



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No.: 109/MP/2021 along with IA No. 37/2021

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
श्री पी. के. सिंह, सदस्य / Shri P. K. Singh, Member

आदेश दिनांक/ Date of Order: 29th of September, 2021

IN THE MATTER OF:

Clarification Petition under Section 79 (1) (f) and Section 94 of the Electricity Act, 2003 and Regulation 111 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 read with Section 151 of Code of Civil Procedure seeking clarification of Order dated 05.02.2019 passed by this Commission in Petition No. 187/MP/2018 and 193/MP/ 2018

AND

IN THE MATTER OF:

M/s Renew Wind Energy (TN2) Private Limited
Through its authorized signatory,
138, Ansal Chamber – II
Bikaji Cama Place,
New Delhi – 110066

...Petitioner

Versus

1. NTPC Limited
Through its Managing Director,
Core - 7, SCOPE Complex,
7, Institutional Area,
Lodi Road, New Delhi – 110003.
2. NTPC Vidyut Vyapar Nigam Limited
Through its Managing Director,
Core - 7, SCOPE Complex,
7, Institutional Area,
Lodi Road, New Delhi – 110003.
3. Southern Power Distribution Company of Telangana Limited
Through its Managing Director,
6-1-50, Corporate Office, Mint Compound,
Lakdikapool, Hyderabad,
TELANGANA – 500004
4. Northern Power Distribution Company of Telangana Limited
Through its Managing Director,
H. No. 2-5-31/2, Corporate Office,
Vidyut Bhavan,
Nakkalgutta, Hanamkonda,
Warangal- TELANGANA – 506001
5. Bangalore Electricity Company Limited
Through its Managing Director,
K.R. Circle, Bangalore
Karnataka – 5600001
6. Hubli Electricity Supply Company Limited
Through its Managing Director,
Navnagar, PB Road
Karnataka – 580025
7. Gulbarga Electricity Supply Company Limited
Through its Managing Director,
Gulbarga Main Road, Gulbarga
Karnataka- 585102
8. Mangalore Electricity Supply Company Limited
Through its Managing Director,
MESCOM Bhawan Bejai, Kavour Cross Road
Mangalore, Dakshina Kannada
Karnataka- 575004

...Respondents

Parties present: Shri Sujit Ghosh, Advocate, ReNew
Ms. Mannat Waraich, Advocate, ReNew
Ms. Poorva Saigal, Advocate, NTPC
Ms. Tanya Sareen, Advocate, NTPC
Shri Ispaul Uppal, NTPC

आदेश/ ORDER

The Petitioner, Renew Wind Energy (TN2) Private Limited is a wholly owned subsidiary of M/s Renew Power Limited which is an Independent Power Producer (IPP) of clean energy with more than 5600 MW of commissioned and under-construction clean energy assets and has set up a number of wind and solar power projects in India. The Petitioner is a generating company as defined in Section 2 (28) of the Electricity Act, 2003 (hereinafter referred to as “the Act”). The Petitioner has filed the present clarification petition under Section 79 (1)(f) of the Act seeking clarification of the Commission’s common Order dated 05.02.2019 passed in Petition No. 187/MP/2018 and Petition no. 193/ MP/2018 (Original Petition).

2. The Respondent No. 1, National Thermal Power Corporation Limited (hereinafter referred to as “NTPC”) is a Public Sector Undertaking engaged in the business of generation of electricity and allied activities. NTPC is also the Implementation Agency for setting up grid-connected solar power projects and for facilitating purchase and sale of power *inter alia* under the National Solar Mission.
3. The Respondent No. 2, NTPC Vidyut Vyapar Nigam Limited (hereinafter referred to as “NVVN”) is a wholly owned subsidiary of NTPC and is engaged in the business of power trading.
4. The Respondent Nos. 3 & 4, Southern Power Distribution Company of Telangana Limited and the Northern Power Distribution Company of Telangana Limited (collectively referred to as “Telangana Discoms”) are the main distribution companies which have been created with the principal object of engaging in the business of distribution and supply of electricity across all districts of the State of Telangana.
5. The Respondent Nos. 5 to 8, Bangalore Electricity Supply Company Limited, Hubli

Electricity Supply Company Limited, Gulbarga Electricity Supply Company Limited, Mangalore Electricity Supply Company Limited (collectively referred to as “Karnataka Discoms”) are the main distribution companies which have been created with the principal object of engaging in the business of distribution and supply of electricity across all districts of the State of Karnataka.

6. The Petitioner has made the following prayers:

- a) *Allow the present clarification petition and thereby clarify that in light of the Order dated 05.02.2019 passed by this Commission in Petition No.187/MP/2018 and 193/MP/ 2018, GST claim for change in law ought to be allowed for goods and services procured prior to COD where invoices were raised post COD and for goods and services procured post COD where invoices were also raised post COD.*
- b) *Pass any such other and further reliefs as this Commission deems just and proper in the nature and circumstances of the present case.*

I.A. 37/2021

- a) *Allow the present application and direct the Respondent NTPC Limited to forthwith release the payments towards the accepted GST claim amount of INR 5,66,51,694 as reconciled and agreed with the Applicant as an interim measure during the pendency of the present Petition; and/or*
- b) *Pass such order(s) as this Commission may deem fit and proper in facts and circumstances of the present case.*

Background and chronological date of events

7. **23.06.2016:** PPA was entered into between NTPC and the Petitioner in respect of 50 MW project at Pavagada, Karnataka for sale of power to the Discoms of Karnataka.
8. **30.08.2016:** Ten (10) PPAs were entered into between NTPC and Renew in respect of 100 MW project in Telangana for sale of power to the Discoms of Telangana.

9. **01.07.2017:** The Central Goods and Services Tax, Act 2017 (CGST Act), State Goods and Services Tax Act, 2017 (SGST Act), Integrated Goods and Services Tax Act, 2017 (IGST Act) (collectively referred to as “GST laws”) were introduced.
10. **01.11.2017 & 14.12.2017:** Actual date of commissioning of the projects.
11. **05.02.2019:** The Commission passed the Order in 187/MP/2018 and 193/MP/2019 holding the GST laws to be a change in law.
12. **08.04.2019:** The Petitioner submitted a claim for Rs 18.69 crores to NTPC for Telangana Project and Rs 13.13 crores for the Karnataka project.
13. **13.05.2019 & 14.05.2019:** NTPC raised an objection in respect of invoices that were raised for the period after the actual date of commissioning of the projects i.e. 01.11.2017 and 14.12.2017
14. **22.05.2019:** The Petitioner wrote to NTPC stating that the ‘date of invoices have nothing to do with the actual delivery of goods and services and installation of the same at site’.
15. **07.06.2019:** NTPC wrote to the Petitioner requesting for revised CA certificates and reiterated its stand regarding the claim post COD.
16. **03.02.2020:** The Petitioner revised its claim to Rs 13.45 crores (Telangana) and Rs 8.88 crores (Karnataka).
17. **06.04.2020:** NTPC sought auditor certificates from the Petitioner.
18. **07.04.2020 & 15.06.2020:** The Petitioner sought time from NTPC to collect data on account of lockdown.

19. **09.09.2020:** NTPC clarified that in light of the decision by this Commission that liability shall be till the COD period only, it informed the Petitioner that it is required to subtract the invoices for the period post COD.
20. **14.11.2020:** The Petitioner wrote an email to NTPC revising its claim to Rs 8.55 crores in respect of Telangana project and Rs 6.91 crores in respect of Karnataka project.
21. **17.12.2020:** The auditor certificates were re-submitted by the Petitioner in respect of the revised claims.
22. **19.01.2021:** NTPC wrote to the Petitioner enquiring about the Custom duty notification for increase in rate of custom duty. At the time of LOA placement, custom duty was @ 5.5% which was purported to have increased to 10% in respect of the Karnataka PPA. NTPC requested for the requisite documents which have not been provided yet.
23. **11.02.2021:** The Petitioner wrote to NTPC requesting release of Rs 5.66 crores out of Rs 6.91 crores. The Petitioner accepted that the GST claim was restricted to Rs 6.91 crores.
24. **04.03.2021:** NTPC re-iterated that it is yet to receive the full documentation for Rs 6.91 crores
25. **10.03.2021:** The Petitioner sought release of Rs 5.66 crores out of Rs 6.91crores.
26. **12.04.2021:** NTPC re-iterated that it is yet to receive the entire documents for the claim of Rs 6.91 crores as stated in the Order dated 05.02.2019. In the absence of the full documentation, as prescribed by the Commission, NTPC would not be able to disburse the amount in instalments/tranches.
27. Hence the Petition.

Submissions of the Petitioner

28. The Petitioner has submitted as under:

- a) The Petitioner was selected by NTPC as SPD for setting up a solar power generation facility with an installed capacity of 100 MW in the State of Telangana. The Petitioner entered into 10 separate PPAs with NTPC, each of which is for setting up solar power project of 10 MW capacity in the State of Telangana and for the consequent sale of solar power to NTPC. Further, the Petitioner entered into a single LOI in relation to the 10 PPAs as signed by them.
- b) Further, in relation to the projects in the State of Karnataka, the Petitioner entered into a PPA with NTPC, for setting up the solar power project of 50 MW capacity and for consequent sale of solar power to NTPC.
- c) Subsequently, Central Goods and Services Tax, Act 2017 (CGST Act), State Goods and Services Tax Act, 2017 (SGST Act), Integrated Goods and Services Tax Act, 2017 (IGST Act) (collectively referred to as “GST laws”) were introduced with effect from 01.07.2017 which brought about a change in the topography of indirect taxation regime in India, resulting in a paradigm shift by subsuming various old taxes and introducing new taxes.
- d) Consequently, the Petitioner filed Petition Nos. 187/MP/2018 and 193/MP/2018 under Section 79 of the Electricity Act read with Article 12 of the PPA, before this Commission seeking declaration that the event of implementation of GST qualifies as a change in law and compensation consequent to such change in law on account of implementation of the GST regime with effect from 01.07.2017.
- e) Vide common Order dated 05.02.2019, this Commission adjudicated upon the aforesaid petitions and held that the introduction of GST Laws w.e.f. 01.07.2017 was an event of change in law under Article 12 of the PPA. The key findings of this Commission are summarized below:
 - a. Introduction of GST was an enactment of a ‘law’ as also in the nature of a change in tax structure and the introduction of a new tax on supply of power, after the bid submission date and was thus an event of Change in Law under Article 12 of the present PPA;
 - b. Compensation allowed for increase in tax cost on account of implementation of GST laws w.e.f. 01.07.2017 which had led to an increase in non-recurring expenditure for the Petitioner qua activities of construction of power project, which was Petitioner’s obligation under the PPA. In this regard, the

methodology and mechanism for compensation was elaborated upon by this Commission in the following terms:

- i. The Commission reproduced a detailed chart depicting a weightage of the components of capital cost as submitted in Petition no. 17/SM/2015 forming a part of its own Order dated 23.12.2015. Thereafter, it considered certain rates of GST as per its own understanding and arrived at weighted average of GST. It directed the Respondents to pay the amount as per the said methodology.
 - ii. However, the Commission also directed that in cases where the GST rates are on the higher side, the commercial decisions taken by the SPDs should not be questioned and specifically directed that payments should be made on the basis of the invoices raised and supported by the Auditor's certificate.
- c. Upon submission of these documents to the Respondents, the Respondents would be liable to pay the stipulated amounts after reconciliation in accordance with the directions of the Commission in this regard.
 - d. However, the Commission denied compensation on account of O&M services on the ground that the same had been outsourced, and since such outsourcing was a commercial decision of the Petitioner otherwise not mandated under the PPA, any increased tax cost on account of change in law could not be claimed.
 - e. Lastly, this Commission also denied relief on account of carrying cost on the ground that the same was not specifically provided for under the PPA.
- f) The Petitioner has preferred an appeal (bearing no. 432 and 433 of 2019) against the aforementioned order before the Appellate Tribunal for Electricity (the Tribunal) to the extent the claim of the Petitioner has been denied for O&M services and carrying cost. The same is pending adjudication. It is also stated that NTPC has not appealed against the said decision of the Commission.
 - g) In accordance with the aforesaid directions of this Commission in Order dated 05.02.2019, the Petitioner, vide its letter dated 08.04.2019, duly submitted its claims along with documentary evidence clearly depicting the actual GST suffered. Subsequently, various communications were exchanged between the Petitioner and the Respondent wherein all the information sought by the Respondent was duly provided by

the Petitioner for final reconciliation and payment of the Petitioner's claim.

- h) However, the claims of the Petitioner with respect of 187/MP/2018 and 193/MP/2018 were partly rejected by the Respondent No.1 vide its email dated 13.05.2019 and 14.05.2019 respectively stating that various invoices whose invoice date is after the date of actual commissioning, i.e., 01.11.2017 and 14.12.2017 cannot be included in the claim. This objection came to be issued by NTPC despite no such direction being made by the Commission in the Petitioner's own case.
- i) On receipt of the said email, the Petitioner vide email dated 22.05.2019 proceeded to justify its claim providing detailed explanation on the aspect that the goods and services, the invoices of which were raised post commissioning, had been procured prior to commissioning. Further, such goods and services were solely for the said project and thus would be covered under the said change in law claim. However, vide email dated 07.06.2019, NTPC once again denied the claim of the Petitioner in relation to invoices raised post commissioning.
- j) Thereafter, till September 2020, the Petitioner exchanged various correspondences with NTPC duly providing all documents and information as sought for by NTPC to justify its claim. However, despite providing all details, after the expiry of one and half years, on 09.09.2020, NTPC relying upon the decision of this Commission in the case of Wardha Solar (Maharashtra) Private Limited in Petition no. 388/MP/2018 stated that the liability of payment on account of GST shall lie only till the Commercial Operation Date (COD). On this basis, it proceeded to direct the Petitioner to submit its claim in relation to invoices raised upto COD i.e. 01.12.2017 and 14.01.2018 for MP/187/2019 and 193/MP/2019 respectively.
- k) Thus, relying upon a decision rendered subsequently, the Respondent no. 1 once again proceeded to change its stand and decided to allow the claim of the Petitioner till COD, despite no such direction/ restriction being provided for in the Petitioner's own case i.e. in 187 and 193 of 2019 decided vide Order dated 05.02.2019.
- l) Further, despite specific directions of this Commission in the Petitioner's own case and despite providing all possible details and information, NTPC has not released any part of the GST claim till date to the Petitioner. In 193/MP/2018, even though the Respondents have reconciled and accepted that the claim of Rs. 5,66,51,694 (out of the total claim of Rs. 6,91,89,713 for the period upto COD), they are refusing to disburse the same solely

on the ground that the claim cannot be released on a piece meal basis.

m) Under these circumstances, the Petitioner is constrained to file the present clarificatory petition seeking a clarification and direction on the following:

(a) That in light of the order of the Commission dated 05.02.2019 which does not lay down any restriction with respect to claim being prior to or post COD, the claims which relate to invoices raised post COD against the procurements made before COD, where such procurements are in relation to goods and services used for setting up of the Project in terms of the PPA, should be allowed.

(b) That in light of the order of this Commission dated 05.02.2019 which does not lay down any restriction with respect to claim being prior to or post COD, the claims which relate to procurements made post COD should be allowed in as much as they are in relation to goods and services used for setting up of the Project in terms of the PPA.

Written Submissions of NTPC

29. NTPC has submitted as under:

Re: Compensation on account of introduction of GST laws for cost incurred beyond COD

a) The Commission's Order dated 05.02.2019 in Petition No. 192/MP/2018 filed by the Petitioner, inter-alia, reads as under:

"205. Our decisions in this Order are summed up as under:

....

b. Issue No. 2: As regards the claims during construction period, the Petitioners have to exhibit clear and one to one correlation between the projects and the supply of goods and services duly supported by the Invoices raised by the supplier of goods and services and auditors' certificate. The amount determined by Petitioner shall be on "back to back" basis shall be paid by DISCOMS to the Petitioners under respective "Power Sale Agreements". The Claim based on discussions in paragraph 174 & 182 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/PSAs. Alternatively, the Petitioners and the Respondents may mutually agree to 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) The Commission vide subsequent Order dated 30.12.2019 in Petition No.4/MP/2019 and connected Petitions in the matter of *Parampujya Solar Energy Private Limited –v- Solar Energy Corporation of India Limited & Ors.*, has held as under:

“85. The Commission notes that the liability of the Respondents for payment of purchase of the power from the SPDs starts from the Commercial Operation Date (COD). Further, as per definition of Commercial Operation Date (COD) provided in Article 1 of the PPAs, COD will be the date 30 days subsequent to the actual date of commissioning of full capacity. Accordingly, the Commission holds that the liability of payment on account of impact of GST on procuring of Solar PV panels and associated equipment by the Petitioners shall lie with the Respondents till the Commercial Operation Date (COD) only. The Commission is also of the view that there has to be a clear and one to one correlation between the projects, the supply of goods or services and the invoices raised by the supplier of goods and services.”

- c) Similar decision has been taken by the Commission in the following Orders: a) dated 28.01.2020 in Petition No.67/MP/2019 and 68/MP/2019; b) dated 26.03.2020 in Petition No.127/MP/2019 and connected Petitions; c) dated 27.03.2020 in Petition No.388/MP/2019; d) dated 02.04.2020 in Petition No.299/MP/2019 and 360/MP/2019; and e) dated 25.01.2021 in Petition No.211/MP/2018.

- d) The terms of the PPA considered in the above Orders are similar to the PPA between the Petitioner and NTPC.

- e) The PPA dated 30.08.2016 defines the terms SCoD and ‘Commercial Operation Date’ as under:

“Commercial Operation Date [COD]” Shall mean the 30 days from the actual commissioning date of the last module of the contracted capacity of the Power Project where upon the SPD starts injecting power from the Power Project to the Interconnection point /Delivery Point /Metering point. CoD is intended to match allocation and availability of thermal power for bundling;

*Scheduled Commissioning Date” shall mean **18.08.2017** i.e. thirteen (13) months from the Effective Date;*

- f) Article 9 of the PPA dealing with Applicable Tariff, inter-alia, reads as under:

ARTICLE 9: APPLICABLE TARIFF

9.1 The SPD shall be entitled to receive the Tariff of Rs.4.66/kWh with effect from the Commercial Operation Date

- g) In view of the above, the cut off-date for consideration of GST claims in regard to the goods purchased can in no event be beyond the COD as per the provisions of the PPA executed with the Petitioner.
- h) There is no provision in the PPA for payment of any additional capital cost for any capital investments done by the Petitioner at any time after the COD date i.e. after the construction period is over. Any upgradation or improvement or repair or changes that are undertaken by the Petitioner at any time after the COD and during the operation period are entirely to the account of the Petitioner and are to be undertaken at the cost and expense of the Petitioner with no liability on NTPC or the Distribution licensees/Buying Entities. The above position has been adequately and amply made clear in the abovementioned decisions of the Commission dealing with COD being the cut-off date.
- i) The Petitioner has alleged that it is entitled to be reimbursed for the goods/services procured prior to COD, but where invoice was raised post COD.
- j) No invoices for GST for goods can be raised after the COD in view of the following:
 - a. No capital cost after the COD for procurement of goods etc. can be considered; and
 - b. The tax invoices in respect of the goods procured prior to the COD have to be necessarily raised in terms of the GST Laws by the delivery date.
- k) Even the goods procured before the COD have to be necessarily supported with a taxable invoice of a date prior to COD and not after the COD of the project. It cannot be that goods were delivered after the COD or invoices were raised after the COD but were incorporated in the project by the COD. Any such contention would mean that the Petitioner had declared COD before the project was ready, which is not permissible. NTPC has placed its reliance on the Commission's Order dated 24.01.2021 in Petition

No.157/MP/2018 alongwith I.A. No.2 of 2019 in the matter of *Prayatna Developers Private Limited –v- NTPC Limited & Ors.*

- 1) With regard to the reliance placed by the Petitioner on the Order dated 13.11.2019 passed by Maharashtra Electricity Regulatory Commission in Case No.259 of 2019, the said decision is in a different context. The issue in the present case is related to the capacity to be installed by the COD.

Re: Piece-meal payment to be made to the Petitioner

30. In addition to the above, the Petitioner has also filed an Interim Application No. 37 of 2021 seeking the payment of '*a GST claim amount of INR 5,66,51,694 as reconciled and agreed with the Applicant as an interim measure during the pendency of the present Petition*'
31. NTPC has submitted as under:
 - a) As per the Commission's Order dated 05.02.2019, the onus for providing the primary documents, invoices etc. lies with the Petitioner itself and it is only once this primary obligation is discharged, that NTPC is required to reconcile the amount and disburse the payments.
 - b) In terms of the above Order, it is clear that (i) the Petitioner is required to exhibit one to one correlation between the projects and the supply of goods and services duly supported by the Invoices raised by the supplier of goods and services and auditors' certificate; (ii) once the claim is submitted to NTPC in the manner prescribed by the Commission, then the Respondents (NTPC/Karnataka Discoms) are required to reconcile the amount; and (iii) NTPC is then liable to make a lump sum payment to the Petitioner within sixty days from the date of the submission of the claim. There was an option for payment on annuity basis. However, the Petitioner had opted for the payment on lump sum basis. Further, the amount so determined is then payable by Karnataka Discoms to NTPC.
 - c) There has been no delay on the part of NTPC in the reconciliation process. Pursuant to the Order of this Commission, the Petitioner had raised the first bill/invoice on NTPC on

08.04.2019 with a claim of Rs. 13.13 crore. In February, 2020, the Petitioner had itself stated that the claim amount was Rs. 8.8 crore pursuant to the reconciliation between the parties. After further reconciliation and the auditor certificate, the Petitioner revised its claim to Rs. 6.91 crore in November, 2020. Thereafter, in January, 2021, when NTPC sought certain additional data/documents, the Petitioner expressed its inability to produce Customs Notification in support of its claim of Rs. 1.25 crore and the same is still pending as on date. The above sequence of events clearly shows that the claim amounts have been consistently changing.

- d) In light of the directions issued by this Commission, the amount could be disbursed as a one time lump sum amount to the Petitioner once the primary obligation has been discharged. Such a piece-meal disbursement, as sought for by the Petitioner, besides not being in line with consistent practice and the express wording of the Order dated 05.02.2019, may lead to a situation where every generator may insist upon releasing the payment against each and every reconciled amount without any threshold limit and irrespective of total claims.
- e) Further, NTPC also has to recover the money from the Buying Entities i.e. the Karnataka Discoms and such piece meal disbursement would also lead to issues in recovery of monies from the Buying Entities.

Analysis and decisions

- 32. We have heard the learned counsels for the Petitioner and the Respondents and have carefully perused the records.
- 33. From the submissions of the parties, the following issues arise for clarification/adjudication:

Issue No. 1: *Whether the cut-off date for payment of GST/Safeguard Duty claims in respect of Orders passed by this Commission needs clarification?*

Issue No. 2: *Whether NTPC can be directed to release the reconciled payments of Rs. 5,66,51,694 out of total claim of Rs. 6,91,89,713 for the period upto COD in view of Order dated 05.02.2019?*

34. No other issue was pressed or claimed. We now discuss and analyse the issues.

Issue No. 1: *Whether the cut-off date for payment of GST claims in respect of Orders passed by this Commission needs clarification?*

35. The Petitioner has submitted that the Order dated 05.02.2019 does not impose any restriction with respect to the Petitioner's claims being prior to or post COD of the project. However, NTPC has denied certain claims of the Petitioner on the basis that invoices being received after COD as per the subsequent Orders of the Commission including Order dated 30.12.2019 in Petition No. 4/MP/2019 and Ors. Since the aforesaid issue was neither argued during the proceedings of Petition No.187/MP/2018 and Petition No.193/MP/2018, nor the Order dated 05.02.2019 makes any reference in this regard, the Commission may issue an appropriate clarification in this regard.

36. We have considered the submission. The relevant Articles in the PPAs are as under:

“COD shall mean the 30 days from the actual part commissioning date of the capacity where upon the SPD starts injecting power from the part Commissioned capacity to the Interconnection point/ Delivery point/ Metering point. COD is intended to match allocation and availability of thermal power for bundling;

ARTICLE 5: SYNCHRONISATION, COMMISSIONING AND COMMERCIAL OPERATION

5.1 Synchronization, Commissioning and Commercial Operation

5.1.1 *The SPD shall give the concerned RLDC/SLDC and NTPC at least sixty (60) days advanced preliminary written notice and at least thirty (30) days advanced final written notice, of the date on which it intends to synchronize the respective units of Power Project to the Grid System.*

5.1.2 *Subject to Article 5.1.1, the Power Project may be synchronized by the SPD to the Grid System when it meets all the connection conditions prescribed in applicable Grid Code, CEA guidelines and CERC Regulations then in effect and otherwise meets all other Indian legal requirements for synchronization to the Grid System.*

- 5.1.3 *The synchronization equipment shall be installed by the SPD at its generation facility of the Power Project at its own cost. The SPD shall synchronize its system with the Grid System only after the approval of synchronization scheme is granted by the head of the concerned sub-station/Grid System and checking/verification is made by the concerned authorities of the Grid System.*
- 5.1.4 *The SPD shall immediately after each synchronization / desynchronization, inform the sub-station of the Grid System to which the Power Project is electrically connected in accordance with applicable Grid Code.*
- 5.1.5 *The SPD shall commission the Project within thirteen (13) Months from the Effective Date.*
- 5.1.6 *The project shall be entitled for payment of energy @ Rs. 3.00 per kWh as infirm power till Commercial Operation Date (COD). The Project CoD shall be considered after 30 days from the actual date of commissioning. CoD is intended to match allocation and availability of thermal power for bundling.*
- 5.1.7 *The 25 year tenure of PPA shall commence from Commercial Operation Date.*

ARTICLE 9: APPLICABLE TARIFF

- 9.1 *The SPD shall be entitled to receive the Tariff of Rs.4.66/kWh with effect from the Commercial Operation Date*

37. We note that as per the PPAs (e.g. Article 5 read with Schedule 9 quoted above) the commissioning of the project implies that all the equipment as per rated project capacity has been installed and the energy has flown into the grid. The Commission also notes that the liability of NTPC/ Discoms for payment for purchase of power from the Respondent SPDs starts from the Commercial Operation Date (COD) as defined in Article 1 of the respective PPAs.

Cut-off date for GST Claims

38. Various Sections of CGST Act, 2017 stipulate as under:

“TIME AND VALUE OF SUPPLY

12. (1) The liability to pay tax on goods shall arise at the time of supply, as determined in accordance with the provisions of this section.

(2) The time of supply of goods shall be the earlier of the following dates, namely:—

(a) the date of issue of invoice by the supplier or the last date on which he is required, under sub-section (1) of section 31, to issue the invoice with respect to the supply; or

(b) *the date on which the supplier receives the payment with respect to the supply:*

Provided that where the supplier of taxable goods receives an amount up to one thousand rupees in excess of the amount indicated in the tax invoice, the time of supply to the extent of such excess amount shall, at the option of the said supplier, be the date of issue of invoice in respect of such excess amount.

Explanation 1.—For the purposes of clauses (a) and (b), “supply” shall be deemed to have been made to the extent it is covered by the invoice or, as the case may be, the payment.

Explanation 2.—For the purposes of clause (b), “the date on which the supplier receives the payment” shall be the date on which the payment is entered in his books of account or the date on which the payment is credited to his bank account, whichever is earlier.

(3) *In case of supplies in respect of which tax is paid or liable to be paid on reverse charge basis, the time of supply shall be the earliest of the following dates, namely:—*

(a) the date of the receipt of goods; or

(b) the date of payment as entered in the books of account of the recipient or the date on which the payment is debited in his bank account, whichever is earlier; or

(c) the date immediately following thirty days from the date of issue of invoice or any other document, by whatever name called, in lieu thereof by the supplier: Provided that where it is not possible to determine the time of supply under clause (a) or clause (b) or clause (c), the time of supply shall be the date of entry in the books of account of the recipient of supply.

(4) *In case of supply of vouchers by a supplier, the time of supply shall be—*

(a) the date of issue of voucher, if the supply is identifiable at that point; or

(b) the date of redemption of voucher, in all other cases

(5) *Where it is not possible to determine the time of supply under the provisions of sub-section (2) or sub-section (3) or sub-section (4), the time of supply shall—*

(a) in a case where a periodical return has to be filed, be the date on which such return is to be filed; or

(b) in any other case, be the date on which the tax is paid.

(6) *The time of supply to the extent it relates to an addition in the value of supply by way of interest, late fee or penalty for delayed payment of any consideration shall be the date on which the supplier receives such addition in value.”*

13. (1) *The liability to pay tax on services shall arise at the time of supply, as determined in accordance with the provisions of this section.*

(2) *The time of supply of services shall be the earliest of the following dates, namely:—*

- (a) *the date of issue of invoice by the supplier, if the invoice is issued within the period prescribed under sub-section (2) of section 31 or the date of receipt of payment, whichever is earlier; or*
- (b) *the date of provision of service, if the invoice is not issued within the period prescribed under sub-section (2) of section 31 or the date of receipt of payment, whichever is earlier; or*
- (c) *the date on which the recipient shows the receipt of services in his books of account, in a case where the provisions of clause (a) or clause (b) do not apply:*

Provided that where the supplier of taxable service receives an amount up to one thousand rupees in excess of the amount indicated in the tax invoice, the time of supply to the extent of such excess amount shall, at the option of the said supplier, be the date of issue of invoice relating to such excess amount.

Explanation.—For the purposes of clauses (a) and (b)—

- (i) *the supply shall be deemed to have been made to the extent it is covered by the invoice or, as the case may be, the payment;*
- (ii) *“the date of receipt of payment” shall be the date on which the payment is entered in the books of account of the supplier or the date on which the payment is credited to his bank account, whichever is earlier.*

(3) *In case of supplies in respect of which tax is paid or liable to be paid on reverse charge basis, the time of supply shall be the earlier of the following dates, namely:—*

- (a) *the date of payment as entered in the books of account of the recipient or the date on which the payment is debited in his bank account, whichever is earlier; or*
- (b) *the date immediately following sixty days from the date of issue of invoice or any other document, by whatever name called, in lieu thereof by the supplier:*

Provided that where it is not possible to determine the time of supply under clause (a) or clause (b), the time of supply shall be the date of entry in the books of account of the recipient of supply:

Provided further that in case of supply by associated enterprises, where the supplier of service is located outside India, the time of supply shall be the date of entry in the books of account of the recipient of supply or the date of payment, whichever is earlier

(4) *In case of supply of vouchers by a supplier, the time of supply shall be—*

- (a) *the date of issue of voucher, if the supply is identifiable at that point; or*
- (b) *the date of redemption of voucher, in all other cases.*

(5) Where it is not possible to determine the time of supply under the provisions of sub-section (2) or sub-section (3) or sub-section (4), the time of supply shall—

(a) in a case where a periodical return has to be filed, be the date on which such return is to be filed; or

(b) in any other case, be the date on which the tax is paid.

(6) The time of supply to the extent it relates to an addition in the value of supply by way of interest, late fee or penalty for delayed payment of any consideration shall be the date on which the supplier receives such addition in value.

14. Notwithstanding anything contained in section 12 or section 13, the time of supply, where there is a change in the rate of tax in respect of goods or services or both, shall be determined in the following manner, namely:—

(a) in case the goods or services or both have been supplied before the change in rate of tax,—

(i) where the invoice for the same has been issued and the payment is also received after the change in rate of tax, the time of supply shall be the date of receipt of payment or the date of issue of invoice, whichever is earlier; or

(ii) where the invoice has been issued prior to the change in rate of tax but payment is received after the change in rate of tax, the time of supply shall be the date of issue of invoice; or

(iii) where the payment has been received before the change in rate of tax, but the invoice for the same is issued after the change in rate of tax, the time of supply shall be the date of receipt of payment;

(b) in case the goods or services or both have been supplied after the change in rate of tax,—

(i) where the payment is received after the change in rate of tax but the invoice has been issued prior to the change in rate of tax, the time of supply shall be the date of receipt of payment; or

(ii) where the invoice has been issued and payment is received before the change in rate of tax, the time of supply shall be the date of receipt of payment or date of issue of invoice, whichever is earlier; or

(iii) where the invoice has been issued after the change in rate of tax but the payment is received before the change in rate of tax, the time of supply shall be the date of issue of invoice:

Provided that the date of receipt of payment shall be the date of credit in the bank account if such credit in the bank account is after four working days from the date of change in the rate of tax.

Explanation.—For the purposes of this section, “the date of receipt of payment” shall be the date on which the payment is entered in the books

of account of the supplier or the date on which the payment is credited to his bank account, whichever is earlier.

CHAPTER VII
TAX INVOICE, CREDIT AND DEBIT NOTES

31. (1) *A registered person supplying taxable goods shall, before or at the time of,—*

- (a) removal of goods for supply to the recipient, where the supply involves movement of goods; or*
- (b) delivery of goods or making available thereof to the recipient, in any other case,*

issue a tax invoice showing the description, quantity and value of goods, the tax charged thereon and such other particulars as may be prescribed:

Provided that the Government may, on the recommendations of the Council, by notification, specify the categories of goods or supplies in respect of which a tax invoice shall be issued, within such time and in such manner as may be prescribed.

(2) *A registered person supplying taxable services shall, before or after the provision of service but within a prescribed period, issue a tax invoice, showing the description, value, tax charged thereon and such other particulars as may be prescribed:*

Provided that the Government may, on the recommendations of the Council, by notification and subject to such conditions as may be mentioned therein, specify the categories of services in respect of which—

- (a) any other document issued in relation to the supply shall be deemed to be a tax invoice; or*
- (b) tax invoice may not be issued.*

(3) *Notwithstanding anything contained in sub-sections (1) and (2)—*

- (a) a registered person may, within one month from the date of issuance of certificate of registration and in such manner as may be prescribed, issue a revised invoice against the invoice already issued during the period beginning with the effective date of registration till the date of issuance of certificate of registration to him;*
- (b) a registered person may not issue a tax invoice if the value of the goods or services or both supplied is less than two hundred rupees subject to such conditions and in such manner as may be prescribed;*
- (c) a registered person supplying exempted goods or services or both or paying tax under the provisions of section 10 shall issue, instead of a tax invoice, a bill of supply containing such particulars and in such manner as may be prescribed: Provided that the registered person may not issue a bill of supply*

if the value of the goods or services or both supplied is less than two hundred rupees subject to such conditions and in such manner as may be prescribed;

- (d) a registered person shall, on receipt of advance payment with respect to any supply of goods or services or both, issue a receipt voucher or any other document, containing such particulars as may be prescribed, evidencing receipt of such payment;*
- (e) where, on receipt of advance payment with respect to any supply of goods or services or both the registered person issues a receipt voucher, but subsequently no supply is made and no tax invoice is issued in pursuance thereof, the said registered person may issue to the person who had made the payment, a refund voucher against such payment;*
- (f) a registered person who is liable to pay tax under sub-section (3) or sub-section (4) of section 9 shall issue an invoice in respect of goods or services or both received by him from the supplier who is not registered on the date of receipt of goods or services or both;*
- (g) a registered person who is liable to pay tax under sub-section (3) or sub-section (4) of section 9 shall issue a payment voucher at the time of making payment to the supplier.*

(4) In case of continuous supply of goods, where successive statements of accounts or successive payments are involved, the invoice shall be issued before or at the time each such statement is issued or, as the case may be, each such payment is received.

(5) Subject to the provisions of clause (d) of sub-section (3), in case of continuous supply of services,—

- (a) where the due date of payment is ascertainable from the contract, the invoice shall be issued on or before the due date of payment;*
- (b) where the due date of payment is not ascertainable from the contract, the invoice shall be issued before or at the time when the supplier of service receives the payment;*
- (c) where the payment is linked to the completion of an event, the invoice shall be issued on or before the date of completion of that event.*

(6) In a case where the supply of services ceases under a contract before the completion of the supply, the invoice shall be issued at the time when the supply ceases and such invoice shall be issued to the extent of the supply made before such cessation.

(7) Notwithstanding anything contained in sub-section (1), where the goods being sent or taken on approval for sale or return are removed before the supply takes place, the invoice shall be issued before or at the time of supply or six months from the date of removal, whichever is earlier.

Explanation.— For the purposes of this section, the expression “tax invoice” shall include any revised invoice issued by the supplier in respect of a supply made earlier.”

39. As per Rule 47 of the CGST Rules, 2017, the invoices in respect of taxable supply of services have to be issued within 30 days:

“47. Time limit for issuing tax invoice.- The invoice referred to in rule 46, in the case of the taxable supply of services, shall be issued within a period of thirty days from the date of the supply of service.”

40. Rule 55 of the CGST Rules, 2017 stipulates as under:

“55. Transportation of goods without issue of invoice.-

(1) For the purposes of-

(a) supply of liquid gas where the quantity at the time of removal from the place of business of the supplier is not known,

(b) transportation of goods for job work,

(c) Transportation of goods for reasons other than by way of supply

(d) Such other supplies as may be notified by the Board

the consigner may issue a delivery challan, serially numbered not exceeding sixteen characters, in one or multiple series, in lieu of invoice at the time of removal of goods for transportation, containing the following details, namely....

...

(3)Where goods are being transported on a delivery challan in lieu of invoice, the same shall be declared as specified in rule 138.”

41. We observe that the philosophy behind the ‘Point of taxation’ and ‘raising of invoice’ is enshrined in Sections 12, 13 & 14 read with Section 31 of the CGST Act, 2007 and Rule 47 and 55 of the CGST Act, 2007. It is observed that Section 12 governs the determination of ‘time of supply of goods’, Section 13 governs the determination of ‘time of supply of services’ whereas Section 14 determines the ‘time of supply for goods and services in case there is a change in the rate of tax’.
42. Section 12 stipulates ‘time of supply of goods’ as the date of issue of invoice or the last date specified under section 31 (1) to issue the invoice, whichever is earlier. Therefore, in the instant petition, the date of invoice of goods cannot be after the date of delivery of goods.
43. Section 13 stipulates that ‘time of supply of services’ is the date of issue of invoice which is to be issued within the period prescribed under section 31 (2) or the date of receipt of payment, whichever is earlier.

44. Section 14 of the CGST Act 2017 prescribes the time of supply in case there is a change in the rate of tax. In one supply transaction, the following dates assume relevance: (i) Date of supply; (ii) Date of issue of invoice and (iii) Date of receipt of payment. Two scenarios that emerge are as follows:
- (a) Supply is completed before change in the rate of tax; and
 - (b) Supply is completed after change in the rate of tax.
45. Section 31 stipulates that a registered person supplying taxable goods shall issue a tax invoice before or at the time of delivery of goods. Further, as per Section 31 read with Rule 47 of the CGST Rules, 2017, the invoices in respect of taxable supply of services have to be issued within 30 days and as per Rule 55 of the CGST Rules, 2017, the delivery of a few goods is specifically allowed to be transported on a delivery challan in lieu of invoice at the time of removal of goods for transportation.
46. Thus, in case of ‘supply of goods’, the date of issue of invoice cannot be after the date of supply of goods as per sections 12, 14 and 31 of the CGST Act, 2017 whereas in case of ‘supply of services’ related to the goods procured up to the COD, the date of issue of invoice can be thirty days after the supply of services as per sections 13, 14 and 31 of the CGST Act, 2017 along with the Rule 47 of the CGST Rules, 2017.
47. Accordingly, there cannot be any invoice under law, post supply of goods as the goods are not exempted under Rule 55 of the CGST Rules, 2017. Further, in case the invoices are not raised, the point of taxation for supply of goods is deemed to be the date of delivery of goods.
48. Hence, the invoices related to supply of the goods can be raised only upto COD for all the equipment as per the rated project capacity that has been installed and through which energy has flown into the grid, since the liability of NTPC/Respondent Discom for payment of purchase of the power from the Respondent SPDs starts from the Commercial Operation Date (COD).
49. The Commission further finds that there is a possibility of a few services related to goods procured up to the COD, to be completed on the last date of COD. Hence, in case of ‘supply of services’ related to goods procured up to the COD completed on the last day of COD, the

invoices can be raised within 30 days after COD. Thus, in case of supply of services related to goods procured up to COD, the invoices are to be raised within 30 days of supply of such services, which cannot be later than 30 day of COD and the Petitioner is entitled to be compensated accordingly.

50. The Commission further notes that the Order dated 05.02.2019 was passed in the batch of five petitions viz. Petition No. 187/MP/2018; Petition No. 192/MP/2018; Petition No. 193/MP/2018; Petition No. 178/MP/2018 and Petition No. 189/MP/2018. Out of above five Petitions, the Commission have already given clarification in Petition No. 192/MP/2018; Petition No. 178/MP/2018 and Petition No. 189/MP/2018 vide Order dated 20.08.2021 in Petition No. 536/MP/2020 & Ors.
51. The Commission is of the view that no further clarifications are required. The issue is decided accordingly.

Issue No. 2: Whether NTPC can be directed to release the reconciled payments of Rs. 5,66,51,694 out of total claim of Rs. 6,91,89,713 for the period upto COD in view of Order dated 05.02.2019?

52. The Petitioner vide IA 37/2021 has submitted that in Petition No. 193/MP/2018, the total claim of the Petitioner stood at Rs. 6.91 crore. Out of Rs. 6.91 crore, claim of Rs. 5.66 crore has been completely reconciled and is undisputed by NTPC. However, NTPC has refused disbursement of the accepted claim of Rs. 5.66 crore pending the submission of additional documents for balance claim of Rs. 1.25 crore on the ground that it would not be able to disburse the claim amount in instalments and that the payment shall only be made on lump sum basis as per the Order of the Commission.
53. Vide Order dated 05.02.2019 in Petition No. 187/MP/2018 & Ors., it was held as under:

“183. The Petitioners are directed to make available to the Respondents all relevant documents exhibiting clear and one to one correlation between the projects and the supply of goods or services, duly supported by relevant invoices and Auditor’s Certificate. The Respondents are further directed to reconcile the claims for Change in Law on receipt of the relevant documents and pay the amount so claimed to the SPDs as per the methodology discussed in Para 174 and 182 above. It has been brought to our notice that in some cases, the Respondent Procurers are questioning the rationale of the commercial decisions taken by the SPDs in cases where the rates

of GST are on the higher side. Since, the decision for project implementation including the mode of procurement of goods and services were taken by SPDs prior to the implementation of GST, it would not be appropriate to question such commercial decisions on the basis of the differential rates of GST on certain goods and services, and payments should be made based on the invoices raised and supported by Auditor's Certificate. The Commission is of the view that since the quantum of compensation on account of introduction of GST w.e.f. 01.07.2017 is not large, it should be discharged by the Respondent-Procurers as one-time payment in a time bound manner. Accordingly, it is directed that the GST bills shall be paid within 60 days from the date of issue of this Order or from the date of submission of claims by the Petitioners, whichever is later, failing which it shall attract late payment surcharge in terms of the PPA. Alternatively, the Petitioners and the Respondents may mutually agree to mechanism for the payment of such compensation on annuity basis spread over such period not exceeding the duration of the PPAs as a percentage of the tariff agreed in the PPAs. This will obviate the hardship of the Respondents for onetime payment."

54. From the above we note that in our Order dated 05.02.2019, the contracting parties were given the option of one-time payment or payment on annuity basis. However, the payment in either of the aforesaid modes is incumbent upon the Petitioner making available to the Respondents all relevant documents exhibiting clear and one to one correlation between the projects and the supply of goods or services, duly supported by relevant invoices and Auditor's Certificate. In the instant case, we find that the contracting parties have agreed to one-time payment mode, and that one-to-one correlation between the project and the supply of goods and services has been established so far corresponding to the claim of Rs. 5.66 crore out of Rs. 6.91 crore. Therefore, the said payment of Rs. 5.66 crore (being a major portion of the total claim) for which one-to-one correlation has been established may be released by NTPC to the Petitioner at the earliest as an interim measure. The balance claim of Rs. 1.25 crore will be released by NTPC after receiving full documentation to its satisfaction in terms of the Order dated 05.02.2019 in the original petition.
55. Accordingly, the Petition No. 109/MP/2021 along with I.A. No. 37/2021 is disposed of in terms of the above discussions and findings.

Sd/-
पी. के. सिंह
(सदस्य)

Sd/-
अरुण गोयल
(सदस्य)

Sd/-
आई. एस. झा
(सदस्य)

Sd/-
पी. के. पुजारी
(अध्यक्ष)