

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 20/MP/2021 along with IA No. 29/2021

Subject : Petition under Section 79(1)(c) of the Electricity Act, 2003 read with Regulation 33A of the Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009 and Section 56 of the Indian Contract Act, 1872 for relinquishment of connectivity and for release of Bank Guarantee dated 16.8.2018 (and amendment/extension thereof) in light of events subsequent which has rendered the Transmission Agreement for Connectivity dated 3.8.2018 frustrated/impossible to perform.

Date of Hearing : 19.3.2021

Coram : Shri P. K. Pujari, Chairperson
Shri I. S. Jha, Member
Shri Arun Goyal, Member
Shri P. K. Singh, Member
Shri Prakash S. Mhaske, Member (Ex-officio)

Petitioner : Vaayu Renewables Energy (Mevasa) Private Limited (VREMPL)

Respondent : Power Grid Corporation of India Limited (PGCIL)

Parties Present : Shri Krishnan Venugopal, Sr. Advocate, VREMPL
Shri Vishal Gupta, Advocate, VREMPL
Shri Divyanshu Gupta, VREMPL
Ms. Suparna Srivastava, Advocate, PGCIL
Shri Tushar Mathur, Advocate, PGCIL
Ms. Jyoti Prasad, PGCIL
Shri Bhaskar Wagh, PGCIL

Record of Proceedings

Case was called out for virtual hearing.

2. At the outset, in response to a specific query of the Commission regarding the Petitioner having filed two separate Petitions i.e. the instant Petition and Petition No. 586/MP/2020 with apparently contradictory reliefs/ prayers, learned senior counsel of the Petitioner submitted that Petition No. 586/MP/2020 had been filed by the Petitioner on 7.7.2020, *inter alia*, seeking further extension of time for achieving the milestones including the conditions of financial closure in light of force majeure conditions on account of Covid-19 pandemic outbreak. However, in view of the subsequent events/ developments, the Petitioner is no longer pursuing the Petition No. 586/MP/2020.

3. Learned senior counsel further submitted that the instant Petition has been filed in light of the events which has rendered the Agreement frustrated and impossible to perform, *inter alia*, to permit the Petitioner to relinquish connectivity granted vide Transmission Agreement for Connectivity dated 3.8.2018 (in short 'the Agreement') without being subject to any penalty and consequently direction to the

Respondent to release the Bank Guarantee dated 16.8.2018 furnished by the Petitioner. Learned senior counsel mainly submitted the following:

(a) The Petitioner has been granted Stage-II Connectivity for its 300 MW Wind Power Projects at the Jam Khambhaliya Pooling Station ('PS') and in terms of Clause 9.3.2 of the Detailed Procedure for Grant of Connectivity to Projects based on Renewable Sources to the inter-State Transmission System (in short 'the Detailed Procedure') read with order dated 30.12.2019 in Petition No.55/MP/2019, the Petitioner was required to achieve the financial closure by 31.8.2020.

(b) While the Petitioner had already acquired more than 50% of the land required for construction of its 300 MW Wind Power Projects as pre-requisite for grant of Stage-II Connectivity, the events subsequent have completely swept away the basis/ foundation of the Agreement rendering it completely frustrated/ impossible to perform.

(c) Revenue Department, Government of Gujarat vide its letter dated 27.11.2019 has completely stopped the allotment of land for Wind Projects from SECI Tranche - V onwards. It was also decided that for Wind Projects of SECI Tranche-V onwards, the land for project development shall only be provided to Wind Projects in the proposed Renewable Park being developed by private entities, which is more than 500 km away from the Petitioner's project site.

(d) Since 27.11.2019, Gujarat Energy Development Agency ('GEDA'), the nodal agency of renewable energy in Gujarat, has also stopped issuing Project approval to Wind Power Projects to be undertaken on private land in the State. GEDA may also be impleaded as party to the present Petition and asked to clarify on the above aspect.

(e) On 19.11.2020, Energy & Petrochemical Department, Government of Gujarat in its letter to SECI also clarified its policy decision that the revenue land shall only be provided to the Wind Power Project developers who have been selected in the bids for SECI Tranche-V onwards and that too in the identified Renewable Parks.

(f) These events, which are completely beyond the control of the Petitioner, have rendered it impossible for the Petitioner to set up of its wind power projects either on (i) private land; or (ii) revenue land of Government of Gujarat and to achieve the financial closure of the projects.

(g) Furthermore, the construction of Jam Khambhaliya sub-station is also facing a considerable delay and it is unlikely to achieve the commercial operation prior to the 31.3.2020. There is also a connectivity application for 500 MW by Reliance Industries Limited ('RIL') at Jam Khambhaliya PS and thus, if the bays allotted to the Petitioner are allocated to RIL, there would not be any unutilized capacity in Jam Khambhaliya PS and there would be no loss to PGCIL.

(h) Accordingly, the Petitioner has sought reliefs as prayed for by invoking Regulation 33A (Power to Relax) of the Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009 (in short 'the Connectivity Regulations') and Section 56 (Doctrine of frustration) of the Indian Contract Act, 1872. Reliance was also placed on the Commission's order dated 7.1.2020 in Petition No. 159/MP/2019 (Toramba Renewable Energy Pvt. Ltd. v. PGCIL) to contend that the Commission has

exercised its power under Regulation 33A of the Connectivity Regulations for release of bank guarantee without any penalty in similar circumstances.

(i) Since the Commission was not conducting the hearing in terms of order dated 28.8.2020 of the Hon'ble Supreme Court in Contempt Petition No. 429/2020 in C.A No. 14697/2015, the Petitioner had approached the Hon'ble Delhi High Court by way of Writ Petition (C) No. 9977/2020 (amongst others, for extension of time limit for achieving the various milestones) and thereafter, by Writ Petition (C) No.161/2021 (amongst others, for relinquishment of connectivity and release the bank guarantee) in view of subsequent events. In terms of the order dated 3.2.2021, the Hon'ble High Court disposed of the said Writ Petitions with direction to PGCIL not to take any coercive steps including invocation and/or encashment of bank guarantee till the first date of hearing before the Commission, which was directed to take place within a period of 30 days.

(j) The Petitioner has also filed IA praying for ad-interim order restraining PGCIL from revoking the Petitioner's Stage-II connectivity and from invoking the Bank Guarantee during the pendency of the Petition.

4. Learned counsel for the Respondent, PGCIL objected the admissibility of the Petition and mainly submitted the following:

(a) For relinquishment of connectivity, the Petitioner as such does not need either an order from the Commission or permission from PGCIL. The only issue that arises for consideration is the treatment of bank guarantee on such relinquishment.

(b) The ground of change in Govt. of Gujarat Policy on land acquisition, which was not considered by the Commission even for extension of time for achieving the financial closure in its order dated 30.12.2019 in Petition No. 55/MP/2019 filed by the Petitioner, cannot constitute a ground for pleading frustration of the Transmission Agreement.

(c) It is a settled position that in statutory contracts, which provide for statutory consequences, a plea of frustration of contract cannot be taken.

(d) The Petitioner in its representation to the PGCIL dated 11.12.2020 has clearly indicated that the Petitioner has backed out from the setting up of the Project on account of its commercial decision and not for any other reasons as put forth.

(e) The policies of Govt. of Gujarat relating to land acquisition as relied upon by the Petitioner were already prevalent when it approached the Hon'ble High Court in W.P (C) No 9977/2020 seeking for extension of time for achieving the financial closure. Thus, the plea of frustration on the basis of these policies is merely an afterthought.

(f) As regards the connectivity application of RIL, it may be noted that RIL has applied for connectivity to ISTS for 500 MW as a bulk consumer by developing 400 kV dedicated line upto Jam Khambhaliya PS. However, since no provisions of the Act or the Connectivity Regulations provides for construction of dedicated transmission line by a bulk consumer, as noted by the Commission in its order dated 29.1.2020 in Petition No. 299/MP/2018 filed by BALCO, RIL has been advised to approach this Commission. Hence, the connectivity application of RIL is yet to materialize.

(g) Provisions for the Bank Guarantee and its encashment have been provided for to ensure that there is no underutilisation or wastage of

transmission elements constructed. The Transmission Agreement clearly provides for encashment of Bank Guarantee in case of failure of the Petitioner to achieve the financial closure within the stipulated timeframe.

(h) Only after taking into account the above circumstances, the Petitioner's prayer for interim relief may be considered.

5. After hearing the learned senior counsel for the Petitioner and the learned counsel for the Respondent, the Commission admitted the Petition and directed to issue notice to the Respondent. The Commission directed the Petitioner to serve copy to the Respondent immediately if not already served. The Respondent was directed to file its reply by 16.4.2021 with advance copy to the Petitioner who may file its rejoinder, if any, by 30.4.2021.

6. As regards the Petitioner's request for impleadment of GEDA as party, it was observed by the Commission that various documents of Govt. of Gujarat relating to land acquisition/ allocation for setting-up of Wind Power Projects as relied upon by the Petitioner has already been placed on record by the Petitioner in support of its plea, and accordingly, there was no need to implead GEDA as party to the present Petition.

7. It was further observed by the Commission that in its order dated 3.2.2021 in W.P (C) No. 161/2021 and Ors., the Hon'ble High Court has directed that no coercive steps including invocation and/or encashment of bank guarantee shall be taken till the first date of hearing before this Commission. The Commission also observed that the PGCIL has maintained the aforesaid position and has not yet taken or initiated any coercive steps including invocation and/or encashment of bank guarantee in terms of the aforesaid order. Accordingly, the Commission directed PGCIL not to take any coercive steps against the Petitioner including invocation of bank guarantee till the next date of hearing. Accordingly, the Commission disposed of IA No.29/2021.

8. The due date of filing of reply and rejoinder should be strictly complied with.

9. The Petition shall be listed for hearing in due course for which separate notice will be issued.

By order of the Commission

**Sd/-
(T.D. Pant)
Joint Chief (Legal)**