

KERALA STATE ELECTRICITY REGULATORY COMMISSION
THIRUVANANTHAPURAM

Present: Shri. Preman Dinaraj, Chairman
Date of Hearing: 14.10.2020

OP No 26/2020

In the matter of : Petition filed by M/s THDC India Ltd, for the approval of the procurement of power by KSEB Ltd., from THDC India Ltd's solar PV Project of 50MW capacity established at Kasargode District.

Petitioner THDC India Ltd., Bhagirathi Bhavan,
Top Terrace, Bhagirathipuram,
Tehri Garhwal-249001

Respondents 1. Kerala State Electricity Board Ltd.,
2. Renewable Power Corporation of Kerala Ltd.,(RPCKL)
3. Solar Energy Corporation of India Ltd., New Delhi (SECI).

THDC represented by Sri U C Kannaujia, General Manager (NCR)
Sri Sanjay Singhal, AGM (Coal, RE)
Smt. Sunita Tamta, Manager (RE)
Adv Asok Kumar

SECI represented by Sri Shreedhar Singh, AGM (Projects)
Sri I S Reddy, Manager (PS)
Sri Abhinav Kumar, Manager

RPCKL represented by Sri Augustine Thomas, CEO

KSEB Ltd represented by : Sri. KGP Nampoothiri, EE, TRAC
Smt. Latha S.V, AEE, TRAC

Interim Order dated 23.10.2020

1. M/s THDC India Ltd., (hereinafter referred to as M/s THDC or the petitioner) filed a petition on 07.09.2020, before the Commission under Section 86(1) of the Electricity Act, 2003, read with Rule 8 of the Electricity Rules, 2005 with the following prayers:
 - (1) Approve the procurement of power by KSEB Ltd., from THDC India Ltd., solar PV Project of 50MW Capacity being established in 200MW solar power park in Kasargode District in the State of Kerala.

- (2) Pass any such further Order or Orders as this Hon'ble Commission deems just and proper in the circumstance of the case.

2. The summary of the Petition filed by THDC is as follows:

- (1) THDC India Ltd., the petitioner, is a Joint Venture (JV) of Government of India (Gol) and Government of U.P. THDC is a PSE under the administrative control of Ministry of Power (MoP), Gol. It's registered as public limited company in July,1988. Petitioner further submitted that, THDC is a Central Government Company within the scope of Section 2(31) read with Section 79(1)(a) of the Electricity Act, 2003.
- (2) Solar Energy Corporation of India (SECI) is a Government of India Enterprise under administrative control of MNRE with the objective to assist Gol for implementing and facilitating National Solar Mission, for the development and promotion, commercialization of solar energy technology in the country.
- (3) On 13/2/2015, THDC entered into MoU with SECI for the development of Solar power project on behalf of THDC. On 18/2/2015, SECI and KSEB Ltd, entered into a MoU for undertaking solar power projects for sale of power to KSEB Ltd.
- (4) As proposed by the Government of Kerala, MNRE has given "in principle approval" for the setting up of 200MW solar park at Kasargode district in the State of Kerala and appointed SECI as the implementing agency.
- (5) Subsequently on 31/3/2015, THDC, KSEB Ltd. and SECI entered into a tripartite agreement for the setting up of a 50MW solar plant at Kasargode District for generation and sale of power to KSEB Ltd. In terms of tripartite agreement, THDC agreed to finance and own the project and SECI, on behalf of THDC, has agreed to develop and commission the project through EPC contract and operate and maintain the project through an agency. The power generated from 50MW Unit is intended to be supplied to KSEB Ltd.
- (6) Renewable Power Corporation of Kerala Ltd. (RPCKL), a Joint Venture of KSEBL & SECI, is the developer of the 200MW solar park in Kasargode District.
- (7) SECI on behalf of THDC, selected the EPC Contractor, for developing 50MW solar plant through open competitive e-bidding followed by e-Reverse Auction as per the NIT dated 8/2/2019 for Design, Engineering, Procurement and Supply, Construction and Erection, Testing, Commissioning, Associated Transmission system and also for comprehensive operation and maintenance for a period of 10 years of the 50MW Solar plant at Kasargode district. After completing all the procedures and formalities including e-Reverse Auction, M/s SECI

selected, M/s Tata Power Solar Systems Ltd., as the EPC Contractor with the price as given below:

1	Total EPC Price	Rs.211.34 Cr
2	Total O&M cost for 10 years	Rs.26.04 Cr

As recommended by SECI, THDC issued the Letter of Award (LoA) to the EPC contractor M/s Tata Power Solar systems on 08/08/2019. The contract agreement was signed between M/s THDC and M/s Tata Power Solar systems Ltd., on 11/09/2019.

- (8) Meanwhile a Power Sale Agreement was signed between THDC and KSEB Ltd., on 16/01/2019. The clause (7) of PSA, provides for a ceiling on tariff as under:

“(7) Tariff

The Tariff will be levelized tariff not exceeding Rs.3.10/kWh, which is subject to further reduction based on the project cost discovered through reverse bidding for selection of EPC contractor or rate as approved by Kerala State Electricity Regulatory Commission, whichever is lower”

- (9) THDC submitted that being a Gol undertaking, in terms of Section 79(1) of Electricity Act, 2003, the tariff and terms and condition with respect to generation and sale of electricity by THDC to KSEB Ltd., is within the jurisdiction of CERC. Accordingly, THDC filed a petition before the CERC on 19/5/2020 for the determination of project specific tariff for 50 MW Solar PV Project at Kasargode District, for supplying energy to KSEB Ltd. As per the details of the petition, the tariff proposed by the petitioner is Rs.3.49/kWh, however they have submitted before CERC that, THDC has already agreed for the tariff of Rs.3.10/kWh under the PSA, thus giving benefit to KSEB Ltd. They further submitted before CERC that, THDC seeks liberty approach the CERC for relaxation in the norm without affecting the tariff Rs.3.1/kWh as agreed between the parties under the Power Sale Agreement.

- (10) THDC further submitted that Rule 8 of the Electricity Rules, 2005, notified by Central Government provides as under:

“(8) Tariff of generation companies under section 79, the tariff determined by the central commission for generating companies under clause(a) or (b) of Sub Section(1) of the Section 79 of the Act, shall not be subjected to the re-determination by the State Commission in exercise of the function under clause (a) or (b) of Sub section(1) of Section 86 of the Act, and subjected to the above, the state Commission may determine whether a distribution licensee in the state should enter into Power Purchase Agreement or procurement process with such generating companies based on the tariff determined by central Commission”

Accordingly in terms of the Section 86(1) of the Electricity Act, 2003,

KSERC has the jurisdiction to decide on whether the quantum of power should be purchased by KSEB Ltd from the 50MW Solar plant developed by SECI, at the ceiling tariff of Rs.3.10/kWh or a the tariff determined by CERC, whichever is lower, as per the clause (7) of the PSA signed between the Parties.

- (11) THDC Further submitted that, as per the Section 86(1)(b) of Electricity Act, 2003, approval of this Commission is required to procure power from the 50 MW Solar Plant of THDC by KSEB Ltd. Accordingly, M/s THDC has filed the petition.
3. The Commission admitted the petition as OP 26/2020. During the examination of the documents, the Commission noticed that the 75% equity of Company earlier held by the President of India was sold and transferred in the name of NTPC Ltd. vide Share Purchase Agreement executed between NTPC Ltd. and the President of India on 25th March 2020. An aggregate consideration of Rs 7500 Crores was paid by NTPC Ltd. for the acquisition of legal and beneficial ownership of equity held by the President of India in THDC India Ltd. In order to get clarity on the issue, the Commission vide letter dated 18.09.2020 requested THDC to clarify to which 'person', the shares previously held by the President of India has been transferred. THDC was also directed to provide a copy of the document showing the same.
4. In compliance of the directions of the Commission, M/s THDC vide letter dated 24.09.2020 submitted the share holding of the company as detailed below:

Sl. No	Name of previous share holder	Name of present share holder	No of shares
1	President of India	NTPC Ltd.	27309406
2	Sri Raj Paul (Nominee of President of India)	NTPC Ltd. jointly with Ms Alka Saigal	2
3	Sri D V Singh (Nominee of President of India)	NTPC Ltd. jointly with Ms Nandini Sarkar	1
4	Sri Vijay Goel (Nominee of President of India)	NTPC Ltd. jointly with Mr Aditya Dar	1
5	Sri Judhistir Behera (Nominee of President of India)	NTPC Ltd. jointly with Mr Amit Garg	1
6	Sri R K Vishnoi (Nominee of President of India)	NTPC Ltd. jointly with Sri Arun Kumar	1
		TOTAL	27309412

5. The Commission's appraisal of the above transaction reveals that "the legal and beneficial ownership of the equity held by the President of India in THDC", stood transferred in the name of NTPC Ltd. and its officers nominated by NTPC Ltd. to hold these shares on their behalf. Thereafter, the Commission vide letter dated 05.10.2020 td, informed the petitioner that: "Since the share held by the President of India has been transferred to NTPC Ltd. with effect from 25.03.2020, M/s. THDC India Ltd is a company owned by NTPC Ltd. and not by the Government of India as per the Companies Act,

2013. Section 2(45) of the Companies Act, 2013 defines a ‘Government Company’ as;

“

(45) —Government company|| means any company in which not less than fifty-one per cent. of the paid-up share capital is held by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments, and includes a company which is a subsidiary company of such a Government company;”

In this regard, the Commission also examined the relevant provisions for tariff determination in the Electricity Act, 2003. Section 79 (1) (a) of the Electricity Act, 2003 states:

Section 79. (Functions of Central Commission): --- (1) *The Central Commission shall discharge the following functions, namely: -*

(a) to regulate the tariff of generating companies owned or controlled by the Central Government;

The Commission also examined Section 86(1)(a) & (b) of the Electricity Act, 2003, wherein it is mentioned:

Section 86. (Functions of State Commission): --- (1) *The State Commission shall discharge the following functions, namely: -*

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:

Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

(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;

A combined reading of the above two Sections of the Electricity Act, 2003 reveals that while the Central Electricity Regulatory Commission (CERC) is the Appropriate Commission to regulate the tariff of Generating Companies owned or controlled by the Central Government as per Section 79 (1) (a), Section 86 (1) (a) empowers the State Commission to determine the tariff for generation and supply within the State. Further, Section 86 (1)(b) of the Act vests the State Commission with the powers to regulate the electricity purchase and procurement process of the distribution licensees including the price at which electricity shall be procured from the generating companies through agreements for purchase of power for distribution and supply within the State. Consequent to the sale and transfer of the shares held in the name of the President of India to NTPC Ltd. the Commission noted that THDC does not fulfill the essential criteria to be qualified as a Government Company as per the Companies Act. Thereafter, the Commission directed THDC to amend the petition so as to include the determination of tariff by this Commission.

6. KSEB Ltd, vide the letter dated 13.10.2020, submitted its comments and its summary is given below.
 - (i) KSEB is obliged to meet the RPO target approved by the Commission. As part of the Gol scheme for the installation of 25 solar parks targeting 20000 MW solar power, MNRE GOI had granted approval for the setting up 200 MW solar park at Kasargode district in the State of Kerala. Out of the 200 MW, 50 MW solar plant is owned and operated by IREDA and declared CoD on 14.09.2017.
 - (ii) Tehri Hydro Development Corporation of India Ltd. (THDCIL) was allocated a 50MW project in Paivalike at Kasargode. The land for the project is allotted by GoK on lease basis to KSEBL. KSEBL has allowed the right to use of the land to RPKCL for establishing the project. RPKCL in turn has entered into an agreement with THDCIL on 'Right of use' of the land.
 - (iii) A tripartite agreement between THDC, SECI and KSEBL was signed on 31-3-2015 for development of project and sale of power from the 50MW solar PV project to KSEB Ltd. KSEBL and THDC have initialled the draft PPA. Meanwhile, THDC has already filed petition before CERC for tariff determination. Notwithstanding the tariff determination by Hon'ble CERC, THDC has agreed to supply solar power from the project at a levelized tariff not exceeding Rs.3.10/unit.
 - (iv) KSEB Ltd. requested that, considering the mandatory RPO requirement to be met by KSEB Ltd. and the solar RPO shortfall now faced by KSEB Ltd. and the competitive rate offered by THDC, approval be given for the procurement of power by KSEB Ltd. from THDC India Ltd.'s solar PV project of 50MW capacity established at Kasargode district and to approve the initialled PSA.

Hearing on the Petition:

7. The hearing on the petition conducted on 14.10.2020, through video conference. Adv. Asok Kumar counsel of the petitioner M/s THDC submitted that NTPC Ltd. is a Central Government owned company and THDC is the Joint Venture company between NTPC Ltd. and Uttar Pradesh Government. Therefore, THDC is to be considered as a Central Government Company.
8. However, the Commission pointed out that a plain reading of Section 2(45) of the Companies Act, 2013 makes it amply clear that to qualify as a Government Company, not less than 51% of the paid-up share capital has to held by the Government(s). This shareholding is reflected by the fact that these shares are issued in the name of the President of India in the case of a Govt. of India Company or in the name of the Governor of the State in the case of a State Govt. Company or in both names if it is a JV between the Centre and State or between two states. THDC was indeed a government company as revealed by the share holding pattern prior to 25.03.2020. Consequent upon the transfer of the shares held by the President of India to

NTPC Ltd. and its nominee officers, it ceased to qualify as a government company under the Section 2(45) of the Companies Act, 2013. Further, a JV between two PSUs wherein the majority of shares are issued in favour of the respective PSUs too do not qualify the test of being a government company as defined under Section 2(45) of the Companies Act, 2013.

9. The Commission during the hearing clarified that based on the above criteria and after examining the shareholding pattern of THDC, post 25.03.2020, THDC is no more a company owned or controlled by the Central Government. Accordingly, Section 79 (1) (a) is not attracted and hence the Central Commission has no jurisdiction to regulate the tariff of 50 MW solar plant established by M/s THDC at Kasargode district, in the State of Kerala.

The petitioner's counsel submitted that, he will appraise these facts to the THDC management.

10. Sri Abhinav Kumar, SECI, submitted that SECI is the Central PSU under MNRE and is operating solar plants in Pan India basis, to promote solar power. In the case 50 MW solar plant installed by THDC, SECI is the 'project management consultant'.
11. Smt. Sunita Tamta, Manager RE made a presentation on the petition before the Commission.
12. Sri KGP Nampoothiri, Executive Engineer representing KSEB Ltd submitted that detailed comments on the petition was submitted before the Commission on 13.10.2020, and he had nothing further to add at this stage. Once the petitioner files a proper petition for determination of tariff, KSEB Ltd may be given opportunity to present its comments.
13. Based on the deliberations during the hearing, the Commission hereby direct that,
 - (1) M/s THDC shall amend the petition so as to include the determination of tariff of the electricity generated from the 50 MW solar plant developed by the petitioner at 200 MW Solar Park at Kasargode. KSEB Ltd. and SECI shall be impleaded as respondent, latest by 05.11.2020.
 - (2) Next hearing on the petition shall be held during second week of November-2020.

Sd/-
Preman Dinaraj
Chairman

Approved for issue

C R Satheeshchandran
Secretary