CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 206/MP/2020

Coram:
Shri I. S. Jha, Member
Shri Arun Goyal, Member

Date of Order: 5th February, 2021

In the matter of:

Petition under Section 79(1)(c) of the Electricity Act, 2003 read with section 79(1)(k) of the Electricity Act, 2003 along with regulation 111 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, seeking appropriate direction(s) and / or order(s) from the Commission in relation to provisions 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 which are preventing the petitioner from exercising its rights under certain provisions of the Power Purchase Agreement entered pursuant to competitive bidding guidelines 2017 with Solar Energy Corporation Of India Limited (SECI) and seeking the Commission to give effect to the detailed procedure as approved by the Commission vide its order dated 15.5.2018 and further seeking the Commission to issue consequential directions to Power Grid Corporation of India Limited in terms of the relief sought in the present petition.

And
In the matter of:

1. Renew Sun Waves Private Limited
Through: Authorised Signatory
Commercial Block-1, Zone 6,
Golf Course Road, DLF City Phase-V,
Gurgaon, Haryana – 122 009 **…. Petitioner**

Vs.

1. Power Grid Corporation of India Limited
(Central Transmission Utility)
Through: Chairperson
Saudamini, Plot No. 2, Sector- 29,
Near IFFCO Chowk,
Gurugram, Haryana- 122001

2. Ministry of New and Renewable Energy
Through: Secretary
Block-14, CGO Complex,
Lodhi Road, New Delhi-110 003

3. Solar Energy Corporation of India Limited,
Through: Chairperson
1st Floor, A Wing, O-3,
District Centre, Saket,
New Delhi, 110017 **…. Respondents**

Parties Present:

Shri Apoorva Mishra, Advocate, RSWPL
Ms. Molshree Bhatnagar, Advocate, RSWPL
Shri Sunei Kapoor, RSWPL
Shri Ishan Nagpal, RSWPL
Ms. Suparna Srivastava, Advocate, PGCIL
Ms. Nehul Sharma, Advocate, PGCIL
Ms. Jyoti Prasad, PGCIL
Ms. Swapnil Verma, PGCIL
Shri S. S. Raju, PGCIL
Shri A. K. Verma, PGCIL
Shri B. Dash, PGCIL

ORDER

The instant Petition has been filed under Section 79(1)(c) read with Section 79(1)(k) of the Electricity Act, 2003 (hereinafter referred to as "the Act") along with Regulation 111 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 (hereinafter referred to as "the 1999 CB Regulations"), seeking appropriate direction(s) and/ or order(s) in relation to provisions 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 (hereinafter referred to as "the 2009 Connectivity Regulations") preventing the Petitioner from exercising its rights under certain provisions of the Power Purchase Agreement (PPA) entered into with Solar Energy Corporation of India Limited (SECI) and seeking to give effect to the detailed procedure as approved by the Commission vide its order dated 15.5.2018.

2. The Petitioner has made the following prayers:

a) Allow the present Petition;

b) Issue appropriate direction(s) / order(s) to address and adjudicate the issue at the hand and eliminate restriction(s) that are being faced by the Petitioner in the implementation of certain provisions of the Competitive Bidding Guidelines based Power Purchase Agreements issued by the government instrumentalities;

c) Issue appropriate direction(s) / order(s) to eliminate hindrance in transfer of shares in terms of the Competitive Bidding Guidelines and the provisions of the Power Purchase Agreement entered between the Petitioner and the Solar Energy Corporation of India Limited.

d) Issue appropriate direction(s) /order(s) to allow the utilisation of the connectivity and / or access rights between two wholly owned subsidiary company of the same parent company / sister concerns and / or a company where the parent company exercises its control i.e. where the ownership is directly or indirectly, of more than 50 (fifty) per cent of the voting shares of such Company or right to appoint majority Directors."

Submissions of the Petitioner

3. The Petitioner, ReNew Sun Waves Private Limited, has submitted as under:

(a) The Petitioner is an Independent Power Producer (IPP) and a generating company within the meaning of Section 2(28) of the Act. The Petitioner is currently involved in the business of generation of electricity through wind, solar and roof-top solar power plants and has more than 4 GW of wind and has its presence in 18 States in India.

(b) Ministry of Power (MoP) has issued *"Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects"* vide Gazette Resolution dated 3.8.2017 (hereinafter referred to as "the Competitive Bidding Guidelines) under Section 63 of the Act for long term procurement of electricity from grid-connected Solar PV Power Projects, having size of 5 MW and above, through competitive bidding.

(c) Paragraph 13 of the Competitive Bidding Guidelines allows successful bidder to transfer 49% of its shareholding in the SPV (Special Purpose Vehicle)/ project company) executing the Power Purchase Agreement, to a third party at any time without approval of the Procurers. However, to transfer more than 49% of its shareholding in such SPV/ project company, prior approval of the Procurers is required if such transfer of shareholding is at any time prior to expiry of 1 (one) year from the COD (commercial operation date). Further, the Competitive Bidding Guidelines does not restrict change in the shareholding after the expiry of 1 (one) year (lock-in period) from the COD upon intimation to the Procurers.

(d) The lock-in period of 1 (one) year has subsequently been revised to 3 (three) years. The change/ modification is applicable for only those projects where the bids are initiated after the amendments have been given effect to i.e. July 2019. Although currently its projects fall under pre-amendment period, however, it is seeking the Commission's declaratory relief for the projects falling under post-amendment period.

(e) As part of NSM (National Solar Mission), SECI and NTPC have been inviting proposals for setting up grid-connected Solar PV Power Projects. One such recent proposal was made by SECI on 10.1.2019 that invited proposals for setting up grid-connected Solar PV Power Projects on "Build Own Operate" (BOO) basis for an aggregate capacity of 1200 MW and published Request for Selection (hereinafter referred to as "RfS") in terms of the Competitive Bidding Guidelines. RfS contained the Model PPA and PSA which are prepared in accordance with the Competitive Bidding Guidelines. On 10.1.2019, the Petitioner submitted its response to the RfQ/RfS, which were considered by SECI.

(f) Based on a reverse bidding process undertaken by SECI, the Petitioner was declared as one of the successful bidders. On 5.3.2019, SECI issued a Letter of Award for supply of 300 MW power, in favour of one of the wholly owned subsidiaries of the Petitioner. Subsequently, on 13.8.2019, the Petitioner and SECI executed a Power Purchase Agreement for supply of 300 MW power by the Petitioner for a period of 25 years. In terms of RfS and PPA, the Petitioner is responsible for obtaining connectivity and long-term access for its project.

(g) The Commission in its order dated 29.9.2017 in Petition No. 145/MP/2017 recognized that RfS issued by SECI allows creation of SPVs for project implementation and that a number of companies are executing projects through creation of subsidiaries after winning the bids. In the said order, it was also recognized that there was no provision for transfer of connectivity to any other entity. Resultantly, it was noted by the Commission that if parent company has connectivity, there was no provision for transfer of connectivity from parent companies to its subsidiary. To correct this anomaly, the Commission allowed transfer of connectivity from parent company to its 100% owned subsidiary.

(h) The Commission vide its order dated 15.5.2018, approved the "Detailed Procedure for grant of Connectivity to projects based on renewable energy sources to inter-State Transmission System" (hereinafter referred to as "the Connectivity Procedure") under Regulation 27 of the 2009 Connectivity Regulations. Paragraph 5.2 of the Connectivity Procedure allows transfer of shareholding in the subsidiary company post expiry of one year.

(i) On 9.1.2019, the Commission notified the 7th Amendment to the 2009 Connectivity Regulations. Several comments were submitted to the Commission in response to the draft 7th Amendment to the 2009 Connectivity Regulations published on 9.8.2018, pointing out the conflict of the draft amendment with RfS documents issued by the Government of India. However, the Commission, while notifying the 7th Amendment, allowed transfer of connectivity only to a 100% subsidiary from a parent company and vice versa.

(j) The projects selected through competitive bidding process such as those of the Petitioner mentioned in the present Petition are concluded contracts, but certain provisions of the said contracts are getting affected due to application of Regulation 8A of the 2009 Connectivity Regulations. On one hand, as per the PPAs, the Petitioner is entitled to transfer its shareholding to the extent of 49 per cent even prior to the expiry of the lock-in-period. On the other hand, by virtue of the application of the Regulation 8A of the Connectivity Regulations, the Petitioner is restricted in transferring the same.

(k) The Petitioner has made huge investments placing reliance on the policy documents of the Government of India which allows transfer of shareholding to the extent of 49 per cent without any restriction prior to expiry of the lock-in period. However, the Connectivity Procedure allows divestment of the shareholding by the parent company in the subsidiary company only after the lock-in period provided in the Connectivity Regulations has elapsed. Therefore, there is need to align the policy documents issued by the Government of India having force of law, and the Regulations framed by this Commission.

(l) Regulation 8A of the 2009 Connectivity Regulations provides that a person shall not transfer, assign or pledge its connectivity or LTA either in full or in part to any other person. It also provides that a 100% subsidiary company(ies) can utilize the connectivity and LTA granted to the parent company and vice versa, subject to fulfilling certain conditions. However, the Regulation is silent on the aspect if such connectivity and LTA granted to the parent company could also be utilized between the two wholly owned subsidiary companies of the same parent company and/or a company where the parent company exercises its control i.e. where the ownership is directly or indirectly, of more than 50 (fifty) per cent of the voting shares of such Company or right to appoint majority Directors.

(m) Allowing utilization of connectivity/ LTA between two wholly owned subsidiary companies of the same parent company and/or a company where the company exercises its control will not prejudice any existing rights of the Central Transmission Utility (CTU), Power Grid Corporation of India Ltd. (PGCIL) or other transmission licensees and that the obligations of payments will remain secured due to presence of the parent company exercising its control over such subsidiaries. Further, to take care of any concerns, the Commission may amend the LTA Agreement to incorporate the new entity as the principal entity to be liable for bearing transmission charges towards the open access granted by CTU. Also, a bank guarantee is also furnished by such entity to further protect interests and investments of transmission licensees.

(n) Transfer should be allowed without any limitation to any party concerned since qualified transfer vitiates the intent and purpose as postulated under the Competitive Bidding Guidelines which allows transfer of shareholding upto 49 per cent prior to lock-in period. Pertinently, the Competitive Bidding

Guidelines have been framed with intent to ensure transparency in the bidding and to safeguard the interest of all stakeholders. Therefore, regardless of the transfer of shares, the Petitioner will still be liable towards maintaining its contractual obligations against PGCIL/ transmission licensee.

(o) Regulation 8A of the Connectivity Regulations restricts the freedom of a project company to raise capital through divestment of equity in subsidiary company even one year after the COD of the project. The Commission being the sector regulator ought to be guided by the commercial principles while issuing the regulations, and in this case, it is in the interest of all concerned that the regulations be aligned to the Guidelines issued by the Government of India.

(p) The Petitioner has invested huge sums of money on the basis of the representations and the contractual averments made by SECI which have attained regulatory approval of the Commission. These representations are thus, enforceable on the principles of 'promissory estoppel' and 'legitimate expectation'. The doctrine of promissory estoppel essentially provides that if a party changes its position substantially, either by acting or forbearing from acting in a certain way, after relying upon a promise made by another party, then the first party can enforce the said promise, even in the absence of a formal contract to that effect. Further, the doctrine of legitimate expectation can be said to be a synthesis of the principle of administrative fairness and the rule of estoppel. A case for applicability of the doctrine of legitimate expectation thus arises when an administrative body, by reason of a representation or by past practice or conduct, arouses an expectation which it would be within its powers to fulfil unless some overriding public interest comes in the way.

Submissions during the hearing

4. The matter was heard through video conferencing on 30.7.2020 on admissibility. The learned counsel for the Petitioner reiterated the submissions made in the Petition. The learned counsel for the Respondent, PGCIL/CTU, submitted that the Petitioner is primarily seeking alignment of the 2009 Connectivity Regulations and

the Connectivity Procedure with Bid Documents (RfS and PPA) issued by SECI under the Guidelines issued by the Government of India. The learned counsel further submitted that while participating in tariff based competitive bidding process, the bidders are required to be cognizant of the existing/ prevailing Rules and Regulations. After being selected as successful bidder, it cannot seek amendments to the existing Regulations and the Connectivity Procedure on the basis of the Bid Documents. She further added that PGCIL/CTU being the nodal agency for grant of Connectivity and LTA, is required to act as per the 2009 Connectivity Regulations and the Connectivity Procedure made thereunder. However, if the Commission deems it appropriate that the regulatory intervention is required in the present case, due process for incorporating the amendment to the Regulations may be followed.

5. In response, learned counsel for the Petitioner submitted that the Petitioner is not merely seeking the alignment of Regulations with the Bid Documents but with the statutory Guidelines issued by Ministry of Power under the Act. Learned counsel submitted that the instant Petition may be considered as a representation to the Commission with a request that suitable amendments may be carried out in Regulation 8A of the 2009 Connectivity Regulations and to allow the Petitioner and such other entities to transfer/ utilize the Connectivity/ LTA to a third party after expiry of the lock-in-period in terms of Guidelines issued by the Central Government.

Analysis and Decision

6. We have considered the submissions of the learned counsels for the Petitioner and the Respondent. During the course of hearing, learned counsel for the Respondent, CTU submitted that the Petitioner in the present Petition is seeking

alignment of the 2009 Connectivity Regulations and the Connectivity Procedure with Bid Documents (RfS and PPA) issued by SECI under the Guidelines issued by the Government of India for which due process is required for amendment of the Regulations. In response, learned counsel for the Petitioner submitted that the instant Petition may be considered as its representation to the Commission to amend provisions of the 2009 Connectivity Regulations and the Connectivity Procedure made thereunder.

7. Before dealing with specific prayers of the Petitioner, we consider it appropriate to deal with the issue raised during hearing related to the process of amendment to the provisions of the 2009 Connectivity Regulations and the Connectivity Procedure made thereunder.

8. We observe that in the present petition, the Petitioner is, *inter-alia*, seeking issuance of appropriate direction(s)/ order(s) from the Commission to eliminate hindrance in transfer of its shares that it claims to be permissible in terms of the Competitive Bidding Guidelines and the provisions of the Power Purchase Agreement entered into between the Petitioner and SECI. The Petitioner has further submitted that it is not able to do so since provisions of the 2009 Connectivity Regulations come in the way of such transfer. In effect, the Petitioner has argued that there is a need for amendment to the 2009 Connectivity Regulations and the Connectivity Procedure so that the Petitioner can transfer its shares as permitted under the Standard Bidding Documents issued by the Central Government. Without going into the merit of the issue raised, we intend to clarify that filing of a Petition is not the proper way for requesting the Commission to initiate the process to amend the existing regulations. The Petitioner is aware that the power to make, amend and repeal regulations has

been vested in the Commission under Section 178 of the Act. Any action to make or amend regulations is initiated when the Commission is satisfied that there is such a need and that this cannot be initiated or undertaken through filing a petition.

9. We now deal with prayers of the Petitioner. Prayers (b) and (c) of the Petitioner are as under:

> *"(b) Issue appropriate direction(s) / order(s) to address and adjudicate the issue at the hand and eliminate restriction(s) that are being faced by the Petitioner in the implementation of certain provisions of the Competitive Bidding Guidelines based Power Purchase Agreements issued by the government instrumentalities;*
>
> *(c) Issue appropriate direction(s) / order(s) to eliminate hindrance in transfer of shares in terms of the Competitive Bidding Guidelines and the provisions of the Power Purchase Agreement entered between the Petitioner and the Solar Energy Corporation of India Limited."*

10. The Petitioner has submitted that it has been declared as successful bidder through competitive bidding process initiated by SECI in January 2019 and, thereafter, having been declared as successful bidder, it signed PPAs with SECI. However, certain provisions of the PPAs are not getting implemented due to application of Regulation 8A of the 2009 Connectivity Regulations. According to the Petitioner, as per the PPAs, the Petitioner is entitled to transfer its shareholding to the extent of 49 per cent even prior to expiry of the lock-in-period, while Regulation 8A of the Connectivity Regulations does not permit the same.

11. There was no provision regarding transfer of Connectivity/LTA before the same was incorporated through the Connectivity Procedure on 15.5.2018 and, thereafter, Regulation 8A of the Connectivity Regulations introduced transfer of connectivity/ LTA for the first time under specific conditions. Regulation 8A (that came into force w.e.f. 28.1.2019) of the 2009 Connectivity Regulations has been introduced vide Seventh Amendment to the 2009 Connectivity Regulations after wide

consultation and taking into consideration the comments/ suggestions of the stakeholders. Prior to the said amendment, utilisation/ transfer of connectivity was governed by provisions of the Connectivity Procedure as approved on 15.5.2018. Thus, necessary stipulations providing for treatment of transfer/ utilisation of connectivity/ LTA vis-à-vis parent company and its subsidiary companies were already prevailing when the Petitioner participated in the Competitive Bid Process initiated by SECI. While participating in any bid process, the Petitioner (as a prudent bidder) was required to keep in mind the applicable regulations governing connectivity and LTA. Not having done so, it cannot, after being declared a successful bidder, seek that certain provisions of regulations should be favourably amended so as to benefit it. In our view, this would defeat the very fundamental of the competitive bid process and would be to the disadvantage of those who had participated in the bidding process keeping in view the provisions of the regulations.

12. The Petitioner has also argued that the right under the PPAs is not merely a contractual right and rather it is on the basis of PPAs and RfS provided in the Competitive Bidding Guidelines issued by the Ministry of Power, Government of India under Section 63 of the Act. In our view, the said rights provided under the PPA/RfS based on the Competitive Bidding Guidelines and requirement to comply with the provisions of the 2009 Connectivity Regulations and Detailed Procedure operate in two different spheres. While Competitive Bidding Guidelines that have been notified by the Central Government under Section 63 of the Act deal with the transparent process for bidding, the 2009 Connectivity Regulations have been notified by the Commission under Section 178 of the Act deal with issues related to connectivity/ LTA. Any entity seeking connectivity/ LTA or its transfer/ utilization can do so only

under provisions of the 2009 Connectivity Regulations and the Connectivity Procedure thereunder.

13. The Petitioner has submitted that the provisions of the 2009 Connectivity Regulations and the Connectivity Procedure should be amended to the extent they are not aligned with the PPAs. In this regard, we would like to refer to order of the Hon'ble Supreme Court in Civil Appeal No. 3902 of 2006 & ors (PTC India Ltd. vs CERC) as under:

> *"43. ….On the making of the impugned Regulations 2006, even the existing Power Purchase Agreements ("PPA") had to be modified and aligned with the said Regulations. In other words, the impugned Regulation makes an inroad into even the existing contracts. This itself indicates the width of the power conferred on CERC under Section 178 of the 2003 Act. All contracts coming into existence after making of the impugned Regulations 2006 have also to factor in the capping of the trading margin. This itself indicates that the impugned Regulations are in the nature of subordinate legislation. Such regulatory intervention into the existing contracts across-the-board could have been done only by making Regulations under Section 178 and not by passing an Order under Section 79(1)(j) of the 2003 Act. Therefore, in our view, if we keep the above discussion in mind, it becomes clear that the word "order" in Section 111 of the 2003 Act cannot include the impugned Regulations 2006 made under Section 178 of the 2003 Act.*
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> *59. Summary of Our Findings:*
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> *(i) In the hierarchy of regulatory powers and functions under the 2003 Act, Section 178, which deals with making of regulations by the Central Commission, under the authority of subordinate legislation, is wider than Section 79(1) of the 2003 Act, which enumerates the regulatory functions of the Central Commission, in specified areas, to be discharged by Orders (decisions).*
>
> *(ii) A regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities inasmuch as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulations.*
> *……….*
>
> *(vi) Applying the principle of "generality versus enumeration", it would be open to the Central Commission to make a regulation on any residuary item under Section 178(1) read with Section 178(2)(ze). Accordingly, we hold that the CERC was empowered to cap the trading margin under the authority of delegated legislation under Section 178 vide the impugned notification dated 23.1.2006."*

14. From a plain reading of the above judgment, it emerges that the regulations of this Commission can even override the existing PPAs and if the Petitioner finds that there is conflict in provisions of the PPAs with the 2009 Connectivity Regulations, the Petitioner may take up the matter with SECI and undertake amendment to the PPAs so that there is no inconsistency between the PPAs and the provisions of the Regulations.

15. The contention of the Petitioner that it has made huge investments on basis of representations and the contractual averments made by SECI and that such representations are thus, enforceable on the principles of 'promissory estoppel' and 'legitimate' is untenable as the Petitioner has not sought any relief against SECI bringing out breach of promises committed by SECI.

16. In view of the above, the relief sought by the Petitioner under prayers (b) and (c) cannot be granted.

17. Under prayer (d), the Petitioner is seeking to allow utilisation of Connectivity and LTA between a parent and its subsidiary company even for cases where it is not a 100% subsidiary company. The Petitioner is also seeking clarity whether connectivity and/or LTA can be utilised (i) between two wholly owned subsidiary companies of the same parent company i.e. sister concerns; and (ii) in case of a company where the parent company exercises its control i.e. where the ownership is directly or indirectly, of more than 50 (fifty) per cent of the voting shares of such Company or right to appoint majority Directors.

18. Paragraph 5.2 of the Connectivity Procedure provides for utilisation of Connectivity between parent and subsidiary company as under:

"5.2.1 The Connectivity granted to a company may be utilised by its wholly owned (100%) subsidiary company(ies) including SPVs. In such cases, the parent company cannot sell its shareholding in the subsidiary company (ies) before the lock-in period of one year after the commencement of supply of power from such subsidiary. In case of more than one wholly owned (100%) subsidiary of the same company, the lock-in period of one year shall apply from commencement of supply of power from the last such subsidiary. An illustration is given below:
"A company is granted Connectivity for 1000 MW and it wins a bid for 250 MW. It forms five wholly owned (100%) subsidiaries of 50 MW each. In such a case lock-in period shall be 1 year from commencement of supply from last subsidiary (i.e. subsidiary which is commissioned last) out of this 250 MW."

19. Further Regulation 8A of the 2009 Connectivity Regulations that deals with the issue of transfer of Connectivity and LTA is extracted as under:

"8A. Transfer of Connectivity and LTA

A person shall not transfer, assign or pledge its connectivity or LTA either in full or parts and the associated rights and obligations to any other person:

Provided that the above provision shall not be applicable to applicants defined under Regulation 2(1)(b)(i)(g):

Provided further that 100% subsidiary companies shall be allowed to transfer their connectivity and LTA to the parent company and vice versa one year after achieving commercial operation of Renewable Energy generating station(s):

Provided further that transfer of Connectivity and LTA from the parent company to more than one 100% subsidiary shall be permitted one year after the commercial operation of the generating station of the last subsidiary and subject to minimum capacity as per Regulation 2(1)(b):

Provided also that till such Connectivity and LTA are transferred, the concerned subsidiary company(ies) shall be allowed to utilize the Connectivity and LTA granted to the parent company and vice versa."

20. We observe that Regulation 8A of the 2009 Connectivity Regulations is clear about utilisation and transfer of Connectivity and LTA. Thus, transfer/ utilisation of Connectivity/ LTA between two wholly owned subsidiary companies of the same parent company i.e. sister concerns is not permitted. Similar is the case with a company where the parent company exercises its control i.e. where the ownership is

directly or indirectly of more than 50 (fifty) per cent of the voting shares of such company or right to appoint majority Directors. Thus, prayer (d) of the Petitioner is also rejected.

21. Petition No. 206/MP/2020 is disposed of in terms of the above.

sd/-	sd/-
(Arun Goyal)	**(I. S. Jha)**
Member	**Member**