

**JOINT ELECTRICITY REGULATORY COMMISSION
FOR THE STATE OF GOA AND UNION TERRITORIES
GURUGRAM**

CORAM

Ms. Jyoti Prasad, Member (Law)

Petition No. 59/2021

Date of Hearing: 24.02.2022

Date of Order: 31.03.2022

In the matter of:

Seeking the approval of the Commission for purchase of 100 MW Solar Power from ISTS Connected Power Projects through M/s NTPC Ltd. and to adopt the tariff as determined through competitive bidding process.

In the matter of:

The Electricity Department,
Puducherry.

.....Petitioner

Versus

ABC Solar (India) Pvt. Ltd.

..... Respondent No.1

NTPC Limited

..... Respondent No.2

Present

For the Petitioner

Shri T. Chanemougam – Superintending Engineer cum Head of Department, Electricity Department, Puducherry

For the Respondent No.1

Shri Nishant Kumar, Advocate

Respondent No. 2

1. Shri Sakie Jakharia, Advocate

2. Shri Ishpaul Uppal ,AGM Commercial
3. Shri Malkhan Singh Nagar, DGM, Corporate Commercial – RE

ORDER

The Petitioner, Electricity Department Puducherry (EDP), through this Petition sought the approval of the Commission under Section 86 of the Electricity Act, 2003 for Power Sale Agreement (PSA) executed between Electricity Department, Puducherry and NTPC Limited for 100 MW of Solar Power.

The Commission has received applications under Order 1, Rule 10 of Code of Civil Procedure for impleadment from ABC Solar (India) Pvt. Ltd. and NTPC Ltd. The Commission has heard the applicants and Petitioner on 24.02.2022 and directed the Petitioner to implead ABC Solar (India) Pvt. Ltd. and NTPC Ltd. as Respondent No.1 and Respondent No. 2 respectively.

The Commission has heard the Petitioner and the Respondents in detail. The Petitioner has submitted his submissions in brief as under:-

1. That with the objective to comply with the Renewable Purchase Obligations (RPO) as part of initiatives taken has requested NTPC Ltd. for allocation of 100 MW of Solar Power from the ISTS connected Renewable Energy Power Projects being developed by it.
2. That NTPC Ltd. has offered 100 MW of Solar Power to the Petitioner from 300 MW ISTS Connected Solar Power Project being developed at Todiya Village, Jaisalmar, Rajasthan. The tariff of the Solar Power offered is Rs 2.63/Kwhr plus the trading margin

of Rs 0.07/Kwhr, aggregating to Rs 2.70/Kwhr. The tariff of Rs 2.63/Kwh price is discovered through competitive bidding process.

3. That as per Order No. 23/12/2016-R&R dated 15.01.2021 of Ministry of Power, Government of India, waiver of Inter-state transmission charges and losses on transmission of the electricity generated from solar and wind sources of energy is applicable for the power plants commissioned till 30.06.2023. This waiver is available for twenty five years from the date of commissioning of the power plant provided the sale of power from the projects is utilised for compliance of the RPO of the buying entity and such power projects are awarded through competitive bidding process in accordance with the guidelines issued by Central Government.
4. That the above mentioned Solar Power Plant being setup by ABC Solar (India) Private Limited from which the power allocation is made to the Petitioner has been awarded through competitive bidding process and the plant is likely to be put into commercial operation well before June, 2023. Further, the solar energy purchased from this power project would be utilised by the Petitioner towards compliance of its RPO. As such, these projects qualify for waiver of Inter-state transmission charges and losses on transmission of the Renewable Energy up to the peripheral grid of the Petitioner. Availing the waiver as stated above would benefit the Petitioner in achieving RPO.
5. That the Petitioner has obtained necessary administrative approval of the Government of Puducherry for purchase of said 100 MW of Solar Power through NTPC Ltd. The Power Sale Agreement (PSA) with NTPC Ltd. for purchase of 100 MW of Solar Power was duly executed on 05.01.2021.

6. That the total cost of the said solar power offered under this Power Sale Agreement including the trading margin is much less than that of present power purchase cost i.e. Rs 3.89/Kwhr (2021-22).

The Respondent No. 1 has submitted his submissions in brief as under:-

1. That the Respondent No. 1 has executed a Power Purchase Agreement (hereinafter referred to as the "PPA") with NTPC Ltd. (Respondent No.2) on 13.06.2020 for supply of 300 MW Solar Power on a long term basis.
2. That pursuant to the said allocation of capacity from the Respondent No. 1, NTPC Ltd. entered into back-to-back PSA dated 05.01.2021 with the Petitioner for supply of 100 MW Power. The remaining capacity of 200 MW was agreed to be sold to Madhya Pradesh Power Management Company Limited ("MPPMCL") in accordance with the terms of the Power Sale Agreement dated April 30, 2021, and the purchase of the said capacity and the trading margin of NTPC Ltd. was approved by the Madhya Pradesh Electricity Regulatory Commission ("MPERC") vide its Order dated May 27, 2021, in Petition No. 65 of 2020.
3. That it is pertinent to mention here that a Supplementary PPA was also entered into between the ABC Solar (India) Private Limited and NTPC Ltd. on 05.05.2021 after execution of the PSA dated 05.01.2021. The said supplementary PPA was executed for the purpose of expressly mentioning the intention of parties qua the back to back arrangement for supply of 200 MW Solar power to the State of Madhya Pradesh and 100 MW Solar power to Government of Puducherry on a long term basis.

4. That the Central Electricity Regulatory Commission (CERC) in its Order dated 08.09.2021 in Petition No. 126/AT/2021 adopted the tariff @ Rs 2.63/Kwh for the said solar project in terms of Section 63 of the Electricity Act, 2003 after observing that the selection of the successful bidders has been done and the tariff of the solar project has been discovered by the NTPC Ltd. through a transparent process of competitive bidding in accordance with Guidelines issued by Central Government under Section 63 of the Act.
5. That said project being developed by the ABC Solar (India) Private Limited is presently at an advanced stage and is likely to be partially commissioned i.e. 150 MW by 31.03.2022 and the remaining 150 MW by 30.04.2022.
6. That EDP hereby acknowledges and accepts that NTPC Ltd. is an Intermediary to facilitate the promotion of Solar Power Projects and to purchase and re-sell the electricity to the distribution licensees to enable them to fulfil the Renewable Purchase Obligation. The sale of electricity by NTPC Ltd. to EDP under this Agreement shall be entirely on a back to back basis.
7. That in accordance with the above and except as otherwise specifically provided in this agreement, the rights and obligations of EDP under this agreement shall be available and enforceable entirely and effectively on a back to back basis to the rights and obligations of the NTPC Ltd. in the PPA and in the event NTPC Ltd. is not in a position to enforce its rights against the ABC Solar (India) Private Limited or is subject to any obligation to be performed towards ABC Solar (India) Private Limited, EDP shall

be liable to perform such obligations or shall be entitled to such rights only on a mutatis mutandis basis, without any additional or independent exposure whatsoever to NTPC Ltd.

8. That except as otherwise specially provided in this agreement, EDP acknowledges and accepts that the terms and conditions of the PPA shall mutatis mutandis apply to this Agreement between the parties. EDP agrees to correspondingly fulfil, on back to back basis, all the obligations assumed by NTPC Ltd. towards ABC Solar (India) Private Limited. EDP further agrees, acknowledges and accepts that as an intermediary NTPC Ltd. is not assuming any obligation to EDP over and above the obligation which the ABC Solar (India) Private Limited shall duly perform under the PPA.”

The Respondent No. 2 has submitted his submissions as under:-

1. That NTPC Ltd. intends to facilitate the development of Solar Power Projects in India and sale of Solar Power to the Distribution Licensees in the States to enable them to procure Solar Power for the fulfilment of the Renewable Purchase Obligations.
2. That in response to the Commission’s specific query in relation to the terms in Clause 3.9, it is submitted that for Collateral Arrangement there was no insistence on an Escrow Arrangement or Arrangement to Hypothecate the Receivables of Puducherry. NTPC Ltd. did not insist on such arrangement and the payments for supply of electricity by NTPC Ltd. to EDP are presently secured by way of Letter of Credit considering the fact that Electricity Department, Puducherry is presently a Department of Government of Puducherry for which payments are secured through

budgetary allocations from Central Government to Government of Puducherry. Also since Puducherry has agreed to establish a Letter of Credit covering 135% of one month's estimated billing in respect of power supplied, therefore, this arrangement is suitable to all the parties in the PSA.

3. That Clause 3.11 - on Collateral arrangement also covers NTPC Ltd. for any changes that might take place in the future with respect to reorganisation of EDP or assignment of PPA to other organisation. In such an event, Clause 3.11 provides for an alternative payment security mechanism to the satisfaction of the NTPC Ltd. before assignment of this Agreement. It is for the Government of Puducherry to ensure that a separate Escrow Arrangement, through which receivables shall be routed as a backup to the Letter of Credit, is executed with a separate "Agreement to Hypothecate cum Deed of Hypothecation" to hypothecate their receivables to the extent required for payment of dues under the PPA by creation of first charge in favour of NTPC Ltd. This alternative arrangement is further necessitated as the Government of Puducherry has not signed the TPA (Tri-Partite Agreement) under the Scheme of "One Time Settlement of SEB Dues" of Government of India.

In relation to an additional query of the PPA as to the manner in which payment security fund is going to be maintained, it is submitted that the payment security mechanism shall be covered through Clause 10.4 specified in Power Sale Agreement.

4. That Clause 3.12 & 3.13 – in relation to the concern on double charging on termination or reallocation of power it is submitted that in such an event, the Electricity Department has to pay charges equivalent to:

- i) Average monthly billing of last twelve months
- ii) till capacity is reallocated to a third party

Therefore, there is no double charging or requirement to adjust. As the charges will be only for the period when the power remains unallocated to a third party. Also the charges will be that of the average of the monthly billing of the previous twelve months.

5. That Clause 3.21 – with regard to the provision for restoration of power within 30 days from the date of clearing all outstanding dues it is pertinent to note that the said provision contemplates of restoration of power when power is already diverted and sold to third party due to occurrence of events specified in Clause 3.16. Therefore, to cease sale to such third party and resume regular supply to EDP, 30 days notice to such third party shall be required and hence the requirement of 30 days to restore power, from the date of clearing all outstanding dues payable to NTPC Ltd. by EDP.

6. That for any claim of EDP against Respondent No. 2 in regard to performance of any obligation of NTPC Ltd. under this PSA for enforcement of any right of EDP against NTPC Ltd. under this PSA, the same will be subject to ability of NTPC Ltd. to enforce corresponding obligations assumed by the ABC Solar (India) Private Limited in the PPA. Such proceedings shall be initiated in consultation with the EDP.

7. That it is submitted that the reference to Central Commission in Clause 6.1.1 shall be modified as “Appropriate Commission” in matters of the PSA. It is therefore, submitted that the Commission may consider the following provisions as a substituted Clause in relation to Clause 6.1.1 which may be added as a Schedule to the PSA”

“6.1.1. This Agreement may only be amended or supplemented by a written agreement between the Parties, with the approval of the Appropriate Commission, if necessary. Subject to the provisions of the RfS Documents and keep this Agreement as principal Agreement, both Parties may execute further Agreement on similar terms and conditions.”

8. That regarding the concern for absence of a provision for Dispute Resolution in the PSA it is submitted that the following provision may be considered as a part of the PSA by way of a Schedule annexed to the PSA”

“Governing Law and Dispute Resolution”.

Governing Law

1.1.1 This Agreement shall be governed by and construed in accordance with the Laws of India. Any legal proceedings in respect of any matters, claims or disputes under this Agreement shall be under this jurisdiction of appropriate courts in Delhi.

9. That in response to the provision in Clause 5.1.1 being Event of Default, the concern regarding failure on behalf of EDP to evacuate power for a continuous period of one

day as provided in Clause 5.1.2 (ii), it is submitted that failure to evacuate for a continuous period of 1 day does not lead to termination or other penal consequences immediately. The said failure to evacuate only triggers the consequences of EDP Event of Default where under sufficient time and opportunity is provided to parties for consultation (60 days) and then another notice period (30 days) for termination in the event of continuation of such default.

10. That in relation to the Trading Margin of 7 paise instead of 2 paise agreed upon between the parties in the PSA, it is submitted that the same is in compliance with the Trading Licence Regulations of the CERC, under which parties can mutually agree on a trading margin. Relevant provision is extracted hereunder:-

“8(1)(d) For transaction under long term contracts trading margin shall be decided mutually between the trading license and the seller.

.....

Provided that in contracts where escrow arrangement or irrevocable, unconditional and revolving letter of credit as specified in clause (1) of Regulation 9 is not provided by the Trading Licence in favour of the seller, the Trading License shall not charge “Trading margin exceeding two (2.0) paise/Kwh.”

The Commission has considered the arguments advanced by the Petitioner & the Respondents. It has also carefully examined the Power Sale Agreement along with additional information filed by the Petitioner and the Respondents after passing of Interim Order dated 24.02.2022. It has also examined the relevant provisions of the Electricity Act, 2003 and Rules

& Regulations made thereunder and Order of Central Electricity Regulatory Commission (CERC) in Petition No. 126/AT/2021 dated 08.09.2021 filed by the NTPC Ltd for adoption of tariff under Section 63 of the Electricity Act, 2003 and the guidelines issued by the Ministry of Power dated 03.08.2017 for tariff based competitive bidding process for procurement of power from grid connected solar power projects for setting up of ISTS connected solar power projects.

The Commission is solely relying on Section 63, Section 86((1)(b) and 86(1)(e) and Clause 1(d) of Regulation – 8, Proviso to Regulation 8 (1) (d) and Regulation 8(1(f) of the Trading License Regulations of the Central Electricity Regulatory Commission:-.

Section 63 provides as under:-

Notwithstanding anything contained in Section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.

Section 86 (1(b) and Section 86 (1) (e) provides as under:-

(1) The State Commission shall discharge the following functions, namely: -

- (b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;
- (e) promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such

sources, a percentage of the total consumption of electricity in the area of a distribution licensee;

Clause (1) (d) of Regulation 8

“For transaction under long term contracts, the trading margin shall be decided mutually between the Trading Licensee and the seller.”

Proviso to Regulation 8(1)(d)

“8(1) (d).....

Provided that in contracts where escrow arrangement of irrevocable, unconditional and revolving letter of credit as specified in clause (1) of Regulation 9 is not provided by the Trading Licensee in favour of the seller, the Trading Licensee shall not charge trading margin exceeding two (2.0) paise/kWh.”

Regulation 8 (1) (f)

“For transactions under Back to Back contracts, where escrow arrangement or irrevocable, unconditional and revolving letter of credit as specified in clause (1) of Regulation 9 is not provided by the Trading Licensee in favour of the seller, the Trading Licensee shall not charge trading margin exceeding two (2.0) PAISE/KwH.”

The Commission has noted that NTPC Ltd. in the capacity of Intermediary Agency, invited proposals for setting up of ISTS connected Solar Power Projects on Pan- India basis, on “Build, Own and Operate” basis for an aggregate capacity of 1200 MW. NTPC Ltd. entered into a Power Purchase Agreement with ABC Solar (India) Private Limited (SPD) for 300 MW capacity.

Subsequently, NTPC Ltd. entered into Power Sale Agreement dated 05.01.2021 with the Electricity Department, Puducherry for 100 MW and Power Sale Agreement dated 30.04.2022 with Madhya Pradesh Power Management Company Limited (“MPPMCL”) for 200 MW. NTPC also entered into Power Purchase Agreement dated 13.06.2020 read with supplementary Power Purchase Agreement dated 05.05.2021.

The Central Electricity Regulatory Commission vide its Order dated 08.09.2021 in Petition No. 126/AT/20212, adopted tariff @ Rs 2.63 per Kwh for the said solar power project in terms of Section 63 of Electricity Act. After observing that an agreement of successful bidder has been done and the tariff of the solar project has been discovered by the NTPC Ltd. through bidding in accordance with the guidelines issued by the Central Government under Section 63 of Electricity Act, 2003. In addition to the tariff of Rs 2.63/Kwh there will be trading margin of Rs 0.07/ Kwh (as mutually agreed between the parties) to be recovered from the EDP in terms of the Power Sale Agreement. In this regard, Clause 1(d) of Regulation 8 of the Trading Licence Regulation of CERC provides as under:-

Clause (1) (d) of Regulation 8

“For transaction under long term contracts, the trading margin shall be decided mutually between the Trading Licensee and the seller.”

Proviso to Regulation 8(1)(d)

“8(1) (d).....

Provided that in contracts where escrow arrangement of irrevocable, unconditional and revolving letter of credit as specified in clause (1) of Regulation 9 is not provided by the Trading Licensee in favour of the seller, the Trading Licensee shall not charge trading margin exceeding two (2.0) paise/kWh.”

Regulation 8 (1) (f)

“For transactions under Back to Back contracts, where escrow arrangement or irrevocable, unconditional and revolving letter of credit as specified in clause (1) of Regulation 9 is not provided by the Trading Licensee in favour of the seller, the Trading Licensee shall not charge trading margin exceeding two (2.0) paise/KwH.”

Therefore, in case of failure of NTPC Ltd. to provide an Escrow Arrangement or irrevocable, unconditional and revolving Letter of Credit to the solar generators trading margin shall be limited to Rs 0.02/ Kwh as specified in Regulation 8(1)(d) & Regulation 8 (1)(f) of the Trading Licensee Regulations.

The Commission has further noted that NTPC Ltd. is not a grid connected entity in respect of solar power contracted under the Power Sale Agreement. The ABC Solar (India) Private Limited and the EDP are the grid connected entities. The sale of electricity by NTPC to EDP is entirely on a back to back basis with no liability on the NTPC Ltd. The rights and obligations of EDP under a Power Sale Agreement shall be available and enforceable entirely on a back to back basis to the rights and obligations of the NTPC Ltd. in the Power Purchase Agreement and rights of EDP shall be on a mutatis mutandis basis , without any additional liability to NTPC Ltd.

The Commission has further noted that Clause 6.1.1 of the Power Sale Agreement is in correct as it provides that this agreement may only be amended or supplemented by a written agreement between the parties with the approval of the Central Commission, if necessary.

The Commission is of the view that Central Commission shall be substituted by the “appropriate Commission”. Accordingly, the Commission has modified Clause 6.1.1 of the PSA.

Further, the Commission has noticed that there is no provision for Dispute Resolution in Power Sale Agreement. The Commission is of the considered view that the following Clause shall be added into the Power Sale Agreement: -

Governing Law and Dispute Resolution

This Agreement shall be governed by and construed in accordance with the Laws of India. Any legal proceedings in respect of any matters, claims or disputes under this Agreement shall be under the jurisdiction of appropriate courts in Delhi. Accordingly, the Commission has modified the Power Sale Agreement.

The Commission is of the view that in order to fulfil its RPO purchase of 100 MW Solar power under the said Power Sale Agreement will be advantageous to the Petitioner and will also help in reducing the level of pollution in the UT of Puducherry. Further the purchase of said solar power will reduce the tariff of consumers. The approval of the said Power Sale Agreement by the Commission will be a step forward to promote cogeneration and generation of electricity from renewable sources of energy which is one of the functions of State Commission under Section 86 (e).

The Commission agrees that the purchase of 100 MW solar power under the said Power Sale Agreement at the total cost of Rs 2.70/Kwh for 25 years is much less than that of present power purchase cost i.e. Rs 3.89/Kwh.

In view of the above, the Commission is inclined to approve the said PSA and accordingly accord its approval to the modified PSA for 100 MW Solar Power from NTPC Ltd. Under Section 86(1)(b).

Ordered accordingly.

Sd/-
(Jyoti Prasad)
Member (Law)

Certified Copy


(Rakesh Kumar)
Secretary