

**WEST BENGAL ELECTRICITY REGULATORY COMMISSION**

**WEST BENGAL**

**Petition No. OA-351/20-21**

**Date of hearing: 9<sup>th</sup> September, 2021**

**Time of hearing: 14.30 hours**

**Quorum:**

**Shri Sutirtha Bhattacharya, Chairperson**

**Shri Durgadas Goswami, Member**

**Shri Pulak Kumar Tewari, Member**

**In the matter of**

**Petition for net metering for Roof Top Grid Connected Solar Plant under RESCO Model, adjudication or resolution of dispute regarding regulation of purchase and procurement process of electricity.**

**And**

**In the matter of  
Rule (3) of the Electricity Rules, 2005 read with section 2(8) of the Electricity Act, 2003**

**And**

**In the matter of**

**Braithwaite & Co Limited,  
(A Govt. of India Undertaking)  
Under Ministry of Railways  
5, Hide Road, Calcutta 700 043**

**..... Petitioner**

**And**

**CESC Limited,  
CESC House, Chowringhee square, Kolkata-700001**

**..... Respondent**

**Representatives attended:**

**Braithwaite & Co Limited [Petitioner]**

1. Mr. Debanik Banerjee, Advocate
2. Mr. Debasish Ghosh, Senior Manager (Project)

**CESC Limited [Respondent]**

1. Mr. Avijeet Lala, Advocate
2. Ms. Astha Sharma, Advocate
3. Ms. Gargi Chatterjea, Executive Director, CESC Limited

**CASE IN BRIEF**

1. The petitioner, Braithwaite & Co Limited (in short 'BCL'), has three manufacturing units located at different places within the licensed area of CESC Limited, viz. Clive Works, Victoria Works and Angus Works. The petitioner contemplated to install roof top grid connected solar power system at their three units to a summated load of 3.7 MW (Clive work – 0.9 MW, Victoria works – 0.3 MW and Angus Works – 2.5 MW) under RESCO model in line with the extant guidelines of the Government of India related to installation capacities, due to lack of funding capacity for investing in capex model. Accordingly, Braithwaite & Co Limited approached Solar Energy Corporation of India (SECI), nodal agency of GOI for promoting, coordinating, guiding and realizing the solar energy projects all over India, who in turn included their requirement in their collective national tender for identification of a suitable vendor who would supply the solar units.
2. During the last hearing held on 10.08.20212, it was directed by the Commission that –
  - a) M/s Braithwaite & Company shall submit their affidavit duly sworn in a Non-Judicial stamp paper of requisite value within 7 days from the date of receipt of this order;
  - b) Upon receipt of the above, the next date of hearing will be fixed.
3. Accordingly, BCL, vide their letter dated 11<sup>th</sup> August, 2021 submitted their rejoinder duly sworn in a Non-Judicial Stamp paper of requisite value within the scheduled date, with copy to CESC and Neeti Niyaman (Counsel for CESC) through e-mail.
4. Based on above, an e-hearing was scheduled on 9<sup>th</sup> September, 2021 at 14.30 hrs. The e-hearing was held as scheduled and the representatives from both the parties were present.



### SUBMISSION DURING HEARING

5. The Ld. Advocate, on behalf of BCL, submitted that –

- a) From the very beginning the petitioner opted only for RESCO model for installation of roof top grid connected solar power system at its 3 units in line with the extant guidelines of the Government of India related to installation capacities, due to lack of funding capacity for investing in capex model. Accordingly, Braithwaite & Co Limited approached Solar Energy Corporation of India (SECI), nodal agency of GOI for promoting, coordinating, guiding and realizing the solar energy projects all over India. As per the guidelines of SECI, BCL can engage any of the vendors identified through SECI tender who shall install the solar units at their cost and shall operate them for a period of 25/15/10 years. The petitioner shall have to purchase the entire power generated by them at a rate finalized by SECI and the power in excess of instantaneous consumption shall be fed to the grid through a net metering system for which the Government pay back for the excess power exported.
- b) It is submitted that the petitioner intimated the respondent the status of their solar project and requested the respondent to initiate adequate measures for approval and installation of net metering systems in all the three units of the petitioner. But, the respondent stated their inability to extend net metering arrangements for the reasons that the units are to be set up and owned by separate entities as per RESCO Model and therefore will not qualify as captive generating plant within the meaning of the Electricity Act, 2003.
- c) It is also submitted that the proposed association of RESCO & BCL qualifies as a generating company as per the definition laid down in the provisions of the Electricity Act, 2003. Therefore, the RESCO units can be declared as 'Captive Generating Unit' for implementation of net metering by the respondent.
- d) The petitioner herein does not come within the ambit of the definition of "consumer" as defined in Section 2 (15) of the Act, but ought to be considered as a "generating company" as defined in Section 2(28). In such a case, the remedy of the petitioner lies before this Hon'ble Commission, in terms of Section 86 of the Electricity Act, 2003 and not before the CGRF, as alleged by the respondent or at all.

- e) RESCO model means 'Renewable Energy Service Company' and it is a company who makes investments for installation of the solar plant on the roof, maintains the plant and sells the power generated thereat to its partner company, which in the present case is the petitioner herein. The unit rate of energy and the period of service depend upon the agreement between RESCO and its partner company and upon the expiry of the service period the partner company becomes the owner of the entire solar plant.
- f) The concept of RESCO, read conjointly with Section 2(8) of the Electricity Act, 2003, which defines "Captive Generating Plant, does not necessarily disqualify the petitioner herein for net metering under the present regulatory dispensation put in place by this Hon'ble Commission.
- g) This commission, vide an order dated March 19, 2021 in Case No. WBERC/A - 82/1 has granted time up to June 30, 2021 to the consumers to finish installation of their solar PV system and notify the same to the licensee within that date. It is also pertinent to mention herein that the Hon'ble Commission in aforesaid order has not disqualified and / or excluded the RESCO model from getting the benefit of net metering.
- h) It is also an admitted fact that the petitioner had made investments for the solar energy project based on Notification No. 50/WBERC dated March 22, 2013 and the First Amendment to WBERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) Regulations came into effect subsequently. This Hon'ble Commission in its Order dated March 19, 2021 passed in Case No. WBERC/A-82/1 has observed at Paragraph No. 5.0 that the projects where investments have been planned based on provisions prior to notification of the First Amendment Regulations the submission of consumers and solar entrepreneurs are reasonable. Under such circumstances, the petitioner herein is under a legitimate expectation that the case would be considered in such light and ruled in its favour.
- i) Under the circumstances stated and more fully clarified hereinabove, it is most humbly prayed that this Hon'ble Commission may be graciously pleased to allow the petition and grant the reliefs prayed for therein in favour of the petitioner herein.



6. The Ld. Advocate, on behalf of CESC Limited, submitted that –

- a) The petition filed by the Petitioner suffers from the vice of improper pleadings. The present petition is defective for want of proper pleadings inasmuch as the petition is vague and ambiguous. It is not clear as to what is the cause of action and the grievance of the Petitioner. While in the heading the petition mentions "Application for Net Metering for Roof Top Grid connected Solar Plant under RESCO Model, adjudication or resolution of dispute regarding regulation of purchase and procurement process of electricity", the relief sought towards the end of the Petition is "Based on the above, our RESCO Units can be declared as "Captive Generating Unit" for implementation of Net Metering by CESC'. While on one hand, the Petitioner is purportedly filing an application for net-metering for its Roof-top Grid connected Solar Plant under RESCO model, on the other hand it is seeking declaration of its RESCO Units as a 'Captive Generating Unit' for the consequential relief of implementation of net metering by the respondent.
- b) It is submitted that Section 86(1)(f) of the Electricity Act, 2003 (in short 'Act') provides that the State Commission can adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration. It is pertinent to highlight that the adjudicatory function of the State Commission does not extend to consumer disputes. The section 42(5) of the Act provides that every distribution licensee shall necessarily establish a forum for redressal of grievances of the consumers in accordance with the guidelines as may be specified by the State Commission. The sub-sections (6) and (7) of section 42 of the Act provide that any consumer, aggrieved by non-redressal of their grievances under sub-sections (5), may make a representation before an Ombudsman to be appointed by the State Commission. The Rules, under Rule 7, also provide for provisions relating to Consumer Redressal Forum and Ombudsman. Hence, all grievances between the consumers and the distribution licensees are statutorily required to be decided by the Consumer Grievance Redressal Forums ("CGRF"), and if such order of the CGRF is deemed to be unsatisfactory, the aggrieved consumer can appeal to the Ombudsman appointed by the State Commission.
- c) The Respondent in complete compliance of Section 42(5) of the Act, and the WBERC

(Guidelines for Establishment of Forum for Redressal of Grievances of Consumers and Time and Manner of Dealing with such Grievances by the Ombudsman) Regulations, 2013, has assigned Grievance Redressal Officers for 6 Region / District and 2 Central Grievance Redressal Officers for both commercial and supply matters.

- d) The WBERC (Guidelines for Establishment of Forum for Redressal of Grievances of Consumers and Time and Manner of Dealing with such Grievances by the Ombudsman) (First Amendment), Regulations, 2020, ("CGRF First Amendment Regulations 2020") issued on 19.05.2020, specified that a consumer grievance of any nature, has to be necessarily raised before CGRF. Hence, it is respectfully submitted that this Hon'ble Commission is not the proper forum for agitating and/or seeking redressal of any grievance that the Petitioner may have with regard to net metering.
- e) It is submitted that under the Act and the Rules, 'captive generation plant' has a very distinct legal connotation. It is respectfully submitted that the Petitioner is required to establish its case to show how it is eligible for the net metering arrangements under the Renewable Regulations as amended by the First Amendment thereof.
- f) Furthermore, as is apparent from the definition of "eligible consumer" contained in the First Amendment and as is also clear from a conjoint reading of other provisions of the Regulations (discussed in extenso in later part of this reply) to be eligible for net metering or net billing arrangement, the solar PV generating system must be self-owned by the consumer. A rooftop plant set up through a third-party vendor or through RESCO route does not qualify for net metering under the present regulatory dispensation put in place by this Hon'ble Commission. In the instant case the Petitioner is admittedly installing its plant under RESCO model. It cannot, therefore, be categorized as a 'captive plant', because the ownership of the plant would be with a third party. In this view of the matter it is submitted that prayer to declare the three Solar PV Generating Systems ("SPGS") being developed under RESCO model as Captive Generating Plant of the Petitioner does not survive.
- g) It is submitted that the Petitioner cannot seek a consequential relief as a matter of course. The Petitioner is required to set up a case as to why and how it is eligible for the net-metering facility. It cannot be an automatic consequence after declaration as a



captive generating plant. The Petitioner is required to establish its eligibility as per the sanctioned load, total installed capacity, threshold limit, etc. as per the prevalent law. The Petitioner has failed to satisfy, by way of its pleadings and the documents placed on record, that it satisfies the criterion as laid down in principal Renewable Regulations as modified by the Renewable Regulations First Amendment.

- h) As per the Renewable Regulations First Amendment, net metering is allowed for all agriculture consumers and all other eligible consumers having sanctioned load up to 5 kW and net billing / gross metering to eligible consumers having sanctioned load above 5 kW. The Petitioner's project, post the First Amendment, by Petitioner's own admission is much in excess of the threshold limit for net metering (i.e. up to 5 kW) as prescribed by this Hon'ble Commission. Hence, Petitioner's SPGS would not be eligible for net metering arrangement.
- i) This Hon'ble Commission vide order dated 19.03.2021, by utilizing its inherent powers, extended the benefit of net metering to all those consumers who will install their solar PV system and notify the same to the concerned licensee within 30.06.2021 ("Order dated 19.03.2021"). However, the relaxation extended by this Hon'ble Commission vide its Order dated 19.03.2021 would not accrue benefit of the Petitioner because Petitioner is setting up its rooftop solar PV plant through the RESCO model, which is impermissible under the Regulations.
- j) It is submitted that the RESCO model is not recognized under the Principal Renewable Regulations, 2013 or under the First Amendment thereto. It is respectfully stated that as per the regulations framed by this Hon'ble Commission, rooftop solar PV generating plant under net metering arrangement is allowed for self-owned system only.
- k) With respect to roof top solar PV plants, Electricity (Rights of Consumers) Rules, 2020 ("Consumer Rules, 2020") notified by the Central Government allows for net metering for loads up to 10 kw and gross metering for load above 10 kW. The Petitioner's project's sanctioned load being way above 10 kW, would not be eligible for net metering even under the Consumer Rules, 2020.
- l) The Petitioner has specifically averred that it does not come within the definition of

"consumer" as defined in Section 2(15) of the Act. As per the Petitioner, it is a "generating company" as defined in Section 2(28) of the Act. On this basis, the Petitioner has contended that the remedy of the Petitioner lies before this Hon'ble Commission in terms of Section 86 of the Act and not before Consumer Grievance Redressal Forum ("CGRF"). It is respectfully submitted that while the Petitioner on one hand is submitting that it is not a consumer, but a generating company under Section 2(28) of the Electricity Act, 2003, on the other hand the Petitioner is seeking to establish its case that it is eligible for net metering which option, under the West Bengal Electricity Regulatory Commission (Cogeneration and Generation of Electricity from Renewable Sources of Energy) Regulations, 2013 ("Renewable Regulations 2013") and the amendment ("Renewable Regulations First Amendment") thereof., is only available to 'eligible consumers'. Hence, the Petitioner is trying to set up a new case in its Rejoinder by claiming itself to be generating company and hence amenable to the adjudicatory jurisdiction of this Hon'ble Commission under Section 86 (1) (f) of the Act. Such a conduct of the Petitioner is improper and amounts to misuse of process of law. It is submitted that the Petitioner is trying to blow hot and cold in the same breath. The Petitioner cannot be allowed to approbate and reprobate to suit its convenience. The same is impermissible under the law.

- m) To claim any benefit under the net metering arrangement, the Petitioner is required to be an 'eligible consumer under Regulation 2.1 (xi) (A) of the Renewable Regulations First Amendment. If the Petitioner is claiming to be a generating company, then the benefit of net metering and net billing cannot be extended to it under the law.
- n) Even otherwise, being an 'eligible consumer' under the Renewable Regulations First Amendment, the Petitioner is not eligible for net metering arrangement as it does not qualify the threshold criteria for the same.
- o) It is submitted that the averment that Petitioner has made investment for the solar energy project based on Notification No. 50/WBERC dated March 22, 2013 is false, and misconceived. The Petitioner cannot make bald statements without any documentary proof thereof. It must be put on record that it is not an admitted fact that the Petitioner made investment under the Renewable Regulations, 2013 and the First Amendment came into effect subsequently. While the Renewable Regulations First



Amendment were issued on 21.12.2020, but it is important to note that this Hon'ble Commission had invited objections/ suggestions/ comments on the 'Draft WBERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy) (First Amendment) Regulations, 2020' on 15.09.2020 well before the present petition filed on 09.12.2020. Thus, the Petitioner was well-aware that the Renewable Regulations are in the process of being amended and an amendment is likely to be issued to the Renewable Regulations. The Petitioner, therefore, filed the instant petition immediately before the notification of Renewable Regulations First Amendment so as to circumvent the rigors of amended regulations. This, in our respectful submissions, shows the malafide conduct of the Petitioner.

- p) However, the respondent submitted that the Hon'ble Commission may kindly first decide upon the maintainability of the case considering the fact that whether the matter is to be adjudicated through CGRF or the Commission. Upon receipt of the decision of the Commission, the respondent shall proceed for the merit of the case.

#### **OVSERVATIONS OF THE COMMISSION**

7. The Commission observes that the Electricity Act, 2003 does not provide any net metering facility whereas the Regulations framed by the Commission contains net metering facilities for which certain criteria is required to be fulfilled for eligibility. Under the circumstances, the petitioner was asked to clarify as to under which regulation of the Commission's extant Regulations, the petitioner is eligible for net metering facility for implementation of the project, in question, under RESCO model. In reply, the petitioner said that they need to look into the extant Regulations of the Commission to make any comment on the same.
8. The Commission with the above observation, issues interim order as below:
  - (i) Both the parties will submit their written arguments to the Commission within seven days from the date of receipt of the order;
  - (ii) The Commission reserves the order and shall pass the necessary order upon receipt of the written arguments from the parties involved.

9. A copy of this order be served upon the petitioner and the respondent.

**Sd/-**  
**PULAK KUMAR TEWARI**  
**MEMBER**

**Sd/-**  
**(DURGADAS GOSWAMI)**  
**MEMBER**

**Sd/-**  
**(SUTIRTHA BHATTACHARYA)**  
**CHAIRPERSON**

**Dated: 27.09.2021**

**Sd/-**  
**SECRETARY**