

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 211/AT/2021

Subject : Petition under Section 63 of the Electricity Act, 2003 for adoption of tariff for 2000 MW Solar Power Projects (Tranche-IX) connected to Inter-State Transmission System and selected through competitive bidding process as per the Guidelines dated 3.8.2017 of Ministry of Power, Government of India.

Date of Hearing : 21.1.2022

Coram : Shri I. S. Jha, Member
Shri Arun Goyal, Member
Shri P. K. Singh, Member

Petitioner : Solar Energy Corporation of India Limited (SECI)

Respondents : Avikiran Surya India Private Limited and 10 Ors.

Parties Present : Shri M. G. Ramachandran, Sr. Advocate, SECI
Ms. Tanya Sareen, Advocate, SECI
Ms. Srishti Khindaria, Advocate, SECI
Shri Atulya Kumar Naik, SECI
Shri Shibasish Das, SECI
Shri Mudit jain, SECI
Shri Hemant Sahai, Advocate, Eden Renewables
Shri Nitish Gupta, Advocate, Eden Renewables
Ms. Nehul Sharma, Advocate, Eden Renewables
Ms. Shefali Tripathi, Advocate, Eden Renewables
Ms. Rakshikka Kaul, AMP Energy
Ms. Jyotsna Khatri, AMP Energy
Shri Sourya Choudhary, AMP Energy
Shri Abhilash Yada, AMP Energy
Shri Kulbhushan Kumar, IB VOGT
Shri Jafar Alam, Advocate, Avikiran Surya and Thar Surya
Shri Saahil Kaul, Advocate, Avikiran Surya and Thar Surya
Ms. Shikkha Ohri, Advocate, ReNew Power
Ms. Surabhi Pandey, Advocate, ReNew Power
Shri Ishan Nagpal, ReNew Power

Record of Proceedings

Case was called out for virtual hearing.

2. Learned senior counsel for the Petitioner submitted that the present Petition has been filed seeking adoption of tariff for 2000 MW solar power selected through the competitive bidding process as per the 'Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects' issued by the Ministry of Power, Government of India dated 3.8.2017 ('the Guidelines'). Learned senior counsel further submitted that so far, SECI has

executed the Power Supply Agreements ('PSAs') for 400 MW and accordingly, the Power Purchase Agreements ('PPAs') have been executed for 300 MW and the signing of PPA for the balance 100 MW is under process. However, for the balance 1600 MW, SECI is having discussions with various buying utilities/ distribution licensees for signing of PSAs. PPAs with the selected bidders will be signed by SECI subsequent to the execution of PSAs with the buying utilities/ distribution licensees for procurement of such power. He suggested that in such circumstances, the Commission may consider the adoption of tariff in respect of which PPAs and PSAs have been signed and the matter may be kept pending allowing time to SECI to tie-up the balance capacity.

3. Learned counsel for the Respondent No.4, Eden Renewable Bercy Private Limited submitted the following:

(a) While the Respondent as such has no objection towards adoption of tariff, its concerns are limited to two aspects relating to the Change in Law clause incorporated in the PPA.

(b) As per Article 12 of the PPA read with the submission made by SECI in its rejoinder, the Change in Law clause only covers the events resulting in increase/ decrease in the project cost upto Scheduled Commission Date ('SCD') and any impact of events post-SCD have not been covered thereunder.

(c) Further, contrary to Clause 5.7.1 of the Guidelines, there is no express restitution clause in Article 12 of the PPA. Even SECI's proposal for amendment to Change in Law clause of the Guidelines to MNRE vide letter dated 26.11.2020 contained an express restitution clause which, however, is not present in the PPA.

(d) The above changes amount to imposing restriction on Change in Law clause (Clause 5.7) provided in the Guidelines and, therefore, a deviation from the provisions of the Guidelines. The reliance was placed on the decision of the Commission dated 2.6.2021 in Petition No. 721/AT/2020 (NHPC Ltd. v. MNRE and Ors.)

(e) Article 12 of the PPA itself provides for recognition of Change in Law clause by the Commission at the stage of adoption of tariff. Accordingly, the Respondent is entitled to seek necessary clarifications in this regard at this stage. The necessity of providing regulatory certainty at the stage of adoption of tariff has been recognized by APTEL in its order dated 12.10.2021 in Appeal No. 251 of 2021 in the matter of Green Infra Renewable Energy Ltd. v. RERC and Ors.

(f) Accordingly, SECI may be directed to incorporate Clause 5.7 of the Guidelines in Article 12 of the PPA. Alternately, it may be clarified that the Clause 5.7 of the Guidelines is an integral part of the Article 12 of the PPA.

4. In response, learned senior counsel for the Petitioner mainly submitted the following:

(a) There is no deviation when the PPA provides for detail provisions so long the provisions are not inconsistent or in conflict with the provisions of the Guidelines. As per the settled principles, the test of repugnance needs to be considered on the basis that they are of conflicting nature so that one set of

provisions contained in the PPA cannot be given effect without violating the command in the Guidelines.

(b) Clause 3.1.1(c)(ii) of the Guidelines itself provides that detailing of the provisions in the draft PPA will not be considered as deviation from the Guidelines.

(c) SECI has already placed on record its letter dated 26.11.2020 and e-mail dated 13.1.2021 whereby it requested MNRE to modify certain provisions of the Guidelines including Change in Law provisions and, in the meantime, to allow SECI to make changes with respect to certain provisions in the scheme documents and to enable SECI to enter into PSAs, PPAs etc. and the letters of MNRE dated 1.3.2021 and 18.12.2020 to SECI, in exercise of its power to issue clarification/ modification under the Guidelines, whereby it gave ex-post facto approval for changes, *inter alia*, in regard to Change in Law provisions vis-à-vis Standard Bidding Guidelines in respect of (i) bids that have been issued but not closed; (ii) bids that have been issued and closed by SECI.

(d) The aspect of Change in Law clause only covering the events resulting in increase/ decrease in the project cost upto SCD is squarely covered under SECI's proposal dated 26.11.2020 to MNRE requesting modification to the Change in Law clause and the consequent approval given by MNRE vide its letter dated 1.3.2021. There was no such approval in the case of NHPC and, therefore, the reliance on the order dated 2.6.2021 in Petition No. 721/AT/2021 is misplaced.

(e) Prior to the date of bid submission, the clarification to queries of the developers on RfS document, *inter alia*, on the Change in law provisions were given and the Respondent was fully aware and it duly accepted the position explained therein without any reservation or condition while participating in the bidding and submitting its bid. It is not open to the Respondent to claim now that such bid terms are not acceptable for signing the PPA.

(f) As regards the issue of express restitution clause in Article 12 of the PPA, according to SECI, the said issue stands covered by the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021. The reliance was placed on the decision of the Commission dated 22.12.2021 in Petition No. 178/AT/2021. However, the Commission may issue necessary direction in this regard.

(g) The Commission may take into the consideration that ReNew Solar Power Private Limited vide its undertaking dated 15.9.2021 has reduced the tariff from Rs. 2.38/kWh (as discovered in competitive bid process) to Rs. 3.37/kWh in respect of 400 MW solar power capacity awarded to it.

5. Learned counsel for the Respondent No. 7, ReNew Solar Power Private Limited submitted that the Respondent has already filed its reply and supports the prayers made by SECI. Learned counsel further submitted that the tariff adoption may not be held back on account of the aforesaid issue relating to Change in Law clause.

6. Learned counsel for the Respondent No. 1, Avikiran Surya India Pvt. Ltd. and Respondent No.8, Thar Surya 1 Pvt. Ltd. submitted that the Respondents have also filed their reply and support the present Petition. Learned counsel submitted that Respondent No. 8, Project Company of Respondent No.1, has already executed the PPA with SECI for 300 MW and its project is at an advanced stage of

implementation. Thus, the Commission may expeditiously adopt the tariff in the matter to facilitate timely commissioning of the project and disbursement of funds from the lenders. Learned counsel further submitted that the adoption of tariff may not be held up due to the above controversy relating to Change in Law clause. The Commission may also recognize that in terms of Article 12.1.3 of the PPA, the parties have agreed that the increase in rate of Safeguard Duty, GST and Basic Custom Duty after 22.6.2020 amount to Change in Law events.

7. The representative of the Respondent No.3 submitted that the Respondent has also filed its reply to the Petition. He further submitted that SECI is yet to execute the PPA with the Respondent and, accordingly, SECI may be directed to sign the PPA as expeditiously as possible. The representative of the Respondent further submitted that the Commission may grant in-principle approval to the various Change in Law events in terms of Article 12.1.3 of the PPA at this stage, which would enable the Respondent to raise the necessary funds from its lenders.

8. Based on the request of the learned counsel for the Respondent No.4, the Commission permitted the Respondent to file its written submission within a week with copy to the Petitioner, who may also file its written submission, if any, within a week thereafter. The Petitioner was directed to file a comparative statement indicating the steps and process followed by the Petitioner in the bidding/ tender, mapping the same to the corresponding enabling provisions of the Guidelines issued by the Central Government within two weeks.

9. Subject to the above, the Commission reserved the matter for order.

By order of the Commission
Sd/-
(T.D. Pant)
Joint Chief (Law)