



**Petition No. 1340 of 2018**  
**BEFORE**  
**THE UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION**  
**LUCKNOW**

(Date of Order: 02.12.2022)

**PRESENT:**

Hon'ble Shri Raj Pratap Singh, Chairman  
Hon'ble Shri Vinod Kumar Srivastava, Member (Law)

**IN THE MATTER OF:** Petition under Section 81(1) and (b) of the Electricity Act, 2003 and Article 12 read with Article 16.3.1 of the PPA executed between the Petitioner and UPPCL dated 27.12.2013 seeking relief on account of a "Change in Law" viz. the introduction of GST laws at the central level and change in rate of Service Tax, resulting in additional recurring expenditure in the form of an additional tax burden to be borne by the Petitioner after the Effective Date of PPA.

**Azure Surya Private Limited (ASPL)**

Southern Park, 5<sup>th</sup> Floor, D-II, Saket Place, Saket, New Delhi – 110017

.....Petitioner

**Versus**

**Uttar Pradesh Power Corporation Limited (UPPCL)**

7<sup>th</sup> Floor, Shakti Bhawan Extn, 14 Ashok Marg, Lucknow – 226001

.....Respondent

The following were present:

1. Shri Vishal Binod, Advocate, Azure Power
2. Shri C.P. Maurya, AE, UPPCL
3. Shri Divyanshu Bhatt, Counsel, UPPCL
4. Shri Sashwat Singh, Advocate, UPPCL

**ORDER**  
**(Date of Hearing – 24.11.2022)**

1. Azure Surya Pvt. Ltd., the petitioner, has developed a 10 MW solar project under the competitive bidding by UPNEDA vide RFP dated 15.3.13 and its amendment dated 24.4.13. The petitioner has filed instant petition seeking





relief, in terms of PPA dt.27.12.13 on account of following change in law events:

- (i) Finance Act,2015 (w.e.f. 1.6.15)
- (ii) Notification no.21&22/2015-ST dt.6.11.15 by Ministry of Finance, Govt. of India (w.e.f.15.11.15)
- (iii) Finance Act,2016 (w.e.f.1.6.16) (items i, ii, iii above collectively referred as Service Tax Laws)
- (iv) Central Goods & Service Tax, 2017 (w.e.f.1.7.17) (GST Law)

2. The petitioner has prayed as follows:

- a. Declare that the promulgation of the Finance Act,2015 (with effect from 1.6.15), Notification no.21 and 22/2015-ST dated 6.11.15 by the Ministry of Finance, Govt. of India (with effect from 15.11.15), Finance Act,2016 (with effect from 1.6.16) and Central Goods & Service Tax, 2017 are each a change in Law under Article 12 of the PPA dated 27.12.13 executed between the petitioner and respondent.
- b. Direct the respondent to accordingly pay the petitioner an additional tariff of Rs.0.114/kWh with effect from Commercial Operation Date of Petitioner's solar power generating systems as compensation for additional tax burden incurred by the petitioner on operating & maintaining the said solar power generating systems, as elaborated in instant petition, due to promulgation of the Finance Act,2015 (with effect from 1.6.15), Notification no.21&22/2015-ST dt.6.11.15 by the Ministry of Finance, Govt. of India (with effect from 15.11.15), Finance Act,2016 (with effect from 1.6.16) and the Central Goods and Service Tax,2017 along with carrying costs, subject to any adjustments based on the final additional expenditure incurred by petitioner as on the commercial operations date of the petitioner's solar power generating systems as duly audited by the petitioner's statutory auditor at the end of the relevant financial year.





### 3. Brief Facts as stated in petition

- a. UPNEDA vide its RFP dated 15.3.13 and amended on 24.4.13 conducted bidding for selection of solar power developers for a cumulative capacity of 200 MW for supply of solar energy to UPPCL. The petitioner was successful bidder for 10 MW project and executed a PPA dated 27.12.13 with UPPCL.
- b. With the enactment of service tax laws & GST law, the petitioner is required to bear additional recurring expenditure after the effective date under the PPA in the form of additional tax burden on O&M expenses due to increase of service tax from 12.36% to 18%. A comparison between old tax laws and rates applicable as on effective date of PPA and revised rate is as below:

Old tax law	Old tax rate	New tax law	New tax rate	Applicable period for new tax law
Finance Act, 2012	12.36%	Finance Act, 2015	14%	1.6.2015-14.11.2015
Finance Act, 2015	14%	Imposition of Swacch Bharat Cess by Notification no.21/2015-ST, dated 6.11.15 issued by Ministry of Finance, Government of India	14.5%	15.11.2015-31.5.2016
Finance Act, 2015	14.5%	Imposition of Krishi Kalyan Cess by Finance Act, 2016	15%	1.6.2016-30.6.2017
Finance Act, 2016	15%	The Central Goods and Services Tax, 2017	18%	1.7.2017- till date

- c. As per the certificate from the Chartered Accountant dated 1.6.18, the net amount to be incurred additionally over entire period of PPA in operating & maintain the project is approximately Rs.3.34 Cr. on O&M cost assuming that GST rate for services remains constant for entire period of PPA. The above amount has been computed by considering annual O&M fee of Rs.1.16 Cr. with annual escalation of 5.2% from 17.1.15, the date of commissioning till 16.1.40, end of the PPA term(extended).





- d. The promulgation of service tax & GST law after effective date of PPA resulting in additional recurring expenditure attracts article 12 of PPA entitling petitioner to change in law relief stipulated thereunder.
- e. Under article 9.1.1 of PPA, the petitioner was originally entitled to receive a tariff of Rs.8.99 /kwh from the COD of project. Therefore, on account of new laws the tariff would need to revise upwards to account for additional tax burden.
- f. An additional tariff including carrying cost payable on monthly basis may be approved by this Commission subject to reconciliation with actual additional tax paid based on annual audited accounts certified by its statutory auditor. As per petitioner calculation, the levelized tariff increase works out to 0.114/kwh.

#### **Record of proceedings**

4. The Commission, during hearing held on 23.10.18 had granted 15 days' time to UPPCL to file its counter. Subsequently, UPPCL has not filed its reply and even any request from petitioner was received by Commission over last 3 years. The Commission, during hearing held on 28.9.21, again directed UPPCL to file reply and the petitioner to file its rejoinder. UPPCL has filed its reply dated 27.11.21.
5. The Commission during hearing on 30.11.21 granted additional time to petitioner to file its rejoinder. The Commission during next hearing on 8.2.22 allowed further time to petitioner as last opportunity. The petitioner was also directed to file following information:
  - a. complete copy of registered O&M agreement
  - b. note on process of selection of O&M outsourcing company, whether through competitive bidding or limited tender. A copy of newspaper publication 'Notice for inviting tender' shall be placed on record.
  - c. Note on provision of O&M cost mentioned in PPA.
  - d. Copy of notifications claimed to be change in law event in the present petition.
  - e. Provide updated address for correspondence.
6. The Commission during hearing on 29.3.22 allowed 10 days' time to petitioner to file rejoinder and furnish information as directed earlier. The petitioner vide





affidavit dated 10.5.22 has furnished copy of O&M agreement, note on selection of O&M outsourcing company and O&M cost as mentioned in petition along with updated address for correspondence and copy of notifications claimed to be change in law in the petition.

7. During hearing on 10.5.22, the Commission allowed UPPCL to file its reply to the information and petitioner to submit rejoinder if any. UPPCL has submitted its reply 1.6.22 to information submitted by the petitioner vide affidavit 10.5.22. The next hearing on 9.6.22 was adjourned on request of petitioner. The petitioner filed its rejoinder on 7.7.22 to the reply of UPPCL dated 1.6.22.
8. The matter was argued by the petitioner and UPPCL during hearing on 7.7.22 and 28.7.222 respectively, wherein, the Commission allowed parties to file their written submissions and concluded hearing. UPPCL and ASP have filed their written submissions on 28.07.22 and 19.9.22 respectively. The Commission listed the matter on 24.11.2022 for change of quorum, wherein, the Counsel of the respective parties submitted that the arguments and pleading in the matter are concluded.
9. **UPPCL reply dated 27.11.21**
  - a. The project was commissioned on 17.1.15 and claimed change in law events begun on 1.6.15 onwards i.e., during the phase of O&M of project.
  - b. The petitioner has not place on record complete set of invoices for O&M services availed.
  - c. The petitioner has undertaken obligation under the agreement at its own cost & risk. The change in law by way of change in tax or introduction of tax is not applicable if the transaction on which it is levied is undertaken as a discretionary commercial decision.
  - d. The outsourcing of O&M to a third party is not requirement under PPA and saving or additional expenditure for the same is entirely on account of petitioner.
  - e. Various judgements of CERC have been placed on record.