

**Before the**  
**MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**  
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**Case No. 346 of 2019**

**Case of Maharashtra State Electricity Distribution Company Limited Seeking Compensation as per Power Sale Agreement Executed with Solar Energy Corporation of India Limited (Intermediary Procurer) and compensation on account of delay in achieving the Scheduled Commercial Operation Date as per Power Purchase Agreement executed between Solar Energy Corporation of India Limited (Intermediary Procurer) and Solar Power Developer**

Maharashtra State Electricity Distribution Company Limited ..... Petitioner

Solar Energy Corporation of India Limited ..... Respondent

**Coram**

**I.M. Bohari, Member**  
**Mukesh Khullar, Member**

**Appearance**

For the Petitioner : Sh. Ashish Singh (Adv.)  
For the Respondent : Sh. MG Ramchandran (Adv.)

**ORDER ON JURISDICTION ISSUE**

**Date: 14 September, 2020**

1. Maharashtra State Electricity Distribution Company Limited (**MSEDCL**) has filed the present Petition on 21 December 2019 seeking compensation as per Power Sale Agreement (**PSA**) executed between MSEDCL and Solar Energy Corporation of India Limited (**SECI**) (Intermediary Procurer) under Section 86 (1) (f) of the Electricity Act, 2003 (**EA**) and

compensation on account of delay in achieving the Scheduled Commercial Operation Date (SCoD) as per Power Purchase Agreement (PPA) executed between SECI and Solar Power Developers (SPD).

**2. MSEDCL's main prayers are as follows:**

- a) *Hold and declare that SECI has been unable to perform its timely commitments under the PSA's for delivery of the agreed quantum of power:*
- b) *Direct SECI to compensate MSEDCL to the tune of Rs. 131.72 Crs. as losses on account of short-supply by SECI thereby forcing MSEDCL to fulfill its RPO targets through other mechanism/sources:*
- c) *Direct SECI to reimburse the payment of Rs.13.74 Crs. towards the amount for reduction of tariff from CoD to 31.03.2019 for the solar projects as mentioned at Sr. No. 3 (viii) of the Petition.*
- d) *Direct SECI to raise future invoices with respect to Batch-III and Batch-IV projects at the revised tariff rates as mentioned at Sr. No. 3 (viii) of the Petition.*

3. SECI in its written submissions and at the time of the e-hearing through video conferencing held on 18 August 2020, has objected to the jurisdiction of this Commission to deal with relief sought by MSEDCL. Hence, through this Interim Order, the Commission is first deciding the issue of Jurisdiction. Accordingly, in this Order, submission made by both the parties to the extent of issue of jurisdiction only has been captured and adjudicated.

**4. MSEDCL in its Case has stated as follows:**

- 4.1. The Government of India (GoI)/Ministry of New and Renewable Energy (MNRE) announced Jawaharlal Nehru National Solar Mission (JNNSM) in 2009. Under Phase-II, Batch-III of JNNSM, MNRE announced a Scheme for "Setting up of 2000 MW Grid-connected Solar PV Power Projects-State Specific VGF (Viability Gap Funding) Scheme" which was proposed to be implemented by SECI.
- 4.2. MNRE vide its letter dated 19 December 2014 sought consent of the State utilities about participation in VGF (State Specific) scheme to be implemented by SECI under JNNSM Phase-II as Batch-III. The power procured under the said scheme could be utilized for fulfilment of Solar RPO target.

- 4.3. MSEDCL had given consent to MNRE to participate in the proposed JNNSM for procurement of solar power from SECI which was available at cheaper rate.
- 4.4. SECI carried out two separate competitive bidding for selection of solar power developers for 500 MW projects in each case to be set up in Maharashtra for sale to MSEDCL based on the RfS dated 27 August 2015 and dated 24 February 2016. This makes total capacity of projects to 1000 MW.
- 4.5. SECI and MSEDCL entered into two (2) Power Sale Agreements (PSA) on 4 November 2016 and 1 December 2016 wherein SECI undertook to sell “Solar Power” to MSEDCL as per the terms of the PSA by buying the same from the selected Solar Power Developers (SPDs) on back to back basis.
- 4.6. Under the PSAs, SECI was mandated/accountable to Power Purchase Agreements (PPA) and VGF Securitization Agreements (VGFSAs) with the selected SPDs.
- 4.7. The definition of PSA clearly specifies that PPA shall mean including its recitals and Schedules, amended or modified from time to time in accordance with the terms thereof. The SECI-SPD PPA is the schedule to PSA; it means it is an integral part of PSA. Also, SECI itself has agreed that PSA is back to back arrangement.
- 4.8. The scheduled commissioning dates for Batch-III projects were 10 May 2017 for Open content category (450 MW) and 16 August 2017 for Domestic Content category requirement (DCR) (50 MW) category projects, respectively. Also, the scheduled commissioning dates for 500 MW Batch-IV projects was 23 December 2017.
- 4.9. The agreed capacity of power to be sold by SECI to MSEDCL under both the PSAs dated 4 November 2016 and 1 December 2016 was 500 MW each, respectively.
- 4.10. The Commission vide its Order dated 20 February 2017 in Case No. 109 of 2016 approved the procurement of 1000 MW of solar power by MSEDCL from SECI for fulfillment of its RPO.
- 4.11. SECI started supplying power to MSEDCL from June 2017 in phased manner. However, the commissioning of some of the projects which SECI had tied up for sale of power to MSEDCL got delayed which led to shortfall in supply of power as agreed under the PSA executed between MSEDCL and SECI. Further as per terms of Power Purchase Agreement (between SECI and SPD), there are penalty provisions for delay in commissioning of projects such as encashment of PBG, reduction in tariff etc.

- 4.12. SECI has failed to fulfill its material obligations, which resulted into additional shortfall for meeting the solar RPO target by MSEDCL and compelled MSEDCL to procure RECs.
- 4.13. On 21 February 2018, MSEDCL issued first notice regarding SECI's failure to comply with the material obligations under PSA as per Article 9 and Article 10.
- 4.14. On 12 April 2019, MSEDCL wrote letter to SECI claiming compensation in view of short supply of power by SECI and other applicable compensations due to delay in Commissioning of projects. On 29 April 2019, SECI vide its letter denied all claims made by MSEDCL asking for compensation on account of delayed commissioning.
- 4.15. On 4 October 2019, MSEDCL wrote another letter intimating SECI that it shall pay to SECI as per the revised tariff (reduced tariff) in view of its material breach of obligations under the PSA. On 11 October 2019, again SECI denied all claims raised by MSEDCL towards compensation.
- 4.16. Charging of trading margin by SECI at 7 Paisa per unit means that it is acting as a "Intermediary Procurer/Trader". It is submitted that Rule 9 of the Electricity Rules, 2005 is an enabling provision which enables an electricity trader to trade power all across India with an Inter-State trading license granted by CERC. But whenever such electricity trading transaction is completed exclusively in a certain State (in the present case, Maharashtra) then it is that State Commission which would have jurisdiction over the said transaction and such trading transactions would be amenable to the jurisdiction of such State Commission.
- 4.17. The Commission vide its Order dated 27 November 2018 in Case No. 141 of 2018 has clearly held that even if a trader had no trading license granted by the Commission but if trading transaction of buying and selling of power has happened within the periphery of Maharashtra i.e. Intra-State then this Commission would have jurisdiction over the said transaction.
- 4.18. In Case No. 71 of 2014, on the Petition filed by GEPL, an inter-State trader, the Commission held that the sale and purchase of energy was within the State of Maharashtra and hence it had jurisdiction.
- 4.19. Judgment dated 11 April 2017 in Energy Watchdog passed by the Hon'ble Supreme Court (SC) squarely applies to the present case to substantiate the point that CERC's jurisdiction would be ousted, as the transaction is purely within the State.

4.20. The Commission vide its Order dated 20 February 2017 passed in Case No. 109 of 2016, on the basis of which the present PSAs were entered into by MSEDCL has held that all Generators supplying power under the JNNSM scheme are located in Maharashtra meaning thereby that the injection point and drawal point of power are within the State of Maharashtra.

**5. SECI in its reply dated 17 March 2020 has stated as under:**

- 5.1. This Commission has no jurisdiction under the EA qua SECI to entertain the claims of MSEDCL regarding disputes arising out of the PSAs. The Petition filed before this Commission by MSEDCL is misconceived and is not maintainable.
- 5.2. SECI is a GoI Enterprise and a company incorporated under the provisions of the Companies Act. SECI has been designated as the Nodal Agency in the Country for development, promotion, commercialization of the solar energy technology and implementing the schemes for developing the Grid connected solar power capacity through various means in the country under the JNNSM scheme.
- 5.3. SECI has been incorporated as a Generating Company within the scope of Section 2 (28) of the EA. A generating company includes any company which owns or operates or maintains a generating station. SECI is owning and maintaining generating stations in the State of Rajasthan and Andaman and Nicobar Island. SECI is therefore, a generating company owned and controlled by Central Government.
- 5.4. SECI is procuring electricity from SPDs under the PPA and reselling the same to the Buying Entity/ Distribution Licensee namely MSEDCL under the PSAs. SECI is therefore undertaking trading of electricity but is still a generating company i.e. a company incorporated as a generating company within the meaning of the EA.
- 5.5. The matters relating to the tariff determination and all matters connected thereto of SECI in regard to its dealings with the distribution licensees are governed by the provisions of Section 79 of the EA, 2003 and therefore, fall under the regulatory control of the Central Commission. Any dispute which SECI may have with the SPDs or the Wind Power Developers supplying electricity or the Buying Entities/distribution licensees procuring electricity, are also governed under Section 79 (1) (f) of the EA.
- 5.6. Where the Central Commission has jurisdiction, the role of State Commission is restricted to procurement of power only in terms of Section 86 (1)(b) of the EA read with Rule 8 of the Electricity Rules, 2005.

- 5.7. SECI is undertaking the trading in solar power and Wind power on a Pan-India basis and more particularly, as the designated nodal agency of the Government of India for promoting such sources throughout India.
- 5.8. In terms of Rule 9 of the Electricity Rules 2005, SECI, having been granted an inter-state trading license by the CERC, SECI is entitled to undertake intra-state trading without the need of any trading license from the concerned State Electricity Regulatory Commission (SERC).
- 5.9. The scheme/ arrangement of purchase of solar power by SECI from the SPDs and resale of the said procured power to the distribution licensee/ Buying Entity namely MSEDCL, being on a back to back basis and SECI acting as a nodal agency for implementing the JNNSM scheme of the Government of India, the Central Commission is the Appropriate Commission.
- 5.10. The JNNSM Guidelines notified by GoI on 4 August 2015 and the National Solar Mission (NSM) Guidelines notified by GoI on 14 March 2016 envisage SECI selling 90% of the power in the State where the Solar Project is established and the balance 10% of the power outside the State.
- 5.11. In terms of the above provision of the Guidelines, it was envisaged that the power from the projects to be set up under the aforesaid Guidelines will be supplied to more than one state and thus qualifying for Composite Scheme. Accordingly, as per Section 79 of the EA, Central Commission is the Appropriate Commission to exercise jurisdiction with regard to the SECI including in regard to adjudication of any dispute relating to tariff for generation and sale of electricity.
- 5.12. The above principle, namely that if a project is envisaged to sell to two States, then it forms part of a 'Composite Scheme and shall be subject to the jurisdiction of the Central Commission, was upheld by the SC in the case of Energy Watchdog case vs. CERC & Ors. (2017) 14 SCC 80.
- 5.13. Further, the Central Commission has decided on the issue of jurisdiction in the in the following cases:
- a. M/s. Welspun Energy Private Limited vs. SECI, Order dated 11 October 2017 passed in Petition No. 95/MP/2017:
  - b. Acme Bhiwadi Solar Power Private Limited vs. Solar Energy Corporation of India & Ors, order dated October 09, 2018 passed in Petition No. 188/MP/2017 and connected Petitions:

- 5.14. Article 6.5 of the PSAs entitles SECI to divert the solar power or part thereof and sell it to any third party including a licensee under the EA anywhere in India. Accordingly, any diversion to a third party outside the State would necessarily entail an Inter State Sale. Therefore, the jurisdiction to deal with the present matter shall lie with the Central Commission.
- 5.15. SECI has been dealing with the purchase of electricity from the SPDs and resale of electricity to the Distribution Licensees/ Buying Utilities throughout India and it is the Central Commission which is the Appropriate Commission as per Section 79 of the EA.
- 5.16. The reliance placed by MSEDCL on the order dated 27 November 2018 and 2 June 2014 passed by the Commission in Case No.141 of 2018 and Case No. 71 of 2014 is misconceived. The said decisions are not applicable to the facts of the present matter as the PPAs and PSAs are entered into in pursuance of the JNNSM Guidelines and NSM Guidelines which envisage a composite scheme.
- 5.17. MSEDCL has wrongly placed reliance on Order dated 20 March 2017 passed by the Commission in Case No.109 of 2016. The said case relates to approval of procurement of solar power by MSEDCL under the JNNSM scheme which falls within the scope of Section 86(1)(b) of the EA. SECI does not dispute the fact that the State Commission is the Appropriate Commission to exercise jurisdiction in respect of approval of the procurement of power under Section 86(1)(b) of the EA.
- 5.18. It is also important to note that the functions vested in the Central Commission are specific in nature applicable on an all India basis and the functions vested in the State Commission are general in nature applicable to a particular State. The specific function will, therefore, have to be given supremacy to the general functions vested in the State Commission. In law, a specific power, function or jurisdiction vested will always have supremacy over a general power, function or jurisdiction.
- 5.19. In the circumstances mentioned above, this Commission has no jurisdiction to entertain the present petition claiming relief against SECI.
- 6. SECI vide its email dated 17 August 2020 made the following additional submission through its 'Note of Submission':**
- 6.1. The power from the projects to be set up under the JNNSM and NSM Guidelines is to be supplied to more than one state. Therefore, it qualifies as a Composite Scheme within the

scope of Section 79 (1) (b) of the EA as interpreted and decided by the SC in Energy Watchdog case –v- CERC & Ors. (2017) 14 SCC 80.

- 6.2. The most important feature considered by the SC in the above said judgment is a scheme whereunder generation and sale of electricity is envisaged to be in more than one state. The terms and conditions of such generation and sale in the two states may be different, the PPAs may be different, the tariff may be different, the point of time when the sale may take place maybe different etc. It cannot be that the moment there is a third party sale by SECI to a licensee outside Maharashtra, the jurisdiction will shift from this Commission to the CERC or vice versa namely in the case of generation and sale of electricity in two states, the moment the PPA with one state is terminated for any reason whatsoever, the CERC will lose the jurisdiction. It cannot be that the jurisdiction is considered in such manner of constantly shifting. This will result in anomalous situation. For example, during the pendency of the proceedings, a third-party sale is effected, the jurisdiction will shift, or a third party sale is withdrawn, again the jurisdiction will shift.
- 6.3. It is in the above context that SC has emphasised the importance on the expression ‘scheme’ which is whether the entire scheme envisages generation and sale in more than one state and not that at every given point of time, there has to be an actual sale in more than one state. The decision states that ‘generating companies have, in any manner, a scheme for generation and sale of electricity which must be in more than one State and the same needs to be given effect.
- 6.4. The CERC has already exercised jurisdiction in regard to matters concerning the SPDs, SECI and MSEDCL [the non-supply of power by the SPDs which is raised in the present Petition also] in the following Petitions wherein the projects were implemented under the same JNNSM Guidelines and NSM Guidelines:

<b>S. No.</b>	<b>Name of Petitioner</b>	<b>Petition No. before the Central Commission</b>	<b>Guidelines</b>	<b>Project Location</b>
1.	Taletuttayi Solar Projects Four Private Limited	<b>19/MP/2018</b>	JNNSM Guidelines dated 04.08.2015	Maharashtra
2.	Krishna Windfarm Developers Private Limited	<b>27/MP/2018</b>	JNNSM Guidelines dated 04.08.2015	Maharashtra
3.	Welspun Energy Private Limited	<b>95/MP/2017</b>	JNNSM Guidelines dated 04.08.2015	Maharashtra

4.	Solar Energy Corporation of India Limited	<b>2/RP/2019 (against the order passed in Petition No.95/MP/2017)</b>	JNNSM Guidelines dated 04.08.2015	Maharashtra
5.	Parampujya Solar Energy Private Limited	<b>212/MP/2018</b>	JNNSM Guidelines dated 04.08.2015	Maharashtra
6.	Fermi Solarfarms Private Limited	<b>68/MP/2019</b>	JNNSM Guidelines dated 14.03.2016	Maharashtra

6.5. In the above-mentioned cases, MSEDCL, without in any manner raising any dispute to the jurisdiction of the CERC for adjudication of disputes, in fact, raised the pleas which are similar to the one raised in the present Petition namely alleging non-fulfilment of obligations under the PSA by SECI. In this regard, the CERC in the decisions passed in above-mentioned Petitions held as under:

- i. M/s Krishna Windfarms Developers Pvt. Ltd. –v- SECI & Anr. order dated 8 November 2019 passed in Petition No.27/MP/2018

*“116. The Respondent No.2 (MSEDCL) has submitted that Respondent No.1 failed to supply the power as committed in PSA resulting in shortfall in fulfilment of RPO obligations set by the SERC. The Commission observes that the issue relates to the Power Sale Agreement between Respondents. The relief being sought by Respondent No. 2 is qua Respondent No.1 which is not the subject matter of the instant petition. The Commission feels no decision on the same can be given in the instant petition.”*

- ii. M/s Talettutayi Solar Projects Four Private Limited –v- Solar Energy Corporation of India & Ors. order dated 11 December 2019 in Petition No.19/MP/2018

*“116. The Respondent No.2 (MSEDCL) has submitted that Respondent No.1 failed to supply the power as committed in PSA resulting in shortfall in fulfilment of RPO obligations set by the SERC. The Commission observes that the issue relates to the Power Sale Agreement between Respondents. The relief being sought by Respondent No. 2 is qua Respondent No.1 which is not the subject matter of the instant petition. The Commission feels that relief if any is beyond the scope of the instant petition.”*

- 6.6. In terms of the above, MSEDCL was required to file a Petition before the CERC in regard to any of its alleged grievances. It may be noted that the CERC has not rejected the claim of the MSEDCL on grounds of lack of jurisdiction or that the jurisdiction is vested in the State Commission.
- 6.7. PPAs and PSAs entered into by SECI are back to back arrangement and in such situation the jurisdiction in regard to the PSAs has to be the jurisdiction which exists in regard to the PPAs. It cannot be that the jurisdiction in regard to PPAs will be of one Commission and jurisdiction in regard to the PSAs will be of a different Commission. Such an interpretation will be contrary to the back to back scheme.
- 6.8. SECI is acting as an intermediary (as appointed by the Central Government) utilizing its trading license to facilitate such purchase and resale of electricity. SECI is not acting as a merchant trader or otherwise independently purchasing the electricity from the SPD having the option to sell electricity to any person at such time and on such terms and conditions including the price as SECI may decide from time to time. SECI is also not retaining the powers to trade electricity so purchased in the open market or through the platform of Power Exchange or otherwise on a long term basis to earn a trading margin, without being constrained to the fixed trading margin of 7 Paisa/kWh decided by the MNRE.
- 6.9. The obligations and liabilities of SECI to the SPDs, in the facts and circumstances pertaining to such dealing, are on a back to back basis to the obligation to be performed and liabilities to be discharged by Buying Entities/ Distribution Companies to SECI.
- 6.10. The PSAs executed by SECI with MSEDCL contained initial copy of the PPA to be entered into by SECI with the SPD, as an annexure to the PSA. Both the documents are inextricable and intertwined with one another.
- 6.11. CERC in its Order dated 28 January 2020 passed in Petitions including Petition No.68/MP/2019 involving MSEDCL has stated the back to back nature of the PPA and PSA as under:

*“91. From the above, the Commission is of the view that the PPAs and PSAs are interconnected and inextricably linked to each other and as such there is privity between the Petitioner which is the power generator and the Respondents which are the Discoms and the ultimate beneficiaries of the PPAs as well as parties to the PSA. The back to back nature of the PPAs and PSAs implies that the Respondent Discoms are liable to pay to the Respondent SECI all that the said Respondent SECI has to pay to the Petitioner.....*

- 6.12. The role of an intermediary Trader vis-à-vis a Merchant Trader has also been considered by the APTEL in its Judgment dated 4 November 2011 in Appeal No. 15 of 2011 in the case of Lanco Power Limited v Haryana Electricity Regulatory Commission and Ors.
- 6.13. The back to back arrangement of the purchase of solar power from the SPDs and resale of the solar power to the Buying Entities in the context of similar PPAs and PSAs entered into under the scheme for promotion of solar power involving SECI as nodal agency and an intermediary trader has been considered by the APTEL in the recent decision dated 27 February 2020 passed in Appeal Nos. 368, 369, 370, 371, 372 & 373 of 2019 in the matter of Ayana Ananthapuramu Solar Private Limited –v- Andhra Pradesh Electricity Regulatory Commission & Ors.
7. At the e-hearing through video conferencing held on 18 August 2020, the representative of MSEDCL and SECI made their detailed submissions relying on various court judgments and other related records. To bring on record the gist of their arguments made during hearing, Commission granted three days’ time to Petitioner, MSEDCL to file written notes of their arguments and another three days thereafter to SECI to respond thereto.
8. **MSEDCL, by its email dated 21 August 2020, submitted its written note of arguments. MSEDCL made the following submissions:**
- 8.1. APTEL passed in Appeal No. 200/2009 (Pune Power Development Private Limited (Inter-State Licensee) Versus Karnataka Discoms wherein the APTEL has held as under:

*“37. (1) The present case involves a dispute between the Distribution Licensee of Karnataka, the Respondent and the Appellant which is an inter-State licensee. The Appellant is selling power to the Distribution Licensee Respondent in the State of Karnataka, thereby having a nexus to the State. Since the procurement of power by the Distribution Licensee from the Trading Licensee is being done in the State of Karnataka, the Appellant falls within the jurisdiction of the State Commission under Section 86(1)(b) of the Act. The procurement of power has a direct nexus with the State of Karnataka as the supply is to the Karnataka Distribution Licensee. There is no restriction on the location of the Trading Licensees to determine the jurisdiction of the State Commission. The supply of electricity, namely, the Appellant being at a different place does not oust the jurisdiction of the State Commission under Section 86(1)(f) to adjudicate upon the dispute between the licensees. Therefore, we hold that so long as the Distribution Licensees are involved in procurement of power in the State, the State Commission alone will have the jurisdiction under Section 86(1)(f) to adjudicate upon the dispute. The 1 point is answered accordingly.*

II. *In the present case, the Appellant has entered into a contract with Respondent No.2 for procuring power for a trading margin. Therefore, the Appellant cannot be construed to be an agent or a broker of the disclosed principal. As held by the State Commission, the perusal of the documents produced by the Respondent prima-facie indicate that the agreement of the Respondent was with the Appellant which is undertaking the responsibility of taking power from the Respondent to supply to M/s BSBS Rajdhani Power Limited. This is not a gratuitous act undertaken by the Appellant. The Appellant had two separate and distinct agreements, one agreement between the Appellant the Respondent, and another agreement was entered into between Appellant and the M/s BSES Rajdhani Power Limited. As such, there is no privity of contract between Respondent No.2 and BSES Rajdhani Power Limited.*

*Hence, BSES Rajdhani Power Limited cannot be construed to be a necessary party. As such the petition filed before the State Commission is maintainable”.*

- 8.2. The letter dated 05.02.2020 issued by SECI clearly establishes the following facts:
- a. Adoption of Tariff and approval of contracted capacity for “Intra State” schemes comes with the purview of the concerned State Commission under Section 86 (1) (b) and Section 63 of EA.
  - b. SECI has taken up adoption of tariff with CERC only for Inter-State transmission schemes.
  - c. MSEDCL is required to take up the matter with this Commission for Adoption of Tariff and approval of contracted capacity.
- 8.3. SECI has all the while before the CERC disputed the jurisdiction of the CERC and has confirmed that as per the title of RfS document, the power to be supplied is only for Maharashtra meaning that only Intra-sate transmission of electricity within Maharashtra is required and hence CERC would not have jurisdiction. The relevant excerpts from the Order dated 11 October 2017 passed by the CERC in Petition No. 95/MP/2017 (Welspun Energy Private Limited Versus SECI) is reproduced as under:

*“10. Learned counsel for the SECI during the hearing submitted that the Commission, under Section 79 (1) (f) of the Act has jurisdiction to adjudicate disputes between parties falling under Clauses (a) to (d) of Section 79. In the present case, the dispute is neither related to tariff nor inter-State transmission of electricity and does not fall under clauses (a) to (d) of Section 79 of the Act. The dispute sought to be raised in the present petition does not fall within the purview of Section 79 of the Act and is beyond the scope of the Commissions jurisdiction and therefore, is ex-facie not maintainable before the Commission. Learned counsel for SECI argued*

*that as per Article 16.3.2 of the PPA, a dispute that arises out of or in connection with any claims not covered in Article 16.3.1 of the PPA shall be resolved by arbitration under the Indian Arbitration and Conciliation Act, 1996. Since, the Petitioner has already filed an Application No. OMP (I) Comm No.163 of 2017 under Section 9 of the Indian Arbitration and Conciliation Act, 1996 before the Hon"ble High Court of Delhi, it is clear that even the Petitioner has knowledge that the present dispute falls under the ambit of arbitration. Learned counsel further submitted that the Petitioner has committed continuing defaults and material breaches of the most fundamental clauses of the PPA executed between the Petitioner and SECI for setting up a 100 MW solar power project. Learned counsel for SECI argued that the Petitioner, in its rejoinder has mentioned that the present case is a case of inter-State transmission of electricity. However, the title of the RfS document indicates that it is only for the State of Maharashtra and therefore, it is a case of intra-State transmission of electricity in the State of Maharashtra.*

8.4. SECI has argued that MSEDCL has participated before the CERC in several proceedings filed by generators against SECI. It was also argued that in such proceedings MSEDCL has not taken the objection to the jurisdiction of the CERC and has made its submissions without any objections on jurisdiction. However, following facts are presented to dispel the anomaly sought to be created:

- a. MSEDCL was not an original party in the proceedings before CERC.
- b. It was impleaded as a respondent on the direction of the CERC.
- c. MSEDCL only filed its affidavit on one (1) limited issue i.e. whatever is paid by Generators as penalty/costs/damages should be passed on the MSEDCL.
- d. MSEDCL never approached the CERC for adjudication of any dispute. In fact the CERC has clearly stated in its Order dated 11 December 2019 passed in Petition No. 19/MP/2018 that dispute between SECI and MSEDCL arises out of PSA which is a different subject matter altogether.
- e. All Order passed by CERC are now pending adjudication before the APTEL and MSEDCL would be entitled to take its plea of objections w.r.t jurisdiction of the CERC at an appropriate stage. Jurisdiction being a legal plea can be taken at any point in time even before an Appellate forum and hence it cannot be contended that MSEDCL's right to take such plea has been taken away.
- f. Orders of CERC has no binding effect on this Commission.

8.5. It was also argued by SECI that because it is also a Generating Company owned and controlled by the Central Government, hence activities undertaken by SECI falls with the purview of CERC. Such argument being made is absolutely incorrect on account of following reasons:

- a. SECI has entered into a transaction with MSEDCL (PSA) in its capacity of being an “Electricity Trader” being granted a trading license by CERC.
- b. PSAs between MSEDCL and SECI clearly establish that SECI is operating on a fixed trading margin of 0.7 paise.
- c. The reply filed by SECI clearly admits the said position.
- d. In any case under the provisions of EA, a Generator has no authority to act as an electricity Trader. Generators are not recognized as deemed traders under the EA.
- e. SECI is acting in its capacity of being an “Electricity Trader” being granted a trading license by CERC.
- f. No power is flowing from SECI’s generating stations to MSEDCL. Hence, in no circumstance SECI can be said to be within the jurisdiction of CERC for the purposes of the PSA.

8.6. With respect to SECI’s argument that it has authority to divert power outside State of Maharashtra and hence the scheme is a composite scheme, it is submitted that:

- a. The PSA is the final document entered into between the Parties
- b. The PSA contemplates under Article 6.5 that only under “Events of Default” SECI can sell power to a third party.
- c. This nowhere means that SECI has to mandatorily sell power outside State. SECI has the freedom to sell the power to any other licensee in the State or any other consumer.
- d. Moreover, the Clause in the JNNSM Scheme of 90% power to be mandatorily bought by the State in which the projects are located and 10% power being sold outside is merely an enabling provision. Such enabling provisions have fructified into a final PSA between MSEDCL and SECI. In the present case, all power is to be sold within Maharashtra as per PSA. Hence, there can be no power going outside Maharashtra.
- e. The scheme between SECI and MSEDCL is not a composite scheme as entire power is contracted by MSEDCL.
- f. To make a transaction as composite scheme, it is necessary that there is involvement of more than 2 states. In the present case, such is not the situation.
- g. In case, of events of default if SECI is forced to sell power outside, it would be only for a temporary period without there being a composite scheme. Mere option to sale of power outside Maharashtra cannot be called as a composite scheme when there is none in existence in the present time.

9. **SECI made the following submission by its email dated 23 August 2020:**

- 9.1. MSEDCL ignores the salient aspects of the submissions of SECI and is selectively referring to only one aspect of Rule 9 of Electricity Rules, 2005. The important aspects:
- a. SECI is the nodal agency under the JNNSM and NSM scheme of the MNRE;
  - b. SECI is acting as the nodal agency for the development of renewable power on Pan-India basis. SECI is not acting as a merchant trader or a trader treating various transactions of purchase and resale as totally independent transactions;
  - c. SECI enters into the purchase and resale transactions between the generator and SECI and SECI and Buying Utilities on a back to back basis and therefore all issues pertaining to such purchase from the generator and resale to the buying utilities need to be considered together;
  - d. SECI has the right to divert power to third parties outside the State of Maharashtra (in the present case) in the event of default by MSEDCL as provided in Article 6.5 of the PSA but also when there is excess generation beyond 1114.374 MUs specified in Article 6.8.2 of the PSA as per Article 6.8.3 of the PSA read with Article 4.4.1 and Article 4.4.2 of the PPA;
  - e. It is therefore necessary for SECI to have obtained the inter-State Trading License from the Central Commission and also to have a composite scheme for selling electricity not only in the State of Maharashtra but also outside the State of Maharashtra; and
  - f. It is in the above context, Rule 9 of the Electricity Rules 2005, enables SECI to undertake Intra-State trading as well as Inter-State Trading depending upon the exigencies of the situation, without the need to take any license from this Commission.
- 9.2. SECI had already dealt with the implication of the Energy Watchdog Case (2017) 14 SCC 80 decided by the SC. The crucial aspect for the jurisdiction of the CERC considered by the SC is a scheme of any nature which involves generation and sale of power in more than one state. The emphasis is that there has to be a scheme. Once there is a scheme of any kind in terms of the decision of the SC, it would be a Composite Scheme and would be covered under section 79(1)(b) of the EA. This is also fortified by the fact that the issue was considered in the context of Adani Power Mundra Project having nine generating units in Kutch, Gujarat and selling electricity from the first six generating units to Gujarat Utilities and from Unit 7,8,9 to Haryana Utilities. No part of electricity from Units 1 to 6 was being sold to any person on long term basis outside Gujarat and no part of electricity from Unit 7, 8 and 9 was being sold to any state other than Haryana on long term basis. In respect of Units 1 to 6, the competitive bid was undertaken by Gujarat and in respect of Units 7 to 9 by Haryana, each having no inter-relation and conducted in an independent manner. The tariff terms and conditions were different on the sale of electricity to Gujarat and on a sale of electricity to Haryana. The tariff for sale of electricity to Gujarat was adopted by Gujarat Electricity Regulatory Commission and for sale of electricity to Haryana was adopted by

the Haryana Electricity Regulatory Commission. Despite the above, the SC had found a composite scheme on the basis of the generating station and held the jurisdiction of the Central Commission. It is in this context that in Para 24 and 26 of the said Judgement, the SC had diluted then popular notion of interpreting composite scheme in stricter sense (as being now canvassed by MSEDCL) and decided that it can be a scheme of any kind whatsoever. Accordingly, where the documents provide or envisage sale of electricity in more than one state, there is a composite scheme.

- 9.3. In the decision dated 2 June 2014 in Case No.71/2014 which relates to Global Energy Private Limited, this Commission was dealing with an inter-state licensee which had applied for Open Access to MSEDCL and had filed complaint before the Commission in the said case on account of rejection of its application. Similarly, the reliance placed on the decision dated 27 November 2018 of the Commission in Case No.141/2018 in the matter of Siddhayu Ayurvedic Research Foundation Private Limited –v- Global Energy Private Limited is misplaced. In the said cases, none of the aspects, most importantly the statutory Guidelines issued by the GoI, of envisaging sale of electricity to other state was involved.
- 9.4. The reliance placed by MSEDCL on the decision of the APTEL in the matter of M/s. Pune Power Development Private Limited –v- Karnataka Electricity Regulatory Commission & Ors. is misplaced for the following reasons:
  - a. The above decision was rendered on 23 February 2011 which was prior to the scope of composite scheme being decided by the SC in Energy Watchdog Case (2017) 14 SCC 80 decided on 11 April 2017. The prior notion on composite scheme got diluted and any scheme involving sale of electricity to more than one state is to be treated as Composite Scheme. The said decision of SC has attained finality and therefore reliance of MSEDCL on old decisions which has no application is untenable;
  - b. In Paragraph 298 of the Order dated 9 October 2018 in the matter of Acme Bhiwadi Solar Energy Private Limited –v- SECI & Ors Batch - Petition No.188/MP/2017 & Batch, which are also matters involving SECI as nodal agency and engaging in purchase and resale of electricity, the CERC has duly considered the reliance placed by the Distribution Licensees with respect to above decision of the APTEL in Pune Power Development Private Limited Case(supra). CERC concluded in Paragraph 303, that the said decisions are not applicable to the facts of those matter as the PPA and PSA are entered into in pursuance of the JNNSM Guidelines which envisages composite scheme.

- 9.5. SECI and MSEDCL had been a party in the proceedings of the Welspun Case before the CERC. The CERC passed the orders dated 17 December 2018 in Petition No.95/MP/2017, 11 December 2019 in Review Petition No.2/RP/2019 and 13 January 2020 in Petition No.125/MP/2019. Thereafter, Appeals have been filed by SECI (DFR No. 51 of 2020) and Avaada Energy Private Limited successor of Welspun – (Appeal No. 23 of 2020) on merits of the said order before the APTEL. MSEDCL has participated in the proceedings. Neither MSEDCL nor SECI has raised the issue of jurisdiction of CERC. In Appeal No.23 of 2020 filed Avaada Energy Private Limited before the APTEL recently, on 19.08.2020, after the hearing before the Commission on 18.08.2020, both SECI and MSEDCL had opposed Welspun’s successor namely, Avaada Energy Private Limited on the claim for purchase of electricity after termination. MSEDCL did not raise any issue on the jurisdiction of the Central Commission either in the pleadings or during oral arguments.
- 9.6. Till the filing of the present Petition, MSEDCL did not raise any issue on the jurisdiction of the Central Commission on the matters, involving purchase and resale of Electricity to MSEDCL under the PSA where the generating station is situated in the state of Maharashtra. The electricity is being sold to MSEDCL only. The raising of such dispute by MSEDCL in the present Petition is an after-thought. It is also pertinent to note that MSEDCL not only participated in the proceedings at CERC without objection but also sought reliefs against SECI in the said proceedings.
- 9.7. After having sought similar reliefs and submitting to the jurisdiction of CERC, MSEDCL now cannot take a contrary stance that CERC does not have jurisdiction. Therefore, such action of MEDCL amounts to forum shopping.

### **Commission’s Analysis and Rulings**

10. Present Petition has been filed by MSEDCL seeking compensation from SECI under following PSA signed between MSEDCL and SECI, for a capacity of 500 MW each:
- a. PSA dated 4 November 2016 for JNNSM Phase-II Batch-III
  - b. PSA dated 1 December 2016 for JNNSM Phase-II Batch-IV

Such power has to be procured by SECI, acting as an intermediary facilitator, through back to back PPA and VGFSAs with the selected SPDs. The Commission vide its Order dated 20 February 2017 in Case No. 109 of 2016 has allowed procurement of 1000 MW solar power under 2 PSAs listed above.

11. SECI has objected on jurisdiction of this Commission to adjudicate on the relief sought by MSEDCL in the present matter. As per SECI, CERC is an appropriate Commission to adjudicate on these disputes.
12. The Commission notes that PSAs signed between MSEDCL and SECI have following provisions relating to resolution of dispute:

*“12.3 Dispute Resolution:*

*12.2.1 Dispute Resolution by the Appropriate Commission:*

*i. **Where any Dispute** (i) arises from a claim made by any Party for any change in or determination of the Tariff or any matter related to Tariff or claims made by any Party which partly or wholly relate to any change in the Tariff or determination of any of such claim could result in change in the Tariff, or (ii) relates to any matter agreed to be referred to the Appropriate Commission, such Dispute shall be submitted to adjudication by the Appropriate Commission. Appeal against the decisions of the Appropriate Commission shall be made only as per the provisions of the Electricity Act, 2003, as amended from time to time.*

*ii. The obligations of the Buying Utility under this Agreement towards SECI shall not be affected in any manner by reason of inter-se disputes amongst the Buying Utility.*

*12.3.2 Dispute Resolution through Arbitration:*

*i. If the Dispute arises out of or in connection with any claims not covered in Article 12.3.1 i), such Dispute shall be resolved by arbitration under the Indian Arbitration and Conciliation Act, 1996 as under: ... ..” [Emphasis added]*

Thus, in terms of provisions of PSA, present dispute relating compensation which could have impact on tariff needs to be adjudicated by the Appropriate Commission. Similar provision relating to adjudication of dispute exist in PPAs signed by SECI with various SPDs. None of the party has argued that these disputes need to be referred to Arbitration. Only dispute between parties is which is the Appropriate Commission in the present matter, MERC or CERC.

13. Based on the submission and arguments of the Parties, the Commission frames following issues to decide in the matter of its Jurisdiction:
  - a. Whether SECI is acting as Generating Company or a Trading Licensee in the present matter?
  - b. Whether ‘Composite Scheme’ exists in the present matter?

- c. Whether SECI is acting as Inter-State Trader or Intra-State trader in the present case?
- d. Whether MERC has jurisdiction in the present matter?

The above issues are dealt with in the subsequent paragraphs.

14. **Issue A: Whether SECI is acting as Generating Company or a Trading Licensee in the present matter?**

14.1. SECI in its reply has submitted that it has been incorporated as a Generating Company within the scope of Section 2 (28) of the EA. It is owning and maintaining generating stations in the State of Rajasthan, and Andaman and Nicobar Island. SECI is therefore, a generating company owned and controlled by Central Government. SECI is also procuring electricity from SPDs under the PPA and reselling the same to the Buying Entity/ Distribution Licensee namely MSEDCL under the PSAs. While SECI is undertaking trading of electricity, it is still a generating company owned and controlled by Central Government. All matter relating to tariff of SECI, being Central Government Generating company is within jurisdiction of the Central Commission under Section 79 of the EA.

14.2. While countering above claims of SECI, MSEDCL stated that SECI has entered into PSA with MSEDCL as an 'Electricity Trader' and enjoying an operating trading margin of Rs. 0.07/unit for the services rendered. MSEDCL has further stated that under the provisions of EA, a Generator has no authority to act as an electricity Trader nor is it considered a deemed trader.

14.3. The Commission notes that as per PSA, parties have agreed on the following:

***“F. SECI has agreed to sell power to the Buying Utilities at the tariff determined from the reverse auction process mentioned in the RfS plus trading margin of Rs. 0.07 / kWh (maximum possible being Rs. 4.50/kWh including trading margin of Rs. 0.07/kWh) fixed for entire term of this Agreement.” [Emphasis added]***

Thus, under the PSA, parties have agreed to a trading margin of Rs. 0.07/kWh. Under EA, trading margin is payable to trading licensee. Generating company can recover only tariff for sale of electricity and cannot recover any trading margin. Therefore, the Commission rules that for the purpose of PSA under consideration, SECI is acting as a trading licensee.

14.4. The Commission also notes that in its subsequent submissions, SECI has clearly stated that it is performing role of trading licensee under the JNNSM schemes. SECI itself has cited Orders of CERC wherein it is stated that SECI is performing role of trading licensee in similar scheme. One of such Order is dated 11 December 2019 in Petition No. 19/MP/2018

in the matter of M/s Talettutayi Solar Projects Four Private Limited (TSPFPL) Vs. SECI & Others. Relevant excerpt from the said Order is reproduced below:

*“2. The Respondent No. 1, Solar Energy Corporation of India (hereinafter referred to as “SECI”), is a Government of India Enterprise under the administrative control of the Ministry of the New and Renewable Energy (hereinafter referred to as “MNRE”). **SECI is a trading licensee within the meaning of the Electricity Act, 2003. One of its main functions is to implement and facilitate the Jawaharlal Nehru National Solar Mission (hereinafter referred to as “JNNSM”) for development, promotion and commercialization of the solar technologies in the country.**”*

**[Emphasis added]**

14.5. Therefore, the Commission notes that although SECI has been incorporated as generating company, in the present matter it is performing functions of trading licensee. Under EA, a person can perform various roles viz. Generating Company (which does not require Licence), or transmission, distribution, and trading licensee (all of these require Licence from appropriate Commission). While adjudicating on dispute between parties, the adjudicating authority first has to decide role of each party under the agreement and then only jurisdictional issue can be decided. As mentioned above, in the present matter SECI is not acting as generating company and hence the Commission rules that provisions applicable for Central Sector Generating companies are not be applicable here.

14.6. As SECI is functioning as Trading Licensee under the present PSAs/PPAs, jurisdictional issue needs to be decided accordingly.

**15. Issue B: Whether ‘Composite Scheme’ exists in the present matter?**

15.1. SECI has submitted that it has signed back to back agreement for supply of solar power under JNNSM scheme. It signed PPA with SPDs for purchase of solar power and signed PSA with MSEDCL for sale of such solar power. As PSA and PPA are back to back agreements, the two cannot be looked in isolation of each other. Further, SECI has contended that as per the Clause 1.6 of the JNNSM Guidelines and Clause 1.2 of NSM Guidelines, it was envisaged that SECI will sell 90% of the power to the State where the Solar Project is established and the balance 10% of the power outside the State and thus it is qualifying as a ‘Composite Scheme’ under the EA. It stated that as per Supreme Court Judgment in Energy Watchdog Judgment, existence of composite scheme is sufficient to establish jurisdiction of the Central Commission.

15.2. MSEDCL has opposed such contention on the ground that 100% power produced in Maharashtra is being sale to MSEDCL under these PSAs. Hence, there is no composite

scheme for generation and supply of energy. MSEDCL has also referred to the Supreme Court Judgment in Energy Watchdog matter to state that intra-State transaction of power needs to be regulated by the State Regulator.

15.3. As both the parties have referred to the Supreme Court's Judgment in Energy Watchdog matter, it is important to examine the key points of the same. The Commission notes that the Supreme Court has dealt with the following contention about composite scheme in its Judgment:

*“20. The appellants have argued before us that the expression “composite scheme” mentioned in Section 79(1) must necessarily be a scheme in which there is uniformity of tariff under a PPA where there is generation and sale of electricity in more than one State. It is not enough that generation and sale of electricity in more than one State be the subject matter of one or more PPAs, but that something more is necessary, namely, that there must be a composite scheme for the same.”*

Thus, contention before the Supreme Court was that a composite scheme does not merely require generation and sale of electricity in more than one State, but it should be at uniform tariff under the PPA. On this issue, the Supreme Court has ruled as follows:

*“22. The scheme that emerges from these Sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79(1) itself in sub-sections (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression “within the State” in sub-clauses (a), (b), and (d), and “intra-state” in sub-clause (c). This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. **The State Commission’s jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act.** What is important to remember is that if we were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. **This being the case, we are constrained to observe that the expression “composite scheme” does not mean anything more than a scheme for generation and sale of electricity in more than one State”***

23. This also follows from the dictionary meaning [(Mc-Graw-Hill Dictionary of Scientific and Technical Terms (6th Edition), and P.Ramanatha Aiyar's Advanced Law Lexicon (3rd Edition)] of the expression "composite":

(a) 'Composite' – "A re-recording consisting of at least two elements. A material that results when two or more materials, each having its own, usually different characteristics, are combined, giving useful properties for specific applications. Also known as composite material."

(b) 'Composite character' – "A character that is produced by two or more characters one on top of the other."

(c) 'Composite unit' – "A unit made of diverse elements."

The aforesaid dictionary definitions lead to the conclusion that the expression "composite" only means "consisting of at least two elements". In the context of the present case, generation and sale being in more than one State, this could be referred to as "composite".

24. Even otherwise, the expression used in Section 79(1)(b) is that generating companies must enter into or otherwise have a "composite scheme". This makes it clear that the expression "**composite scheme**" **does not have some special meaning — it is enough that generating companies have, in any manner, a scheme for generation and sale of electricity which must be in more than one State.**

25. We must also hasten to add that the appellant's argument that there must be commonality and uniformity in tariff for a "composite scheme" does not follow from the Section."

**[Emphasis added]**

Thus, as against contention of Appellants that Composite Scheme must include sale of power at uniform rate, the Hon'ble Supreme Court held that such meaning cannot be given for 'Composite Scheme'. It is enough if the generating companies have a scheme for generation and sale of electricity in more than one State and under that circumstances, CERC would have jurisdiction to deal with issues involved.

15.4. Based on the above judgment of the Supreme Court, SECI has contended that as JNNSM and NSM guidelines envisage 10% sale of power outside the State, it constitutes a 'composite scheme' and hence CERC has jurisdiction in the matter. SECI has referred to CERC Orders holding JNNSM scheme a composite scheme and hence within jurisdiction of CERC. SECI has also contended that as PSA and PPA are back to back agreements, and hence it cannot be a case that CERC has jurisdiction on PPA and State Commission has

jurisdiction on PSA. Both agreements must be adjudicated by CERC only. In this regard, firstly the Commission opines that CERC Orders are not directly binding on the State Commission. The Commission further notes that Hon'ble Supreme Court in Energy Watchdog matter on the issue of 'composite scheme' has further referred to provisions of Tariff Policy 2016 which gave further clarity on these aspects. Relevant part of Judgment is reproduced below:

*26. Another important facet of dealing with this argument is that the tariff policy dated 6th June, 2006 is the statutory policy which is enunciated under Section 3 of the Electricity Act. **The amendment of 28th January, 2016 throws considerable light on the expression "composite scheme", which has been defined for the first time as follows:***

*"5.11 (j) Composite Scheme: Sub-section (b) of Section 79(1) of the Act provides that Central Commission shall regulate the tariff of generating company, if such generating company enters into or otherwise have a composite scheme for generation and sale of electricity in more than one State.*

*Explanation: **The composite scheme as specified under section 79(1) of the Act shall mean a scheme by a generating company for generation and sale of electricity in more than one State, having signed long-term or medium-term PPA prior to the date of commercial operation of the project (the COD of the last unit of the project will be deemed to be the date of commercial operation of the project) for sale of at least 10% of the capacity of the project to a distribution licensee outside the State in which such project is located.***

*27. That this definition is an important aid to the construction of Section 79(1) (b) cannot be doubted and, according to us, correctly brings out the meaning of this expression as meaning nothing more than a scheme by a generating company for generation and sale of electricity in more than one State."*

**[Emphasis added]**

Hon'ble Supreme Court has referred to the explanation of 'composite scheme' given in Tariff Policy 2016, which is a statutory policy. As per the said explanation, for qualifying the criteria of 'composite scheme', PPA for sale of at least 10% of the capacity of the project to a distribution licensee outside the State must be signed prior to commercial operation of the project. Therefore, in the opinion of the Commission, projects involved in the present PSAs need to be tested against these provisions before declaring them compliant of 'composite scheme' envisaged under the EA.

15.5. The Commission examines the Clause 1.6 of the JNNSM Guidelines and Clause 1.2 of NSM Guidelines given below:

*“1.6 Phase-II, Batch-III: State Specific VGF Scheme*

.....

*These guidelines shall form the basis for selection of Grid Connected Solar PV projects under this scheme. Out of total capacity of 2000 MW, a capacity of 250 MW will be earmarked for bidding with Domestic Content Requirement (DCR).*

*MNRE shall specify the total State-wise Capacity of the projects (both “open Category” and “DCR Category”) **based on commitments from the State for off take of not less than 90%** of the capacity to be invited by SECI before issue of Request of Selection (RfS). SECI shall tie up for the **remaining capacity with the other Buying Entities** for which the Host State shall facilitate inter-State transfer of power.”*

*“1.2 NSM Phase-II, Batch-IV: State Specific VGF Scheme*

.....

*These guidelines shall form the basis for selection of Grid Connected Solar PV projects under this scheme. Out of total capacity of 5000 MW, MNRE may fix some quantity of power to be procured with domestic content requirement of cells and modules made in India depending on availability and price.*

*MNRE shall specify the total State-wise Capacity of the projects (both “open Category” and “DCR Category”) **based on commitments from the State for off take of not less than 90% of the capacity** to be invited by SECI before issue of Request of Selection (RfS). SECI shall tie up for **the remaining capacity with the other Buying Entities** for which the Host State shall facilitate inter-State transfer of power”*

The Commission notes that the Guidelines envisage commitment from the State for off take of ‘not less than 90% of the capacity’, which means that minimum offtake cannot be less than 90% of project capacity. But there is no limit on maximum offtake capacity which can be 100% also. In case, host State does not agree for 100% offtake, then only residual capacity (maximum up to 10%) could be contracted with other States. Therefore, even though above schemes provides possibility of inter-state sales, it is evident that based on commitment from the host State for full offtake, inter-State sales may not be required.

15.6. As an admitted fact, in the present case, MSEDCL and SECI have entered into PSAs for 100% of the project capacity being installed under the respective RfS as invited by SECI.

The entire project capacity is commissioned in the State of Maharashtra and SECI has not entered into any other subsequent PSA with any other utility/buyer. In fact, as 100% capacity has already been tied-up with MSEDCL, there is no capacity left for contracting with other States. Further, capacities contracted have been commissioned. Therefore, Tariff Policy's requirement for contracting 10% capacity of project with distribution licensees in other States before commissioning of the project has also not been fulfilled.

- 15.7. Commission is of the opinion that merely having an enabling feature of inter-state supply of energy under JNNSM without acting on it, would not render it a 'composite scheme' to attract jurisdiction of the CERC. Hon'ble Supreme Court's ruling in Energy Watchdog matter that 'existence of scheme is sufficient' is with reference to contention of composite scheme must be at uniform tariff raised in that matter. It is further important to note that in that matter, Generator already had PPAs with more than one State. However, in the present case, PSAs have been signed with only one State with 100% capacity generated within the State has been contracted within the State by invoking intra-state transmission connectivity.
- 15.8. In view of the above analysis, the Commission rules that with respect to power projects commissioned under PSAs/ PPAs in the present case, there is no existence of 'composite scheme' as envisaged under Section 79 (1)(b) of the EA.

**16. Issue C: Whether SECI is acting as Inter-State Trader or Intra-State trader in the present case?**

- 16.1. The Commission notes that it is an admitted fact that projects for generation of electricity under present case are located in Maharashtra. However, SECI has contended that it is acting as inter-State Trader in present matter as it has the right to divert power to third parties outside the Maharashtra in the event of default by MSEDCL as provided as Article 6.5 of the PSA. Further, it can also sell excess generation beyond the MUs specified in Article 6.8.2 and Article 6.8.3 of the PSA read with Article 4.4.1 and Article 4.4.2 of the PPA to third party outside the State. MSEDCL has opposed such contention of SECI and has stated that such provisions relating to defaults cannot be relied upon for deciding jurisdiction of main contract.

- 16.2. The Commission notes that Article 6.5 of the PSA reads as below:

*"6.5. Third Party Sales by SECI:*

*6.5.1 Notwithstanding anything to the contrary contained in this Agreement, upon the occurrence of any of the following event (s), SECI shall be entitled to regulated power supply of Solar Power of the Buying Utility;*

i) Default in making payment by the 15<sup>th</sup> day after the Due Date,

ii) Non-recoupment of LC by the 15<sup>th</sup> day after its operation.

iii) Non-availability of LC for operation and for its required value by the 14<sup>th</sup> day after the Due Date

.....  
**6.5.5. SECI shall have the right to divert the solar power or part thereof and sell it to any third party namely:**

i) Any consumer, subject to applicable Law; or

ii) Any licensee under the Act;

*SECI shall request the concerned SLDC/RLDC to divert such power to third party as it may consider appropriate.”*

**[Emphasis added]**

Thus, SECI’s right to sale of power to third party under the PSA, is only subsequent to default of MSEDCL with respect to events as listed in Article 6.5.1. In normal circumstances, when there is no default from MSEDCL, SECI cannot entertain this right of selling power to third party. Therefore, in the opinion of the Commission, such clause which is applicable only under circumstances of default of party, cannot be basis for deciding nature of the agreement (inter-state/intra-state).

16.3. The Commission further notes that the Article 6.8.2 of both the PSAs specifies the number of units the buying utility i.e. MSEDCL is entitled to purchase. The Article 6.8.3 specifies the treatment of generation in excess of agreed quantum. Relevant provisions are reproduced below:

*“6.8.2: The Buying Utility, at any time during a Contract Year, shall not be obliged to purchase any additional energy from the SECI beyond ..... Million kWh (MU) as per PPAs signed by SECI with the SPD for solar PV Projects. ....”*

*6.8.3 Notwithstanding Article 6.8.3, any power which is in excess of the quantum of power agreed to be supplied under this Agreement shall be offered to the Buying utility and in case the Buying Utility does not accept the same, SECI shall take appropriate action as per PPA.”*

**[Emphasis added]**

The above provisions of PSA clearly demonstrate that any excess generation has to be first offered to MSEDCL and only if MSEDCL refuses to take it then only it can be sold to third party. The Commission further notes that Article 4.4.1 and Article 4.4.2 of the PPA executed under JNNSM / NSM Guidelines read as follows:

*4.4.1 SECI, at any time during a contract year, shall not be obliged to purchase any additional energy from the SPD beyond ..... Million kWh (MU). .....*

*4.4.2 Notwithstanding Article 4.4.1 Any excess generation over and above 10% of declared annual CUF will be purchased by SECI at a tariff as per Article 9.4 provided SECI is able to get any buyer for sale of such excess generation. While the SPD would be free to install DC solar field as per its design of required output, including its requirement of auxiliary consumption and to reconfigure and repower the Project from time to time during the term of the PPA. It will not be allowed to sell any excess power to any other entity other than SECI (unless refused by SECI). ...”*

**[Emphasis added]**

Terms of PSA and PPA which has been signed back to back need to be interpreted harmoniously. Rights of SECI under the PPA to sell excess power to any buyer is restricted by provisions of PSA which require SECI to first offer any excess generation to MSEDCL and in case MSEDCL refused to buy, then only SECI can sell such power to third party including party outside State. In the opinion of the Commission, similar to third party sale under default of MSEDCL, sale of excess generation to third party is not a main clause of the agreement. Only if MSEDCL refused to buy excess generation then only SECI can sell excess generation outside State. Moreover, as assured generation quantum is to be supplied during the year, considering infirm nature of solar energy, any excess generation can be known only at the end of the financial year. Hence possibility of entering into separate contract for sale of excess generation is highly improbable. Such residual clauses under the Agreement cannot be the basis for deciding nature of the agreement (inter-state/intra-state).

16.4. In view of the above analysis, the Commission notes that generating plants in the present case are located under the Maharashtra. Further, 100% capacity of these projects is contracted with MSEDCL under the PSAs. Hence, SECI is buying and selling the energy from/to the entities which are in Maharashtra only. SECI's reliance on clauses of agreement which enables it to sale of energy to third party (outside State) under circumstances of MSEDCL's default or MSEDCL's refusal to buy excess generation, for demonstrating possibility of sale of electricity to more than one State, cannot be allowed as ground for deciding main nature of contract (inter-state/intra-state). Hence, the Commission rules that SECI is acting as intra-State Trader in the present matter.

## 17. Issue D: Whether MERC has jurisdiction in this matter?

17.1. In the earlier part of this Order, the Commission has already held that SECI is acting as a trading licensee and not a generating company under the present case. Further, no ‘composite scheme’ as envisaged under Section 79 (1) (b) of the EA exists in the present case. Considering transactions involved within the State, the Commission has also held that these are intra-state transactions.

17.2. The Commission notes that APTEL, in Appeal No. 200/2009 (Pune Power Development Private Limited (Inter-State Licensee) Vs Karnataka Discoms) passed a judgement dated 23 February 2011, on the Jurisdiction of the State Commission and held as under:

*“37. (1) The present case involves a dispute between the Distribution Licensee of Karnataka, the Respondent and the Appellant which is an inter-State licensee. The Appellant is selling power to the Distribution Licensee Respondent in the State of Karnataka, thereby having a nexus to the State. Since the procurement of power by the Distribution Licensee from the Trading Licensee is being done in the State of Karnataka, the Appellant falls within the jurisdiction of the State Commission under Section 86(1)(b) of the Act. **The procurement of power has a direct nexus with the State of Karnataka as the supply is to the Karnataka Distribution Licensee. There is no restriction on the location of the Trading Licensees to determine the jurisdiction of the State Commission. The supply of electricity, namely, the Appellant being at a different place does not oust the jurisdiction of the State Commission under Section 86(1)(f) to adjudicate upon the dispute between the licensees. Therefore, we hold that so long as the Distribution Licensees are involved in procurement of power in the State, the State Commission alone will have the jurisdiction under Section 86(1)(f) to adjudicate upon the dispute. The 1 point is answered accordingly.**”*

**[Emphasis added]**

Thus, as per the above judgment, if Distribution Licensee is involved in procurement of power in the State, the State Commission has jurisdiction to adjudicate dispute between parties. Jurisdiction of the State Commission cannot be denied just because trading licensee involved in transaction is an inter-state trading licensee if such transaction are intra-state.

17.3. SECI has argued that the above Order of the APTEL was concluded in February 2011, which was prior to the scope of composite scheme being decided by the Supreme Court in Energy Watchdog matter. However, the Commission has already ruled that composite

scheme does not exist in the present matter and hence, the above cited APTEL Judgment is squarely applicable to the present matter.

- 17.4. Parties have already admitted that PPA and PSA in the present matter are signed on back to back basis. This can be further corroborated by looking at the following condition of RfS document published by SECI for selection of SPD:

*“3.14.4. Separate back-to-back Power Sale Agreements (PSAs) will be executed by SECI with the Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL) for sale of solar power to them”*

Thus, SPD while submitting their bids was aware that power will be sold to MSEDCL under the PSA which would be signed separately by SECI. The Commission further notes that Schedule I of PSA signed between MSEDCL and SECI has listed details of PPA signed by SECI with selected SPD. This clearly establishes that PPA and PSA in the present matter are back to back agreements.

- 17.5. In view of the above analysis, the Commission concludes that as an admitted fact all SPDs selected under Maharashtra specific RfS and their solar projects are located within the State of Maharashtra. All of them are selling electricity to MSEDCL under back to back PPA and PSA through SECI which is acting as a trading licensee with a trading margin of Rs. 0.07/kWh. This clearly shows that transaction involve are within the State of Maharashtra. Hence, Commission rules that it has jurisdiction to adjudicate on dispute arising out of PSA/PPA in the present matter.

18. The Commission notes that SECI has contended that while participating in the proceeding before the CERC in the matter relating to SPDs under JNSSM scheme, MSEDCL never objected to the jurisdiction of CERC, and therefore now it cannot take a plea that this Commission has jurisdiction and not CERC. MSEDCL in its reply has stated that it was never the main party in those matters nor has it filed any Petition before CERC. The Commission does not wish to go into further details on this issue, as it has already ruled on the issue of jurisdiction as above.

19. Hence, the following Order.

### **ORDER ON JURISDICTION ISSUE**

- 1. This Commission has jurisdiction to adjudicate on the dispute arising out of Power Sale Agreement / Power Purchase Agreement in the present matter.**

2. Solar Energy Corporation of India Limited shall file its submission on the merits of the Petition, serving a copy to Maharashtra State Electricity Distribution Company Limited, within two weeks from the date of this Order.
3. Maharashtra State Electricity Distribution Company Limited to file its Rejoinder within one week thereafter.
4. Subsequent date of hearing on the merits of the case will be informed by the Secretariat of the Commission separately.

**Sd/-**  
**(Mukesh Khullar)**  
**Member**

**Sd/-**  
**(I.M. Bohari)**  
**Member**

  
**(Abhijit Deshpande)**  
**Secretary**

