



Delhi Electricity Regulatory Commission
Viniyamak Bhawan, 'C' Block, Shivalik, Malviya Nagar, New Delhi – 110017.

F.11(1800)/DERC/2020-21/CF 6865/

Petition No. 34/2020

In the matter of: **Petition seeking extension of Scheduled Delivery Date (SDD) under Section 86(1)(b), (e) and (f) of the Electricity Act, 2003 read with Article 4.1.1 read with Article 7 of the respective Power Purchase Agreements dated 15.07.2015 executed between M/s TPDDL and SEI Renewable Energy Private Ltd., SEI Jyotiswaroop Power Private Ltd. and SEI Ravikiran Energy Private Ltd.**

SEI Renewable Energy Private Ltd. & Ors.

.... Petitioners

VERSUS

Tata Power Delhi Distribution Ltd.

.....Respondent

CORAM:

Hon'ble Sh. Justice S S Chauhan, Chairperson

Hon'ble Dr. A. K. Ambasht, Member

Appearance:

1. Mr. Sushael Buttan, Adv., Petitioners
2. Mr. Samarth Kashyap, Adv. Respondent

ORDER

(Date of Order: 05.03.2021)

Background

1. The present Petition is filed by SEI Renewable Energy Private Ltd. ("SEI Renewable"), SEI Jyoti Swaroop Power Private Limited ("SEI Jyotiswaroop") and SEI Ravikiran Energy Private Ltd. ("SEI Ravikiran"). The Power purchase Agreement dated 15.07.2015 (PPA) executed with M/s Tata Power Delhi Distribution Ltd. (TPDDL) seeking extension of Scheduled Delivery Date ("SDD") of the respective 30 MW Solar Photovoltaic Power Generating Stations at District Shivpuri, Madhya Pradesh, i.e. cumulatively 90 MW capacity, (collectively the "Project") to 31.10.2020 for Force Majeure reasons i.e. due to outbreak of the Novel Coronavirus pandemic ("Covid 19") and consequent continuous lockdown and related restrictions adversely affecting the performance the Petitioners under the PPA with the Respondents.

Submissions of the Petitioner

2. The Petitioner has mainly submitted as under:
 - (i) That as per Second Supplementary PPA dated 17.01.2020, the SDD had been extended to 20.04.2020 and the same was submitted for the approval of the Commission vide I.A. No. 02 of 2020 in Petition No. 58 of 2014. The Commission

vide Order dated 22.07.2020 has granted approval to the Supplementary PPA dated 17.01.2020. However, owing to the outbreak of COVID-19 and consequent lockdown and its related restrictions, the project commissioning works have been severely impaired and therefore, are seeking further extension of SDD to 31.10.2020.

- (ii) That primary ground on which the Petitioners are seeking extension of SDD from 20.04.2020 to 31.10.2020, is an account of Force Majeure reasons i.e. the outbreak of the Covid-19 and its related restriction which resulted into a countrywide lockdown. That as a result of COVID-19, supply chains have been severely affected and there has been demobilisation of manpower resulting in the suspension of works.
 - a) The Ministry of Finance, Government of India ("MOF") on 19.02.2020 had issued an office Memorandum ("OM") declaring the outbreak of COVID-19 to be an event of Force Majeure.
 - b) Ministry of New and Renewable Energy, Government of India ("MNRE") on 20.03.2020 and 17.04.2020 had issued OM's declaring the outbreak of COVID-19 and related restrictions to be an event of Force Majeure and allowing extension of time in schedule commissioning date of projects due to the impact of COVID-19.
 - c) On 30.06.2020, MNRE vide its Office Memo No. F.No. 283/1/2020 Grid Solar has clarified that for the purpose of MNRE's Memo dated 17.04.2020, the period of lockdown is to be treated from 25.03.2020 to 31.05.2020. MNRE also directed the RE agencies to grant extension of time for RE Projects equivalent to the period of lockdown and additional 30 days for normalization.
 - d) On 13.08.2020, MNRE vide its Office Memo No. F.No. 283/18/2020 Grid Solar has clarified that this OM was issued in supersession of earlier OM's on the subject and the MNRE conveyed its decision that all Renewable Energy (RE) implementing agencies will treat the lockdown due to COVID-19 as Force Majeure. Further, in the said OM MNRE directed that all RE Projects under implementation as on the date of lockdown shall be given a time extension of 5 months from 25th March, 2020 to 24th August, 2020. It was further clarified in the said OM that this blanket extension, if invoked by RE developers will be given without case to case examination and no documents/evidence will be asked for such an extension.
- (iii) That as per the agreed terms arrived between TPDDL and the Petitioners, the SDD of the Project was agreed to be fixed as 20.04.2020. In this regard, Supplementary Agreement dated 17.01.2020 were executed between the parties, and the same was placed before the Commission for approval by way of IA No. 02.2020 in Petition No. 58 of 2014.
- (iv) That the Project Status Presentation submitted by the Petitioners clearly demonstrates that the progress and pace of the multiple development activities pertaining to the evacuation system, status of Solar PV, inverter and other key materials required for the construction and development of the project, showing the earnest and diligent efforts made by the Petitioners. However, the said progress has been disrupted by the global pandemic Covid-19 and its related restrictions.
- (v) That Covid-19 and its related restrictions squarely fall within the definition of force majeure as per Article 7.3.1 (c) of the PPA and for which relief in terms of Article 7.7 read with Article 4.1.1 ought to be granted to the Petitioner.
Article 7.3.1 (c) of the PPA is reproduced as follows: -

"7.3 Force Majeure

7.3.1 A 'Force Majeure' means any event or circumstance or combination of events and circumstances as stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been foreseen or avoided if the Affected Party had taken reasonable care in performing its obligation.

a. Act of.....

b. Explosion.....

C. **any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riots, insurrection, terrorist or military action making the performance of obligations as specified herein as impossible."**

- (vi) That from the perusal of Article 7.3.1 (c) of the PPA the following emerge consideration:
- i. The definition of Force Majeure is an inclusive definition and does not envisage all events and circumstances, which fall within the scope of Force Majeure.
 - ii. Further, Article 7.3.1 (c) of the PPA clearly brings lockdown imposed by the Central and State Government within the purview of Force Majeure.
 - iii. The lockdown was initiated by the Central Government vide its notification dated 24.03.2020 but has continued by the State Government of Madhya Pradesh till 19th July, 2020. Therefore, the period of lockdown squarely falls within the purview of Article 7.3.1 (c) of the PPA as Force Majeure.
 - iv. The Petitioners in due compliance with procedures prescribed under the PPA has served the Force Majeure notice on 14.03.2020.
 - v. The procedure to claim relief for Force Majeure has been duly complied and the event of lockdown squarely falls within the purview of Force Majeure.
- (vii) That as per MNRE's OM dated 20.03.2020 read with OM dated 17.04.2020 and 30.06.2020, relevant implementing agencies have been directed to allow extension of time in scheduled commissioning due to impact of Covid – 19. In addition, on 30.06.2020 MNRE in furtherance to the OM dated 17.04.2020 clarified that the period of lockdown is to be treated from 25.03.2020 to 31.05.2020.
- (viii) That MOF's OM dated 19.02.2020 also recognises the disruption in supply chains as a Force Majeure event. In view thereof, relief under Article 7.7 of PPA ought to be granted to the Petitioners in the form of extension of SDD and relief from making payments.
- (ix) That as a result of the lockdown, closing State Borders and suspension of all official and commercial work, material and equipment procured for the Project could not be transported from within the country, as well as outside the country to the project site.
- (x) Since majority of the work has already been completed by the Petitioners herein but on account of pendency of approval of the Supplementary PPA dated 17.01.2020 and the approval of revised SDD due to Covid-19, the Petitioners are not in the position to draw down funds from its Lender i.e. Tata Capital even though MNRE vide its OM dated 20.03.2020, 17.04.2020,

30.06.2020 and 13.08.2020 has granted blanket extension to RE Developers such as the Petitioners.

- (xi) That because of the Covid-19 both the Central and State Govt. imposed lockdowns, had restricted working hours, and imposed curfew to contain the spreading of Coronavirus. Under these circumstances, there has been significant adverse impact on timelines of project schedule.
- (xii) That on 29.09.2020, Petitioners/Applicants had written to TPDDL and apprised TPDDL that they are ready to commission the Project on 15.10.2020 in accordance with the PPA dated 15.07.2015 (as amended from time to time) and in accordance with the applicable provisions of the Act. Thereafter, on 06.10.2020, applicants again wrote to TPDDL and apprised that the Commissioning of the Project has been advanced to 09.10.2020 instead of 15.10.2020 as indicated in the email dated 29.09.2020.
- (xiii) On 19.10.2020, Ministry of Finance, Department of Expenditure vide its OM with reference to Para 9.7.7 of the "Manual for procurement of Goods 2017, clarified that the disruption of the supply chains is due to the spread of Covid-19 in China or any other country and the same should be considered as a case of natural calamity and Force Majeure Clause may be invoked.
- (xiv) The construction of the Petitioners' Projects was severely impacted much before the lockdown imposed on 25.03.2020 by the Government of India and effectively commenced from 19.02.2020.
- (xv) This Hon'ble Commission vide its letter dated 20.12.2019 and on the basis of which the 2nd Supplementary PPA was executed between the Petitioners and the Respondent on 17.01.2020 granted time to the Petitioner to extend their Project by 20.04.2020. Admittedly, the Revised Scheduled Deliver Date of 20.04.2020 fell right in the centre of pandemic.
- (xvi) That Force Majeure clause under the PPAs creates an embargo to take refuge under the said provision, unless the Petitioners are able to demonstrate that the performance has been affected. The said contention of TPDDL is untenable in the eyes of law for the reasons mentioned below:
 - i. China is the main source of supply of Solar PV Modules, inverters, connectors and other equipment. However, in February 2020, China had been struck with Covid-19, which had virtually brought life in China and many other countries, including India to standstill, which in turn affected the Routine Project operations.
 - ii. Moreover, Project operations were also affected because of the unavailability of labour, materials, equipment and other essential commodities required for completion of project.

Submissions of the Respondent

3. The Respondent has mainly submitted as under:

- (i) That the Commission has already accorded extension of time to the Petitioner and as per the Order of the Commission dated 22.07.2020 in I.A. No. 02 of 2020 in petition No. 58 of 2014(**Extension Order**), the SDD as on date stands as 20.04.2020(**Extended SDD**).
- (ii) That although the Petitioner's projects purportedly were affected by the outbreak of Covid – 19 and therefore, claims to be impaired for performing its obligations under the PPAs, however, the project related activities require to

be categorised for being impacted due to outbreak of Covid – 19. The construction activities to be undertaken by the Petitioners were not impacted till the announcement of country wide lockdown on 25.03.2020.

(iii) The Petitioners have failed to demonstrate their progress till 25.03.2020 and beyond 20.04.2020. The claims of Force Majeure intimated by the petitioner by way of its communications were duly intimated to the Commission.

(iv) The Force Majeure clause under the PPAs creates an embargo to take refuge under the said provision, unless the Petitioners are able to demonstrate that the performance has been affected, but only if to the extent that such events or circumstances are not within the reasonable control in performing its obligations.

COMMISSION ANALYSIS

4. We have considered the submissions of the Petitioner and the Respondent and all the documents available on record. Based on the Petition, replies, rejoinders and other materials placed on record, the following issues emerge for the consideration of the Commission:

Issue No. 1: Whether the claim of the Petitioner as regards extension of Schedule Delivery Date (SDD) of the respective 30 MW solar Photovoltaic Power Generating stations at District Shivpuri, MP i.e. Cumulatively 90 MW capacity to 31.10.2020 is a force majeure event in terms of the PPA and;

Issue No. 2: Whether the Petitioner is eligible for extension to shift the Schedule Delivery Date as per PPA?

We discuss the above issues in subsequent paragraphs.

Issue No. 1: Whether the claim of the Petitioner as regards extension of Schedule Delivery Date (SDD) of the respective 30 MW solar Photovoltaic Power Generating stations at District Shivpuri, MP i.e. Cumulatively 90 MW capacity to 31.10.2020 is a force majeure event in terms of the PPA?

5. The PPA was signed on 15.07.2015 between TPDDL and M/s Sun Edison for procurement of 180 MW Solar power based on the Commission's approval in Petition No. 58 of 2014 which was eventually taken over by M/s Greenko on account of financial difficulties faced by M/s Sun Edison.
6. The Respondent, TPDDL has submitted that they were in receipt of communication from SEI Solarvana Pvt. Ltd. requesting for extension of date of commissioning of 90 MW solar projects out of 180 MW for TPDDL by 4 months from the scheduled COD (SCOD) of 21.11.2019. M/s SEI Solarvana Pvt. Ltd. sought extension on account of purported delay in resolution of land issues between Revenue Department and Forest Department of Govt. of Madhya Pradesh, which is beyond its reasonable control. Further, SEI Solarvana Pvt. Ltd. has furnished a letter dated 01.10.2019 from Pr. Secretary, New and Renewable Energy Department, Govt. of Madhya Pradesh wherein it was indicated that the issue of land is beyond the developer's control and quoted that the matter is being handled on priority and expected to be settle shortly.
7. SEI Solarvana Pvt. Ltd. also proposed to indemnify the Respondent for the losses owing to delay in commissioning beyond targeted date of 21.11.2019 in the following manner:
- i) Cost of Solar RECs (including GST) purchased by TPDDL for the delayed capacity till commissioning of respective capacities based on actuals.

- ii) Difference between TPDDL Average Pooled Power Cost and landed cost of Sun Edison's Solar power for the quantum under delay till commissioning of respective capacities.
8. Accordingly, the Commission vide its letter dated 20.12.2019 extended the SCOD by 4 months for the said project from the date of issuance of that letter subject to the following:
- i) SEI undertaking to indemnify TPDDL for the losses due to delay in commissioning.
 - ii) Risk for non-compliance of RPO for the intervening period due to delay in commissioning has to be hedged by TPDDL.
 - iii) Any arrangement made by TPDDL, due to this delay in SCOD of 90 MW SEI Solarvana Pvt. Ltd., in order to cater to the demand for the intervening period shall not have extra bearing on Power Purchase Costs over and above the levelised tariff approved for the SEI Solarvana Pvt. Ltd.
9. Further, MNRE vide OM dated 13.08.2020 decided that all Renewable Energy implementing agencies of the Ministry of New & Renewable Energy (MNRE) will treat lockdown due to COVID-19, as Force Majeure condition. All RE projects under implementation as on the date of lockdown, i.e. 25.03.2020, through RE Implementing Agencies designed by the MNRE or under various schemes of the MNRE, shall be given a time extension of 5 (five) months from 25.03.2020 to 24.08.2020. This blanket extension, if invoked by the RE developers, will be given without case to case examination and no documents/evidence will be asked for such extension.
10. In view of the Govt. of Madhya Pradesh letter dated 11.05.2020, the Commission vide letter dated 20.12.2019 extended the SCOD for the said project from 20.12.2019 to 20.04.2020. Further, for the period from 25.03.2020 till 24.08.2020, the blanket extension was provided by MNRE vide OM dated 13.08.2020 considering Covid-19 as Force Majeure condition. Therefore, the issue of Force Majeure is now left to be decided for the period from 25.08.2020 to 31.10.2020.
11. Article 4.0 of the PPA defines Supply of Power. The relevant extract of the Article 4.0 reads as under:
- "4.0 Supply of Power
 4.1 Commencement of Supply of Power to Procurer
 4.1.1 The **Seller should achieve complete commissioning of the project on or before Final Delivery Date unless prevented by Force Majeure.....**"
12. Further, Article 7.3 of the PPA defines Force Majeure. The relevant extract of the Article 7.3 reads as under:
- "7.3 Force Majeure
 7.3.1 A 'Force Majeure' means any even or circumstance or combination of events and circumstances as stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly of the Affected Party and could not have been foreseen or avoided if the Affected Party had taken reasonable care in performing its obligations:
 c) any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action making the performance of obligations as specified herein as impossible: or"
13. Further, the relief available in the Force Majeure is indicated Article 7.7 of the PPA. The relevant extract of Article 7.7 of the PPA reads as under:

"7.7 Available Relief for a Force Majeure Event

7.7.1 Subject to this Article 7:

- (a) No party shall be in breach of its obligations pursuant to this Agreement except to the extent that the performance of its obligations was prevented, hindered or delayed due to a Force Majeure Event;
- (b) Every Party shall be entitled to claim relief in relation to a Force Majeure Event in regard to its obligations as specified under this Agreement;
- (c) For avoidance of doubt, neither Party's obligation to make payments of money due and payable prior to occurrence of Force Majeure events under this Agreement shall be suspended or excused due to the occurrence of a Force Majeure Event in respect of such Party; Provided that no payments shall be made by either Party affected by a Force Majeure Event for a period of such event on account of its inability to perform its obligations due to such Force Majeure Event."

14. On 21.03.2020, Tata Power Solar Systems Limited (TPSSL), (who is the EPC Contractor of the Petitioner) issued a letter to Petitioner wherein it was stated that due to various restrictive movements within India because of COVID-19 there would be a delay in the supplies due to the low worker strength at factories for manufacturing of equipment and material. TPSSL would not be able to transport the supplies due to the lockdown situation, which would have a significant impact on the project schedule.
15. Further, we note that at Annexure 8 of Rejoinder filed by the Petitioner to the reply dated 02.11.2020 filed by the Respondent, TPDDL it is indicated that the Principal Secretary of Govt. of Madhya Pradesh vide its letter dated 11.05.2020 informed TPDDL **"that many of the Project works could not be continued due to COVID-19 particularly balance works relating to the plant 220kV connectivity with Madhya Pradesh Power Transmission Co. Ltd. (MPPTCL), NOC from the Forest Dept. for commencing the construction at the site are awaited."** Further in the said letter it was recommended to TPDDL for extension of 4 months in SCOD from date of forthcoming DERC Order for enabling developer to complete the project, as follows:

We are also given to understand that significant progress of the land resolution was underway from the Forest Department, which unfortunately could not be concluded due to the prevailing global COVID-19 pandemic, and the challenge faced by the administration on that account.

...

...TPDDL may consider granting extension of SCOD timeline by 4 months from the date of the forthcoming DERC order for enabling the developer to complete the project and commission the entire 180 MW capacity as per the PPA in force.

16. Thus, it is clear from the above that Covid-19 and its related restrictions qualify as a Force Majeure. Further, in terms of Article 7.7.1 of PPA the relief for Force Majeure is to be granted with regard to the event and the consequences, which ensue from the event of Force Majeure. Also, from the chronology of events as indicated in paragraphs above, it is noted that Petitioner cannot be faulted for non-action at any stage. The Respondent vide Affidavit dated 02.11.2020 has submitted that the remaining capacity of the plant has achieved Commercial Operation on 27.10.2020. The Petitioner vide letter dated 26.10.2020 has submitted that each of SEI Ravikiran Energy Private Limited, SEI Jyotiswaroop Power Private Limited and SEI Renewable Energy Private Limited will achieve commercial operation on 27.10.2020, in full compliance of the respective PPA read with the Supplementary PPA and Second Supplementary PPA. An email from NRLDC dated 26.10.2020 w.r.t. commencement of scheduling of the power from M/s SEI Sunshine Pvt. Ltd. to TPDDL w.e.f. 00:00 hours of 27.10.2020 is also on record. In view of the above, the period from 25.03.2020 to 24.08.2020 and that from 25.08.2020 to 27.10.2020 are reckoned under force majeure event.

Issue No. 2: Whether the Petitioner is eligible for extension to shift the Schedule Delivery Date as per PPA?

17. That as per the rejoinder, SEI Solarvana Pvt. Ltd. has submitted the progress detail of the project from 26.08.2020 to 27.10.2020 as follows:
- a) The Govt. of India issued various notifications on lifting lockdown restrictions and considering renewable energy sector as essential commodity, with the existing manpower available locally, works resumed with limited manpower by adhering COVID-19 safety norms.
 - b) The Govt. of India lifted all interstate travel restrictions on 26.08.2020. However, some states-imposed interstate travel restrictions, due to limited travel options and public transportation system, manpower could not turn up to projects. Restrictions were also imposed at the Project site work. Project execution work has commenced but with only 15-20% workforce and that too at reduced work place due to enforcement of social distancing regular disinfection, additional hygiene and sanitization at the Project site.
 - c) Due to Covid-19 at Shivpuri, slowly, manpower started increasing from last week of Aug'20 to it increased to required strength by 3rd week of Sep'20. Some of the workers who came to work in Petitioner's Project site, unfortunately also got infected due to corona virus. The Petitioners had to keep them under 14 days mandatory quarantine and then allowed for work by adhering COVID-19 safety measures. The Petitioners were able to increase the progress of works in the last week of September 2020 to the required level. And after that, works progress increased briskly and achieved COD on 27th October 2020. During Testing & Commissioning of projects, mobilization of Commission Engineer/Service Engineers was also put under mandatory quarantine due to the fact the man power was coming from across nation by buses/trains/flights etc. and completed the works.
 - d) After lifting of the lockdown, restoration of Project works to normalcy has been a slow process. The Petitioners received several communications from tis EPC contractor inter alia stating that they are struggling hard to increase the manpower because of workers from the other States are not willing to mobilize, shortage of raw materials etc.
 - e) During the month of Aug'2020, the Petitioner resumed mobilizing equipment like string inverter shipments and completed final delivery of the material. Further, during the month of Sep'20, the Petitioner took stock of erection activities which were pending.
 - f) Delhi State Load Despatch Centre vide its letter dated 13.10.2020 granted its consent for scheduling remaining 90 MW (out of 180 MW) under LTA from SEI Sunshine Power Pvt. Ltd. to TPDDL.
 - g) On 24.10.2020, Madhya Pradesh Power Transmission Co. Ltd. (MPPTCL) accorded for injection of power from 90 MW phase II (3 x 30 MW) of 180 MW Solar Power Projects of M/s SEI Sunshine Power Pvt. Ltd. connected at 220kV substation Shivpuri. The real time code for injection of power shall be issued by SLDC as and when request is made, through EE(T), MPPTCL, Shivpuri.
 - h) On 26.10.2020, the Petitioner informed MPSLDC, NRLDC, WRLDC, DSLDC, CTU and TPTDL that the Petitioner achieved commercial operations of their respective solar power plants on 27.10.2020 pursuant to synchronization of their projects with the grid on 24.10.2020.
 - i) MPPTCL on 27.10.2020 granted commissioning certificate to the Petitioner and indicated that all 3 SPV's (SEI Ravikiran Energy Private Limited, SEI Renewable

Energy Private Limited & SEI Jyotishwaroop Power Private Limited) (Total 90 MW) have been synchronized with grid on 24.10.2020 as per power injection permission given by SLDC Jabalpur.

18. It is observed that Article 7.3 read with Article 7.7 of the PPA provides for extension of period of scheduled delivery date or the revised scheduled delivery date, as the case may be, by a period for which the Seller has been affected by force majeure event. Therefore, in view of above Articles of PPA related to Force Majeure, facts placed on record and considering the grim situation of COVID-19 global pandemic, the prayer of the Petitioner related to extension of Scheduled Delivery Date (SDD) is granted upto 27.10.2020, without any additional cost burden to consumers.
19. The Respondent vide its affidavit dated 02.11.2020 has submitted that the period of delay between 26.08.2020 till actual delivery date has to be separately scrutinized by the Commission and for such delay the Respondent is entitled to receive indemnification payments along with interest charges till COD of balance 90MW projects.
20. In view of the above, summary of our decision with respect to the prayers of the Petitioner is as under: -
 - a. On account of Force Majeure condition, the extended Scheduled Delivery Date shall be 27.10.2020.
 - b. No indemnification payments will be payable to the Respondent for the period of delay between 25.03.2020 till Actual Delivery Date i.e. 27.10.2020.
21. The Petition is disposed off in terms of the above.
22. Ordered accordingly.

Sd/-
(A.K. Ambasht)
Member

Sd/-
(Justice S S Chauhan)
Chairperson