



NEWSLETTER

# ENERGY AND INFRASTRUCTURE

July 2021

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## MNRE OFFICE MEMORANDUM FOR SOLAR PV POWER PROJECTS UNDER TRANCHE-I AND TRANCHE-II OF CPSU SCHEME PHASE II

(02.06.2021)

### INTRODUCTION

On 02.06.2021, the Ministry of New & Renewable Energy (**MNRE**) issued an Office Memorandum (**O.M.**) extending the timeline for project execution under Tranche I and Tranche II of the CPSU Scheme Phase-II being implemented by the Solar Energy Corporation of India (**SECI**). This was pursuant to representations received for such an extension on account of, *inter alia*, temporary shortage of equipment for solar PV power projects particularly domestically manufactured solar PV cells.

MNRE's interactions with the stakeholders had revealed that addition of new domestic manufacturing capacity of solar cells has been delayed due to the COVID-19 pandemic and its related travel restrictions. In short, *one*, the period of commissioning has been enhanced from the

existing 24 months to 30 months from the date of the Letter of Award (**LoA**) and *two*, the intermediate milestone of "Award of EPC Contract", which was previously 6 months from the LoA, has now been increased to 12 months.

### COMPLIANCE WITH THE O.M.

SECI has been directed to file a compliance report in reference to the new timelines propounded in the O.M., which are as follows:

- Extending the time period for project execution by EPC contractor, to whom the contract is awarded within 6 months following SECI's issuance of the LoA so that the overall project timeline becomes 30 months.

- The Government Producers shall keep the time period for project execution by Engineering, Procurement and Construction (**EPC**) contractor so that the total project timeline is 30 months from the date of LoA by SECI in case of projects where the award of EPC contract occurred beyond 6 months but within 12 months of LoA by SECI.
- Carefully assessing the readiness of the project for commissioning within 30 months and deciding on giving more time subject to payment of applicable penalties by such government producers in cases where the EPC contract has not been awarded even within 12

months of issuance of LoA by SECI. All other projects will be cancelled, and organisations will be able to reapply or participate in upcoming CPSU Scheme tenders.

- The following dates do not include any COVID-19-related extensions, such as the 5-month blanket extension already granted by MNRE.

*Please find link to Office Memorandum here*

### *SKV Comment...*

*The Office Memorandum not only provides a much needed relief from the impact of the Covid-19 pandemic to Projects where the EPC Contract is awarded within 6 months or between 6-12 months from the date of the Letter of Award, by extending the project deadline to 30 months, but also to Projects where issuance of the EPC contract has been delayed post 12 months of the Letter of Award. The Covid-19 pandemic and the 2<sup>nd</sup> wave has admittedly disrupted import of crucial components for solar power projects. This invariably has a domino effect on timely execution of the Project. By way of the O.M., rather than outrightly cancelling all projects where the EPC Contract is delayed beyond 12 months from the LoA, SECI has been empowered to assess the readiness of the Project for commissioning within 30 months. This will help salvage a Project where circumstances are yet favourable as well as prevent the investment already from being laid to waste.*

## MINISTRY OF POWER RELEASES A DRAFT PAPER PROPOSING A RENEWABLE ENERGY CERTIFICATE MECHANISM

(04.06.2021)

### INTRODUCTION

The Ministry of Power (**MoP**) vide notification 07.06.2021 circulated a discussion paper on redesigning the “Renewable Energy Certificate (**REC**) Mechanism”, which is open for public consultation till 25.06.2021. The basic aim of the discussion paper is to realign the REC mechanism with the ever-changing power sector & to promote the on-fossil fuel share in the electricity energy basket.

### CURRENT STATUS

As per the current system, RECs is of 1095 days (approx. 3 years) from the date of issuance though depending on the situation, the validity period, from time to time, has been extended by CERC to avoid expiry of any REC(s). Till date, CERC has revised non-solar and solar RECs around four to five times. The last revised prices were effective from 01.01.2015 to 31.03.2017 as notified by CERC.

### REC TRADING STATUS

The floor and forbearance price notified by CERC, which were effective from 01.07.2020, is sub-judice and no trading session of RECs has been held from July 2020 onwards. The key development of the proposed REC Mechanism is outlined below:

#### A. Validity period of RECs: Floor & Forbearance Price

- The proposed measure removed the validity period of REC such that RECs will be valid till it is sold.
- Since RECs are perpetually valid, the floor and forbearance prices are not required to be

specified as holders of RECs would have complete control over the timings to sell.

- CERC will be required to have monitoring and the surveillance mechanism to ensure that there is no hoarding of the RECs and creation of artificial price rise in the REC market.
  - CERC will have to power of intervention if malpractices or abuse of market power in REC trading are observed.
- #### B. Period for which the RECs are to be issued to RE generators
- REC issuance by eligible renewable generator for new projects will be limited to 15 years from the date of commissioning (while old projects can continue to 25 years).

### PROMOTION OF NEW AND HIGH-COST TECHNOLOGIES IN RE AND THE PROVISION OF MULTIPLIER FOR ISSUANCE OF RECS

The draft paper also introduces the concept of multiplier, under which less mature RE technologies can be promoted over other matured renewable technologies. The concept of negative list and sunset clause may also be considered for various technologies depending upon their maturity level.

Any technology which needs to be promoted may be identified two years in advance. For such projects, at least 15 years of policy visibility would be provided to attract investments and promote such technologies in renewable energy.

A technology multiplier can be introduced for promotion of new and high priced RE technologies, which can be allocated in various baskets specific to technologies depending on maturity.

The existing RE technologies which are reaching maturity stage can be given a relative evaluation of a multiplier or can be included in the negative list or be provided with a sunset clause. However, these conditions will be applicable only to new RE projects and not the already commissioned projects.

### INCENTIVIZING OBLIGATED ENTITIES

Two incentives are proposed herein – *one*, only DISCOMs to be issued RECs for quantum beyond RPO compliance, as per the prevalent practice and *two*, RECs can be issued to all the obligated entities which purchase RE Power beyond their RPO compliance, similar to the provisions for the existing DISCOMs.

### NO REC TO BE ISSUED TO THE BENEFICIARY OF THE CONCESSIONAL CHARGES OR WAIVER OF ANY OTHER CHARGES

RECs should not be given to any seller who is benefitting or preferential treatment. The role of trader can be enhanced in the REC trading as it will give long-term visibility to the buyers of the REC, and they can easily fulfil the RPO. The role of trader can be enhanced in the REC trading to facilitate ease of fulfilling RPO including the small buyers.

*Please find link to Notice [here](#)*

### *SKV Comment...*

*RECs' essentially aim at addressing the mismatch between availability of renewable energy sources and the requirement of Obligated Entities to meet their renewable purchase obligation across States. The draft paper creates an incentive for Obligated Entities to procure RE power beyond their RPO requirement, which will act as a catalyst for promotion of renewable energy. The paper also introduces a sliding scale multiplier that incentivizes new and costly RE technology to enter the market. We also believe that the perpetual validity of the RECs' is aimed at addressing the halt in the trading of RECs', since the issue before the Appellate Tribunal for Electricity concerns, inter alia, the floor and forbearance prices determined by CERC. However, the complexity of the issue needs to be understood from the perspective of RE generators who have made substantial investment based on the extant applicable RE regime which guarantees a certain Floor price.*

## TAMIL NADU POWER PRODUCERS' ASSOCIATION V. TAMIL NADU ELECTRICITY REGULATORY COMMISSION & ORS.

(15.06.2021)

### INTRODUCTION

The Appellate Tribunal for Electricity (**APTEL**) *vide* judgment dated 07.06.2021 in *Tamil Nadu Power Producers Association v. Tamil Nadu Electricity Regulatory Commission & Ors.* has partly allowed an Appeal filed by the Association (**TNPPA**) challenging an Order dated 28.01.2020 passed by the Tamil Nadu Electricity Regulatory Commission (**TNERC**) prescribing a procedure for verification of the status of captive generation plants and captive users and appointing the Tamil Nadu Generation and Distribution Corporation Ltd. (**TANGEDCO**) as the delegate of the Commission for undertaking the verification.

### BRIEF FACTS

TNPPA, an association of power producers in the State of Tamil Nadu, had contended before APTEL that TANGEDCO had issued Circular Memorandums requiring captive generators and captive users to furnish documents and data for the purpose of verification of Captive Generating Plants (**CGPs**) in accordance with Rule 3 of the Electricity Rules, 2005. This was challenged before the Single and Division Bench of the Hon'ble High Court of Madras (Madurai Bench) whereby TANGEDCO was directed to communicate the procedure for verification of the CGP status, which upon receipt of data, would then be adjudicated before TNERC in accordance with the Electricity Act. The issue of the jurisdiction of TANGEDCO to verify and determine the CGP status was specifically left open.

Following this, TNERC webhosting the draft procedure for verification of CGP status and the various stakeholders made their representations. A

hearing was conducted, which resulted in the Impugned Order dated 28.01.2020 in appeal before APTEL.

### RULING

One of the primary issues before APTEL was whether the appointment of TANGEDCO as the verifying as well as adjudicating authority was justified in law. In other words, under Section 97 of the Electricity Act, 2003, could TNERC have delegated its power to verify captive status onto an instrumentality of the State such as TANGEDCO.

On this, APTEL held that while Section 97 entitles TNERC to delegate its power and functions barring the function of adjudication of disputes, such delegation cannot wither away the foundations of transparency, unbiasedness and fair play. The vesting of a critical function such as verification of CGP status upon a direct beneficiary of the process, i.e., TANGEDCO, is against the ethos of such principles. It invariably amounts to permitting TANGEDCO being a judge in its own cause.

It was also held that the verification for determining ownership & consumption for CGP / captive users under Rule 3 of the Electricity Rules (2005), which specified the shareholding patten of a CGP that entitles one to the status of a captive plant, should be done at the end of the financial year, on annual basis. Thus, the Impugned Order was partly set aside.

*Please find link to judgment here*

### *SKV Comment...*

*The judgement strikes at the heart of any arbitrary exercise of power by an interested state instrumentality such as TANGEDCO while determining the status of a captive generation plant under the Electricity Act, 2003 read with the Electricity Rules, 2005. Captive Generators have often been plagued by such state instrumentalities having the last say in such matters of importance. Preserving the sanctity of the adjudicatory process before TNERC, the judgment ensures that Captive Generators would have a say in any interpretation accorded to the data through the verification process undertaken by the State Electricity Regulatory Commission. Rightly, the State instrumentality such as TANGEDCO is vested only with the right to collect the data for verification by the Regulatory Commission.*



## ADYAH SOLAR ENERGY PRIVATE LIMITED. VS. GULBARGA ELECTRICITY SUPPLY COMPANY LIMITED

(15.06.2021)

### INTRODUCTION

The Karnataka Electricity Regulatory Commission (**KERC**) was considering a petition filed by Adyah Solar Energy Private Limited (**Adyah**), a generating company within the meaning of Section 2(28) of the Electricity Act, 2003, praying that the imposition of safeguard duty vide Notification No. 01/2018 (Customs-SG) dated 30.07.2018 (**SD Notification**) issued by the Ministry of Finance, Government of India, on the import of Solar Modules amounts to a "Change in Law" under the Power Purchase Agreement (**PPA**) signed between Adyah and the Gulbarga Electricity Supply Company Limited (**GESCOM**) for the development of 50 MW AC capacity of a Solar Power Project and supply of the power to GESCOM.

### BRIEF FACTS

In the present case, Adyah had participated in a competitive bidding process initiated by the nodal agency of the Government of Karnataka, i.e., the Karnataka Renewable Energy Development Solar Park (**KREDL**) for the development of the 1200 MW AC solar Power Project within the 2000 MW Pavagada Solar Park. Adyah's bid for development of 50 MW AC capacity of the Solar Power Project was accepted by KREDL, pursuant to which the PPA was signed. The Solar Power Project is commissioned withing the schedule commissioning period.

On 30.07.2018, the Central Government brought the SD Notification imposing safeguard duty as per the following rates on the import of "Solar Cells whether or not assembled in modules or panels" (Solar Cells and Modules):

- (a) 25% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30.07.2018 to 29.07.2019;
- (b) 20% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30.07.2019 to 29.07.2020;
- (c) 15% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30.01.2020 to 29.07.2020

As a result, Adyah filed the Petition seeking compensation on account of the imposition of the safeguard duty on the import of solar cells and modules. It had stated that the Notification had resulted in an increase in the recurring expenditure due to which the additional expenditure for the project had also increased. Hence, it was prayed that the SD Notification be declared as a "Change in Law" event to ensure effective completion of the commitments under the PPA. It is further stated that the Ministry of Power *vide* letter dated 27.08.2018 had issued directions to the CERC inasmuch as any change in domestic duty, levy, cess and tax imposed by the Central Government, State Government, Union Territory or any Governmental instrumentality, which leads to corresponding changes in cost, may be treated as Change in Law

On the other hand, GESCOM contended that Adyah could have imported solar modules / cells from developing countries except China and Malaysia, which were previously notified on 05.02.2016 vide Notification No. 19/2016 wherein there is no safeguard duty levied on import of solar cells, whether assembled or not in modules or panels,

from developing countries. It was also contended that Indian Manufacturers such as Tata Power Solar and Adani Solar Modules could have been approached as vendors, who provide a more economical rate than imports. The SD Notification was issued to protect domestic solar manufacturers and not to encourage purchase of products from foreign entities. To this, Adyah had submitted that there was no bar under its PPA on import of solar modules and Article 15.1.1, which detailed a Change in Law event, was clear.

## RULING

Under Article 15.1.1 of the PPA, the term “Change in Law” meant the occurrence of any of the following events after submission of the online Techno Commercial Bid resulting in an additional recurring / non-recurring expenditure by the Solar Power Developer of any income to the developer:

*“[...] (e) any change in taxes and duties or introduction of any taxes and duties made applicable for setting up for setting up of the project and supply of power by the developer as per the terms of agreement----- any change in law pertaining to taxes, duties after the date of submission of Technical Bid shall be to the account of the GESCOM and appropriate change in tariff, either increase in proportionate, due to change in taxes, duties shall be as per clause 15.2 (Relief for change in Law) of PPA.”*

Interpreting this, the Commission held that the PPA clearly provides that any change in law pertaining to taxes, duties after the date of submission of the Techno Commercial Bid shall be to the account of the GESCOM and appropriate change in tariff, either increase or decrease in proportionate, due to the change in taxes, duties shall be as per clause 15.2 of PPA. In the instant case, the safeguard duty levied on import of solar cells whether or not assembled in modules or panels falls under the category of duty as envisaged under the clause 15.1.1 (e) of the PPA. From the records, it was clear that Adyah had

participated in competitive bidding for the solar power project, KREDL has accepted the bid and PPA was entered into on 20.04.2018 prior to the SD Notification. Thus, the Commission was of the view that the SD Notification was a Change in Law event under the PPA and Adyah was entitled to compensation for the additional cost incurred due to the imposition of the duty.

*Please find link to Judgment [here](#)*

### *SKV Comment...*

*The judgement comes as a much needed relief for Generators importing solar modules / cells from China and Malaysia and inflicted with the increased cost from the imposition of safeguard duty. This, however, is subject to the PPA recognizing any change in law pertaining to taxes and duties after the date of submission of Technical Bid as a “Change in Law” event and the import falling within the period prescribed in the Notification. What remains to be seen is the effect of the final judgement of the Hon’ble Supreme Court in Union of India v ACME Solar Holding wherein the validity of the SD Notification is under consideration. Like the present judgement, it appears that if the Notification is struck down, then any benefit received under such “Change in Law” would have to be returned, which the Commission holds to be regardless of whether the beneficiary, like Adyah, is a party to the dispute before the Hon’ble Supreme Court or not.*

## TATA POWER RENEWABLE ENERGY LIMITED V. UNION OF INDIA & ORS.

(17.06.2021)

### INTRODUCTION

The High Court of Andhra Pradesh *vide* its judgment dated 17.06.2021 in the case of *Tata Power Renewable Energy Limited v. Union of India & Ors.* has allowed the Writ Petition filed by Tata Power Renewable Energy Ltd. (**TPREL**) to quash the Request for Selection (**RfS**) issued by the Andhra Pradesh Green Energy Corporation Ltd. (**APGECL**) for procurement of 6400 MW of solar photovoltaic power from Grid connected solar photovoltaic projects and the draft Power Purchase Agreement issued thereupon. Holding that the award of the tender was in contravention of the Electricity Act, 2003 (**Act**), APGECL has been directed to issue a fresh RfP in accordance with the law.

### BRIEF FACTS

The Govt. of AP decided to provide 9hrs daytime free power supply to 18.73 lakhs farmers in the state. Accordingly, it formulated the scheme, decided to implement the solar power project and issued operational guidelines for implementation of the scheme. The responsibility of being the executing agency, to take action to set-up the 10,000 MW solar power capacity, to procure the power by conducting competitive bidding, to be the Nodal agency for developing solar parks under Ultra Mega Solar power projects and etc. was given to APGECL.

In December 2020, APGECL had floated the bid to develop 6.4 GW of solar projects to provide the 9hrs free daytime power supply to the farmers. Within a month, APEGCL issued the RfS and draft PPA. Thereafter, a petition was filed by TPREL challenging the RfS and draft PPA on account of them being against the provisions of the

Competitive Bidding Guidelines dated 03.08.2017 notified by the Ministry of Power under Section 63 of the Act, which provide for a standard and uniform procedure for long-term procurement of electricity from grid connected solar photovoltaic power projects, having size of 5MW and above, through competitive bidding. The RfS and draft PPA was also contended to outside the purview of the Act.

### FINDINGS

The Court held that the power is not being supplied free of cost to the customers by APGECL as the cost is being borne by the Govt. of AP. As a result, the activity of APGECL of procuring power and supplying the same to the customers involves trading. Hence, it cannot be accepted that no trading activity is involved in the transaction of APGECL.

As APGECL can be termed as procurer, intermediary procurer, agent of the Govt. of AP, the activity done comes within the ambit of clause 1.2 of Competitive Bidding Guidelines and within the meaning of 'Trading' as defined under Section 2(71) of the Act. Therefore, to invite bids from the SPD, APGECL would require a license.

The dispute resolution mechanism provisions in the draft PPAs proposed to vest the power to arbitrate disputes with bureaucrats, which was a violation of the provisions of the Act. The Court held that the impugned RfS and PPA varied significantly from the provisions of the Act and the Competitive Bidding Guidelines, and the said deviations were not approved by the Andhra Pradesh Electricity Regulatory Commission. Therefore, its continuation by successive

Governments without any legal impediment is uncertain and will end up limiting the participation of the bidders in the bidding process due to lack of fairness. Hence, the Court allowed the Writ Petition and set aside the impugned RfS and draft PPA.

*Please find link to Judgment [here](#).*

### *SKV Comment...*

*The Electricity Act, 2003 is a complete code and issues such as competitive bidding must be in terms of the Act and the Regulator has an intrinsic role to play in such transactions. In this case however, a method was carved outside the Act and also outside the scope and powers of the Regulators, which in our view is not permissible. This has been upheld by the High Court as well, where TPREL was represented by SKV Law Offices. It is the duty of the APDECL to issue RfS and PPA strictly in accordance with law.*

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