

Rajasthan Electricity Regulatory Commission

Petition No. RERC-1905/21 and 1933/21

In the matter of Petition filed under Section 63 of the Act for adoption of tariff for 1070 MW Solar PV Power and

In the matter of Petition under 86(1)(b) of the Electricity Act, 2003 seeking approval and recognition of Article 12.1.3 and 12.2.3 of the Power Purchase Agreement dated 04.03.2021 executed between AEW India North One Private Limited and Solar Energy Corporation of India Limited and appropriate directions thereof.

Coram:

Dr. B.N. Sharma, Chairman

Shri Hemant Kumar Jain, Member

Dr. Rajesh Sharma, Member

- Petitioner : Rajasthan Urja Vikas Nigam Limited.
AEW India North One Private Limited (1933/21)
- Respondent(s) : 1. Solar Energy Corporation of India (in 1905/21 and 1933/21)
2. Green Infra Wind Energy Ltd. (in 1905/21)
3. AEW India North One Private Limited (in 1905/21)
4. NTPC Renewable Energy Ltd. (in 1905/21)
5. Rajasthan Urja Vikas Nigam Ltd. (in 1933/21)
- Date(s) of hearing** : **22.07.2021 and 02.08.2022**
- Present** : Sh. Rajesh Kumar Verma, Representative for Petitioner.
Sh.M.G.Ramachandran, Sr.Advocate for Respondent Solar Energy Corporation of India Ltd. ('SECI').
Sh. Sanjay Sen, Sr. Advocate for Respondent, M/s Green Infra Renewable Projects Limited ('GIRPL').
Sh. Nihal Bhardwaj, Advocate for Respondent, NTPC Renewable Energy Pvt Limited ('NTPC REL').

Sh. Sujit Ghosh, Advocate for Respondent, AEW India North One Private Limited ('AEW India').

Date of Order:

31.08.2022

Order

Brief Background:

1. Rajasthan Urja Vikas Nigam Ltd. (RUVNL) had filed this Petition on 24.03.2021 under Section 63 of the Electricity Act, 2003 for the adoption of tariff for 1070 MW Solar PV power to be purchased by three Discoms for which bidding was conducted by SECI.
2. In the matter of this Petition, two rounds of litigations are involved.
3. The Orders in the matter of this Petition were issued by the Commission on 23.07.2021 and 13.12.2021, whereas Hon'ble APTEL had passed judgment in respect of these orders on 12.10.2021 and 28.01.2022 respectively.

Commission Order dated 23.7.2021:

4. During the proceedings of this Order, M/s Green Infra filed an IA to implead it as a Respondent in the matter on which the Commission directed to implead all the successful Generators in the bid as Respondents.
5. Respondent Generators prayed that at the time of adoption of the tariff itself Commission should declare some events, as mentioned in their replies, as Change in Law/Force Majeure events in terms of the PPA. They also prayed for the extension of timelines for the period of pendency of the present Petition.
6. The Commission issued the Order on 23.7.2021 in terms of Section 63 of the Electricity Act, 2003, for the adoption of tariff. Further, in the said Order, Commission deemed it appropriate not to look into the merits of the issues raised by the Respondent Generators regarding the declaration of Change in Law and Force Majeure events. However, parties were given the liberty to file fresh petitions to raise such issues at the appropriate time

APTEL order dated 12.10.21 in Appeal No.251 of 2021:

7. The above order dt. 23.7.21 was challenged before Hon'ble APTEL by Green Infra Renewable Projects Ltd. bearing Appeal No. 251 of 2021 & IA No. 1223 of 2021. Hon'ble APTEL on 12.10.2021 passed the Order in the matter and directed the Commission to hear the parties further in the light of the observations made by the Tribunal and pass further orders specifically with respect to the three change in law event claims presented by the appellant, preferably within two months. The relevant paras of the APTEL's Order are extracted below:

"16.....it is the duty of the State Commission to inquire into such claim at the first opportune time and bring in suitable corrections, may be first by declaration and followed up by detailed tariff orders. If the event referred to actually constitutes change in law within the four corners of its definition under the PPA, there is no reason why it cannot be duly recognized as a change in law at the stage of tariff adoption, the actual impact and extent of the relief admissible to be determined at the appropriate stage.

17. For the forgoing reasons, we allow the appeal finding the impugned Order to be an adjudication that is incomplete and proceedings wherein the appellant had sought the above-mentioned declarations having remained inchoate. The State Commission is directed to hear the parties further in the light of the above observations and pass further orders specifically in relation to the three change in law event claims presented by the appellant, rendering its decision as expeditiously as possible, preferably within two months from today."

Commission order dated 13.12.2021:

8. In light of the above Order dated 12.10.2021 passed by the Hon'ble APTEL in Appeal No. 251 of 2021, the matter was remanded to the Commission for the consideration of the change in law events raised by the developers. Accordingly, the Petition was listed for hearing on 28.10.2021, where Respondents were directed for filing their consolidated submissions.
9. AEW India North One Pvt Ltd., (hereinafter 'AEW India'), Green Renewable Projects Ltd., (hereinafter 'GIRPL' or 'Green Infra'), Solar Energy Corporation of India Ltd.,(hereinafter 'SECI')filed their written

submission, and Rajasthan Urja Vikas Nigam Ltd. (hereinafter 'RUVNL') filed their reply on the submission filed by the Respondent. M/s AEW India also filed a petition bearing no. 1933/21 for approval and recognition of Change in Law. As the issues that had arisen in both the petitions for consideration and decision of the Commission were similar, these petitions referred to in the cause title were clubbed.

10. While analysing the petitions, the Commission noted that the Solar Power Developers (SPDs) Respondents, in their written submissions, had mainly raised the following issues:

- (a) Hold and declare that the increase in rates of Basic Customs Duty ('BCD') on the import of Solar Inverters pursuant to the Ministry of Finance ('MoF') Notification dated 01.02.2021, whereby the Exemption Notification dated 06.01.2011 has been rescinded, is a change in law event under the PPA;
- (b) Hold and declare that the levy of BCD on the import of Solar Cells and Modules/Panels pursuant to the MNRE OM dated 09.03.2021 with effect from 01.04.2022 is a change in law event under the PPA;
- (c) Hold and declare that the MoF GST Notification is a change in law event under the PPA;
- (d) Hold and declare that the SC GIB Order qualifies as a change in law event under the PPA, and consequently, SPDs are entitled to compensation and extension of time accordingly;
- (e) Since the Project has already been delayed due to SC GIB Order as well as delay in tariff adoption proceedings, the SCD and other timelines under the PPA be extended to account for the time spent in the legal proceedings before the Hon'ble Tribunal and the Commission;
- (f) RUVNL be directed to place on record the impact of the SC GIB Order on the downstream transmission line/system;
- (g) Declaration of increase in Grid Connectivity Charges from Rs 2 lakh per MW to Rs 2.5 lakh per MW to be payable by Renewable Energy Projects, as per Regulation 89 of the Rajasthan Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable Energy Sources), Regulations, 2020 (hereinafter referred to as the "RE Tariff Regulations, 2020")

issued by the Commission vide Notification No. RERC/Secy/Regulation 138, dated 02.11.2020 as an event of change in law in terms of Article 12.1.1 of the Power Purchase Agreement dated 04.03.2021 executed between AEW India and SECI read with Article 12.1.2 and Article 12.2.4 of the PPA.

- (h) Approval and Recognition of Article 12.1.3 and Article 12.2.3 of the Power Purchase Agreement, which specifically provides that change in the rate of safeguard duty, GST, and basic customs duty after 28.10.2020 will be treated as change in law, and every net increase/decrease of 1 lakh per MW in Project cost will be liable for corresponding increase or decrease of an amount equal to Rs. 0.005/kWh;

11. During the hearing SECI submitted that in terms of the APTEL order, the Commission may recognize the three events as constituting the change in law events under Article 12 of the respective Power Purchase Agreements (hereinafter "PPAs"). The Commission observed that proceeding in pursuance to the APTEL order dated 12.10.2021 were restricted to the following change in law events:

- (i) Increase in rates of Basic Customs Duty on import of Solar Inverters pursuant to the MoF Notification No. 07 dated 01.02.2021, whereby Customs duty exemption notification No. 01 dated 06.01.2011 has been rescinded.
- (ii) Levy of Basic Customs Duty on import of Solar Cells, Modules/Panels pursuant to MNRE Office Memorandum dated 09.03.2021.
- (iii) The direction issued by Hon'ble Supreme Court of India by its Order dated 19.04.2021 in Writ Petition (Civil) No. 838 of 2019 titled *M.K. Ranjitsinh & Ors. vs. Union of India & Ors.* in terms of which all existing and future overhead low and high voltage power lines in the Priority and Potential habitats of Great- Indian Bustard are necessarily required to be laid under- ground.

12. The Commission issued its Order dated 13.12.2021 in the matter wherein it noted that though some of the generators have also claimed relief on other change of law events. In the said order Commission was of the view that in terms of the decision of the Hon'ble Tribunal, only the recognition of the change in law events in respect of the above three events was required.

13. In the aforesaid order Commission, accordingly, considered events (i) and (ii) as the change in law events, and regarding the event (iii) held that the prayer of SPDs to recognize directions issued by the Hon'ble Supreme Court of India by its Order dated 19.04.2021 as Change in law event was not justified as that bid for procurement of solar power was not location specific, and therefore, their prayer was disallowed.

APTEL Judgment dated 28.01.2022 (Appeal No. 344 of 2021 & IA No. 2065 of 2021) (Appeal No. 9 of 2022 & IA No. 69 of 2022):

14. Aggrieved by order of the Commission on GIB and non -consideration of other issues, the generators approached APTEL, which vide its judgment dt. 28.01.2022 held as under:

"In this view, we only reiterate what we said in the previous Judgment. The adoption proceedings before the State Commission will be treated as incomplete and inchoate. It shall pass further order on the remaining claims for declaration of change in law events having a bearing on the tariff to be adopted, as expeditiously as possible, not later than one month hereof after hearing the parties and in accordance with law. We are conscious that the Appellants are also aggrieved upon denial of the relief vis-à-vis the judgment of Hon'ble Supreme Court in Great Indian Bustard case. The right of the Appellants and such other parties as may be thereby affected, to pursue the remedy of appeal, is hereby reserved to be brought after the further Order is passed."

15. However, due to the vacancy of Post of Hon'ble Member (Legal) in the Commission, Hon'ble APTEL, in its Order dated 25.02.2022, directed that the time for fresh decision in terms of the remit-by judgment dated 28.01.2022 would come into force on the date Member (Legal) joins the Commission.
16. Subsequently, on the appointment of the Member (Legal) in the Commission, the matter was listed for hearing on 22.07.2022 wherein the Commission directed all the parties to file their written submissions within a week's time.
17. Accordingly, NTPC Renewable Energy Ltd. (hereinafter 'NTPC Renewable'), AEW India Limited, and SECI submitted their respective written submissions on 28.07.2022. while Green Infra Renewable Ltd.

and RUVNL submitted their respective written submissions on 29.07.2022.

18. The matter was finally heard on 02.08.2022, wherein, Sh. Rajesh Kumar Verma, Representative for Petitioner, appeared on behalf of the Petitioner. Sh. M.G. Ramachandran, Advocate, appeared for SECI. Sh. Sanjay Sen, Sr. Advocate appeared for M/s Green Infra, Sh. Nihal Bhardwaj, Advocate appeared for NTPC Renewable, Sh. Sujit Ghosh, Advocate appeared for AEW India. The Commission directed the parties to file their brief written arguments within three days. The Order was reserved in the matter.
19. Subsequent to the above, GIRPL also filed an I.A. on 12.08.2022 requesting for declaring the increase in Grid Connectivity Charges vide RERC RE Tariff Regulations 2020 issued on 02.11.2020 as a change in law event under the PPA. GIRPL in their I.A. have also submitted that since the issue of grid connectivity has also been raised by AEW India, which is pending for consideration before the Commission, a fresh hearing for consideration of this change in law claim may not be required. Accordingly, this issue has been considered along with the issue raised by AEW India.
20. **M/s SECI, during the hearing and in its written submissions has submitted as under:**
 - 20.1. Commission may recognize and declare the following events as constituting the Change in Law events under Article 12 of the respective Power Purchase Agreements (hereinafter 'PPAs'):
 - 20.1.1. Increase in rates of Basic Customs Duty on import of Solar Inverters pursuant to Ministry of Finance Notification No. 07 /2021- Customs dated 01.02.2021 whereby custom duty exemption notification no. 1/2011, dated 06.01.2011, has been rescinded.
 - 20.1.2. Levy of Basic Customs Duty on import of Solar Cells, Modules/Panels pursuant to Ministry of New and Renewable Energy Office Memorandum dated 09.03.2021.
 - 20.1.3. Levy of GST vide Notification dated 30.09.2021 of Ministry of Finance.
 - 20.2. Ministry of New and Renewable Energy vide Office Memorandum dated 03.02.2022 has dealt with the decision dated 19.04.2021 of the

Hon'ble Supreme Court in the GIB matter and has provided for the following:

Reference is invited to issues arising out of Hon'ble Supreme Court's Order dated 19.04.2021 (in I.A. No. 85618/2020 in W. P. No. 838 of 2019) regarding undergrounding of transmission lines in habitats of Great Indian Bustard (GIB) in Rajasthan and Gujarat, and the relief sought by Industry in this regard.

2. This Ministry has filed an I.A. in the Hon'ble Supreme Court, jointly on behalf of MNRE, M/o Power and M/o Environment, Forest & Climate Change (MoEF & CC) on 17.11.2021 contesting the aforesaid Order dated 19.04.2021. It has been inter-alia prayed that Hon'ble Supreme Court may allow high voltage and extra high voltage lines i.e. 66 kV and above power lines in Priority GIB Habitat to be laid as overhead power lines with installation of appropriate mitigation measures like bird diverters and laying of overhead transmission lines in future outside the Priority area with installation of appropriate bird diverters. The matter is yet to be decided by Hon'ble Supreme Court. This situation has caused uncertainty among RE developers with regard to the action they are required to take.

3. In view of above, the undersigned is directed to inform MNRE's RE Implementing Agencies (REIAs), that for all under implementation RE projects where REIA is the intermediary procurer and for which the transmission infrastructure lies wholly or partly in the priority or potential area; the project land has been procured and the project commissioning is delayed due to non-completion of project transmission infrastructure on account 'of the aforesaid Order of the Hon'ble Supreme Court, the Scheduled Date of Commissioning is hereby extended to a date which is 30 days after the date of judgment by Hon'ble Supreme Court in the IA filed by MNRE.

4. The above relief is for facilitating RE project development and shall not be taken for any other purpose, including for claiming IDC or for termination of PPA. REIAs are requested to accord requisite extension of Scheduled Date of Commissioning keeping in view the above.

20.3. The change in law aspect of the decision mentioned above dated 19.04.2021 of the Hon'ble Supreme Court on the projects to be established by the Respondents- Solar Power Developers is to be

considered as per the terms of the Office Memorandum dated 03.02.2022 of MNRE and the outcome of the decision of the Hon'ble Supreme Court on the I.A. as specified in the said Office Memorandum.

- 20.4. The nature and extent to which the above events will have an impact are to be considered based on the factual details and circumstances having implications of the above laws on the implementation of the project by the Respondents-Solar Power Developers (SPDs). The impact of the change in law is to be considered at the appropriate stage in terms of the formula provided in Article 12.2.3 of the respective PPAs and in terms of the decision dated 12.10.2021 of the Hon'ble APTEL in Appeal No. 251 of 2021.
- 20.5. For the application of the formula provided in Article 12.2.3 of the PPAs for relief of Change in Law, the amount constituting the project cost cannot be considered on an estimated basis. The project cost will be available only upon the capital expenditure being incurred as on the actual commissioning date of the last part capacity or Scheduled Commissioning Date /Extended Scheduled Commissioning Date.
- 20.6. The claim made by AEW India for declaring increase in Grid Connectivity Charges as per Regulation 89 of Rajasthan Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2021 as Change in Law under Article 12 of PPA is disputed by SECI. The said claim was raised by AEW India in the proceedings before the Hon'ble Appellate Tribunal in Appeal No.07 of 2022, which was also disposed of by the Hon'ble Appellate Tribunal vide Order dated 09.05.2021. SECI had disputed the claim of AEW in its reply filed in Appeal No.07 of 2022 before the Hon'ble Appellate Tribunal as follows:
- 20.6.1. The Rajasthan Tariff Regulations are not applicable to the transaction of purchase and sale of electricity under the present PPA and PSA executed in pursuance of Competitive Bidding in terms of Section 63 of the Electricity Act. In this regard, Regulation 3 dealing with the scope of Regulations provides as under:

3. Scope of Regulation and extent of application

3.1 These Regulations shall apply to those new generating station(s) or unit based on renewable energy sources, which fulfil the following criteria:

- (a) are commissioned in the State of Rajasthan for generation and sale of electricity to Distribution Licensee(s) in the State during the Control Period;
- (b) are Eligible projects as per eligibility criteria specified in Regulation 4 of these Regulations;
- (c) **whose tariff is to be determined by the Commission under Section 62 read with Section 86 of the Act:**

3.2 Notwithstanding anything contained in these Regulations, the Commission shall adopt the tariff, if such tariff has been determined through a transparent process of bidding in accordance with the guidelines issued by the Central Government, as envisaged under Section 63 of the Act

[Emphasis Supplied]

20.6.2. Accordingly, independent of the above Regulations, the Renewable Power Developer has to arrange for connectivity and pay the charges as may be applicable from time to time as per the orders and directions of the Rajasthan Commission. Such charges are not incidence of change in law.

20.6.3. In terms of the bidding documents and the PPA, the responsibility of getting connectivity with the transmission system owned by the STU or any other transmission utility, as may be required, is entirely of the Solar Power Developer and the same was at the cost and risk of the SPD. The entire cost of Transmission including cost of the arrangement of connectivity is to be borne by the SPD. In this regard, the following provisions are relevant :

“Article 4.1.1 (e) and 4. 2.2 of the PPA

4.1 SPD Obligations

The SPD undertakes to be responsible at SPD's own cost and risk, for the following:

e) Connecting the Power Project switchyard with the Interconnection Facilities at the Delivery Point. The SPD shall made adequate arrangements to connect the Power Project switchyard with the Interconnection Facilities at Interconnection / Metering/Delivery Point ; and

4.2 Information regarding Interconnection Facilities

.....

4.2.3 The responsibility of getting connectivity with the transmission system up to the Interconnection Point, will lie with the SPD. The transmission of power up to the point of