



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No.70/MP/2019

कोरम/ Coram:

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: 9th of August, 2022

IN THE MATTER OF:

A petition before the Central Electricity Regulatory Commission seeking an appropriate mechanism for grant of an appropriate adjustment/ compensation to offset financial/ commercial impact of change in law events on account of imposition of Goods and Service Tax

AND IN THE MATTER OF:

Solar Edge Power and Energy Private Limited,
SP Center, 41/44, Minoo Desai Marg,
COLOBA, Mumbai – 400 005

...Petitioner

Versus

1. Solar Energy Corporation of India Limited,
1st Floor, D-3, A Wing, Religare Building,
District Centre- Saket, 110017
2. Maharashtra State Electricity Distribution Company Limited,
Prakashgad Plot No. G9, Proj. Anad Kanehar Marg,
Bandra (East), Mumbai-400051

Parties Present: Shri Sujit Ghosh, Advocate, SEPEPL
Ms. Mannat Waraich, Advocate, SEPEPL
Shri Mohd Munis, Advocate, SEPEPL
Shri Mridul Gupta, Advocate SEPEPL
Shri M. G. Ramachandran, Sr. Advocate, SECI
Ms. Shikha Sood, Advocate, SECI
Ms. Tanya Sareen, Advocate, SECI
Ms. Neha Singh, SECI

आदेश/ ORDER

1. The Petitioner, Solar Edge Power and Energy Private Limited is developing a Grid Connected Solar Photo Voltaic Power Project for generation of electricity of cumulative capacity of 450 MW in the State of Maharashtra. The Petitioner is seeking an appropriate mechanism for grant of an appropriate adjustment/ compensation to offset financial/ commercial impact of change in law events on account of imposition of Goods and Service Tax.
2. The Respondent No. 1, Solar Energy Corporation of India Limited (SECI) is a Government of India enterprise under the administrative control of the Ministry of New and Renewable Energy (MNRE). The Respondent has been designated as the nodal agency for implementation of MNRE schemes for developing grid connected solar power capacity through VGF mode in India.
3. The Respondent No. 2, the Maharashtra State Electricity Distribution Company Limited (MSEDCL) is engaged in the business of distribution and supply of electricity across all districts of the State of Maharashtra.
4. The Petitioner has made the following prayers:
 - (a) *Declare the introduction of GST as Change in Law in terms of the PPA(s) which have led to an increase in the recurring and non-recurring expenditure for the Project;*
 - (b) *Evolve a suitable mechanism to compensate the Petitioner for the increase in recurring and non-recurring expenditure incurred by the Petitioner on account of Change in Law;*
 - (c) *Grant interest/carrying cost for any delay in reimbursement by the Respondent; and*

(d) Pass any such other and further reliefs as this Hon'ble Commission deems just and proper in the nature and circumstances of the present case.

Brief factual background:

5. On 14.06.2016, SECI issued Request for Selection (RfS) of Solar Power Developers (SPDs) for 450 MW Grid Connected Solar Photo Voltaic Power Projects in Part-B (Open) under NSM Phase-II Batch IV Tranche-III in Maharashtra. Pursuant to the RfS, the Petitioner was selected for setting up a solar power generation facility with a total installed capacity of 130 MW in the State of Maharashtra.
6. On 10.02.2017, the Petitioner entered into three (3) separate PPAs with SECI, being two PPAs for setting up a solar power project of 50MW each and one for setting up a solar power project of 30 MW respectively. As per the PPAs, the Scheduled date of Commissioning (SCoD) was 23.12.2017. SECI also executed a back to back Power Sale Agreement (PSA) with Maharashtra Discoms for sale of power supplied by the Petitioner.
7. On 01.07.2017, the Central Goods and Services Tax Act, 2017; the Integrated Goods and Services Tax Act, 2017; and the Maharashtra Goods and Services Tax Act, 2017 (GST Laws) were introduced.
8. As per the Petitioner, the implementation of GST has resulted in an increase in the recurring and non-recurring expenditure for the Petitioner after the Effective Date of the PPAs, and consequently, has adversely impacted the business of the Petitioner.
9. The present petition was filed on 01.03.2019 and admitted by this Commission on 04.06.2019, whereby the Respondents were directed to file their replies by 25.06.2019 with an advance copy to the Petitioner who could file its rejoinders, if any, by 09.07.2019.
10. Accordingly, SECI filed its reply on 24.06.2019, followed by the Petitioner filing its rejoinder to the same on 27.07.2019.

Hearing dated 04.06.2020:

11. On 04.06.2020, the case was called out for virtual hearing. During the course of hearing, the learned counsel for the Petitioner submitted that through the present Petition, it is seeking a

declaration that the introduction/enactment of GST is a Change in Law event and seeking consequential compensation for additional recurring/non-recurring expenditure incurred by the Petitioner. Further, as far as the issue of back-to-back nature of the agreement and liability of payment on account of impact of GST on procurement of Solar PV panels and associated equipment till the commercial operation date is concerned, the Petitioner relies on the Commission's Order dated 28.01.2020 in Petition No. 67/MP/2019 and batch matters and sought permission to file written submission on these aspects. Learned senior counsel for SECI, submitted that the issue involved in the petition stands covered by the Commission's earlier Orders relating to Change in Law arising out of enactment of GST Law. Further, the Petitioner may approach SECI along with computation of its claims. Accordingly, the parties will carry out the reconciliation of such claims including the mode of payment on annuity basis in terms of MNRE's letters dated 12.03.2020 and 23.03.2020 and the Commission's earlier Orders on the subject matter.

Hearing dated 09.11.2021:

12. On 09.11.2021, the case was again called out for virtual hearing. During the course of hearing, the Learned counsel of Petitioner submitted that the Petitioner and SECI have reconciled the Change in Law claims relating to enactment of GST Laws and admitted GST claims till Commercial Operation Date ('COD'). SECI submitted that the reconciled claim has been sent to MSEDCL, which has, however, neither commented upon nor objected to the said amount. SECI requested for grant of 60 days' time from the date of Order for making the annuity payment in terms of the Commission's Order dated 20.08.2021 in Petition No. 536/MP/2020 and Others. The Petitioner objected to SECI's request for grant of 60 days' time to make payment. Pursuant to this, the petition was reserved for Orders.
13. SECI also filed a short submission on 09.11.2021 vide which it has *inter-alia* submitted that the Petitioner has accepted the annuity calculation vide its letters dated 13.10.2021 to SECI and has given the undertaking as sought for by SECI vide its letters dated 06.09.2021. Hence, the Petitioner requested the Commission to consider issuing directions to MSEDCL (i.e. the power procurer under the PSA), to make payment towards the reconciled and evaluated claims of the GST payable by SECI to the Petitioner, on a back to back basis under the PSA in a time bound manner. They also requested the Commission to clarify on the Cut-off Date for considering the GST impact as the actual COD i.e. date stipulated for commencement of power

supply under the PPA with the Petitioner.

Subsequent proceedings:

14. After being reserved for Orders on 09.11.2021, the petition was re-listed for hearing before this Commission on 11.01.2022, in view of the issuance of Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 (*Change in Law Rules*) by the Ministry of Power, Government of India which provided for a procedure dealing with the Change in Law cases. The Commission directed SECI to confirm that except for the above small amount as stated by the Petitioner, all the balance claims have been reconciled with MSEDCL, so that the case can be dealt with under Rule 3(8) of Change in Law Rules.

Affidavit dated 25.01.2022:

15. SECI vide affidavit dated 25.01.2022 has submitted as under:
- a) SECI vide its letters (3 in number for 3 PPAs) dated 06.09.2021 to the Petitioner and by letter dated 08.09.2021 to MSEDCL has communicated the provisional reconciliation of the GST claims of the Petitioner (considering cut-off date for Goods as COD and with respect to services no such restriction).
 - b) Vide letter dated 13.10.2021, the Petitioner has accepted the annuity calculation as per letters dated 06.09.2021 of SECI.
 - c) MSEDCL vide its email dated 01.11.2021 to SECI has raised various queries and requested SECI to go through the queries and reply.
 - d) The Petitioner vide its letter dated 22.11.2021 had communicated its clarification and explanations to the queries of MSEDCL.
 - e) SECI after examining the observations of the Petitioner, vide email dated 28.12.2021 has forwarded to MSEDCL, the observations and comments of the Petitioner.
 - f) The Commission vide Order dated 20.08.2020 in Petition No.536/MP/2020 has decided with regard to claim of the project developers beyond COD and with regard to cut-off date for goods and services.
 - g) SECI vide its letters (3 in number for 3 PPAs) dated 24.01.2022 to the Petitioner and by letter dated 24.01.2022 to MSEDCL has communicated the revised provisional reconciliation of the GST claims of the Petitioner in respect of Petitioner's 130 MW projects [2 x 50 MW and 1 x 30 MW].
 - h) The statement made by the counsel for the Petitioner during the hearing dated 11.01.2022

as recorded in ROP that ‘*learned counsel submitted that in respect of its Change in Law claims relating to three Projects, the concerns were raised by MSEDCL only for the two Projects and that too for amount of Rs.13,821.88 and Rs.8,353.13*’ is factually incorrect. Instead, MSEDCL in its communication dated 01.11.2021 has indicated the said amounts of Rs.13,921.88 [50 MW Parli Project] and Rs.8,353.13 [30 MW Parli Project] under the category “Not identifiable (as invoice date Not mentioned)”.

- i) The difference in SECI’s evaluation and MSEDCL’s evaluation of Petitioner’s GST claims works out to Rs 1,81,008.5 in respect of 50 MW Parli Project, Rs 1,57,232.4 in respect of 50 MW Muktainagar Project and Rs 2,61,729.5 in respect of 30 MW Parli Project.
- j) The difference in the claim submitted by the Petitioner, claim evaluated by SECI after implementing the Order dated 20.08.2021 in Petition No.536/MP/2020 and claim evaluated by MSEDCL vide communication dated 01.11.2021 [considering two categories namely ‘upto commissioning and ‘After Commissioning and upto COD’ mentioned in communication dated 01.11.2021] are as under:

Project ID	Capacity	Claim submitted by Petitioner	Claim evaluated by SECI	Claim evaluated by MSEDCL
P2B4T3- SEPEPL-B- 5MH-1V	50 MW	8,27,44,271	8,04,84,959	8,06,65,967.5
P2B4T3- SEPEPL-B- 5MH-2V	50 MW	8,53,42,814	8,24,90,777	8,23,33,544.7
P2B4T3- SEPEPL-B- 5MH-3V	30 MW	5,06,74,955	4,87,82,531	4,85,20,801.5

- k) While MSEDCL has given the statement in response to the claim forwarded to it, there is no explanation as to the reasons for the difference they have pointed out with respect of evaluation by SECI.
- l) MSEDCL in pursuance of Orders dated 28.01.2020 & 12.04.2019 of the Commission in Petition No.’s 68/MP/2019 & 212/MP/2018 respectively, in respect of other projects has been making payment considering Annuity at 9.53% discounting rate and term of payment as 25 years (as against discounting rate of 10.41% and Term of Annuity Period of 13 years as decided by the Commission in Order dated 20.08.2020 in Petition No. 536/MP/2020) on the ground that monthly discounting rate is to be based on the average of last six months.
- m) In terms of the Schedule to Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 (*Change in Law Rules*), the period, the rate of interest to be considered etc.

are different from the period, discounting rate etc. considered by the Commission in Order dated 20.08.2021 in Petition No.536/MP/2020 and accordingly in terms of Rule 3 (7) and (8), the computation of the amount would vary.

Commission's Order dated 28.02.2022:

16. The Commission disposed of the Petition vide its Order dated 28.02.2022, on the following grounds:

“14. It is apparent from a plain reading of the Change in Law Rules that it provides for quantification of claims and a process and methodology for recovery of mutually agreed claims relating to impact of change in law. The Change in Law Rules also provide that if there is a formula in the agreement for adjusting and recovering the amount of the impact of change in law, it shall be applied, otherwise the formula as prescribed in the Change in Law Rules is to be applied. We also find that the Change in Law Rules provide a time bound mechanism for settlement of such claims.

15. We consider the process and methodology as prescribed in the Change in Law Rules as a mechanism for time bound settlement of claims in a deterministic manner. We have already held in our earlier Orders (e.g. Order dated 06.12.2021 in Petition No. 228/MP/2021) that since the Change in Law Rules is in the nature of procedural law and under the Change in Law Rules any substantive rights are not being taken away, it is to be applied retrospectively in all pending proceedings.

16. In view of the foregoing discussion, the Petitioner may approach the procurer for settlement of Change in Law claims among themselves in terms of the Change in Law Rules and approach the Commission only in terms of Rule 3(8) of the Change in Law Rules.

17. Accordingly, the Petition No. 70/MP/2019 is disposed of.”

17. The Commission disposed of several petitions seeking similar reliefs under Change in Law events, taking the view that the concerned entities must have recourse to the Change in Law Rules, 2021. Several of these decisions were appealed against, before the Hon'ble Appellate Tribunal in O.P No. 1 of 2022 and Appeal Nos. 116, 74, 75 & 76 of 2022.

Order of Appellate Tribunal dated 05.04.2022:

18. The Appellate Tribunal passed its judgment, setting aside the Orders of this Commission challenged in O.P No. 1 of 2022 and Appeal Nos. 116, 74, 75 & 76 of 2022, which originally sought compensation on account of Change in Law events, and were disposed by this Commission. The Appellate Tribunal passed the following order in the aforementioned appeals:

72. For the foregoing reasons, we find the impugned orders of the Central Commission applying the CIL Rules to matters pending before it for adjudication under Section 79(1)(f) of Electricity Act on the date of coming into force of said rules wholly erroneous, improper and bad in law. The said orders are thus set aside. In the result, the proceedings in claim cases (in which impugned orders were passed – and that includes the orders dated 04.02.2022 in the Original Petitions) remain inchoate. The Central Commission is duty-bound to consider each of them on the merits of the claims and adjudicate in accordance with law on the dispute(s) in proper exercise of its jurisdiction under Section 79 of the Electricity Act. It is directed to proceed to do so expeditiously.

73. We would be failing in our duty if we do not also note here (as also indicated earlier in this judgment) that prior to the decisions which were challenged by the captioned petitions/appeals, as indeed subsequently, the Central Commission has been taking the impugned approach on pending claims which has and would have resulted in a large number of such claims being unduly scuttled, non-suiting the parties similarly placed as the petitioners/appellants herein. If the factual back-ground is same as in the cases at hand, such decisions would also constitute want of performance of statutory function by the Central Commission meriting an appropriate direction by this tribunal. This would be constrained to seek remedy against such order, if it thereby feels aggrieved. The remedies available in law include approaching the Central Commission for review or this tribunal ordinarily by an appeal.

74. Such that the affected parties do not suffer on account of faulty approach of adjudicatory authority, and this tribunal is not flooded by appeals raising identical issues against such other decisions as above, rendered in similar fact-situation by the Central Commission, it would be appropriate that it be asked to properly and fully perform its statutory function by exercise of its review jurisdiction, suo motu, in all similarly-placed claims for compensation founded on change in law events where similar decisions have been taken by the Central Commission after coming into force of CIL Rules on 22.10.2021 and, if such decisions are found running afoul of the view taken by this tribunal by this judgment, to vacate the same and restore the concerned Claim cases to its file and complete the process of adjudication thereupon in accordance with law. Needful action in above nature shall be initiated by the Central Commission within four weeks of this judgment. Of course, review can be undertaken even at the instance of the parties in question should they approach the Commission on their own. We may add that these directions are without prejudice to the remedy, if any, already pursued or intended to be pursued by the concerned parties vis-à-vis other such cases.”

19. Pursuant to the decision of the Appellate Tribunal, the present petition, along with several others were listed before this Commission on 09.05.2022 whereupon the following observations were made by the Commission, as recorded in the ROP:

“During the course of hearing, learned senior counsels and the learned counsels for the parties made detailed suggestions with regard to the methodology to be adopted for implementation of the directions of Appellate Tribunal for Electricity (“APTEL”) in its

judgment dated 5.4.2022 in OP No. 1 of 2022 and Ors. Since many of such suggestions were overlapping, only a gist of them is being reproduced hereunder:

.....

(e) As a consequence of vacating the Commission's disposal orders, the cases shall be restored to stage as they were prior to the Commission's disposal orders.

(f) Since the matters which came to be disposed by applying the Change in Law Rules were at different stages of proceedings (i.e. reserved for order, pleadings to be completed and admission stage, etc.), the Commission may consider passing separate orders in each case considering the stage at which they were prior to their disposal. view in this regard thereafter after proper bunching of the Petitions or independently.

...

4. After hearing the suggestions put forth by the learned senior counsels and the learned counsels for the parties, the Commission noted that the as per the directions of the APTEL in judgment dated 5.4.2022 in OP No. 1 of 2022 and Ors., in particular at paragraph 74, it would be apt to pass suo-motu order(s) in the Petitions which were disposed by the Commission by applying the Change in Law Rules. However, for the Petitions where the dismissal orders of the Commission have already been set aside by the APTEL in paragraph 72 of the judgment, there would be no need to pass any suo-motu order(s). Accordingly, the Commission indicated that it will proceed to take the appropriate course of action in this regard, as to the various request of the learned counsel for the parties, inter alia, permission to file additional affidavit and impleadment of distribution licensees, etc., the Commission observed that similar matters are listed for hearing on 17.5.2022, the Commission will take a view in this regard thereafter after proper bunching of the Petitions or independently.

”

20. The present petition was re-listed for hearing before this Commission on 14.07.2022. As per ROP the Commission made the following observations:

“2. At the outset, learned senior counsel for the Respondent, SECI submitted that the Petitioner's GST claims have already been reconciled by SECI as well as the distribution licensee, Maharashtra State Electricity Distribution Company Ltd. (MSEDCL) and details to this extent have already been furnished by SECI in its affidavit dated 25.1.2022. Learned senior counsel pointed out that while there is a minor difference in the GST claim evaluated by SECI and MSEDCL, MSEDCL has not furnished any reason for such difference. Learned senior counsel, accordingly, requested the Commission to pass an appropriate order in the matter.

3. Learned counsel for the Petitioner confirmed that the Petitioner's GST claims have already been reconciled with SECI as well as MSEDCL and requested the Commission to pass an appropriate order by taking into the account the claim amounts as reconciled by SECI.”

Analysis and Decision

21. We observe that on 10.02.2017, the Petitioner had entered into three (3) separate PPAs for 130 MW (50MW + 50 MW + 30MW) with SECI and as per PPAs, the SCoD was 23.12.2017. On 01.07.2017, the GST Laws were introduced. The enactment of GST Laws is squarely covered as 'Change in Law'. The Petitioner and SECI have admitted on record that the GST claims stand reconciled between themselves as per affidavit dated 25.01.2022 and MSEDCL has not objected to the same.

22. The Commission vide Order dated 20.08.2021 in Petition No. 536/MP/2020 has already held as under:

“ ...

105. The summary of our findings are as follows:

Issue No. 1:

....

• The liability of SECI/ Discoms for 'Monthly Annuity Payments' starts from 60th (sixtieth) day from the date of orders in respective petitions or from the date of submission of claims by the Respondent (SPDs), whichever is later. In case of delay in the Monthly Annuity Payment beyond the 60th (sixtieth) day from the date of orders in respective petitions or from the date of submission of claims by the Respondent (SPDs), whichever is later, late payment surcharge for the delayed period corresponding to each such delayed Monthly Annuity Payment(s) shall be payable as per respective PPAs/PSAs.

• The "Tenure of Annuity Payments" shall be for 13 years.

• The annuity payment liability shall be a part of the existing payment security mechanism as stipulated in the PPAs and already established under the PPAs by making suitable provision for the annuity payments.

”

23. In view of the above discussions, the Commission holds that the liability of SECI/ Discoms for 'Monthly Annuity Payments' starts from 60th (sixtieth) day from the date of this Order or from the date of submission of claims (pending documents) by the Petitioner, whichever is later. In case of delay in the Monthly Annuity Payment beyond the 60th (sixtieth) day from the date of Order or from the date of submission of claim (pending documents) by the Petitioner, whichever is later, late payment surcharge for the delayed period corresponding to each such delayed Monthly Annuity Payment(s) shall be payable as per respective PPAs/PSAs.

24. Regarding prayers (b) & (c) the Commission observes that the issue regarding O&M and carrying cost has been remanded back by the Appellate Tribunal of Electricity in Appeal Numbers 61, 62, 63, 64 and 65 of 2021. Therefore, the Commission is of the view that the issues as contained in prayers (b) & (c) of the instant petition shall be dealt along with the remanded matters and as such the petition is tagged with Petition Nos. 184/MP/2018 & batch qua relief against prayers (b) & (c) in the instant petition.
25. Accordingly, the prayer (a) along with prayer (b) qua compensation for the increase in non-recurring expenditure as reconciled as per affidavit dated 25.01.2022 is answered in affirmation and the Petition No. 70/MP/2019 is partially disposed of.
26. Further, for prayer (b) qua compensation for the increase in recurring expenditure (O&M) & prayer (c) (carrying cost), the Petition No. 70/MP/2019 is tagged along with Petition Nos. 184/MP/2018 & batch for further hearing. The parties are directed to file their submission (if any) accordingly.

Sd/-
पी. के. सिंह
(सदस्य)

Sd/-
अरुण गोयल
(सदस्य)

Sd/-
आई. एस. झा
(सदस्य)