

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 169 of 2020

Petition of M/s Juniper Green Energy Private Limited seeking clarification on certain observation in the Common Order dated 23.07.2020 passed by the Commission in Case No.61 of 2020.

M/s Juniper Green Energy Private Limited Petitioner

Maharashtra State Electricity Distribution Co. Ltd. Respondent

And

Case No. 170 of 2020

Petition of M/s Nisagra Renewable Energy Private Limited seeking clarification on certain observation in the Common Order dated 23.07.2020 passed by the Commission in Case No.61 of 2020.

M/s Nisagra Renewable Energy Private Limited Petitioner

Maharashtra State Electricity Distribution Co. Ltd. Respondent

Coram

I.M. Bohari, Member
Mukesh Khullar, Member

Appearance in both the Cases:

For the Petitioner

M/s Juniper Green Energy Private Limited

M/s Nisagra Renewable Energy Private Limited : Shri.Sakya Chaudhuri (Adv)

For the Respondent

: Shri. Rahul Chouhan (Adv)

ORDER

Date: 11 January, 2021

1. The Commission has issued a Common Order dated 23 July 2020 (Impugned Order) in Case No.61 of 2020 and 62 of 2020 in the matter of approval and determination of quantum and mechanism of compensation on account of the Change in Law event due to imposition of Safeguard Duty (SGD) on the import of solar cells vide Notification No. 1/2018-Customs (SG) dated 30 July 2018 of the Ministry of Finance (Government of India).
2. M/s Juniper Green Energy Private Limited (JGEPL) and M/s Nisagra Renewable Energy Private Limited (NREPL) vide e-mail dated 6 August 2020 have filed this Petition seeking clarification in respect of observations made by the Commission regarding revision of CUF without increase in installed DC capacity in the Impugned Common Order. The Commission is deciding these two cases through this Common Order. JGEPL and NREPL together have been termed as Petitioners.

3. **Main prayers of the Petitioners are as follows:**

- (a) *Clarify the Impugned Order dated 23.07.2020 passed in Case No. 61 of 2020 / 62 of 2020 to the extent of clarifying the subject observations of this Hon'ble Commission in relation to revision of CUF, without increase in the installed DC capacity as per commissioning certificate(s), leading to revision in compensation for change in law as per the prescribed formula in the Impugned Order;*
- (b) *Clarify that in case of revision of CUF, without increase in the installed DC Capacity, compensation for change in law as per the prescribed formula shall be revised accordingly;*
- (c) *Condone any inadvertent omissions / errors / shortcomings and permit the Petitioner to add/change/modify/alter this filing and make further submissions as may be required at a future date;*
- (d) *Pass such clarification and other order(s) as this Hon'ble Commission may deem fit and proper in the facts and circumstances of the case..*

4. **Petitioners in its Petition has stated as follows:**

- 4.1. The Petitions in Case No. 61 and 62 of 2020 were filed before the Commission seeking approval for Change in Law, determination of quantum and further the mechanism of computing the compensation and interest, if any, on account of the Change in Law event of

imposition of safeguard duty on the import of solar cells vide notification no. 1/2018-Customs (SG) dated 30.07.2018 of the Ministry of Finance.

- 4.2. The Commission vide its common Order dated 23 July 2020, partly allowed the Petitions by upholding the Petitioners' claim towards compensation on account of imposition of safeguard duty (including additional GST) under Change in Law provisions of PPA.
- 4.3. The Commission in its Impugned Order made certain observations with respect to dispensation provided for the Capacity of Solar Modules eligible for compensation, which are relevant for review and clarification. The relevant portion of the Impugned Order is reproduced reproduce below:

“

35. The Commission in preceding para 28 of this Order has given the justification for not considering various options proposed by the Petitioners for determining eligible DC capacity for payment of SGD compensation. In view of the above ruling of the Commission, for fulfilling the contractual obligation of supplying total 100 MW (AC) capacity from 10 projects to MSEDCL, the Petitioners are entitled to compensation under Change in law for maximum DC capacity of 133 MW.

...

The Commission also notes that the PPAs also provides option to Generator to revise CUF within one year from date of commissioning of the project. Petitioners may exercise its choice to finalise its declared CUF and the DC installed capacity. No further claims of change in law would be admissible for any additional modules in case DC installed capacity is upwardly revised.

- 4.4. The Commission in its Impugned Order has acknowledged and accepted that as per Article 5.5.1 of the PPA, the Solar Generator has an option to revise CUF within one year from date of commissioning of the project. However, the Commission while restricting further claims of change in law for any additional modules in case DC installed capacity is upwardly revised, has not clarified as to what shall happen in a case wherein the Petitioners revises its CUF while keeping the DC installed capacity the same.
- 4.5. The PPA itself provides for revision of the CUF, any modifications and requirements to comply/bring into effect such revision ought to automatically flow from the PPA itself. The observation by the Commission to allow revision of the CUF on one hand and refusal to any further claims of change in law towards any additional modules in case of upward revision of DC installed capacity seems confusing and needs clarification to the extent where CUF is revised without any upward revision of DC installed capacity.

By way of illustration, if installed DC capacity is say 145 MW and CUF is 25% then as per the prescribed formula by Commission, DC capacity is considered as 131.58 MW. In case

CUF is revised to say 27% then DC capacity would be 142 MW as per the prescribed formula.

- 4.6. The Generator may revise the declared CUF from the one declared at time of PPA signing due to various reasons without any upward revision of DC installed capacity, including but not limited to topography of the land location, length of transmission line, module and inverter technology, real time data of irradiation/generation/ equipment performance/ plant availability/grid availability etc. This clarity comes post commissioning of the plant and running the plant beyond the initial stabilization period. That is the primary reason why the clause relating to revision in CUF within one year from date of commissioning of the project is included under the bidding documents. In such case, higher DC capacity should be considered for calculation of compensation of change in law, as per the prescribed formula.
- 4.7. Further, the requested clarification shall also be beneficial to the MSEDCL in a situation where a Generator “downwardly revises” its declared CUF. In such a scenario, the Generator who has obtained approval on DC capacity solar modules as per previously declared higher CUF will be unjustly enriching itself, which will be unfair and arbitrary on the Generators.
- 4.8. The Commission while allowing revisions of the declared value of the CUF has not considered the logical consequences flowing from such revision i.e. revised compensation for change in law. Further, the Commission has not provided any reasonable explanation and has merely provided a non-speaking observation. Such observations need to be clarified by the Commission to ensure that there is effective implementation of the Impugned Order as well as other such similar orders.

5. MSEDCL in its reply dated 11 May 2020 submitted as below:

- 5.1. Petitioners are trying to obtain a relief for its installed DC capacity of 145.51 MW by using Clause 5.5.1 of the PPA which provides for resetting the CUF during the first year after COD and therefore trying to circumvent the clear orders of the Commission.
- 5.2. The Impugned Order is absolutely clear and without any ambiguity that even if the Petitioner resets the CUF in accordance with the provision of the PPA, no further claims will be admissible for any additional modules in case DC capacity is upwardly revised. Accordingly, this Petition is liable to be dismissed on this ground itself.
- 5.3. The provision relating to the revision of CUF is not linked to the relief available to the Petitioners under the Change in Law or any other provision of the PPA.

Clause 5.5.1 of the PPA provides the option to the Solar Power Generator to revise its CUF within the first year of COD but do not have any provision to seek a revision of tariff or any other relief in terms of monetary compensation.

- 5.4. Any change or revision in CUF, after the PPA is executed and during the first year after COD, is the commercial decision of the Solar Generator depending on the performance observed by it in first year after the COD. This is an enabling provision under the PPA to safeguard the commercial viability of the project depending on the performance achieved over the first-year post COD.
- 5.5. For the purposes of Change in Law relief, the CUF as presented before the Commission is considered while arriving at the MW_{DC} capacity of the Project using the formula as provided vide Commission's Order dated 13 November 2019 in Case No. 259 of 2020.
- 5.6. Any subsequent decisions to increase/ decrease the DC Capacity or revise CUF comes under the choice/discretion of the generator and procurer is not concerned with the same, as far as the terms of the PPA are not disturbed and complied. Hence, the procurer is not liable to pay for any additional MW_{DC} capacity if the CUF is revised after the Petitioner has received relief from the Commission.
- 5.7. Once the tariff is discovered under the competitive bidding process as per the bidding documents, the same cannot be subjected to any change or revision during the period of the PPA. The Petitioner is entitled for change in law claim with same DC capacity calculated as per the Common Order dated 23 July 2020 in Case No. 61 & 62 of 2020 even in a situation where the Petitioners "downwardly revises" or "upwardly revises" its declared CUF.
- 5.8. The filing of an affidavit under Regulation 85 of the MERC (Conduct of Business) Regulation,2004 would automatically be tantamount to be a Review Application. Further, any party filing an application for Review of an Order passed by the Commission has to satisfy requirements specified in Regulation 85 of MERC (Conduct of Business) Regulation,2004.
- 5.9. The Petitioner is not merely seeking a clarification but is also assailing the Impugned Order for which it should be approaching the Hon'ble Appellate Tribunal for Electricity (APTEL). It is therefore not clear whether the Petitioner is (a) seeking a clarification from the Commission; (b) seeking a review of the Impugned Order; or (c) is attempting to reopen the issues which have already been decided by the Commission instead of approaching the APTEL against such orders.
- 6. Petitioners in its Notes of Argument dated 28 December 2020 has stated as under:**
- 6.1. Petitioners have approached the Commission for a limited clarification of its Order dated 23 July 2020, with respect to PPA where the Solar Generator revises the CUF as per the PPA without commissioning any additional modules or in cases where a generator downwardly revises its CUF. This aspect has not been covered under the Order, thus resulting in

ambiguity on the rights of the Petitioner under the PPA. Such clarification is necessary for effective implementation of the Impugned Order.

- 6.2. In the instant case, the Petitioner's full DC capacity is covered by the Commissioning Certificates and it may consider revising the CUF within the stipulated period under the PPA, without any upward revisions in the DC installed capacity.
- 6.3. As per Article 5.5.1 of the PPA, a Generator has an option to revise the Declared CUF within one (1) year from the date of commissioning. In such a situation, revised CUF should be considered in the formula for calculating the DC Capacity to be considered for calculating compensation for change in law. For e.g. if installed DC capacity is say 145 MW and CUF is 25% then as per the prescribed formula by the Commission, DC capacity is considered as 131.58 MW. In case CUF is revised to say 27% then DC capacity would be 142 MW as per the prescribed formula. Therefore, higher DC capacity of 142 MW should be considered for calculation of compensation of change in law, as per the prescribed formula, especially when modules corresponding to such additional capacity have already been installed.
- 6.4. The benefit of higher CUF is availed by MSEDCL. MSEDCL cannot be allowed to unjustly enrich itself by not compensating the Petitioner as per the prescribed formula for change in law as set out by the Commission for such higher CUF.
- 6.5. The intent of the observations made by the Commission in para 35 of the impugned Order seems to be to restrict change in law claims for additional DC capacity pursuant to additional modules commissioned after Commissioning of the Project. This would not be applicable where higher CUF is achieved after commissioning without additional modules.
- 6.6. Alternately, where a Generator "downwardly revises" its declared CUF, for ex: if a Generator who has already received approval on DC capacity solar modules as per declared CUF of say 25% at the time of execution of the PPA; and such Generator revises his declared CUF to say 22% within one-year period as prescribed in the PPA, then obviously such Generator has obtained approval on DC capacity solar modules as per previously declared higher CUF will be unjustly enriching itself, which will be unfair and arbitrary on the Generators like the Petitioner as well as for the Procurer/MSEDCL.
- 6.7. Accordingly, while the Commission has disallowed additional claims on account of additional modules, it needs to consider the logical consequences flowing from revision of CUF for other reasons, including higher compensation for change in law.
7. At the E-hearing held on 29 December 2020, both parties have reiterated their submission made in Petition/Reply.

Commission's Analysis and Rulings

8. Present Petition has been filed seeking clarification of Commission's ruling in the impugned common Order dated 23 July 2020 relating to observation of not allowing subsequently commissioned additional DC capacity for computation of Change in Law. The Commission notes that in its impugned common order dated 23 July 2020, the Petitioners have approached the Commission for Change in Law compensation towards imposition of Safeguard Duty by Govt of India on import of Solar panel/ module. By using the regulatory powers, the Commission has adopted formula for deciding Solar DC capacity which is eligible for compensation. This intervention was necessary to comply with the prudence and due diligence provisions as specified in Article 3.1.8 of the PPA to ensure and allow only prudent oversizing of DC capacities under Change in Law and avoid burden of inefficiencies of generator to be passed on to procurer and consumers. Therefore, the Commission has stipulated a formula $[\text{AC Contracted Capacity} \times (\text{Declared CUF} / \text{Minimum Guaranteed CUF as per bid})]$ to limit allowable over sizing of DC capacity which can be considered as a base for computation of Change in Law compensation.
9. Both Petitioners in present matter have filed Appeals before the APTEL (M/s Nisagra in DFR No. 163 of 2020 and M/s Juniper in DFR No. 171 of 2020) challenging above decision of the Commission to restrict allowable DC capacity for Change in Law compensation as per formula specified in impugned common Order. None of the parties mentioned about such appeal being filed before the APTEL. As there is no stay on the impugned common Order dated 23 July 2020, the Commission is dealing with the clarification sought in the present matter.
10. Petitioners have sought clarification in respect of following observations made by the Commission in the impugned Order:

“

35. The Commission in preceding para 28 of this Order has given the justification for not considering various options proposed by the Petitioners for determining eligible DC capacity for payment of SGD compensation. In view of the above ruling of the Commission, for fulfilling the contractual obligation of supplying total 100 MW (AC) capacity from 10 projects to MSEDCL, the Petitioners are entitled to compensation under Change in law for maximum DC capacity of 133 MW.

...

The Commission also notes that the PPAs also provides option to Generator to revise CUF within one year from date of commissioning of the project. Petitioners may exercise its choice to finalise its declared CUF and the DC installed capacity. No further claims of change in law would be admissible for any additional modules in case DC installed capacity is upwardly revised.”

11. The Petitioners stated that there is no clarity in the impugned Order for situations where the Solar Generator revises the CUF as per the PPA but a Solar Generator does not commission any additional modules. The Petitioners suggest that the revised CUF should be considered in the formula for calculating the eligible DC Capacity that will be considered for calculating compensation for change in law.
12. MSEDCL has opposed such request contending that the provision relating to the revision of CUF is not linked to the relief available to the Petitioner under the Change in Law or any other provision of the PPA. Any change or revision in CUF; after execution of PPA and within first year of COD, is the commercial decision of the Solar Generator depending on the plant performance within first year of COD. As per MSEDCL, Generator shall get compensation based on CUF declared in the PPA irrespective of generator revising CUF upward or downwards. Further, MSEDCL has also objected that Petitioners effectively are seeking review of Order without pointing out error apparent on face of records in the impugned Order.
13. Considering submissions of the parties, the Commission is of the opinion that relief sought by Petitioners are clarificatory in nature and not review of impugned Order. Petitioners are seeking clarification whether revised CUF within one year of commissioning of the project with same installed capacity of DC module can be considered for computation of allowable DC capacity for Change in Law compensation. In this regard, the Commission in impugned Order has used formula for eligible DC module capacity for Change in Law compensation as = Installed DC Module Capacity x [**Declared CUF**/Minimum Guaranteed CUF in Bid Document]. In this formula, it is pertinent to note that the Commission has specifically used declared CUF for calculation purpose.
14. MSEDCL has contended that the declared CUF must be taken as declared in the PPA and Petitioners are contending that the same shall be considered as declared within one year from date of commissioning of the project. In this regard, the Commission notes that Article 5.5.1 of the PPA, dealing with CUF reads as below:

" 5.5.1 Criteria for generation:

*The power producer will **declare the CUF** of their project at the time of PPA and **will be allowed to revise the same once within first year of COD**. The declared CUF shall in no case be less than 19% over a year. They shall maintain generation so as to achieve CUF in the range of ± 10 % of their declared value during the entire PPA duration of 25 years either from the Commercial Operation Date in case of proposed/new solar power projects or from the date of execution of PPA for existing solar power projects. The lower limit will,*

however, be relaxable by MSEDCL to the extent of grid non-availability for evacuation which is beyond the control of the developer."

Thus, PPA allows Generator to revise CUF within first year of COD of the project and then the revised CUF will be considered as declared CUF for further modalities as envisaged under PPA.

15. With such clear provision in the PPA, CUF revised by the Generator within first year of COD of the project needs to be considered as declared CUF for all purpose of PPA including computing allowable DC module capacity for Change in Law computation. MSEDCL has opposed this on the contention that it is commercial decision of the Generator and there is no linkage of such revised CUF with Change in Law compensation under the PPA. In the opinion of the Commission, this is very narrow interpretation of the PPA without considering commission's ruling in the impugned Order. As the PPA does not have any provision of restricting oversizing of DC capacity to prudent level, the Commission had to use its regulatory powers and stipulate formula for allowable DC capacity. This intervention was necessary to avoid unrestricted compensation that would be payable on all installed capacity of DC modules and the same could be totally and unilaterally decided by the generator. The PPA is a bilateral document and in a Regulated environment prudence of the commercial decisions needs to be verified by the Commission.
16. While doing so, as stated above 'Declared CUF' has been considered in the formula. If MSEDCL's contention is considered, then any revision in CUF within first year from COD need not be considered. In that case, non-consideration of revision on lower side i.e. reduction in CUF than that declared in PPA, would led to allowing compensation for higher DC module than prudent level which is not at all desirable. Hence, revised CUF within one year from COD of the project needs to be considered for computing allowable DC capacity for Change in Law compensation. Same is illustrated as below:

Sr. No	Case	Project AC Capacity (MW)	Installed DC Capacity (MW)	Declared CUF (%)	Max. DC capacity entitled for Change in Law (MW)
1	Base Case – CUF as per PPA	10	14.59	25.16	$(25.16/19 \times 10) = 13.24$
2	Case I – Upward revision in CUF within 1 year of CoD	10	14.59	26.16	$(26.16/19 \times 10) = 13.77$
3	Case II- Downward revision in CUF within 1 year of CoD	10	14.59	24.16	$(24.16/19 \times 10) = 12.72$

As can be seen from above table, based on revision in declared CUF, DC capacity to be considered for Change in Law is changing and same shall be considered by MSEDCL for allowing Change in Law compensation subjected to maximum upto total installed capacity.

17. The Commission's ruling at para 35 of the impugned Order reproduced in earlier part of this Order only deals with situation where DC modules are added subsequent to commissioning of the project. However, in case generator revises CUF as per enabling provisions under PPA without adding any extra DC module, then such revised CUF needs to be considered for calculating allowable DC module capacity for Change in Law compensation.
18. The Commission categorically mentions here that above ruling only clarify issue of declared CUF to be considered while computing allowable DC capacity for Change in Law compensation. Issue of compensation against total DC installed capacity without restricting capacity through formula stipulated by the Commission is under consideration of Hon'ble APTEL.
19. Hence, the following Order.

ORDER

1. **The Cases Nos. 169 of 2020 and 170 of 2020 are allowed.**
2. **In case generator revises CUF as per enabling provisions under the PPA without adding any extra DC module, then such revised CUF shall be considered for calculating allowable DC module capacity for Change in Law compensation.**

Sd/-

**(Mukesh Khullar)
Member**

Sd/-

**(I.M. Bohari)
Member**

