

**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 Order: 18th September, 2017

I.A. No. 52/2017

in

Petition No.327/MP/2013

In the matter of

Interlocutory Application seeking amendment of pleadings/prayers and bringing on record subsequent facts.

And

In the matter of

Diwakar Solar Limited.
Plot No.4, Software Units Layout
HITEC City, Madhapur,
Hyderabad-5000081

....Applicant

Vs.

1. NTPC Vidyut Vyapar Nigam Ltd.
Core-7, SCOPE Complex,
Institutional Area, Lodhi Road,
New Delhi-110 003
2. Ministry of New and Renewable Energy
Block-14, CGO Complex,
Lodi Road, New Delhi 110 003

....Respondents

I.A. No. 53/2017

In

Petition No. 14/MP/2014

In the matter of

Interlocutory Application seeking amendment of pleadings/prayers and bringing on record subsequent facts.

**And
In the matter of**

KVK Energy Venture Private Limited
6-3-1109A/1, 3rd Floor, Navabharath Chamber,
Raj Bhawan Road, Samojjuda,
Hyderabad-500 082

....Petitioner

Vs.

1. NTPC Vidyut Vyapar Nigam Ltd.
Core-7, SCOPE Complex,
Institutional Area, Lodhi Road,
New Delhi-110 003
2. Ministry of New and Renewable Energy
Block-14, CGO Complex,
Lodi Road, New Delhi 110 003
3. Chief Engineer/Incharge, SLDC
Punjab State Power Corporation Ltd.
220 kV Grid sub-station,
PSPCL, Ablowal, Patiala-147 001
4. Chief General Manager (commercial & RAC
Central Power Distribution Company of Andhra Pradesh Ltd.
Mint Compound, Hyderabad-500063
5. Chief General Manager, (Commercial, RAC & Plg.)
Eastern Power Distribution Company of Andhra Pradesh
Corporate Office, P&T Colony, Seethammadhara,
Vishakhapatnam-530013
6. Chief General Manager, Operation, Commercial & IPC
Northern Power Distribution Company of Andhra Pradesh Ltd.
H.No. 1-1-478, 503 & 504 Opposite
NIT Petrol Bunk, Chaitnaya Puri, Kazipet,
Warrangal-506004
7. Chief Engineer (Commercial)
Chattisgarh State Power Distribution Company Ltd.
Fourth Floor, Vidyut
Seva Bhawan, Dangania, Raipur
(Chhatisgarh)-492013
8. Chief Engineer (Commercial)
Maharashtra State Electricity Distribution Company Ltd.
"Prakashgad",

5th Floor, Anant Knekar Marg,
Bandra (East), Mumbai-400051

9. Managing Director,
Ajmer Vidyut Vitran Nigam Ltd.
Old Power, Hathi Bhata, Ajmer-305001
10. CMD, Jaipur Vidyut Vitran Nigam Ltd.
Jaipur-302005
11. Managing Director, Jodhpur Vidyut Vitran Nigam Ltd.
New Power House, Industrial Area, Jodhpur-342003
12. Chief Engineer (PPA), U.P. Power Corporation Ltd.
14th floor, Shakti Bhawan, Ext. 14, Ashok Marg,
Lucknow-226001
13. Chief General Manager (Commercial)
Assam Power Distribution Company Ltd.
Bijulee Bhawan, Paltanbazar,
Guwahati-781001
14. The General Manager (Elec.)
Bangalore Electricity Supply Corporation,
Power Purchase,
BESCOM, Corporate Office, K.R. Circle,
Bangalore-560001
15. Chief Engineer (Commercial),
Damodar Valley Coporation,
DVC Towers, VIP Road,
Kolkata-700054
16. Sr. GM (PP), GRIDCO Ltd.
Janpath,
Bhubhaneswar-751022
17. Director (Distribution),
Tamil Nadu Generation and Distribution Company Ltd.
144, Anna Salai
Chennai-600002
Tamil Nadu, India
18. Chief Engineer (PTR)
West Bengal State Electricity Distribution Company Ltd.
Vidyut Bhawan, 7th Floor, Block-DJ, Sector-II
Bidhannagar
Kolkata-700091

I.A. No. 48/2017
In
Petition No. 41/MP/2014

In the matter of

Interlocutory Application seeking amendment of pleadings/prayers and bringing on record subsequent facts.

And

In the matter of

Aurum Renewable Energy Limited
"Aurum Platz" BN Cross Lane
Pandita Ramabai Marg
Mumbai-400007

....Petitioner

Vs.

1. NTPC Vidyut Vyapar Nigam Ltd.
Core-7, SCOPE Complex,
Institutional Area, Lodhi Road,
New Delhi-110 003
2. Ministry of New and Renewable Energy
Block-14, CGO Complex,
Lodi Road, New Delhi 110 003

....Respondents

Parties Present:

Shri Gopal Jain, Senior Advocate, KVKEVPL & DSL
Shri S.B. Upadhyay, Senior Advocate, AREL
Shri Sakya Singha Chowdhury, Advocate, KVKEVPL & AREL
Ms. Molshree Bhatnagar, Advocate, KVKEVPL, AREL
Ms. Manpreet Kana, KVKEVPL & DSL
Shri M.G. Ramachandran, Advocate, NVVNL
Ms. Anushree Bardhan, Advocate, NVVNL
Shri Shubham Arya, Advocate, NVVNL
Shri Dharmendra Singh, NVVNL
Shri R.Mishra, Advocate, MNRE
Shri Sanjay Karndhar, MNRE
Shri Chaturman Das, MNRE
Shri Soumyajit Pani, Advocate, WBSEDCL
Shri Surajit Chakraborti, WBSEDCL

ORDER

In the present order, the Commission is dealing with the Interlocutory Applications filed by three Petitioners, namely, Diwakar Solar Power Limited, KVK Energy Ventures Private Limited and Aurum Renewable Energy Limited for amendments of the pleadings and prayers in their main petitions.

Brief Facts of the Case

2. Petition No.327/MP/2013 was filed by Diwakar Solar Power Limited (hereinafter referred to as "DSPL") on 26.12.2013 in which the following prayers were made:

"(a) Revise the applicable tariff under Article 9 of the PPA on account of variation in DNI levels and allow an upward revision of Rs. 2.70/unit on Rs.10.49/unit.

(b) Revise the applicable tariff under Article 9 of the PPA on account of variation in foreign exchange rates and allow an upward revision of Rs.1.11/unit on Rs.10.49/unit.

(c) Extend the Commissioning Date of the Project for clear 18 months from the date of the disposal of the present petition.

(d) Direct NVVN to amend the PPA in order to incorporate consequential changes.

(e) Pass an order restraining the Respondent, its servants and agents from invoking the Performance Bank Guarantee bearing Nos. 00070100005957 amounting to Rs. 36,76,60,000, Performance Bank Guarantee bearing No.00070100005958, amounting to Rs.73,53,20,000 & Performance Bank Guarantee bearing No.00070100005959 amounting to Rs.73,53,20,000 drawn on Axis Bank Ltd, dated 5th January, 2011 and further extended the validity up to September 9, 2014 for any delay in achieving COD beyond 9th March, 2014.

(g) Pass ex-parte ad interim order in terms of para (e) above pending the adjudication of the present petition.

(h) Pass such other and further orders which may be deemed necessary in the interest of justice."

3. Petition No.14/MP/2014 was filed by KVK Energy Ventures Private Limited (hereinafter referred to as “KEVPL”) on 24.1.2014 in which the following prayers were made:

“(a) Revise the applicable tariff under Article 9 of the PPA on account of variation in DNI levels and allow an upward revision of Rs. 2.88/unit on Rs.11.20/unit.

(b) Revise the applicable tariff under Article 9 of the PPA on account of variation in foreign exchange rates and allow an upward revision on Rs.11.20/unit.

(d) Extend the Commissioning Date of the Project for clear 18 months from the date of the disposal of the present petition.

(e) Direct NVVN to amend the PPA in order to incorporate consequential changes.

(f) Pass an order restraining the Respondent, its servants and agents from invoking the Performance Bank Guarantee bearing Nos.1436/ILG/07/11 amounting to Rs.12,33,20,000, Performance Bank Guarantee bearing No. 1436/ILG/06/11, amounting to Rs.29,66,66,000 & Performance Bank Guarantee bearing No. 080411LPER0054 amounting to Rs. 47,00,00,000 drawn on Indian Overseas bank , dated 7.01.2011 and further extended the validity up to 9.09.2014 for any delay in achieving COD beyond 9.3.2014.

(g) Pass ex-parte ad interim order in terms of para (e) above pending the adjudication of the present petition.”

4. Petition No.41/MP/2014, Aurum Renewable Energy Limited (hereinafter referred to as “AREL”) on 26.2.2014 in which the following prayers were made:

“(a) Revise the applicable tariff under the PPA on account of variation in DNI levels and allow an upward revision of Rs. 3.16/unit on Rs. 12.19/unit;

(b) Revise the applicable tariff under the PPA on account of variation in foreign exchange rates and allow an upward revision of tariff under the PPA;

(c) Extend the Commissioning Date of the project for clear 18 months from the date of the disposal of the present petition;

(d) Direct Respondent No. 1/NVVN to amend the PPA in order to incorporate consequential changes;

(e) Pass an order restraining Respondent No. 1/NVVN, its servants and agents from invoking the Performance Bank Guarantee bearing nos. 003GT02132340019, 003GT02132350007, 003GT02132350008, 003GT02132350009, 03GT02132360008, amounting to Rs. 21,18,10,000 (Rupees Twenty One Crore

Eighteen Lac Ten Thousand only) drawn on HDFC Bank dated 23.08.2013 and 24.08.13 valid upto 09.09.2014 for any delay in achieving Cod beyond 9.3.2014;

(g) Pass ex-parte ad interim order in terms of para (e) above pending the adjudication of the present petition.

(h) Pass such other and further orders which may be deemed necessary in the interest of justice”

5. The Commission vide interim order dated 28.2.2014 issued the following directions:

“7. The encashment of Performance Bank Guarantee is linked to the SCD of the project which is going to expire on 9.3.2014. In our view, the petitioners should have approached MNRE for consideration of their requests for extension of SCD under para 4.4 of the Guidelines as quoted above. However, the petitioners have failed to take up the matter with the concerned authority for this purpose. Considering the requests made by the petitioners, we deem it appropriate to direct the petitioners to approach the MNRE within a week, under para 4.4 of the Guidelines for consideration of their request for extension of SCD. Such applications, if made by the petitioners, may be considered by concerned authorities mentioned in para 4.4 of the Guidelines within a period of two weeks thereafter. We direct NVVNL not to encash the Performance Bank Guarantee of the petitioners till that time. It is, however, clarified that NVVNL shall be at liberty to encash the Performance Bank Guarantee anytime after three weeks of this order if no time extension for SCD is allowed by the concerned authorities.

8. The petitions shall be notified for further hearing on the issue of maintainability in due course.

9. I.A. No.4/2014 in Petition No.16/MP/2014 and prayers in other petitions for ad interim order with regard to Performance Bank Guarantee are disposed of in terms of the above.”

6. Thereafter, the proceedings in the main matters were adjourned by the Commission from time to time pending the consideration by Ministry of New and Renewable Energy (MNRE) of the representations made by the Petitioners and other Solar Power Developers.

7. The Commission after hearing the parties in these petitions as well as five other similar petitions on 18.5.2017 gave various directions including in regard to the

final hearing of the matters on 8.8.2017. Relevant paras of the Record of Proceedings are extracted as under:

“8. The Commission directed the petitioners to serve the copies of the petitions on the respondents immediately, if already not served. The respondents, the distribution companies and MNRE were directed to file their replies on or before 22.6.2017 with an advance copy to the petitioners, who may file their rejoinders, if any, by 14.7.2017. The Commission directed that due date of filing the replies and rejoinders should be strictly complied with. No extension shall be granted on that account.

9. The Commission directed NVVNL to maintain status quo and not to encash the Performance Bank Guarantees of the petitioners. The petitioners were directed to keep the Performance Bank Guarantees valid taking into account the next date of hearing plus three months and claim period in line with the terms and conditions of their respective PPAs.

10. The Commission directed to list these petitions for final hearing on 8.8.2017.”

8. On 14.6.2017 MNRE filed reply affidavit in the petitions, inter alia, stating as under:

“8.....

(f) Without prejudice to the above, there is otherwise no cause of action for the petitioner to file the present petition seeking revision in the tariff on account of DNI. MNRE did not at any stage give any advisory on the aspect of DNI based on which the Solar Power Developer should submit the bid for the project. MNRE had issued Guidelines for selection of new grid connected solar power projects of PV and Thermal. These Guidelines are available in the web sites of MNRE. These Guidelines form the basis for selection of new projects under 1st batch of JNNSM. In these Guidelines also, there is no advisory whatsoever on DNI.

(g) Similarly, the website of MNRE contained the following disclaimers;

“This website belongs to Ministry of New & Renewable Energy, Government of India. Content displayed on this website is managed by MNRE and are for reference purpose only. All efforts have been made to make the information as accurate as possible. The MNRE will not be responsible for any loss or harm, direct or consequential or any violation of laws that may be caused by inaccuracy in the information available on this website. Any discrepancy found may be brought to the notice of Ministry. Website Designed and Developed by NIC-MNRE Computer Centre & Hosted at NIC web server.”

9. The petitioner was expected to do his own requisite due diligence w.r.t. DNI and other relevant data and submit his bid accordingly at his own risk. Further, if the petitioner felt that there was insufficient data available for basing the bids, he could have refrained from participating in the bid process. MNRE had no role in DNI estimation at the time of bidding. Hence any loss or damage, financial or otherwise,

due to differences, if any, on the DNI estimated at the time of bidding and DNI measured on site, cannot be attributed to MNRE.

10. In view of the above, there cannot be any claim on the part of the Petitioner for any advisory on DNI.”

8. On 8.8.2017, the Commission commenced the final hearing in all the matters. The Commission heard extensively M/s Godavari Green Energy Limited (Petition No.304/MP/2013) and M/s Rajasthan Sun Technique Energy Private Limited (Petition Nos. 312/MP/2013 and 313/MP/2013). There was a request from some of the Solar Power Developers including Aurum Renewable Energy Limited in Petition No. 41/MP/2014, Diwakar Solar Limited in Petition No. 327 of 2013 and KVK Energy Venture Private Limited in Petition No. 14 of 2014 to file a rejoinder to the reply filed by MNRE who were granted time till 14.8.2017 to file the rejoinders. The Commission directed all the eight petitions to be listed for hearing on 17.8.2017.

9. On 17.8.2017, learned counsels for MIEL (16/MP/2014), AREL (41/MP/2014), KVK (14/MP/2014) and DSPL (327/MP/2013) and learned counsel for NVVNL argued on the merit of the respective petitions.

10. IA No. 48/2017 was filed by Aurum Renewable Energy Limited on 11.8.2017, and IA Nos. 52/2017 and 53/2017 were filed by Diwakar Solar Power Limited and KVK Energy Ventures Private Limited on 18.8.2017 seeking amendment of the respective petitions and substitution of the prayers contained in the main petitions. I.A. No. 49/2017 was filed in Petition No. 313/MP/2013 by Rajasthan Sun Technologies Limited in which an additional ground of unprecedented variation in foreign exchange rate variation during the execution of the project has been urged in support of force majeure. These IAs were listed for admission of 28.8.2017 and

notices were issued to the Respondents including NVVNL and MNRE to file their replies. Both NVVNL and MNRE have filed their replies.

11. Through IA No. 48/2017, the Petitioner, AREL has sought amendment in Petition No.41/MP/2014 for addition of paras 58 and 59 after para 57 which relate to the raising aspects as described by the Petitioner under the following heads:

- A. 'MNRE/NVVN cannot cherry – pick recommendations made by the Expert Committee/Technical Committee';
- B. 'MNRE cannot renounce its role as a facilitator under JNNSM to provide enabling environment for Solar Power Developers';
- C. 'MNRE has erred in ignoring the failure of Concentrated Solar Power (CSP) technology in India';
- D. 'MNRE has erred in ignoring the submissions of various Distribution Companies refusing to procure power from the Solar Thermal Power Plants' and
- E. 'MNRE has erred in not taking note that the procurement of power through Solar Power Developers (Thermal) will be disadvantageous for NVVN'.

Additionally the Petitioner has also prayed for addition of Grounds A to I after Para 63 of the original petition. The Petitioner has sought to substitute the prayer clause as under:

“(a) Hold and declare that the Power Purchase Agreement dated 10.1.2014 executed between NTPC Vidyut Vyapar Nigam Limited and M/s KVK Energy Ventures Private Limited is not based on correct reflection of DNI at ground level and therefore not viable;

(b) Hold and declare that the solar thermal project to be developed by the petitioner is not viable and workable at the DNI levels recorded at the project site;

(c) Declare that no loss would be caused to NTPC Vidyut Vyapar Nigam Limited on account of non-performance of the Power Purchase Agreement dated 10.1.2014 executed between NTPC Vidyut Vyapar Nigam Limited and M/s KVK Energy Ventures Private Limited;

(d) Direct NTPC Vidyut Vyapar Nigam Limited to release and return bank guarantee of INR 21.18 crore issued in favour of NTPC Vidyut Vyapar Nigam Limited;

(e) Pass any other order as this Commission may deem fit.”

12. Through IA No. 52/2017, the Petitioner, DSPL has sought amendments to the factual matrix and grounds in Petition No. 327/MP/2013 similar to that as in IA No.48/2017. The prayers have been sought to be substituted as under:

“(a) Hold and declare that the Power Purchase Agreement dated 10.1.2014 executed between NTPC Vidyut Vyapar Nigam Limited and M/s Diwakar Solar Projects Limited is not based on correct reflection of DNI at ground level and therefore not viable;

(b) Hold and declare that the solar thermal project to be developed by the petitioner is not viable and workable at the DNI levels recorded at the project site;

(c) Declare that no loss would be caused to NTPC Vidyut Vyapar Nigam Limited on account of non-performance of the Power Purchase Agreement dated 10.1.2014 executed between NTPC Vidyut Vyapar Nigam Limited and M/s KVK Energy Ventures Private Limited;

(d) Direct NTPC Vidyut Vyapar Nigam Limited to release and return bank guarantee of INR 183.33 crore issued in favour of NTPC Vidyut Vyapar Nigam Limited;

(e) Pass any other order as this Commission may deem fit.”

13. In IA No. 53/2017, the Petitioner, KEVPL has sought amendment to the factual matrix and grounds similar to that as in IA No.48/2017. The prayers have been sought to be substituted as under:

“(a) Hold and declare that the Power Purchase Agreement dated 10.1.2014 executed between NTPC Vidyut Vyapar Nigam Limited and M/s KVK Energy

Ventures Private Limited is not based on correct reflection of DNI at ground level and therefore not viable;

(b) Hold and declare that the solar thermal project to be developed by the petitioner is not viable and workable at the DNI levels recorded at the project site;

(c) Declare that no loss would be caused to NTPC Vidyut Vyapar Nigam Limited on account of non-performance of the Power Purchase Agreement dated 10.1.2014 executed between NTPC Vidyut Vyapar Nigam Limited and M/s KVK Energy Ventures Private Limited;

(d) Direct NTPC Vidyut Vyapar Nigam Limited to release and return bank guarantee of INR 148.33 crore issued in favour of NTPC Vidyut Vyapar Nigam Limited;

(e) Pass any other order as this Commission may deem fit.”

14. The Petitioners have submitted that the amendments sought to be made by them are necessary for proper adjudication of the disputes pending before the Commission. Owing to change in the dynamics of the market and solar sector in India and reasons described in the amendment applications, the reliefs sought by the Petitioners in the Main Petitions are required to be substantially amended. It has also been stated that without the amendment of the pleadings, the Commission would not be entitled to modify or alter the relief and, therefore, it is necessary for the Petitioner to substitute the prayer. It has been contended that the power to allow amendment is wide and can be exercised at any stage of the proceedings. The Petitioners have submitted that there has been no delay on part of the Petitioners to file the IAs seeking amendment of the Petitions. The Petitioners have further submitted that even if amendment sought is barred by limitation, if the Court after examining the facts and circumstances of the case comes to the conclusion that amendment serves the ultimate cause of justice and avoids further litigation, the amendment should be allowed.

15. The Respondent, NVVNL has filed its replies opposing the amendments sought for by the Petitioners. In the replies, NVVNL has stated that the amendments

sought for by the Petitioners seek to change the basis and substance of the petition already filed wherein the Petitioners had sought increase in the tariff, adjustment for foreign exchange rate variation, extension of time for completion of the project etc. There was no prayer in the petitions filed that the PPAs entered into between the parties should be declared as void ab initio or that the Petitioners should be released of all the obligations under the PPAs. NVVNL has submitted that the Petitioners are seeking belatedly and after the commencement of the final hearing on 8.8.2017 to substitute wholly different reliefs on substantially different grounds. It has been stated that the Petitioners had adequate time and opportunity to raise aspects which are referred to in the applications for amendment for incorporating the paras before 8.8.2017. It has been specifically urged by NVVNL that on the principles of Order 6 Rule 17 – Proviso, the Petitioners cannot be allowed the amendment of the petitions after commencement of final hearing on 8.8.2017 except in regard to matters which the Petitioners could not have raised before in spite of the exercise of due diligence. The amendment applications have also been opposed on grounds of being filed as an afterthought.

16. Ministry of New and Renewable Energy (MNRE) have filed their replies to the IAs vide affidavits dated 11.9.2017. MNRE have submitted that the applications filed by the Petitioners for amendment of the Petitions seek to substantially change the basis and substance of the originally filed petitions, namely, Petition No.327/MP/2013, Petition No.14/MP/2014 and Petition No.41/MP/2014. In the petitions originally filed, the Petitioners had sought for increase in the tariff, adjustment of FERV, extension of time for completion of the project and restraint on the encashment of the Performance Bank Guarantee. In the original petitions, there

was no allegation of act of commission or omission against the MNRE nor was there any allegation of mistake on the part of MNRE to the extent of DNI at the site to achieve the Capital Utilisation Factor. The Petitioners had only sought the exercise of regulatory power by the Commission to give relief for increase in the tariff admissible under the PPAs. The Petitioners had not sought for any relief for declaration of the PPA as *void ab initio* and for the Petitioners to be released of all obligations under the PPAs. The Petitioners are now seeking to substitute the entire prayer clause to seek wholly different reliefs after the trial in the matters has already commenced with the final hearing (starting from 8.8.2017). MNRE have submitted that it is well settled that an amendment cannot be allowed if the proposed amendment constitutionally or fundamentally changes the nature and character of the case. MNRE have further submitted that most of the aspects included in the amendment applications are in regard to the challenge to the policy decisions or alleged acts of omission or commission on the part of MNRE and these aspects cannot be subject matters of the proceedings under section 79(1)(b) or section 79(1)(f) of the Act.

17. At the hearing of the IAs on 15.9.2017, learned Senior Counsel appearing for AREL (IA No. 48/2017) submitted that the touchstones for allowing the amendments to the pleadings have been discussed in various judgements of the Hon'ble Supreme Court of India according to which the Court may allow application for amendment of pleadings if the same (i) is not resulting in completely changing the nature of the suit; (ii) is necessary for the purpose of determining the real question(s) in the controversy between the parties; (iii) does not take away any right that has accrued to the other party due to lapse of time; and (iv) may result in multiplicity of proceedings. Learned

senior counsel submitted that the present application does not change the basic nature of the Petition. The cause of action for instituting the original petition was the drastic decline of the DNI data based on which CUF was determined for the project. During the pendency of the proceedings, it has come to light that there has been constant degradation of the DNI, various distribution companies are refusing to procure bundled power from NVVN, especially power generated through solar thermal power plants, the power procured through Solar PV would be extremely cheaper compared to Solar Thermal, and performance under the PPA is impossible, impractical and useless. Learned senior counsel submitted that the Petitioner is not seeking to introduce a new cause of action but is merely seeking a consequent relief which although pleaded as alternative relief in the original petition is now being pressed as one of the main reliefs due to intervening circumstances. Learned Senior counsel submitted that the amendment to the Petition is necessary for the purpose of determining the real question in controversy between the parties i.e. whether the PPA executed between the Petitioner and NVVN has become impossible, impractical and useless which requires regulatory indulgence of the Commission. In this connection, learned Senior Counsel relied upon the judgement of the Hon'ble Supreme Court in Rajesh Kumar Aggarwal and Others v. K.K. Modi and Others {(2006) 4 SCC 385} and Hon'ble High Court of Madras in Hi. Sheet Industries Vs. Litelon Limited {AIR 2007 MAD 78}. Learned Senior Counsel further submitted that the application for amendment has not been filed after commencement of trial as contended by MNRE and NVVN. Learned Senior Counsel submitted that MNRE filed its reply on 11.7.2017 and the copy of the reply was served on the Petitioner on 25.7.2017. Upon receiving the reply, the Petitioner noticed that MNRE has shifted its previous stand wherein it had acknowledged variation in DNI as an event beyond the

control of the Petitioner and has taken an adversarial position in the matter. Learned Senior Counsel submitted that the pleadings in the matter would have completed upon submission of the rejoinder by the Petitioner and since the Petitioner submitted the rejoinder and the IA simultaneously on 11.8.2017, it was well before the pleadings in the matter were completed. In this connection, learned Senior Counsel relied upon the judgement of the Hon'ble Supreme Court in Ajendraprasadji N. Pande & Anr Vs. V. Swami Keshavprakeshdasji N. 7 Others {2007 AIR SCW 513}. Learned Senior Counsel submitted that even upon commencement of trial, a court may allow amendment of pleadings to avoid multiplicity of proceedings and to adjudicate the real controversy between the parties to the suit. Learned Senior Counsel relied upon the judgement of the Hon'ble Supreme Court in Pankaja v. Yellappa {(2004) 6 SCC 415} and North Eastern Railway Admn. V. Bhagwan Das {(2008) 8 SCC 511}.

18. Learned Senior Counsel appearing for KEVPL and DSPL (IA Nos.52/2017 and 53/2017) adopted the arguments of learned Senior Counsel for AREL. Learned Senior Counsel further submitted that the Commission is invested with vast powers under the Electricity Act, 2003 and is not bound by the provisions of the CPC. Learned Senior Counsel submitted that the Commission in exercise of its regulatory power can allow the amendment for proper adjudication of the real controversies between the parties.

19. Learned counsel for NVVNL had countered the arguments of the learned counsels for the Petitioners and relied on various decisions of the Hon'ble Courts as under:

- a) Revajeetu Builders & Developers v. Narayanaswamy and Sons And Others (2009) 10 SCC 84.
- b) State of Madhya Pradesh v. Union of India And Another - (2011) 12 SCC 268.
- c) J. Samuel And Others v. Gattu Mahesh (2012) 2 SCC 300.
- d) Chander Kanta Bansal Vs. Rajinder Singh Anand, (2008) 5 SCC 117.
- e) Vasudev –v- Rupkumari @ Banaraso Devi ILR (2007) I Delhi 785.
- f) Vidyabai and Others v. Padmalaatha and another (2009) 2 SCC 409.
- g) Rajkumar Gurawara v. S. K. Sarwagi and company Pvt. Ltd (2008) 14 SCC 364.
- h) Smt. Ganga Bai case v. Vijay Kumar (1974) 2 SCC 393

20. In reply to the submission that the trial did not commence on 8.8.2017 as the Commission had on that day given time to some of the Solar Power Developers to file the rejoinder by 14.8.2017, learned counsel for NRVNL submitted that the final hearing commenced on 8.8.2017 with the pleadings having been completed, namely, the petition as well as the reply being filed and the request of some of the Solar Power Developers to allow time to place rejoinder would not amount to postponing the final hearing. Learned counsel submitted that the Commission had heard extensively the arguments on behalf of the two Solar Power Developers who had commenced the final hearing. It was not the case of the Petitioners (Aurum or KVK or Diwakar) that the final hearing fixed on 8.8.2017 should be postponed till the rejoinders are filed. In fact, on 8.8.2017, none of the Petitioners made any request that they would make applications for amendment of the pleadings in the petitions. Learned counsel submitted that KVK and DSPL, in fact, filed the applications for amendment on 18.8.2017 subsequent to the hearing on 17.8.2017.

Analysis and Decision

21. In the light of the written pleadings and oral submissions by the learned Senior Counsels for the Petitioners and learned counsel for NVNNL, the principal issue to be considered by the Commission in the present proceedings is whether the application for amendment of pleadings in the three cases, namely, in Petition Nos. 41/MP/2014, 14/MP/ 2014 and 327/MP/2013 should be allowed.

22. There is no specific provision regarding amendment of pleadings in the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, as amended from time to time. Therefore, the Commission has to rely on the provisions of the Code of Civil Procedure, 1908 (CPC). Order 6 Rule 17 of CPC deals with amendment of pleadings. Rule 17 is extracted below:

“17. Amendment of Pleadings.- The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties:

Provided that no application for amendment shall be allowed after trial has commenced, unless the court comes to the conclusion that inspite of due diligence, the party could not have raised the matter before commencement of trial.”

23. Hon'ble Supreme Court in the case of Rajesh Kumar Aggarwal and Others Vs K.K. Modi and Others {(2006) 4 SCC385} explained the scope of Order 6 Rule 17 of CPC as under:

“15. The object of the rule is that the courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side.

16. Order 6 Rule 17 consists of two parts. Whereas the first part is discretionary (may) and leaves it to the court to order amendment of pleading. The second part is imperative (shall) and enjoins the court to allow all amendments which are necessary for the purpose of determining the real question in controversy between the parties.

17. In our view, since the cause of action arose during the pendency of the suit, proposed amendment ought to have been granted because the basic structure of the suit has not changed and that there was merely change in the nature of relief claimed. We fail to understand if it is permissible for the appellants to file an independent suit, why the same relief which could be prayed for in the new suit cannot be permitted to be incorporated in the pending suit.

18. As discussed above, the real controversy test is the basic or cardinal test and it is the primary duty of the court to decide whether such an amendment is necessary to decide the real dispute between the parties. If it is, the amendment will be allowed; if it is not, the amendment will be refused. On the contrary, the learned Judges of the High Court without deciding whether such an amendment is necessary have expressed certain opinions and entered into a discussion on merits of the amendment. In cases like this, the court should also take notice of subsequent events in order to shorten the litigation, to preserve and safeguard the rights of both parties and to subserve the ends of justice. It is settled by a catena of decisions of this Court that the rule of amendment is essentially a rule of justice, equity and good conscience and the power of amendment should be exercised in the larger interest of doing full and complete justice to the parties before the court.

19. While considering whether an application for amendment should or should not be allowed, the court should not go into the correctness or falsity of the case in the amendment. Likewise, it should not record a finding on the merits of the amendment and the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing the prayer for amendment. This cardinal principle has not been followed by the High Court in the instant case.”

As per the above judgement, the real test for deciding whether amendment to the pleadings should be allowed or not is the “real controversy test” i.e. whether such an amendment is necessary to decide the real dispute between the parties. Further, Hon’ble Supreme Court has observed in the above case that the amendment ought to have been allowed as the basic structure of the suit has not been changed but there is only change in the nature of relief claimed. In other words, if basic structure of the suit is sought to be altered through the amendment, then amendment cannot be allowed.

24. The Petitioners have relied upon the Full Bench judgement of the Madras High Court in case of Hi. Sheet Industries Vs. Litelon Limited {2006(5) CTC 609} in support of the contention that subsequent events after institution of the suit should

be taken into consideration while granting amendment of pleadings. Para 11.13 of the said judgement is extracted as under:

“11.13. Ordinarily, a Suit is tried at all stages on the cause of action as it existed on the date of its institution, but it is open to the Court even including a Court of appeal to take notice of the events which have happened after the institution of the suit and afford relief to the parties in the changed circumstances, where it is shown that the relief claimed originally has (1) by reason of subsequent change in circumstances become inappropriate, or (2) where it is necessary to take notice of the changed circumstances, in order to shorten the litigation or (3) to do complete justice between the parties.”

We have also noticed an important observation of the Hon'ble High Court in para 6.00 of the said judgement which is extracted as under:

“6.00. Thus, the oldest golden case law and the latest modern case law by interpreting the law clearly says and clarifies that the settled position is that amendment of pleadings can be allowed at any stage of the proceedings, provided it is necessary for the purpose of deciding the controversies between the parties. They further clarified that even if such an amendment is barred by time, that factor is to be taken into consideration in exercise of the discretion as to whether amendment should be allowed or not and when it does not affect the cause of action and when it does not introduce a new case and when there is no serious prejudice caused to the opposite party and when such amendment is required to do justice, the Court has wide discretionary power to allow such amendment.”

Therefore, the amendment can be allowed at any stage of the proceedings if it is necessary for deciding the controversies between the parties. The amendment cannot be allowed when it affects the cause of action and when it introduces a new case.

25. In North Eastern Railways Administration Vs. Bhagwan Das {(2008) 8 SCC 511}, Hon'ble Supreme Court held as under:

“16. In so far as the principles which govern the question of granting or disallowing amendments under Order 6 Rule 17 CPC (as it stood at the relevant time) are concerned, these are well settled. Order 6 Rule 17 CPC postulates amendment of pleading at any stage of the proceedings. In In Pirgonda Hongonda Patil V. Kalgonda Shidgonda Patil which still holds the field, it was held that all amendments ought to be allowed which satisfy the conditions: (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining real controversy between

the parties. Amendments should be refused only where the other party cannot be placed in the same position as if pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in cost.”

26. In the case of Revajitu Builders and Developers Vs. Narayanswamy {(2009) 10 SCC 84}, the Hon'ble Supreme Court enunciated the following principles for allowing the amendment:

“Whether amendment necessary to decide the real controversy

58. The first condition which must be satisfied before the amendment can be allowed by the court is whether such amendment is necessary for the determination of the real question in controversy. If that condition is not satisfied, the amendment cannot be allowed. This is the basic test which should govern the court's discretion in grant or refusal of the amendment.

No prejudice or injury to other party

59. The other important condition which should govern the discretion of the court is potentiality of prejudice or injustice which is likely to be caused to the other side. Ordinarily if the other side is compensated with costs, then there is no injustice but in practice hardly any court grants actual costs to the opposite side. The Courts have very wide discretion in the matter of amendment of pleadings but the Court's powers must be exercised judiciously and with great care.”

Factors to be taken into consideration while dealing with the application for amendment.

63. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

- (1) Whether the amendment sought is imperative for the proper adjudication of the case;
- (2) Whether the application for amendment is bonafide or malafide;
- (3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;
- (4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;
- (5) Whether the proposed amendment constitutionally or fundamentally changes the nature or character of the case; and
- (6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with the application filed under Order 6 Rule 17. These are only illustrative and not exhaustive.

64. The decision on an application made under Order 6 Rule 17 is a very serious judicial exercise and the said exercise should never be undertaken in a casual manner. We can conclude our discussion by observing that while deciding applications for amendments the courts must not refuse bona fide, legitimate, honest and necessary amendments and should never permit mala fide, worthless and/or dishonest amendments.”

27. From the above judicial decision on the issue of amendment under Order 6 Rule 17, it is clear that the dominant test that needs to be carried out is that the amendment is required in the interest of justice and for the purpose of determination of real controversy between the parties and to reduce multiple litigations.

28. In the cases under consideration, the Petitioners had in the original petitions raised their grievance that there was a substantial difference between the DNI based on which they had quoted the bid and the actual DNI on the ground. The Petitioners had prayed for revision of tariff under the PPA on account of variation in DNI level, on account of variation in foreign exchange and extension of commissioning dates of the project. When the Petitioners approached the Commission by way of the present petitions, they had also made representations to MNRE to consider their requests. Since a parallel consultation process was on, the Commission decided to defer the hearing of the Petitions. Subsequently, MNRE vide its affidavit dated 14.6.2017 submitted the replies to the Petitions in which it was averred that MNRE had no role in DNI estimation at the time of bidding and hence any loss or damage, financial or otherwise, due to differences, if any, on the DNI estimated at the time of bidding and DNI measured on site, cannot be attributed to MNRE. MNRE in the reply also stated that there cannot be any claims on the part of the Petitioners for any advisory on DNI. Pursuant to this affidavit, the Petitioners have filed the applications for

amendments of the petitions. After para 57 of the Petition No. 41/MP/2014, AREL has made submissions regarding the lapse of MNRE on various counts such as cherry picking the recommendations of the Expert Committee/Technical Committee, renouncing the role of facilitator JNNSM, ignoring the failure of concentrated solar power in India, ignoring the submissions of distribution companies refusing to procure power from Solar Thermal Power Plant, and ignoring the fact that procurement of power from Solar Thermal Power Plants will be disadvantageous to NVVN. In the Grounds, the following new grounds have been taken:

- (a) The entire solar thermal eco system has changed over the period of time and the CSP technology has failed to thrive globally.
- (b) In the project site of the Petitioner, the ground reading of DNI is below 1700 Kwh/sqm/year and therefore it is impossible for the Petitioner to perform under the PPA.
- (c) Enforcing performance of the existing PPA between NVVN and the Petitioner will result in unreasonable loss to both the parties to the PPA.
- (d) The development of the project by the Petitioner at this stage is neither desirable nor fair. The Petitioner is seeking indulgence of the Commission to issue directions for nullifying the PPA between the Petitioners and NVVN and with further direction to release the bank guarantee.
- (e) The Petitioner was restrained in obtaining SCOD as indicated the PPA for reasons not attributable to the Petitioner.

(f) The amendments to the PPA sign subsequently between NVVN and the Petitioner cannot translate into waiver of raising issues being faced by the Petitioner while developing the project.

(g) The shortfall in the DNI cannot be attributable to the Petitioner herein.

(h) NVVN/Discoms have failed to demonstrate actual loss suffered by them due to non-supply of power by the Petitioner.

Similar submissions have been made by the Petitioners in Petition No. 14/MP/2015 and 327/MP/2014.

29. The prayers have also been completely revised in the Applications for amendment. While in the original petitions, the Petitioner had sought revision of the applicable tariff on account of variation in DNI, variation in foreign exchange rate and extension of SCOD of the project, the revised prayers seeks a declaration that the PPA is not based on correct reflection of DNI at ground levels, the solar thermal power project to be developed by the Petitioners are not viable and workable at DNI levels recorded at the project site, a declaration that no loss would be caused to NVVN on account of non-performance of the PPAs and direction to NVVN to release the bank guarantees.

30. Without going into the merit of the amendments sought in these three petitions, it is apparent from the factual matrix, grounds and prayers sought to be substituted through the amendment that they give rise to a separate cause of action completely different from those pleaded in the original petitions. The proposed amendments have completely altered the nature of dispute and thereby do not help

in determining the real question in controversy between the parties. In the original petitions, the dispute was confined to the variation in the DNI relied upon at the time of bid and the DNI actually on the ground and compensation for such variation. On the other hand, the ground taken for the amendment is that globally the thermal solar technology has failed and it is not viable for the Petitioners to discharge their obligations under the PPA. In our view, the proposed amendments fundamentally change the nature and character of the case; as the cause of action, the grounds for relief and the relief prayers in the amendment applications are fundamentally different from the original petitions. Moreover, since the nature of dispute between the Petitioners and NVVN changes on account of the proposed amendment, the amendments sought cannot be imperative for determining the real issue in controversy and for proper and effective adjudication of the case. Further, the amendments are likely to cause prejudice to NVVN who has entered into back to back PPAs with the distribution companies on the basis of PPAs with the Petitioners. Finally, refusal of the amendments will not result in injustice to the Petitioners or multiplicity of litigation as they can pursue the relief prayed for through separate petitions since the cause of action in both cases are different. Since, the very basis and the prayers in the original petitions are sought to be completely changed through the amendments, we are of the considered view that allowing amendments are not relevant for determining the real questions in controversy between the parties and for proper and effective adjudication of the dispute between the parties.

31. Considerable arguments have been advanced as to whether the amendments have been sought before the beginning of the final trial or final argument in this case. It is on record that the Learned Senior Counsels for the Petitioners had argued the

matters on merit on 17.8.2017. However, we are not going into this aspect since we have held that the proposed amendments are not relevant for the purpose of determination of real questions in controversy between the parties in these petitions and in fact set up new questions of facts and law with completely new prayers.

32. In view of the above discussion, the applications for amendments of the petitions are rejected. Accordingly, IA Nos. 52/2017, 53/2017 and 48/2017 are disposed of.

33. The main petitions, namely, 327/MP/2013, 14/MP/2014 and 41/MP/2014 shall be listed for hearing on merit on 19.9.2017 at 0930 hours.

sd/-
(M.K. Iyer)
Member

sd/-
(A.S. Bakshi)
Member

sd/-
(A.K. Singhal)
Member

sd/-
(Gireesh B Pradhan)
Chairperson