

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 304/MP/2013**

Subject : Petition for adjustment of generation tariff and other consequential reliefs.

Petitioner : Godavari Green Energy Limited.

Respondents : NTPC Vidyut Vyapar Nigam Ltd. and Union of India, Ministry of New and Renewable Energy .

**Petition No. 312/MP/2013**

Subject : Petition under Section 79 of the Electricity Act, 2003 for grant of compensatory tariff on account of depreciation in rupee.

Petitioner : Rajasthan Sun Technique Energy Private Limited.

Respondents : NTPC Vidyut Vyapar Nigam Ltd. and Union of India, Ministry of New and Renewable Energy .

**Petition No. 16/MP/2014**

Subject : Petition under Section 79 (1)(b) read with Section 79(1)(f) of the Electricity Act, 2003 for adjustment of capacity utilization factor, extension of time for execution of project and other consequential relief.

Petitioner : MEIL Green Power Limited.

Respondents : NTPC Vidyut Vyapar Nigam Ltd. and Union of India, Ministry of New and Renewable Energy .

**Petition No. 42/MP/2014**

Subject : Petition for adjustment of tariff, extension of time for execution of project and other consequential reliefs.

Petitioner : Corporate Ispat Alloys Limited.

Respondents : NTPC Vidyut Vyapar Nigam Ltd. and Union of India, Ministry of New and Renewable Energy .

Date of hearing : 28.8.2017

Coram : Shri Gireesh B. Pradhan, Chairperson  
Shri A.K. Singhal, Member  
Shri A.S. Bakshi, Member  
Dr. M.K. Iyer, Member

Parties present : Shri Buddy A. Ranganadhan, Advocate, GGEL & RSTEPL  
Shri Arun Poddar, Advocate, GGEL  
Shri Raunak Jain, Advocate, GGEL  
Shri Vinay Aggarwal, Advocate, GGEL  
Shri Hasan Murtaza, Advocate, RSTEPL  
Ms. Malvika Prasad, Advocate, RSTEPL  
Shri Manoj Pongade , RSTEPL  
Shri Suma Kant, RSTEPL  
Shri Siddhartha Sharma, RSTEPL  
Shri Sakya Singh Chowdhury, Advocate, MEIL  
Ms. Molshree Bhatnagar, Advocate, MEIL  
Ms. Manpreet Kaur, Advocate, MEIL  
Shri N.M. Venugopal, MEIL  
Shri M.G. Ramachandran, Advocate, NVVNL  
Ms. Anushree Bardhan, Advocate, NVVNL  
Ms. Poorva Saigal, Advocate, NVVNL  
Shri Shubham Arya, Advocate, NVVNL  
Shri Dharmendra Singh, NVVNL  
Shri Sudhir Wage, NVVNL  
Shri R. Mishra, Advocate, MNRE  
Shri Sanjay Karndhar, MNRE  
Shri Anand Ganeshan, Advocate, PSPCL  
Ms. Swapna Seshadri, Advocate, PSPCL

### **Record of Proceedings**

At the outset, learned counsel for NTPC Vidyut Vyapar Nigam Limited (NVVNL) submitted that the main grievance of the petitioners is that they have not been able to achieve the Target Capacity Utilization Factor (CUF) on account of variation in the DNI actually available as compared to the DNI as per data given in the website of the Ministry of New Renewable Energy (MNRE) as a part of the bidding documents. Learned counsel for NVVNL further submitted as under:

a). In terms of the Bidding Documents, namely, the Guidelines issued by the MNRE, the RFS documents and the draft PPA, it was for the bidders who had participated in

the Tariff Based Competitive Bidding Process held in accordance with the Guidelines issued by the Government of India for the selection of the successful bidder to take the responsibility and deal with the DNI issue.

b). The various claims made by the petitioners in regard to the reliance on the representations made by MNRE is contrary to the Detailed Project Report (DPR) which the petitioners had, themselves, about 6 months of the execution of the PPA and at the time of the financial closure made alongwith the list of documents, mentioned in the RFS. The DPR determines the viability of the projects to be implemented by the petitioners. At that stage, no issue was raised on the DNI being incorrectly mentioned in the website of the MNRE.

c). The petitioners' projects are Solar Thermal Power Generation. For such projects, the CUF provided for in the Bidding Documents is at normative rate of 23% with a maximum of 25% and a minimum of 16%. These are provided in the RFS and the draft PPA. The implication of this is that the petitioners ought to achieve a minimum of 16% to avoid any financial implication, namely, liability to pay for shortfall in generation. The targeted level of 16% was fixed providing a cushion of 7% to the normative 23% to accommodate the petitioners for some variation in the actual CUF.

d). In the RFS documents, the minimum percentage was provided at 16% and an option was given to the petitioners to increase the maximum percentage of CUF with implications of corresponding increase in minimum CUF percentage. The risk or reward of the decision to be made was entirely on the petitioners and this is the essence and fundamental aspect of any competitive bid process.

e). In terms of the bidding documents, if the maximum percentage of CUF is increased from 25%, there will be a proportionate increase in the minimum percentage to be achieved, a difference of 7% to be maintained from the increased maximum for the minimum to be achieved. All the above aspects have been provided in an unambiguous manner in the RFS Documents.

f). The stand taken by the petitioners that they had only relied on the data provided in the website of the MNRE and there was no occasion for them to go into the issues of DNI, the CUF that could be achieved before committing to the percentage of the CUF is contrary to the DPR which was done after the execution of the PPA.

g). A number of Solar PV projects have been commissioned both in Rajasthan and in Andhra Pradesh. Most of the Solar Power Developers have achieved the target much above the targeted CUF of 12% applicable to Solar PV projects and most of them have achieved the CUF which is the minimum percentage prescribed for even the Solar Thermal Power Plants, namely, above 16%. Therefore, there is no reason for the petitioners not to achieve the targeted minimum in the bidding documents.

h). The increase of the minimum target to be achieved for the Solar Thermal Projects from 16% to 21% were at the instance of the petitioners and based on the

technical advice received by them from their consultants. Accordingly, the obligation to achieve the minimum at the percentage decided by them, ranging from 21% to 28% is entirely on the respective petitioners.

i). It is not open to the petitioners to complain that the DNI given as information in the website of MNRE based on which a minimum percentage was decided at 16% should be considered as a representation by MNRE to warrant the DNI to achieve a minimum of 21% and above. Neither MNRE nor NRVNL had given any representation on the aspect of DNI or its conversion to CUF at a particular level. In any event, it is the decision of the petitioners to have quoted the percentage to be achieved by them on their own based on their Consultants viability report given in the form of DPR.

j). A disclaimer was also given in the Bidding Documents on the information of CUF decided and incorporated in the Bidding Documents. However, the targeted minimum CUF was reduced from 23% to 16% in case of Solar Thermal and from 19% to 12% in the case of Solar PV. The bidders were asked to bid on this basis and the petitioners had given the bid on their own volition. Most of the bidders have increased the targeted minimum on their own. Therefore, there is no question of any representation being given by either the Government of India or by NRVNL on the aspect of DNI or on the CUF that could be achieved. Neither NRVNL nor MNRE ever forced any petitioner to either participate in the bid process or give the bid in a particular manner to be selected for execution of the PPA.

k). The provision for Liquidated Damages under Article 4.4.1 of the PPAs provides for an absolute obligation on the petitioner's fulfillment of its obligations and in case of non-fulfillment to pay the qualified amount. In the present case, the damages are being claimed by a public utility under a regulatory regime and in the interest of consumers at large. The stipulation by way of liquidated damages with a provision such as Article 4.4.1 has been adopted in a regulatory framework considering the fact that it is difficult to prove the actual level of damage. There has to be a certainty for both the parties on the quantum of damages. If the sum is named as liquidated damages, then, it is payable and the burden for showing that there has been no loss or injury is on the petitioners. In support of his contentions, learned counsel relied upon the judgments of the Hon'ble Supreme Court in Kailash Nath Associates Vs. DDA [(2015) 4 SCC 136] and Construction and Design Services Vs. DDA, [(2015) 14 SCC 263].

2. In their rebuttal, learned counsel for Godavari Green Energy Limited (GGEL) and Rajasthan Sun Technique Energy Private Limited.(RSTEPL) and learned counsel for MEIL Green Power Limited (MEIL) submitted as under:

a. MNRE in its reply affidavit dated 14.6.2017 has deviated from its previous stand where it categorically affirmed to give into effect the recommendations of technical committee. MNRE once having held eventualities being faced by the petitioner as events beyond the control of the petitioners is now taking a contrary view without assigning any reasons for such deviation. Once the Expert Committee Report has

already taken a view, MNRE has failed to provide reasons why the same have not been adopted.

b. For the purpose of bidding, the petitioners had to resort to available satellite data to determine the DNI of the sun's rays at the project site, which would define the CUF of the project. The bidders had to proceed on the basis of satellite data as there was no available ground reading of DNI in India at the time of bidding. Measurement of ground data for DNI is required to be carried out for a period of at least one year. Since, no DNI ground measurement was available at the relevant point of time, bidders had to rely on satellite based DNI data. There was no occasion for the bidders to assess the level of DNI radiation on ground given the restrictive timelines for the bidding process. Even the Commission had proceeded to determine generic tariff based on satellite data available to it. It was not possible for the petitioners to have independently verified the DNI data when they did not have the time to verify prior to bidding.

c. The vast variation amongst satellite and ground data arose on account of the high levels of aerosol and dust particle in India, which could not have been foreseen at the relevant time in the absence of ground data. The petitioners could not have taken such variation into account. Therefore, the petitioners cannot be asked to perform the contract in the face of the unforeseen circumstances that has altered the very basis of the bidding process.

d. Clause 4.4.1 of the PPA clearly specifies "those reasons solely attributable to the SPD". MNRE has indicated in the Review Committee Report and its subsequent letter dated 17.8.2016 that the events faced by the petitioner are akin to force majeure and even NRVNL has not been able to demonstrate that the shortfall in supply of contracted capacity is attributable to the petitioner.

e. Availability of DNI is dependent upon natural atmospheric conditions, which clearly are not under the control of the petitioner. Despite undertaking effective measures to mitigate the shortfall, the petitioners could not have anticipated such fluctuation in DNI levels. Fall in DNI is for reasons beyond the control of the petitioners.

f. A year-wise observation of the annual DNI indicates that the average DNI has been only 1398 .00i.e an effective DNI of 1279.2 which will lead to lowering the CUF for the project resulting in reducing the generation capacity of the project. The petitioners could not have estimated such variation in DNI without being provided at least one year of ground reading. The petitioners cannot be subjected to the entire consequence of the DNI variation when it was not possible for the petitioners at the relevant point of time to examine and assess the wide variation in between satellite data and ground data.

g. The extension of 10 months and execution of revised terms of PPA was initiated by MNRE not only because it considered that reduction in DNI is akin to force majeure eventuality but also that the MNRE wanted to promote solar thermal technology and indicated that the same will act like laboratories under Indian conditions. Therefore,

even MNRE understood that there would be possibility of change in dynamics while developing or operating such solar thermal power plants.

h. The bidding process adopted in the present petitions does not qualify to be a bidding under Section 63 of the Electricity Act, 2003 (the Act) which clearly provides that the Commission shall adopt tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government. Since, there were no Central Government guidelines pursuant to which the bidding was carried out, it would not qualify as competitive bidding under Section 63 of the Act. It is a bidding process carried out by NVVNL and subject to scrutiny and re-working under Section 62 of the Act. Therefore, the regulatory power of the Commission under Section 79 (1) (b) of the Act is untrammelled and may be invoked in this case. Further, Article 16.3.1 (iv) of the PPA contemplates adjudication of disputes relating to tariff.

i. It is a settled principle that without demonstrating actual loss, liquidated damages cannot be claimed under law. Also, the grounds other than reduction in DNI, such as fire accident, drought affecting water drawl for construction, State bifurcation agitation affecting statutory approvals like IBR, etc. claimed by the petitioners for seeking relief of force majeure and corresponding extension by another 6 months, are events which have been recognized as force majeure events at various forums. Any claim towards the petitioners by NVVNL can only be made once NVVNL demonstrates that shortfall is for reasons solely attributable to the petitioners.

j. A business risk is undertaken on reasonable assumption. However, in case of drastic variation in assumptions, which could not have been reasonably foreseen, predicted or estimated by a developer, the same cannot be attributed to the developer. In support of his contentions, learned counsel for MEIL relied upon the following judgments of the Hon'ble Supreme Court:

- i. Rajesh Kumar Aggarwal & Others Vs. K.K. Modi & Others [(2006) 4 SCC 385]
- ii. Consolidated Engineering Enterprises Vs. Irrigation Department [(2008) 7 SCC 169]
- ii. T. N. Generation & Distribution Corporation Ltd. Vs. PPN Power Generating Co. Ltd. [(2014) 11 SCC 53]

3. Learned counsel for NVVNL submitted that the present case is squarely covered under Section 63 of the Act which provides that the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the Guidelines issued by the Central Government. In terms of Section 63 of the Act, in the present case, the guidelines are issued by the Central government i.e. MNRE, the bid process is in accordance with the Guidelines and the tariff is determined through competitive bidding process. Learned counsel submitted that MNRE is the Central Government and the guidelines issued by MNRE are equally a guideline under Section 63 of the Act. The Government can always delegate powers for exercising its functions. In the present case, the Government has appointed a Nodal

Agency i.e. NRVNL to implement the Solar Thermal Power Projects and therefore, under the Guidelines of MNRE, NRVNL drafted the documents which are sanctioned by MNRE. The guidelines and RFS and RFP are to be read together as a part of competitive bid process under Section 63 of the Act. Learned counsel for NRVNL further submitted that the petitioners are mixing up the process initiated by the Commission for deciding the ceiling tariff with a process for decision on who should be selected through a tariff based competitive bid process under Section 63 of the Act.

4. After hearing the learned counsels for the parties at length, the Commission directed to list the petitions for hearing on 15.9.2017 at 9:30 A.M.

**By order of the Commission**

**Sd/-  
(T. Rout)  
Chief (Legal)**