementation of the Scheme shall be charged to this account.

6.10. The above Clause leads to the following conclusion:

- i. The Payment Security Fund has been created for securing payments to Developers in the event, DISCOM'S delay or fail to pay bill in a timely manner.
- ii. This fund will have a maximum corpus to cover only 3 months payments.
- iii. The creation of this fund will be from certain sources only.
- iv. The fund can be utilized for certain expenses only.

6.11. SECI has not been able to demonstrate as to how the claim of MSEDCL on account of "Reduction of Tariff" at the very first place is allegedly been utilized by SECI for creating of this 'Fund" in complete contravention to the JNNSM Scheme. MSEDCL submits that the amount received by SECI on account of "Reduction of Tariff" cannot be utilized by SECI for creating of this 'Fund" under Clause 4.5 of the JNNSM Scheme.

6.12. Any interpretation that PSA is for the fixed tariff and dehors the reduction in tariff under the PPA, MSEDCL would still be liable to pay the fixed tariff to SECI would mean that SECI would make windfall profits which is not only prohibited under the terms of the PSA but also under the CERC's Trading Margin Regulations. Once, it is admitted that the PSA and PPA are enforceable on back-to-back basis then any change in PPA would mean that the PSA also has to be given effect to in view of the said change in the PPA and vice versa.

6.13. The same has been upheld by CERC vide order dated 28.01.2020 in Petition No. 67/MP/2019 & 68/MP/2019 as under:

"In view of the above, Commission holds that the Power Purchase Agreement and Power Sale Agreement being back-to-back in nature are interconnected implying thereby that the Respondent Discoms are liable to pay to the Respondent SECI all that the said Respondent SECI has to pay to the Petitioner. However, payment to the Petitioner by Respondent SECI is not conditional upon the payment to be made by the Respondent Discoms to Respondent SECI. The Commission having held that GST is a change in law, the Respondent SECI is liable to pay to the Petitioners as per discussion above. The Respondent SECI is eligible to claim the same from the Respondent Discoms on back-to-back basis."

Further, in the said CERC order, SECI has submitted as under:

"The PPAs and PSA being 'back to back' contracts and mirror images to each other are inextricably linked to each other. The various provisions show that the PPAs are

inextricably linked to the PSA. The said two transactions being under two separate agreements, it has been held that the two agreements are inextricably linked to each other and the rights and obligations arising out of one agreement are also reflected in the other agreement.”

From the plain reading of the above, it is clear that, the PSA and PPA are back-to-back in nature and accordingly the reduction in tariff as per the PPA should be passed on to the buying utility.

7. At the e-hearing through video conferencing held on 7 January 2021, the representative of MSEDCL and SECI made their detailed submissions. The Commission sought details regarding commissioning and commercial operation date of the solar power projects under the JNNSM and NSM guidelines, from SECI.

8. On 8 January 2021, in response to the Commission’s query during e-hearing, SECI made the below submission:

8.1. Given below is the tabular statement containing the details regarding commissioning and commercial operation date of the solar power projects established by the Solar Power Developers (SPDs) under the JNNSM and NSM Guidelines for procurement and supply of power to MSEDCL under the PSA dated 4 November 2016 and 1 December 2016 respectively:

S.No	SPD Name	Project Capacity (MW)	Scheduled Comm. Date as per PPA (SCD)	Extended SCD	Actual Comm. Date	COD	Delay in Commissioning (in Days) from the SCD/ Extended SCD	Reasons for Delay in Comm./ Current Status	Remarks
JNNSM SCHEME - Mapped under PSA dated 04.11.2016 with MSEDCL									
1	Bhageria industries	30	10.05.2017	-	17.06.2017	17.07.2017	38	Delay due to the reasons attributable to SPD	-
2	Talettut-ayi Solar Projects Four Pvt. Ltd	50	10.05.2017	-	10.08.2017	09.09.2017	92	Delay due to the reasons attributable to SPD	-

S.No	SPD Name	Project Capacity (MW)	Scheduled Comm. Date as per PPA (SCD)	Extended SCD	Actual Comm. Date	COD	Delay in Commissioning (in Days) from the SCD/ Extended SCD	Reasons for Delay in Comm./ Current Status	Remarks
3	Orange Suvaan Energy Private Limited	50	10.05.2017	-	16.06.2017	16.07.2017	10	Delay due to the reasons attributable to SPD	Liquidated Damages imposed for 10 days only; for remaining days extension granted in terms of Corrigendum dated 09.03.2018 to the Guidelines issued by MNRE and settlement agreement executed between SECI and SPD as recorded in Order dated 14.05.2018 of the Hon'ble High Court of Delhi in in O.M.P. (I) (COMM.) 61/2018 filed by SPD.
4	Orange Suvaan Energy Pvt. Ltd.	50	10.05.2017	-	16.06.2017	16.07.2017	10	Delay due to the reasons attributable to SPD	
5	Sepset Constructions Ltd.	20	10.05.2017	-	08.05.2017	07.06.2017	0		-
6	Sepset Constructions Ltd.	20	10.05.2017	-	08.05.2017	07.06.2017	0		-
7	Krishna Windfarms Developers	10	10.05.2017	-	11.08.2017	10.09.2017	93	Delay due to the reasons attributable to SPD	-
8	NVR Mahasolar Private Limited	50	10.05.2017	-	15.07.2017	14.08.2017	66	Delay due to the reasons attributable to SPD	-
9	Welspun Energy Pvt Ltd	100	10.05.2017	-	NA	NA		The PSA was terminated by MSEDCL on 18.01.2019. The PPA was finally terminated	The termination was challenged by the SPD, but rejected by the CERC. Under Litigation before the APTEL. Under separate arrangement, the

S.No	SPD Name	Project Capacity (MW)	Scheduled Comm. Date as per PPA (SCD)	Extended SCD	Actual Comm. Date	COD	Delay in Commissioning (in Days) from the SCD/ Extended SCD	Reasons for Delay in Comm./ Current Status	Remarks
								by SECI on 11.04.2019.	MSEDCL has been dealing directly with the SPD.
10	Gale Solarfarms Private	50	10.05.2017	-	09.01.2018	08.02.2018	244	Delay due to the reasons attributable to SPD	-
11	Tornado Solarfarms	20	10.05.2017	-	10.10.2017	09.11.2017	153	Delay due to the reasons attributable to SPD	-
12	Tata Power Renewable Energy Limited	30	16.08.2017	-	28.10.2017	27.11.2017	73	Delay due to the reasons attributable to SPD	-
13	Parampujya Solar Energy Private Limited	20	16.08.2017	01.10.2017- 46 days extension on account of MNRE Office Memorandum dated 20.06.2018.	22.02.2018	24.03.2018	144	Delay due to the reasons attributable to SPD	Under litigation before the CERC
Total Capacity		500 MW							
NSM SCHEME - Mapped under the PSA 01.12.2016 with MSEDCL									
14	Vijay Printing Press Private Limited	10	23.12.2017	-	24.01.2018	23.02.2018	32	Delay due to the reasons attributable to SPD	-
15	Solar Edge Power and Energy Pvt. Ltd.(3V)	30	23.12.2017	23.02.2018 - 62 days extension on account of MNRE Office Memorandum dated 20.06.2018.	23.03.2018	22.04.2018	28	Delay due to the reasons attributable to SPD	-
16	Solar Edge Power and Energy Pvt. Ltd.(1V)	50	23.12.2017		09.03.2018	08.04.2018	14	Delay due to the reasons attributable to SPD	-
17	Solar Edge Power and Energy Pvt. Ltd.(2V)	50	23.12.2017		27.03.2018	26.04.2018	32	Delay due to the reasons attributable to SPD	-

S.No	SPD Name	Project Capacity (MW)	Scheduled Comm. Date as per PPA (SCD)	Extended SCD	Actual Comm. Date	COD	Delay in Commissioning (in Days) from the SCD/ Extended SCD	Reasons for Delay in Comm./ Current Status	Remarks
18	Lightsource Renewable Energy Holdings Ltd.	50	23.12.2017	22.02.2018 - 61 days extension on account of MNRE Office Memorandum dated 20.06.2018.	08.03.2018	07.04.2018	14	Delay due to the reasons attributable to SPD	-
19	JBM Solar Energy Maharashtra Pvt. Ltd.	60	23.12.2017	11.04.2018 - 62 days extension on account of MNRE Office Memorandum dated 20.06.2018 and 47 days time extension given by MNRE for application filed before Dispute Resolution Committee.	18.04.2018	18.05.2018	7	Delay due to the reasons attributable to SPD	-
20	JBM Solar Power Maharashtra Pvt. Ltd.	40	23.12.2017	11.04.2018- 62 days extension on account of MNRE Office Memorandum dated 20.06.2018 and 47 days time extension given by MNRE for the application filed before Dispute Resolution Commission.	18.04.2018	18.05.2018	7	Delay due to the reasons attributable to SPD	-
21	M/s. Sukhbir Agro Energy Ltd.	10	23.12.2017	24.01.2018- 32 days extension on account of MNRE Office Memorandum dated 20.06.2018.	24.01.2018	23.02.2018	0	-	-

S.No	SPD Name	Project Capacity (MW)	Scheduled Comm. Date as per PPA (SCD)	Extended SCD	Actual Comm. Date	COD	Delay in Commissioning (in Days) from the SCD/ Extended SCD	Reasons for Delay in Comm./ Current Status	Remarks
22	M/s. Sukhbir Agro Energy Ltd.	10	23.12.2017	24.01.2018- 32 days extension on account of MNRE Office Memorandum dated 20.06.2018.	24.01.2018	23.02.2018	0	-	-
23	M/s. Canadian Solar Energy Holding Singapore 2 PTE. Ltd.	20	23.12.2017	23.02.2018- 62 days extension on account of MNRE Office Memorandum dated 20.06.2018.	14.04.2018	14.05.2018	50	Delay due to the reasons attributable to SPD	Under review of dispute resolution committee for time extension
24	M/s. Canadian Solar Energy Holding Singapore 2 PTE. Ltd.	20	23.12.2017	23.02.2018- 62 days extension on account of MNRE Office Memorandum dated 20.06.2018.	14.04.2018	14.05.2018	50	Delay due to the reasons attributable to SPD	
25	M/s. Canadian Solar Energy Holding Singapore 2 PTE. Ltd.	20	23.12.2017	23.02.2018 (62 days extension on account of MNRE Office Memorandum dated 20.06.2018.	14.04.2018	14.05.2018	50	Delay due to the reasons attributable to SPD	
26	M/s. Canadian Solar Energy Holding Singapore 2 PTE. Ltd.	20	23.12.2017	23.02.2018 - 62 days extension on account of MNRE Office Memorandum dated 20.06.2018.	14.04.2018	14.05.2018	50	Delay due to the reasons attributable to SPD	
27	Essel Green Energy Private Limited	40	23.12.2017	01.06.2018- 160 days extension given by MNRE for application before Dispute Resolution Committee.	22.12.2018	21.01.2019	204	Delay due to the reasons attributable to SPD	-
28	Essel Green Energy Private Limited	20	23.12.2017	01.06.2018- 160 days extension given by MNRE for application filed before	22.12.2018	21.01.2019	204	Delay due to the reasons attributable to SPD	-

S.No	SPD Name	Project Capacity (MW)	Scheduled Comm. Date as per PPA (SCD)	Extended SCD	Actual Comm. Date	COD	Delay in Commissioning (in Days) from the SCD/ Extended SCD	Reasons for Delay in Comm./ Current Status	Remarks
				Dispute Resolution Committee.					
Total Capacity		450 MW							

Commission's Analysis and Rulings

9. Present Petition has been filed by MSEDCL seeking compensation from SECI under following PSAs signed between MSEDCL and SECI, for a capacity of 500 MW each:
- PSA dated 4 November 2016 for JNNSM Phase-II Batch-III
 - PSA dated 1 December 2016 for JNNSM Phase-II Batch-IV

Such power has to be procured by SECI, acting as an intermediary facilitator, through back-to-back PPA and Viability Gap Funding Securitization Agreements (VGFSAs) with the selected SPDs. The Commission vide its Order dated 20 February 2017 in Case No. 109 of 2016 allowed procurement of 1000 MW solar power under 2 PSAs listed above.

10. SECI had objected on jurisdiction of this Commission to adjudicate on the relief sought by MSEDCL in the present matter. As per SECI, CERC is an appropriate Commission to adjudicate on these disputes. In this regard, the Commission vide its Order dated 14 September 2020 on jurisdiction issue has ruled as follows:

"14.6. As SECI is functioning as Trading Licensee under the present PSAs/PPAs, jurisdictional issue needs to be decided accordingly.

.....

16.4. In view of the above analysis, the Commission notes that generating plants in the present case are located under the Maharashtra. Further, 100% capacity of these projects is contracted with MSEDCL under the PSAs. Hence, SECI is buying and selling the energy from/to the entities which are in Maharashtra only. SECI's reliance on clauses of agreement which enables it to sale of energy to third party (outside State) under circumstances of MSEDCL's default or MSEDCL's refusal to buy excess generation, for demonstrating possibility of sale of electricity to more than one State, cannot be allowed

as ground for deciding main nature of contract (inter-state/intra-state). Hence, the Commission rules that SECI is acting as intra-State Trader in the present matter.

.....
17.4. Parties have already admitted that PPA and PSA in the present matter are signed on back to back basis. This can be further corroborated by looking at the following condition of RfS document published by SECI for selection of SPD: “3.14.4. Separate back-to-back Power Sale Agreements (PSAs) will be executed by SECI with the Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL) for sale of solar power to them” Thus, SPD while submitting their bids was aware that power will be sold to MSEDCL under the PSA which would be signed separately by SECI. The Commission further notes that Schedule I of PSA signed between MSEDCL and SECI has listed details of PPA signed by SECI with selected SPD. This clearly establishes that PPA and PSA in the present matter are back to back agreements.

17.5. In view of the above analysis, the Commission concludes that as an admitted fact all SPDs selected under Maharashtra specific RfS and their solar projects are located within the State of Maharashtra. All of them are selling electricity to MSEDCL under back to back PPA and PSA through SECI which is acting as a trading licensee with a trading margin of Rs. 0.07/kWh. This clearly shows that transaction involve are within the State of Maharashtra. Hence, Commission rules that it has jurisdiction to adjudicate on dispute arising out of PSA/PPA in the present matter.”

Thus, while upholding its jurisdiction in the present matter, the Commission has also observed that PSA and PPA in the present matter have been signed on back-to-back basis and SECI is acting as trading licensee between SPD and MSEDCL.

11. Having heard parties on merits of the matter, the Commission notes that MSEDCL’s claim for compensation is broadly divided into following two parts:
 - a. Compensation for shortfall in generation
 - b. Passing on amount of bank guarantee of SPD invoked by SECI and reduction in tariff to MSEDCL.

The Commission is addressing these issues in the following paragraphs.

12. Issue a: Compensation for shortfall in generation:

- 12.1. As against MSEDCL’s claim for compensation towards shortfall in supply of solar power, SECI has submitted that as per the provisions of PPA and PSA, it is not liable to

pay any compensation before actual commissioning of the project and any claim for the shortfall in supply of minimum energy for the period prior to the date of actual commissioning and commercial operation of the solar power projects is erroneous. Further, post commissioning period, such compensation is payable only if SPD pays it to SECI as PSA and PPA have been signed on back-to-back basis and hence unless SPD pays compensation to SECI, it cannot pay it to MSEDCL.

- 12.2. MSEDCL rebutting the submission of SECI, has submitted that SECI being an “Electricity Trader” cannot earn anything more than 7 Paise/unit which is the margin fixed not only by the CERC but also under the PSA. The PSA and PPA are enforceable on back-to-back basis as per the PSA, the liability of SECI comes into effect from the date of execution of PSA.
- 12.3. In this regard, the Commission notes that MSEDCL has relied upon following provision of PSA for seeking compensation on account of short supply of energy in any contract year:

Article 6.8.2 of the PSA:

*“The Buying Utility, at any time during a **Contract Year**, shall not be obliged to purchase any additional energy from the SECI beyond 1040.303 Million kWh (MU) as per PPAs signed by SECI with the SPD for solar PV projects. If for any Contract Year, it is found that the SECI has not been able to supply minimum energy of 803.87 Million kWh (MU) till the end of 10 years and 756.584 Million kWh (MU) for the rest of the Term of the Agreement, as per PPAs signed by SECI with the SPDs for Solar PV Projects, on account of reasons solely attributable to the SECI, the such non-compliance shall make SECI liable to pay such compensation and SECI shall duly recover such compensation from the SPDs under the SECI -SPD PPAs to enable the buying Utilities to pay such amount. This compensation shall be equal to the compensation payable (including RECS) by the Buying Utility towards non-meeting of RPOs, if such compensation is ordered by the State Commission and proportional to the amount of shortfall of solar energy during the contract Year. This compensation shall be subject to the adjustment made in energy generated in case of non-availability of grid for evacuation which is beyond the control of SPD and for Force Majeure identified under PPA with SECI affecting supply of solar power by SPD.” (Emphasis Added)*

It is important to note that the above provision of PSA signed between MSEDCL and SECI has referred to PPA signed between SECI and SPD. This clearly established that

SECI's obligation of supplying energy depend upon energy generated by SPD under the PPA.

- 12.4. Further, PPA signed between SECI and SPD has following provision for compensation on account of shortfall in energy supply:

“4.4 Right to Contracted Capacity & Energy

4.4.1 SECI, at any time during a Contract Year, shall not be obliged to purchase any additional energy from the SPD beyond 19.272 kWh (MU). If for any Contract Year, it is found that the SPD has not been able to generate minimum energy of 14.892 Million kWh (MU) till the end of 10 years from the COD and 14.016 Million kWh (MU) for the rest of the Term of the Agreement, on account of reasons solely attributable to the SPD, the non-compliance by SPD shall make SPD liable to pay the compensation provided in the PSA as payable to Buying Utilities and shall duly pay such compensation to SECI to enable SECI to remit the amount to Buying Utilities. This will, however, be relaxable by SECI to the extent of grid non-availability for evacuation, which is beyond the control of the developer. This compensation shall be applied to the amount of shortfall in generation during the Contract Year. The amount of compensation shall be equal to the compensation payable (including RECs) by the Buying Utilities towards non-meeting of RPOs, if such compensation is ordered by the State Commission. However, this compensation shall not be applicable in events of Force Majeure identified under PPA with SECI affecting supply of solar power by SPD.” [emphasis added]

Similar to PSA which has reference to PPA signed between SECI and SPD, above quoted provision of PPA has also referred to PSA signed between MSEDCL and SECI and stipulates that SECI shall be eligible for recovering compensation from SPD for short supply of energy in any contract year so that the same can be remitted to MSEDCL under the PSA.

- 12.5. Above provision of PSA and PPA clearly established that compensation for short supply of energy in any Contract Year is recoverable by SECI from SPD for remitting it to MSEDCL. This clearly establishes back-to-back arrangement of SPA and PPA.
- 12.6. MSEDCL has relied upon definition of Contract Year and Effective Date in PSA and contended that Contract Year under the PSA starts from first year of signing of PSA without any linkage with commissioning of generator. Accordingly, MSEDCL has sought compensation for short supply of energy. In the opinion of the Commission, this approach of MSEDCL is not correct. As already established above, payment of compensation for short supply of energy is on back-to-back basis and it is recovered from SPD and paid to

MSEDCL. It would be incorrect to treat Contract Year in PSA for seeking compensation for shortfall in generation independent of Contract Year in PPA. In fact, Contract Year as defined in PPA is more relevant for claiming compensation for short supply of energy under PPA and PSA. Said definition of Contract Year under the PPA is reproduced below:

“Contract Year” : Shall mean the period beginning from the Effective Date and ending on the immediately succeeding March 31 and thereafter each period of 12 months beginning on April 1 and ending on March 31 provided that:

(i) In the financial year in which the COD would occur, the Contract Year shall end on the date immediately before the COD and a new Contract Year shall commence once again from the COD and end on the immediately succeeding March 31, and thereafter each period of Twelve (12) months commencing on April 1 and ending on March 31, and (ii) provided further that the last Contract Year of this Agreement shall end on the last day of the Term of this Agreement.

Thus, in terms of the above provision of Contract Year stipulated in PPA, Contract Year start in the financial year in which COD of the project occurs. Therefore, compensation for short supply of energy which is linked to Contract Year cannot be claimed before COD of the project of SPD. Therefore, the Commission rules that MSEDCL claims related to compensation towards short supply of energy before COD of SPD’s project which has been tied up on back-to-back basis is not correct.

12.7. However, it is important to note that such compensation for short supply of energy is applicable post COD of the project and SECI in its submission has also agreed with the same. Accordingly, MSEDCL may revise its claim for short supply of energy and include only for period post COD of the projects. On submission of such revised claims, if any, SECI shall make payment towards the same as per provisions of PSA/PPA.

13. Issue b: Passing on amount of bank guarantee of SPD invoked by SECI and reduction in tariff to MSEDCL.

13.1. MSEDCL has claimed that as per the Article 4.6 and Article 5 of PPA, signed between SECI and the SPDs, it is eligible for the amount of bank guarantee encashed by SECI for delay in commissioning of the projects and also ‘Reduction in Tariff’ due to further delay in project COD.

13.2. SECI has opposed such contention of MSEDCL and has stated that PSAs signed with MSEDCL do not have any clause related to reduction in tariff and instead stated that PSA

has stipulated levy of fixed tariff through the period of PSA. SECI has also contended that such amount received from encashment of bank Guarantee and reduction in tariff under the PPA is deposited under the Fund created as per guidelines of MNRE for payment security mechanism and hence such amount cannot be passed on to MSEDCL.

- 13.3. In this regard, the Commission notes that Article 4.6 of PPA dated 3 August 2016 executed by SECI with SPDs under JNN SM guidelines reads as follows:

“4.6 Liquidated Damages for delay in commencement of supply of power to SECI

4.6.1 If the SPD is unable to commence supply of power to SECI by the Scheduled Commissioning Date other than for the reasons specified in Article 4.5.1, the SPD shall pay to SECI damages for the delay in such commencement of supply of power and making the Contracted Capacity available for dispatch by the Scheduled Commissioning Date as per the following:

- a) Delay up to one (1) month – SECI will encash 20% of the total Performance BG on per day basis and proportionate to the Capacity not commissioned.*
- b) Delay of more than one (1) month and upto three months – SECI will encash remaining Performance BG on per day basis and proportionate to the Capacity not commissioned.*

In case the commissioning of the Power Project is delayed beyond three (3) months from the Scheduled Commissioning Date, the pre-fixed tariff given in the Article 9.1 shall be reduced at the rate of half paisa (0.50 paisa) per kWh per day of delay in such remaining capacity which is not commissioned.” [emphasis added]

The Commission notes that as per the above Article of the PPAs signed between SECI and the SPDs, the SPD is penalized, through encashment of PBG and reduction in tariff, for not commissioning the project as per the given timelines.

- 13.4. However, SECI has stated that such money received on account of Liquidated Damages (comprising of Bank Guarantees amount or from reduction of tariff (if any)) is required to be deposited in a separate fund under Payment Security Mechanism to be maintained by SECI under the guidance of Ministry and New and Renewable Energy (MNRE) for utilization as decided by the MNRE. The Clauses governing such creation of fund under the JNN SM and NSM guidelines are reproduced below:

Clause 4.5 of the JNN SM Guidelines

“4.5 Payment Security Mechanism

*SECI shall set up a payment security mechanism in order to ensure timely payment to the developers. This fund will have a corpus to cover 3 months payment. **The money received from encashment of BGs, interest earned on this fund, incentives for early payment and the grants from Government/ NCEF will be used to build this fund.** The Ministry of New and Renewable Energy will frame Rules to operate this fund. Any charges incurred by SECI on account of litigation related to implementation of the Scheme shall be charged to this account. The expenses on account of short term open access charges, UI charges, fund requirements for furnishing security deposits in the form of Bank Guarantee/ LCs to STUs in accordance with BPTA or associated charges etc. may be utilized from PSM.”*

(Emphasis Added)

Clause 4.5 of NSM Guidelines

4.5 Payment Security Mechanism

*SECI will establish a payment security fund to cover delays/defaults in payments to SECI by buying entities (DISCOMs/State utilities/bulk consumers), so that timely payment to developers could be ensured. This fund will be gradually enhanced to cover three months payment for the projects set up under three VGF schemes i.e. 750 MW, 2,000 MW and 5,000 MW. National Clean Energy Fund (NCEF) will provide Rs. 500 crore to operationalize the payment security mechanism. **The money received from encashment of BGs, interest earned on this fund, incentives for early payment and the grants from Government/ NCEF will be used to build this fund.** MNRE will decide the amount to be given to the Payment Security Fund in each Financial Year from 2015-16 to 2019-20. Any charges incurred by SECI on account of litigation related to implementation of the Scheme shall be charged to this account. The expenses on account of short term open access charges, UI charges, fund requirements for furnishing security deposits in the form of Bank Guarantee/ LCs to STUs in accordance with BPTA or associated charges etc. may be utilized from PSM. The guidelines for utilization of the Fund are as follows:*

1) Payment security fund will be utilized for the following purposes:

(a) To make timely payment to Solar Project Developers in case of delay in realizing the payment from the buying utilities.

(b) For providing security in the form of Letter of Credit/ Bank Guarantee for the purpose of obtaining long-term open access, transmission charges, etc. not envisaged at the time of signing of PSA/PPA and applicable charges as per Bulk Power Transmission Agreement (BPTA) signed with CTU/STU in line with the applicable regulations.

(c) To make the differential payment to the developers from the agreed PPA rate in case of short recovery of tariff from the buying utilities based on average pool pricing due to policy/regulatory issues and transmission-evacuation/open access constraints etc.

(d) To make the payment on account of short-term open access charges, Deviation Settlement Mechanism (DSM) charges, as per applicable regulations.

(e) Any charges on account of litigations and arbitration awards, etc. related to implementation of the scheme including issues arising out of operational difficulties of PPA/PSA/VGF Securitization.

2) Operation Mechanism: SECI shall open a separate flexi bank account and the funds shall be deposited and operated as per MNRE approved guidelines. SECI shall utilize the funds for the purpose defined in the guidelines and utilization details shall be reported to MNRE on quarterly basis”

13.5. The Commission observes that in order to make timely payments to the developers (in case of any default by beneficiary Discoms) and for other operational activities, both JNNSM and NSM Guidelines have specified development of a Payment Security Fund. The Commission further notes that to keep the Payment Security Fund afloat, the following sources are utilized:

- a. money received from encashment of BGs,
- b. interest earned on this fund,
- c. incentives for early payment and
- d. the grants from Government/ NCEF

Accordingly, money received from encashment of BGs has to be deposited into above stated fund. Hence, MSEDCL cannot claim such amount from SECI. However, MNRE in its guidelines has specified a ceiling limit of such fund i.e. three months of payments to the projects setup under the guidelines. Once such limit is reached, benefit of any subsequent encashment of BG would need to be passed on to MSEDCL. To enable MSEDCL to claim such benefit, SECI is directed to provide details of fund created under MNRE guidelines, its ceiling level considering three months payment to the project and details of BG encashed, if any, subsequent to reaching such ceiling limit of funds. Based on such details, if applicable, MSEDCL may claim amount received by SECI towards encashment of BG.

13.6. Further, abstract of MNRE’s guidelines reproduced above clearly indicate that benefit of reduction in tariff accrued to SECI due to delay in COD of the project need not be deposited in above referred fund created for payment security mechanism. It is admitted fact that as per Article 4.6 of PPA signed by SECI with SPDs (reproduced at para 13.3 above), tariff rate stipulated in PPA would be reduced if the project is delayed beyond 3

months of scheduled COD. SECI did not oppose or refute the claim that it has reduced the tariff of the projects whose COD delayed beyond 3 months as per provisions of PSA. But SECI has declined to pass on such benefit of reduced tariff to MSEDCL on the ground that as per PSA signed with MSEDCL, tariff for sale of energy is fixed and there is no provision for reduction in tariff. In this regard, provision related to tariff rate in PSA is reproduced below:

“ARTICLE 5: APPLICABLE TARIFF

5.1.1 The Tariff for Solar Power of Individual projects shall be tariff determine from the reverse auction process mentioned in the RfS plus trading margin of Rs. 0.07/kWh (maximum possible being Rs. 4.50/kWh including trading margin of Rs 0.07/kWh) fixed for entire term of this Agreement.

5.1.2 The applicable tariff shall be the weighted average tariff of all the commissioned projects capacity as per Article 14.1, till the end of the term of the Agreement. The Buying Utility shall make the Tariff Payments to SECI as per the provisions of this Agreement” [emphasis added]

As can be seen from the above provision of PSA, tariff for sale of energy to MSEDCL is linked to tariff discovered for individual projects through reverse auction process plus SECI’s trading margin of 7 paise/kWh. Such tariff of individual project is stipulated in the PPA signed by SECI with SPD based on reverse auction process. It is also important to note that above provision of PSA has put higher limit i.e. Rs. 4.50/kWh of tariff which can be levied to MSEDCL, but there is no lower limit of tariff.

- 13.7. As PSA has referred to the tariff discovered through reverse auction process as per RfS for selection of SPDs. Such discovered tariff is stipulated in the PPA signed by SECI with SPDs and is always subject to change viz. reduction in tariff for delay in project beyond 3 months from scheduled COD or increase in tariff on account of Change in Law event. When there is increase in tariff on account of Change in Law, SECI recovers the same from beneficiary Dicoms, which is contradictory to SECI’s claim that tariff under FSA is fixed for the tenure of FSA. Therefore, when there is reduction in tariff on account of delay in commissioning of the project, SECI will have to pass on the benefit of the same to MSEDCL. This would also be consistent with back-to-back nature of PSA and PPA wherein trader has to pass on any liability or benefit from buyer to seller and vice-versa.
- 13.8. From the detailed project commissioning status submitted by SECI, it is observed that number of projects have been commissioned with delay more than 3 months. All such projects must have been subjected to reduced tariff as per provision of PPA and SECI

must have accrued benefit of reduced tariff. Therefore, the Commission directs SECI to pass on any benefit accrued to it on account of reduction in tariff of SPD, to MSEDCL within a month and bill the MSEDCL for energy supplied through such projects at reduced rate with effect from upcoming billing cycle.


14. Hence, the following Order.

ORDER

1. Case No. 346 of 2019 is partly allowed.
2. Solar Energy Corporation of India Limited shall pass on following benefits to Maharashtra Electricity Distribution Co. Ltd:
 - a. Compensation for short supply of energy during Contract Year post COD of the project.
 - b. Amount towards encashment of bank guarantee for delay in commissioning of the project if such bank guarantee has been encashed post creation of fund for payment security mechanism equivalent to three months payments to the projects commissioned under the applicable MNRE guidelines.
 - c. Amount of benefit accrued due to reduction in tariff of the project due to delay in commissioning of the project and henceforth raise the bill at such reduced tariff rate.
3. Solar Energy Corporation of India Limited shall share the above stated details to Maharashtra Electricity Distribution Co. Ltd and pass on any accrued benefit as directed above within a month from the date of this Order.

Sd/-
(Mukesh Khullar)
Member

Sd/-
(I.M. Bohari)
Member


(Abhijit Deshpande)
Secretary

