

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

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

DATE OF HEARING: 17.8.2017

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.
Union of India, Ministry of New and Renewable Energy

Petition No. 313/MP/2013

Subject : Application for stay.

Petitioner : Rajasthan Sun Technique Energy Private Limited

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

Petition No. 327/MP/2013

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

Petitioner : Diwakar Solar Projects Limited, Hyderabad



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

Petition No. 14/MP/2014

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

Petitioner : KVK Energy Venture Private Limited

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

Petition No. 41/MP/2014

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

Petitioner : Aurum Renewable Energy Limited

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

Parties present : Shri S.B. Upadhyay, Senior Advocate, AREL
Ms. Anisha Upadhyay, Advocate, AREL
Shri Nishant Kumar, Advocate, AREL
Shri Gopal Jain, Senior Advocate, KVK & DSPL
Shri Sakiya Chowdhury, Advocate, MEIL & AREL
Ms. Molshree Bhatnagar, Advocate, MEIL & AREL
Ms. Manpreet Kaur, Advocate, MEIL & AREL
Shri Buddy A. Ranganadhan, Advocate, GGEL & RSTEPL
Shri Raunak Jain, Advocate, GGEL
Shri Arun Poddar, Advocate, GGEL
Shri Viney Agrawal, Advocate, GGEL
Shri Hasan Murtaza, Advocate, RSTEPL
Ms. Malavika Prasad, Advocate, RSTEPL
Shri Manoj Pongade, RSTEPL
Shri Suryakant, RSTEPL
Shri M.G. Ramachandran, Advocate, NVVNL
Ms. Anushree Bardhan, Advocate, NVVNL
Ms. Poorva Saigal, Advocate, NVVNL
Shri Shubham Arya, Advocate, NVVNL
Ms. Swapna Seshadri, Advocate, PSPCL
Shri Soumyajit Pani, Advocate, WBSEDCL
Shri Siddharth Jain, Advocate, WBSEDCL

Record of Proceedings

Learned counsel for Godavari Green Energy Limited (GGEL) and Rajasthan Sun Technique Energy Private Limited (RSTEPL) submitted that NTPC Vidyut Vyapar Nigam Ltd. (NVVNL) has submitted certain documents explaining new facts and sought time to file their response in this regard.

2. Learned counsel for MEIL (Petition No.16/MP/2014) submitted that the national solar mission is a major initiative of the Govt. of India to promote ecologically sustainable growth while addressing India's energy security challenge. The objective of the solar mission is to create conditions, through rapid scale up of capacity and technological innovation to drive down costs towards grid parity. However, at the time of competitive bidding, the generic tariff determined by the Commission for Solar PV and Solar thermal were Rs.17.90 and Rs. 15.30 respectively. However, subsequently, Solar PV tariff has reduced considerably (most recently Rs.2.44) but tariff has not reduced accordingly in case of Solar thermal. With regard to scalability, both the technology i.e. Solar PV and solar thermal routes for conversion of solar radiation into heat and electricity which can be effectively harnessed providing huge scalability for solar in India. The constraint on scalability would be the availability of space, since in all current applications, solar power is space intensive. In addition, without effective storage, solar power is characterized by a high degree of variability which would be true in the case of India during the monsoon season. NVVNL and MNRE have failed in achieving objectives set out in the mission document. Learned counsel for MEIL further submitted as under:

(a) Solar thermal technology depends upon DNI, where the radiations from the sun have to be perpendicular to the panel, unlike SPV which depends upon global irradiance where total radiation is important for power generation.

(b) When the scheme was envisaged, there was no prior experience in India with regard to solar thermal technology. The developers totally relied upon the Satellite data as there was no other data source and no other alternate methodology to verify the DNI data was available. However, there was only 3 months gap between issuance of RfS and signing of PPA. Therefore, the Petitioner had no time to record the DNI for a period of one year which is required.

(c) The entire misunderstanding was due to the difference between the Satellite reading and ground readings. The bidding itself had been done based on Satellite readings, as the same data formed the basis of generic tariff as determined by the Commission, which was also the benchmark for bidding. The suspended particles in India, especially in Rajasthan have resulted in the gap between the stated DNI and the actual recorded data.

(d) The mission document quoted that the guidelines would be reviewed after one year. Therefore, the Guidelines itself envisaged the flexibility.

(e) Section 63 of the Electricity Act, 2003 is not applicable in the present case as there were no guidelines for bidding from the Central Government. As far as procurers are concerned, they are free to find the best market rate that they can get. Section 62 of the Electricity Act, 2003 does not prohibit supplying at price lower than that calculated as per Section 62. However, Proviso (i) of Section 62 of Electricity Act, 2003 provides the concept of ceiling tariff which is generic tariff in the present petition. Below this ceiling tariff, there is no restriction on procuring power. Learned counsel for MEIL, in support of his contention, relied upon the Hon'ble Supreme Court judgement in *AIP Engineer Federation V. Sasan Power Limited* to emphasis on the vast regulatory powers of the Commission to intervene in the matter.

(f) Learned counsel requested to extend the SCoD as the plant was commissioned in November, 2014 i.e. after delay of about eight months from the agreed SCoD i.e. March, 2014. The commissioning of plant got delayed on two accounts, firstly there was a declared drought in the State of Andhra Pradesh in the month of January, 1993 and secondly, there was a fire in the month of September, 2013 at the project site which was notified to NVVNL. With regard to non-supply of contracted generation, NVVNL has not submitted that it actually suffered during this period. Therefore, the present case is covered under Article 11 of the PPA. CUF for the commissioned plant is currently 9-11%.

3. The Commission observed that if the projects were not feasible, the Petitioners should have kept the Central Government informed in this regard at the relevant point of time. On a specific query of the Commission whether any foreign experts were consulted before putting up the bid, learned counsel for MEIL replied in negative. Learned counsel

submitted that the Petitioner had 180 days time (as per the bid documents) after bidding to tie up with a technical partner.

4. Learned senior counsel for AREL (Petition No. 41/MP/2014) submitted that as per Clause 1.7 of RfS, MNRE has issued guidelines for selection of new grid connected solar power projects of PV and thermal and these guidelines shall form the basis for selection of new projects under 1st batch of JNNSM. Learned senior counsel for AREL further submitted as under:

(a) The Rfs document provides that weather station shall be constructed after the bid was accepted and at that point of time no ground data was available as there was no weather station in India. AREL at the time of submission of bid, had relied upon the data available by the NASA, the Commission's Regulations and Statement of Reasons thereof, MNRE and other international agencies as these are only available official records. The MNRE website indicated DNI at above 2000kWh/m²/year in Rajasthan which formed the fundamental premise for submission of bids.

(b) Since, both the parties were under misunderstanding of facts, the contract becomes void ab-initio. As per Section 20 of the Contract Act, 1872, an agreement would be void if both the parties to the agreement were under a mistake as to a matter of fact essential to the agreement and in the present case the essential fact is DNI range made available to the parties as held by the Hon'ble Supreme Court vide judgement dated 2.2.1998 in *Tarsem Singh V. Sukhminder Singh*.

(c) The Hon'ble Supreme Court in its judgment in *Satyabrata Ghose V. Mugneeram Bangur & Co. and Another* has observed that as per Section 56 of the Contract Act if the performance of a contract becomes impracticable or useless having regard to the object and purpose of the parties, then the performance of the contract becomes impossible. If the facts have changed "beyond what was contemplated at the time of the agreement" then both the parties are under the purview of discharge of the contract. The Hon'ble Supreme Court has further held that the word "impossible" be interpreted as impracticable and useless from the point of view of the object and purpose that the parties had in view when they entered into the contract as this impracticability or uselessness could arise due to some intervening or supervening circumstances which the parties had not contemplated.

(d) Since, NRVNL has not suffered any loss due to commissioning of the project, it is not entitled to claim. Learned senior counsel, in support of his contention, relied upon the judgement of the Hon'ble Supreme Court in *UOI V. Rampur Distillery and Chemical Co. Ltd.* in which it was held that the amount deposited by way of security for guaranteeing the due performance of the contract cannot be earnest money. Learned senior counsel requested to revise the tariff under the PPA on account of variation in DNI levels, extend the SCOD of the project and direct NRVNL not to encash the Performance Bank Guarantee.

(e) Learned senior counsel for AREL submitted that AREL has filed an Interlocutory Application i.e. I.A. No.48/2017 for amendment of the petition as MNRE has taken an adversarial stand in relation to the DNI issue abdicating its role as the Nodal Ministry as against its earlier stand and requested to take the I.A. on record.

5. Learned senior counsel for KVK (Petition No. 14/MP/2014) and DSPL (Petition No. 327/MP/2013) submitted that exercise of regulatory power of the Commission is dynamic and vast process bestowed by the Parliament in all regulatory enactments and has to be exercised with balance. Learned senior counsel for KVK and DSPL requested the Commission to exercise its power in such a manner which addresses and resolves the sectoral issues. Learned senior counsel for KVK and DSPL further submitted as under:

(a) The Commission was requested to undertake regulatory foresight to break the vicious circle in which the CUF of plants is being under achieved due to the actual DNI being lesser than what was proposed in the mission document.

(b) Apart from the parties present, the lender is also a stakeholder and may not be inclined to finance such projects if the subject projects do not get commissioned. This will only act as hindrance in attaining the objectives of National Solar Mission.

6. Learned counsel for NVVNL submitted that all the SPDs sought two reliefs from the MNRE i.e. (i) change the DNI on account of CUF, and (ii) Extension of time from 28 to 38 months from the date of signing the PPA. However, the MNRE rejected the change in DNI but granted the time extension. Subsequently, on 19.9.2013, a supplementary agreement which was an integral part of the PPA, was signed between NVVNL and all the SPDs. Learned counsel for NVVNL further submitted as under:

(a) In competitive bidding, all the information which is provided was collected from the various sources and all these information does not become a contractual term agreed between the parties. The Hon'ble Appellate Tribunal for Electricity in *Nabha Power Ltd. V. PSPCL & Others* in Appeal No. 207 of 2012 has held that once there is a provision of disclaimer, the burden shifts to the developer to verify the accuracy of the project and to do prudence check. The most important legal principle in a bidding document is the risk and the reward which is of the bidder.

(b) As per the draft PPA, NVVNL had no obligation to purchase power beyond units of 21.5% of CUF and the Commission had arrived at tariff, based on CUF and not DNI.

(c) The maximum parameters of CUF given in the bid documents was 25% for all the SPDs whereas the revised CUF, as per the decision of the bidders in terms of bidding documents, is 29.5% and minimum parameter was 16% which was increased by every developer except AREL. If they achieved 29.5% of CUF then NVVNL has the right to take it from the developers. However, if the CUF is more than 29.5% then NVVNL does not have obligation to claim it. Therefore, the SPDs wanted to maximize their profit from 25% to 29.5% i.e. 4% of CUF. SPDs voluntarily opted for increasing the minimum parameter from 16% to 22.5% and are now

purposely raising the complaint of not being able to achieve 22.5% of CUF. Similarly, RSTECL increased it to 35%.

(d) The developers have increased the CUF to 25% at the time of financial closure as per the right given to them under the PPA which is to be achieved within 180 days. Therefore, it was a conscious decision by the developers and they were fully aware of the consequences. Hence, the situation cannot be considered as *Force Majeure*. The issue of DNI for Solar PV and Solar thermal is same. However, the conversion is a different issue as solar thermal will have a higher conversion ratio than a Solar PV.

(e) Article 4.4.1 of the PPA provide that in case of solar projects using advanced technologies, the value of CUF shall be the average CUF committed by the SPDs at the time of signing the PPA. Therefore, SPDs are allowed to get into advanced technology without any variation in capital cost and discounting of tariff. Article 11.3 of the PPA talks about *Force Majeure* events and all the cases on which the developers have relied upon conclusively stated that the issue of DNI is not a *Force Majeure* event. Therefore, the prayers of the Petitioners that it is a *Force Majeure* event is not maintainable because if the SPDs are able to generate the solar power at any amount and it is achievable then it is not a *Force Majeure*.

7. Learned counsels for the Respondents requested the Commission to direct NVVNL to file its submission on affidavit.

8. After hearing the parties, the Commission directed NVVNL to file its submissions and reply to the I.As on affidavit, on or before 22.8.2017, with an advance copy to the Petitioners, who may file their rejoinders, if any, by 25.8.2017. The Commission directed that due date of filing the submission, reply and rejoinders should be strictly complied with. No extension shall be granted on that account.

9. The Commission directed to list these petitions for final hearing on 28.8.2017 at 9.30 AM.

By order of the Commission

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