



नईदिल्ली
NEW DELHI

याचिका संख्या. /Petition No.: 373/MP/2020 along with I.A. 27 of 2020

कोरम/Coram:

श्री पी. के. पुजारी, अध्यक्ष/ Shri P. K. Pujari, Chairperson
श्री आई. एस. झा, सदस्य/ Shri. I.S. Jha, Member
श्री अरुण गोयल, सदस्य/ Shri. Arun Goyal, Member

आदेश दिनांक /Date of Order: 03rd of June, 2020

IN THE MATTER OF:

Petition filed under Section 79(1)(f) of the Electricity Act, 2003 seeking approval of Annuity model in terms of Central Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2017 for recovering Safeguard Duty Claim on account of Change in Law from M.P. Power Management Company Limited and Delhi Metro Rail Corporation as per the Order dated 15.10.2019 passed by the Commission in Petition No. 19/MP/2019.

AND IN THE MATTER OF:

ACME Jaipur Solar Power Private Limited
Through its authorized signatory
B 4, Plot No. 12, Basement – 2,
Gopi Nath Marg, Purohit ji ka Bagh,
MI Road, Jaipur – 302001,
Rajasthan, India.

...Petitioner

Versus

1. M.P. Power Management Company Limited,
Represented Through Chairman,
Shakti Bhawan, Rampur,
Jabalpur, Madhya Pradesh - 482008
2. Delhi Metro Rail Corporation,
Represented Through Managing Director,
Metro Bhawan, Fire Brigade Lane,
Barakhamba Road, New Delhi – 11001
3. Rewa Ultra Mega Solar Limited
Represented through Chairman,
Urja Bhawan, Link Road No. 2,
Shivaji Nagar, Bhopal, Madhya Pradesh - 462003

...Respondents

Parties present: Shri. Hemant Sahai, Advocate, AJSPPPL
Shri. Tarun Johri, Advocate, DMRC
Shri. Ashish Anand Bernard, Advocate, MPPMCL
Shri Vijay Kumar, DMRC

आदेश/ ORDER

The Petitioner, M/s ACME Jaipur Solar Power Private Limited is a project generating company of ACME Solar Holdings Limited which is engaged in the business of development, building, owning, operating and maintaining utility scale grid connected solar power projects, for generation of solar power. The Petitioner by way of the instant petition is seeking redressal of a dispute that has arisen between the parties qua the annuity payment model proposed by the Respondents for making payments to the Petitioner in terms of Order dated 15.10.2019 in Petition No. 19/MP/2019 passed by the Commission.

2. The Respondent No. 1, M/s MP Power Management Company Limited (hereinafter referred to as 'MPPMCL') is engaged in the business of distribution and supply of electricity and is the holding company of the three Discoms in the State of Madhya Pradesh.

3. The Respondent No. 2, Delhi Metro Rail Corporation (hereinafter referred to as 'DMRC') is a company engaged in implementation of the construction and operation of a metro rapid transport system in the State of Delhi.

4. The Respondent No. 3, M/s Rewa Ultra Mega Solar Limited (hereinafter referred to as "RUMSL") is a joint venture company between Solar Energy Corporation of India Limited and Madhya Pradesh Urja Vikas Nigam Limited with the stated objective to develop and facilitate development of large scale solar projects.

5. The Petitioner has made the following prayers:

In Petition

a. Approve and instruct the MPPMCL and DMRC to make the due payments to Petitioner as per the payment methodology as submitted by the Petitioner in the present Petition;

b. Approve and direct MPPMCL and DMRC to make upfront payment to the Petitioner on lump-sum basis for the period being from COD to the date of first Monthly Annuity Payment along with Late Payment Surcharge;

c. Approve and direct MPPMCL and DMRC to pay Safeguard duty amounts towards Bonds on lumpsum basis along with interest as levied by the concerned customs authority;

d. Allow legal and administrative costs incurred by the Petitioner in pursuing the instant petition;

e. Grant exemption from filing duly affirmed affidavit in view of the extension of the countrywide lockdown due to the outbreak of COVID-19 with an undertaking that the duly affirmed affidavit will be submitted once the regular functioning of the Courts resume;

f. Pass such other/further Order(s)/directions(s) as the Commission may deem fit in the facts and circumstances in the present case.

In I.A. 27 of 2020

a. Declare and direct MPPMCL and DMRC to make payments of admitted amounts to the Petitioner at the annuity rate proposed by the said Respondents as communicated in Letters dated 07.04.2020 and 14.04.2020 respectively till the final disposal of the matter;

b. *Declare, direct and restrain MPPMCL and DMRC from initiating any coercive action against the Petitioner owing to the pendency of the accompanied Petition;*

c. *Grant exemption from filing duly affirmed affidavit in view of the extension of the countrywide lockdown due to the outbreak of COVID-19 with an undertaking that the duly affirmed affidavit will be submitted once the regular functioning of the Courts resume;*

d. *Pass such other/further Order(s)/directions(s) as this Commission may deem fit in the facts and circumstances in the present case.*

BACKGROUND

6. The Government of Madhya Pradesh and the Government of India had set up a 750 MW solar project in Rewa district. RUMSL was designated as the solar power park developer in respect of the aforementioned Rewa Solar Power Project. RUMSL issued an Request for Selection (RfS) document for Solar Power Developers (SPDs) for development of 750 MW capacity of solar project split into three units of ground mounted grid-connected solar photovoltaic power plants of 250 MW capacity each, identified as Unit 1, Unit 2 and Unit 3.

7. M/s ACME Solar Holdings Private Limited submitted its bid for the Units in response to RfS of RUMSL. Following the process of selection of bidders as set out in the RFP, M/s ACME Solar Holdings Private Limited was selected by RUMSL as successful bidder to develop one unit comprising 250 MW capacity of the Rewa Solar Power Project on 10.02.2017. Subsequently, RUMSL issued the letter of award on 21.02.2017 to M/s ACME Solar Holdings Private Limited appointing it as the Solar Power Developer to implement the Unit. ACME Solar Holdings Private Limited incorporated a Special Purpose Vehicle (hereinafter referred to as 'SPV') i.e., ACME Jaipur Solar Power Private Limited (the Petitioner) and informed the Procurer and RUMSL by its letter dated 16.03.2017 that the SPV is the entity which shall undertake and perform its obligations, including the obligation to enter into Agreement to supply power. Accordingly, the Petitioner entered into two separate Power Purchase Agreements ('PPAs') dated 17.04.2017 with the Respondents for the development of 1 unit of 250 MW of the Rewa Solar Power Project in the State of Madhya Pradesh and for consequent sale of solar power to MPPMCL & DMRC.

8. Vide Notification No. 1/2018 (SG) dated 30.07.2018 (hereinafter referred to as 'Safeguard Duty Notification'), the Central Government imposed safeguard duty as per the following rates on the import of "Solar Cells whether or not assembled in modules or panels":-

- a. 25% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th July 2018 to 29th July 2019;
- b. 20% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th July 2019 to 29th January 2020;
- c. 15% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30th January 2020 to 29th July 2020.

9. The Petitioner filed Petition No. 19/MP/2019 before the Commission on 17.01.2019 for (i) declaration of "Change in law" event; and (ii) grant of consequential relief to compensate for the increase in capital cost due to introduction and imposition of SafeGuard Duty (SGD) by way of Safeguard Duty Notification in terms of Article 17 of the PPAs executed between Petitioner and Respondents viz. MPPMCL and DMRC.

10. The Commission issued Order dated 15.10.2019 in Petition No. 19/MP/2019 and also a Corrigendum dated 19.02.2020, wherein, *inter alia*, it was held that the Claims decided in the Order shall be paid within sixty days of the date of the Order or from the date of submission of claims by the Petitioners. An option was also provided to the Petitioners and the Respondents to mutually agree to a mechanism for the payment of such compensation on annuity basis spread over the period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs.

11. On 18.10.2019 and 14.11.2019, in compliance to the Order dated 15.10.2019 in Petition No. 19/MP/2019, the Petitioner submitted revised supplementary invoices of Rs. 19,41,31,052/- and Rs. 69,38,07,500/- (total Rs. 88,79,38,552/-) to DMRC and MPPMCL

respectively. The Petitioner also proposed revised annuity model for the amount to be payable on yearly basis by the Respondents.

12. On 22.11.2019, the Petitioner issued a reminder to DMRC requesting it to initiate the process of payments by making ad hoc payment of 75% of 19.41 crores (the claim amount).

13. On 17.12.2019, MPPMCL sought for further documents for reconciliation of the Safeguard Duty (SGD) claim. On the same date, the Petitioner informed MPPMCL that the documents being sought by MPPMCL have already been provided to it vide the Petitioner's letter dated 18.10.2019.

14. On 07.01.2020, the Petitioner submitted the updated annuity model to DMRC in terms of Regulation 8 of the Central Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2017 for settlement of the SGD claim on account of change in law.

15. On 13.01.2020, a meeting was conducted at MPPMCL RO, Bhopal, the minutes of which were issued by MPPMCL vide its letter dated 16.01.2020, on the SGD claims raised by the Petitioner wherein certain queries were raised by MPPMCL and DMRC.

16. On 21.01.2020, the Petitioner responded to the queries raised by MPPMCL and DMRC in the meeting dated 13.01.2020 whereby the Petitioner clarified one to one correlation of the supplementary invoices with the relevant documents pertaining to debit notes of M/s ACME Cleantech, custom and transport documents for solar modules imported from China.

17. On 27.01.2020, the Petitioner submitted the detailed calculation sheet of claim as per annuity method in the format shared by MPPMCL for payment of Rs. 88.79 crores towards SGD claims of MPPMCL and DMRC.

18. On 05.02.2020, the Petitioner again issued reminder to DMRC stating that the timelines for reconciliation of claims and payment have expired on 02.11.2019 and 17.12.2019 respectively and no payments have been received from DMRC. On the same day

DMRC raised additional queries and sought reply to the same along with the submission of additional documents and revised annuity model.

19. On 23.02.2020, the Petitioner issued letter to RUMSL detailing the SGD amounts due from MPPMCL and DMRC and the delay caused by them in reconciling the amounts pursuant to which, the Petitioner is facing severe financial crisis and is unable to perform contractual obligations.

20. On 24.02.2020, the Petitioner requested DMRC for immediate release of payment against Supplementary invoices on account of SGD .

21. On 07.03.2020, MPPMCL issued letter wherein it denied to pay Rs. 88.79 crore as the total claimed amount from MPPMCL and DMRC and decided on the reconciled amount of Rs. 47,10,35,111/- (which also includes Rs. 10,29,82,961/- which is to be paid by DMRC) and proposed annuity model wherein negotiated post-tax interest rate based on average SBI MCLR (one-year tenure) prevalent during the last 6 months. The tenure of payment was proposed to be 13 years and Petitioner was asked to raise monthly supplementary bills for annuity payments. SBI MCLR was to be reconciled once every 6 months.

22. On 14.03.2020, CA certificate was issued to the Petitioner certifying the rate of interest on debt and return on equity as 10.48% p.a. and 15.25% p.a. respectively as per the Audited Balance Sheet as on 31.03.2019.

23. On 16.03.2020, a meeting was held between MPPMCL, DMRC and the Petitioner whereby the Petitioner agreed to the reconciled amounts of Rs. 47,10,35,111/- (Rs. 36,80,52,150 to be payable by MPPMCL and Rs. 10,29,82,961 to be payable by DMRC). Rs. 41,69,03,441/- (out of total claim of Rs. 88,79,38,552/-) was not admitted by MPPMCL and DMRC and the same was to be considered for reconciliation subject to the submission of documents pertaining to actual payment of SGD. The payment methodology for the annuity model was considered at a negotiated post-tax interest rate based on average SBI MCLR (one-year tenure) prevalent during the last available 6 months. The tenure of payment of

annuity was decided to be 13 years. The Petitioner sought time to decide on the methodology of the annuity model proposed by MPPMCL and DMRC.

24. On 19.03.2020, the Petitioner proposed for either an upfront payment as a lumpsum amount with Late Payment Surcharge or deferred annual payments for a period of 13 years with an annuity rate of SBI MCLR (one-year tenure) average of last 6 months plus 560 basis points (annuity rate of 14.15%).

25. On 20.03.2020, a meeting was again held between the Petitioner and DMRC whereby they agreed on a reconciled amount of Rs. 10,29,82,961/- and the balance amount against the bills was to be released after the actual payments were made by the Petitioner to SGD authorities. In the said meeting “interim payment methodology” subject to final settlement with MPPMCL was also decided. As per “interim payment methodology”, the annuity payment was to be based on interest rate of 6 months average SBI MCLR (one year tenure) plus 250 basis points (floating). Tenure of monthly annuity payment was to be 13 years and the payment was to commence from March, 2020 for which the supplementary invoices would be raised in the month of April, 2020 along with the energy bills.

26. Pursuant thereto, various communications were exchanged amongst the Petitioner, MPPMCL and DMRC to decide on the methodology of payments due towards the Petitioner.

27. On 07.04.2020, MPPMCL informed the Petitioner that an amount of Rs. 36,80,52,150 has been reconciled and the same shall be paid in 13 years at interest rate of 250 basis point above average SBI MCLR (one-year tenure). MPPMCL also informed the Petitioner that the same shall be paid only after Petitioner’s unconditional acceptance of the same proposal.

28. On 14.04.2020, DMRC informed the Petitioner that an amount of Rs. 10,29,82,961/- has been reconciled towards the SGD claims and the same would be paid in 13 years at interest rate of 250 basis point above average SBI MCLR (one year tenure) prevalent during the last available 6 months and further sought unconditional acceptance of the Petitioner to the said proposal by DMRC.

SUBMISSIONS OF THE PETITIONER IN THE IA

29. The Petitioner has submitted that it has filed an interim application through which it is seeking payment of the amounts as admitted by MPPMCL and DMRC through their letters dated 07.04.2020 and 14.04.2020 respectively @ the proposed annuity rate of 10.408%.

30. The Petitioner has submitted that despite its earnest and fair efforts, the Respondents have paid no heed to the same and have unlawfully, unjustifiably and arbitrarily issued the letters dated 07.04.2020 (by MPPMCL) and 14.04.2020 (by DMRC) to the Petitioner stating that no payments will be made until the Petitioner provides an unconditional acceptance to the annuity payment method proposed by the said Respondents.

31. The Petitioner has submitted that the methodology as proposed by the Respondents are in gross ignorance of basic principles of project financing (as the said methodology refuses to take into account the concept of a project comprising of equity and debt) and is also in gross violation of the Central Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2017 (hereinafter referred to as the RE Tariff Regulations), which has been mutually accepted and taken as the basis to formulate a payment method.

32. The Petitioner has submitted that the Respondents are subverting the Commission's order dated 15.10.2019 by employing certain coercive tactics. As per the Order dated 15.10.2019, the mechanism for the payment of compensation on annuity basis has to be mutually accepted by the Parties. However, the Respondents despite being in the know of the same are making unlawful and unjustifiable efforts to coerce the Petitioner into agreeing for an annuity method which has an adverse financial impact on the Petitioner.

33. The Petitioner has submitted that MPPMCL and DMRC may be directed to make payments of admitted amounts to the Petitioner at the annuity rate proposed by them (as communicated in letters dated 07.04.2020 and 14.04.2020 respectively) till the final disposal

of the matter and MPPMCL and DMRC may be restrained from initiating any coercive action against the Petitioner owing to the pendency of the accompanied Petition.

HEARING HELD ON 08.05.2020

34. The Petition along with IA came up for hearing on 08.05.2020. The ROP (record of proceedings) of hearing dated 08.05.2020 in the instant petition and I.A., is extracted as under:

“1. The Learned Counsel for the Petitioner submitted that the instant Petition has been filed, inter-alia, seeking approval of annuity model in terms of the Central Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2017 (‘RE Tariff Regulations’) for recovery of Safeguard Duty on account of Change in Law from the Respondents, MPPMCL and DMRC as per the Commission’s order dated 15.10.2019 in Petition No. 19/MP/2019. Learned counsel for the Petitioner mainly submitted as under:-

(a) The Petitioner had filed Petition No. 19/MP/2019 before the Commission, inter-alia, seeking introduction and imposition of Safeguard Duty by the Government of India as Change in Law event and consequential reliefs. The Commission in its order dated 15.10.2019 directed the Respondents to pay the claims of the Petitioner within sixty days from the date of issue of order or from date of submission of claims by the Petitioner as one time lump sum amount. In alternatively, the Commission also allowed the parties to mutually agree to a mechanism for payment of such compensation of annuity basis.

(b) Pursuant to the said order dated 15.10.2019, the parties have ‘in-principle’ mutually agreed for payment of compensation on annuity basis. However, the grievance has arose in respect of annuity rate. According to the Petitioner, it is entitled to the floating annuity rate of SBI MCLR (1 year tenure) avg. of last 6 months plus 560 basis points. However, in order to facilitate an agreement, the Petitioner is willing to accept the annuity rate of 450 basis points based on normative principles of return on debt-equity ratio of 70:30 percent as prescribed under RE Tariff Regulations. Whereas, the Respondents, MPPMCL and DMRC have proposed the floating annuity rate of SBI MCLR (1 year tenure) avg. of last 6 months plus 250 basis points.

(c) On account of above disagreement and due to non-release of payment by the Respondents, the Petitioner had ‘under-protest’ agreed to above proposal of the Respondents. While the Respondent, DMRC has released the payment to the Petitioner on the above annuity rate, the Respondent, MPPMCL has failed to pay any compensation to the Petitioner despite admitted claim of approximately Rs. 36.80 Crore. MPPMCL vide its letter dated 07.04.2020 sought the unconditional acceptance of the Petitioner to interest rate at 250 basis point above avg. SBI MCRL (one year tenure) for processing its claims and thus, coercing the Petitioner to accept its proposal is contrary to the order dated 15.10.2019 wherein the parties are required to mutually agree upon the mechanism for compensation on annuity basis.

2. The Petitioner had also informed the Respondents that the Ministry of New and Renewable Energy vide its letter dated 12.03.2020 has directed SECI to reimburse /compensate the Change in Law payments to Renewable Energy Developer towards Safeguard Duty and

GST Claims by annuity basis and the rate of such annuity should be in accordance with RE Tariff Regulations. Accordingly, SECI is already processing the change in law claims on annuity basis at the annuity rate as per RE Tariff Regulations.

3. *Learned counsel for the Petitioner submitted that the Petitioner has filed I.A. No. 27 of 2020 seeking direction to the Respondents, MPPMCL and DMRC to make the payment of admitted amounts to the Petitioner at the annuity rate proposed by the Respondents as communicated vide letters dated 07.04.2020 and 14.04.2020 respectively till final disposal of the matter.*

4. *Learned counsel for the Respondent, DMRC accepted the notice and requested for four weeks' time to file its reply. Learned counsel submitted that while the annuity rate is subject matter of outcome of the main Petition, the Respondent has already started paying the compensation to the Petitioner for admitted amount at the annuity rate of 250 basis points above average SBI MCRL (one year tenure) prevalent during last 6 months.*

5. *Learned counsel for the Respondent, MPPMCL accepted the notice and submitted that the Respondent in its letter dated 07.04.2020 has already informed the Petitioner that MPPMCL is ready to pay the compensation for admitted amount at 250 basis point above avg. SBI MCRL (one-year tenure) prevalent during the last available 6 months from the month of July, 2020 on account of unforeseen lockdown situation prevailing on account of Covid-19. Learned counsel further submitted that the Petitioner itself vide its letter dated 17.02.2020 and in terms of minutes of meeting held on 16.03.2020 had agreed to 300 basis point above avg. SBI MCLR (one-year) and thereafter reverted its position. However, the Petitioner is now claiming higher annuity rate. Learned counsel submitted that annuity rate is nothing but the interest rate, governed by Interest Act, 1987 and the Court cannot grant any interest more than the prevailing/current rate. Learned counsel requested for weeks' time to file reply to the IA.*

6. *In response, learned counsel for the Petitioner submitted that the proposal recorded in the Minutes of Meeting held on 16.03.2020 itself records that it shall revert back after taking further directions from the Board on the proposed offer. Further, MPPMCL's request for payment from July, 2020 cannot be accepted on account of clear directive of MNRE dated 01.04.2020 that 'payments of RE generators be done on regular basis as was being done prior to lockdown'. Accordingly, MPPMCL be directed to release the payment immediately.*

7. *After hearing the learned counsels for the Parties, the Commission admitted the Petition. The Commission directed MPPMCL to file reply to the IA on or before 15.05.2020. The Petitioner may file rejoinder thereof by 21.05.2020. The Commission reserved the order on IA No.27/2020.*

8. *The Commission directed the Petitioner to serve copy of the Petition on the Respondents immediately, if not already served. The Respondents were directed to file their replies by 05.06.2020 with an advance copy to the Petitioner who may file its rejoinder, if any, by 28.06.2020. The Commission directed that due date of filing of reply and/or rejoinder should be strictly complied with.*

9. *The Commission directed the Petitioner to file the relevant documents pertaining to settlement agreed/reached with SECI on annuity model for payment of compensation, by 21.05.2020.*

10. *The Petition shall be listed for hearing in due course for which separate notice will be issued."*

REPLY OF MPPMCL

35. The Respondent No.1 has filed reply to the Petition through which it has submitted that the MPPMCL is the holding company for all the DISCOMS of MP. Therefore, MPPMCL is responsible for the entire power purchase for the State of Madhya Pradesh.

Re: Conduct of Petitioner- Repudiated its admitted documents

36. MPPMCL has submitted that the instant application seeking interim relief filed by the Petitioner is not maintainable and is also liable to be rejected on merits for the simple fact that vide letter dated 17.02.2020, the Petitioner requested MPPMCL that the annuity payment be made over a period of 25 years and the interest rate shall be SBI MCLR +300 basis points. During deliberations, MPPMCL agreed to settlement of claim in 13 years, but with floating interest rate of SBI MCLR+250 basis points. Vide letter dated 19.03.2020, the Petitioner completely repudiated its own offers and wrote that it has not offered interest rate of 300 basis points above SBI MCLR. Thereafter, the Petitioner has filed the instant petition alleging that MPPMCL is withholding payments to the Petitioner. The Petitioner has not approached the Commission with clean hands and is, therefore, not entitled to any relief. It is logical that if the period of payment by annuity mode is being reduced from 25 years to 13 years, the rate of interest which is offered by the Petitioner i.e. SBI MCLR+300 basis points be also reduced to SBI MCLR+250 basis points.

Re: No Justification to seek 560 basis points

37. MPPMCL has submitted that there is no justification for the Petitioner to seek 560 basis points as the loans taken by the Petitioner are in the range of 9.25-9.75% as per the information with the Respondent. As per the Lenders Agreement, the interest payable by the Petitioner upto COD is 9.75% and after COD is 9.25%. Therefore, the entire claim of the Petitioner seeking 560 basis points in the petition and in the interlocutory application is without any basis and is an attempt towards unjust enrichment.

38. MPPMCL has submitted that reliance of the Petitioner on the RE Tariff Regulations of the Commission to claim the interest rate of 560 basis points is wrong. The RE Tariff Regulations are not applicable to the Petitioner's case. The tariff offered by the Petitioner is through competitive bidding and the same has been adopted under section 63 of the Electricity Act, 2003. The Petitioner cannot apply the RE Tariff Regulations as per its own suitability when the same are not applicable.

39. MPPMCL has submitted that the provisions of the Interest Act, 1978 provides that no court can award interest which is higher than the current rate. The order dated 15.10.2019 passed by the Commission permitted the parties to mutually decide on the annuity model of payment and the Commission, therefore, left it to the wisdom of the parties without giving any observations on the payment of interest.

Re: Similarly placed developer agrees to 250 basis points

40. MPPMCL has submitted that the order dated 15.10.2019 also decided the matter for another developer namely Arinsun Clean Energy Pvt. Ltd. (Petition no. 46/2019) who is also selling power from the same solar park as that of the Petitioner (Rewa) and is selected under the same Bid. Arinsun Clean Energy Pvt. Ltd. is also operating in the same environment as that of the Petitioner and after the passing of the order dated 15.10.2019, it has agreed to annuity payment over 13 years period at SBI MCLR+250 basis points. Therefore, the Petitioner has no justification to seek SBI MCLR+560 basis points interest when another developer who is similarly placed has sought and agreed to a much lower interest rate of SBI MCLR+250 basis points.

Re: COVID-19 Situation

41. MPPMCL has submitted that the submission of the Petitioner to make the payments on annuity model immediately is illegal as current Covid-19 situation has hampered the collections of money and the financial position of the Respondent. Therefore, the Respondent in its letter dated 07.04.2020 has submitted that any such payments can only be

made from July 2020 onwards or thereafter once the Covid-19 Situation, which has admittedly caused a Force Majeure situation, eases and normalizes.

REJOINDER BY THE PETITIONER IN I.A. No. 27 of 2020

42. The Petitioner by way of Rejoinder has reiterated the facts already submitted in the I.A. No. 27 of 2020 and, therefore, the same are not reproduced herewith for the sake of brevity. The Petitioner has additionally submitted that:

- a. The Petitioner is agreeable to an annuity payment mechanism. However, since there is no agreement on the critical financial parameters relevant for determining such annuity payments, the Petitioner has approached the Commission for determining the same relying on the RE Tariff Regulations.
- b. The reply of Respondent MPPMCL is silent as to why an “unconditional acceptance” is being sought for even payment of admitted amounts.
- c. The Respondent has not denied issuance of letters dated 07.04.2020 and 14.04.2020 which unequivocally accept that an amount of Rs. 36,80,52,150/- is payable for being admitted and on this ground alone the reply of MPPMCL can be rejected.
- d. MPPMCL has conveniently ignored to convey that its proposed annuity rate i.e. SBI MCLR (one-year tenure) prevalent for the last 6 months + 250 basis points split in monthly installments for a period of 13 years, is not acceptable to the Petitioner and hence does not qualify as a mutually agreeable mechanism. Therefore, the same cannot be thrust upon the Petitioner through coercive tactics adopted by MPPMCL.
- e. MPPMCL has relied upon the absence of letter dated 17.02.2020 to create a mirage that the Petitioner has not approached the Commission with clean hands. The issue of SBI MCLR + 300 basis points finds its due mention through MoM dated 16.03.2020 and letter dated 19.03.2020 including the reasons as to why the same is not acceptable to the Petitioner. Further reliance by Respondent on letter dated 17.02.2020 is unsustainable/unfounded since the annuity payment calculation of MPPMCL through its dated 07.04.2020 and letter dated 24.04.2020 is not acceptable to the Petitioner.

- f. Any reliance whatsoever on letter dated 17.02.2020 or several other letters exchanged between the parties mutually negotiating the annuity payment calculation is immaterial as none of the offers/ proposals has been accepted by either party till date.
- g. Letters dated 07.04.2020 and 14.04.2020 have made it clear that no payments can be made till the time SBI MCLR + 250 basis is accepted and not complained or agitated against. An offer which is to be mutually agreed in terms of the Commission's Order dated 15.10.2019 cannot be forced upon the Petitioner in this unjustifiable manner which fails both in fairness and equity.
- h. The Respondents has further misled the Commission qua the Petitioner claiming SBI MCLR + 560 basis points. The Petitioner's cost of capital is higher and it had sought SBI MCLR average of last 6 months + 560 basis points on the basis of parameters considered in RE Tariff Regulations.
- i. The Respondent's unfounded reliance on alleged acceptance of one similarly placed developer to deny interim payment is legally unsustainable. The same can neither restrain the Petitioner from exercising its legal remedy nor can it be precedence for it to accept an unjustifiable annual payment mechanism.
- j. The Respondent should have followed pursuit of DMRC which has started making the monthly annuity payments as per the above unilateral position and has not insisted on an unconditional acceptance as sought by MPPMCL as a condition to making these payments.
- k. The alleged claim of COVID-19 by MPPMCL is completely contrary to and militates against the MNRE communique dated 01.04.2020. The payments due are for a period prior to the outbreak of COVID-19 and cannot be denied on this ground.
- l. MPPMCL has failed to reflect any single reason as to why the admitted payments which were to be paid in a period of 60 days from the date of the Order dated 15.10.2019 (and evidently not paid for over a period of 6 months) be not immediately made to the Petitioner.
- m. In terms of the RE Tariff Regulations, the proposed rate of 10.41 % cannot be applied as suggested by MPPMCL because:
 - i. 10.41% is applied only for the debt part (70%) of the additional capex incurred;

- ii. 10.41% is not / cannot be applied on the equity part (30%) of the additional capex;
- iii. the debt-equity ratio is 70:30 and the post-tax Return on Equity (hereinafter referred to as “RoE”) allowed is 14% (pre-tax RoE will be 18.71%, if grossed up with the current effective tax rate @ 25.17%); and
- iv. Resultantly, the RoE for the Petitioners should be 18.71 % (pre-tax) return on 30% value of project cost i.e. 18.71 % (pre-tax).

43. The Petitioner has submitted that the proposed annuity rate of 10.41% cannot be made applicable for the entire 100% of additional capex incurred and for the PPA tenure.

ANALYSIS AND DECISION

44. We have heard the learned counsels for the Petitioner and the Respondents and have carefully perused the records.

45. The Commission observes that vide Order dated 15.10.2019 in Petition No. 19/MP/2019 and Corrigendum dated 19.02.2020, *inter alia*, it was held that:

“92. Our decisions in this Order are summed up as under:

a. Issue No. 1: The imposition of the “Safeguard Duty” vide Notification No. 1/2018 (SG) dated 30.07.2018 is squarely covered as the event classified as “Change in Law” under Article 17 of the PPAs. The Commission directs the Petitioners to make available to the Respondents all relevant documents exhibiting clear and one to one correlation between the projects and the supply of imported goods till the Commissioning Certificate is issued in accordance with the provisions of the PPA, duly supported by relevant invoices and Auditor’s Certificate. The Claim based on discussions in paragraph 84 above of this Order shall be paid within sixty days of the date of this Order or from the date of submission of claims by the Petitioners whichever is later failing which it will attract late payment surcharge as provided under PPAs. To ensure time bound compliance within sixty days of the Order, it is directed that the Respondents shall reconcile the claim related documents within 15 days of submission of claim by Petitioners. Alternatively, the Petitioners and the Respondents may mutually agree to a mechanism for the payment of such compensation on annuity basis spread over the period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs.

b. Issue No. 2: The claim regarding separate “Interest on Working Capital/Return of Equity”/“Carrying Cost” is not admissible.”

46. From the above, the Commission observes that:

a. The Petitioner was to make available to the Respondents all relevant documents exhibiting clear and one to one correlation between the projects and the supply of imported goods till the commissioning certificate is issued in accordance with the provisions of the PPA, duly supported by relevant invoices and Auditor’s Certificate.

b. The claim was to be paid by the Respondents in lump sum within sixty days of the date of Order or from the date of submission of claims by the Petitioners whichever is later.

c. Alternatively, the Petitioners and the Respondents were to mutually agree to a mechanism for the payment of such compensation on annuity basis spread over the period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs.

47. The Commission observes that vide instant Interlocutory Application No. 27 of 2020 , the Petitioner has submitted that out of the supplementary invoices of Rs. 88,79,38,552/- (Rs. 19,41,31,052/- related to DMRC and Rs. 69,38,07,500/- related to MPPMCL) raised by the Petitioner on 14.11.2019, the amounts of Rs. 47,10,35,111/- (Rs. 36,80,52,150 to be payable by MPPMCL and Rs. 10,29,82,961 to be payable by DMRC) stand reconciled. The only submission of the Petitioner is that *lis pendens* Petition 373/MP/2020, the Respondents may be directed to start paying the reconciled amount of Rs. 47,10,35,111/- as per “interim payment methodology” decided among the contracting parties on 20.03.2020.

48. The Commission observes that during the hearing held on 08.05.2020, the learned counsel for the Petitioner submitted that the Respondents may be directed to start paying the reconciled amount of Rs. 47,10,35,111/- (as admitted by the Respondents), as per the deferred annuity payment based on interest rate of 6 months average SBI MCLR (1 year tenure) plus 250 basis points (floating). MPPMCL has proposed that considering the

circumstances due to COVID-19, they will start the payment only from the month of July, 2020 or whenever the prevailing situation normalizes. The Petitioner submitted that the Ministry of New and Renewable Energy (hereinafter referred to as 'MNRE') vide its letter dated 12.03.2020 has directed SECI to reimburse/ compensate the Change in Law payments to renewable energy developers towards Safeguard Duty and GST Claims by annuity basis and the rate of such annuity should be in accordance with the RE Tariff Regulations. Accordingly, SECI is already processing the change in law claims on annuity basis at the annuity rate as per RE Tariff Regulations. Further, MPPMCL's request for payment from July, 2020 cannot be accepted on account of clear directive of MNRE dated 01.04.2020 that 'payments of RE generators be done on regular basis as was being done prior to lockdown'. Accordingly, MPPMCL be directed to release the payment immediately.

49. The Commission observes that vide Order dated 15.10.2019 (read with Corrigendum dated 19.02.2020) in Petition No. 19/MP/2019, it was clearly held that the claim was to be paid in lump sum or alternatively, the contracting parties were to mutually agree to a mechanism for the payment of such compensation on annuity basis. Vide letters dated 07.04.2020 and 14.04.2020, MPPMCL and DMRC have proposed that they agree to make the payment of admitted amounts at the annuity rate as proposed by them provided an unconditional acceptance is given by the Petitioner. Vide I.A. No. 27 of 2020, the Petitioner is seeking direction that MPPMCL and DMRC should make the payment of admitted amounts to the Petitioner at the annuity rate as communicated vide letters dated 07.04.2020 and 14.04.2020 respectively till final disposal of the matter. Learned Counsel for DMRC has submitted that subject to the outcome of the main Petition, it has already started paying the compensation to the Petitioner. Learned counsel for MPPMCL has submitted that MPPMCL in its letter dated 07.04.2020 has already informed that it is ready to pay the compensation for admitted amount at 250 basis point above average SBI MCLR (one-year tenure). Since the contracting parties have mutually agreed for paying the reconciled amount of Rs. 47,10,35,111/- as per deferred annuity payment based on interest rate of 6 months average SBI MCLR (one-year tenure) plus 250 basis points (floating) as an 'interim measure' subject to final outcome of the Petition 373/MP/2020 on merits of the case, the Commission directs

that the payment be made by the respondents on these terms as an ‘interim measure’, subject to the final decision in the main Petition No. 373/MP/2020.

50. The Learned Counsel for MPPMCL has proposed that considering the circumstances due to COVID-19 situation, it will start the payment only from the month of July 2020. In this regard, we note that the bills have been raised by the Petitioner in terms of our order dated 15.10.2019, which is much before the lockdown due to Covid-19 pandemic. We also note that another Respondent, DMRC, has already started paying the Petitioner in the interim. We also take note of O.M. No. F. No. 283/20/2020-GRID SOLAR(ii) dated 01.04.2020 of MNRE that has clarified the matter regarding payment as under:

“OFFICE MEMORANDUM

Sub: Clarification reg. payment to Renewable Energy Generating Stations (REGS) during the moratorium provided to DISCOMs by Ministry of Power (MoP)

1. The Ministry of Power has recently issued instructions providing for a moratorium period to DISCOMs for making payments to electricity generating companies, in the wake of COVID-19.

2. Since then, this Ministry has received representations from Renewable Energy (RE) industry that certain State DISCOMs, citing the said order of Ministry of Power, as mentioned in para (1) above, have started curtailing RE power in some states partially and others completely terming prevailing situation as Force Majeure condition.

3. The matter has been examined in detail and in this regard, following clarifications are issued:

(a). Must-Run Status to RE Projects:

Renewable Energy (RE) Generating Stations have been granted 'must-run' status and this status of 'must run' remains unchanged during the period of lockdown.

(b). Regular Payment to RE Generating Stations:

Since DISCOMs have already been given sufficient relief as mentioned in para (1) above and as electricity from Renewable Energy (RE) Generating Stations comprises only a minor portion of the total electricity generation in the country, the payments to RE generators be done on regular basis as was being done prior to lockdown as per procedure established since 1.8.2019.

4. *These clarifications are issued with the approval of Hon'ble Minister (NRE & Power).*”

51. In view of the above, we are not agreeable to the contention of the Respondents that they may be allowed to make payment from July 2020 or when the lockdown is lifted. They are directed to release payments to the Petitioner immediately.

52. The Commission notes that the Petitioner has prayed to “*restrain MPPMCL and DMRC from initiating any coercive action against the Petitioner owing to the pendency of the accompanied Petition;*” Now, since the Respondents have agreed to pay as per the interim measure , this prayer becomes redundant.

53. The Petitioner has also requested to be granted exemption from filing duly affirmed affidavit in view of the extension of the countrywide lockdown due to the outbreak of COVID-19 and has undertaken to submit the duly affirmed affidavit once regular functioning of the Courts resume. The Commission observes that this is in accordance to our Notice dated 03.04.2020 and hence the prayer qua filing of duly affirmed affidavit once the regular functioning of the Courts resume, is allowed.

54. With the above directions, I.A. 27 of 2020 stands disposed of. The parties are directed to complete the pleadings in Petition No. 373/MP/2020 which shall be listed for hearing in due course of time for which separate notice will be issued.

Sd/-
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सदस्य

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