

No/N /268 /270 /2018

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,
No.16, C-1, Miller Tank Bed Area, Vasanthnagar, Bengaluru-560 052.

Dated : 28.12.2023

Present:

| | | |
|----------------------------|----------|-----------------------|
| Sri P. Ravi Kumar | : | Chairman |
| Sri H.M. Manjunatha | : | Member (Legal) |
| Sri M.D. Ravi | : | Member |

O P No.111/ 2018

BETWEEN:

Adani Green Energy (UP) Limited,
(A Company Registered under the
provisions of the Companies Act,1956,
having its registered office at
Adani House, Nr. Mithakhali Six Roads,
Navrangpura, Ahmedabad – 380 009,
Gujarat.

...PETITIONER

AND

Hubli Electricity Supply Company Limited
A Company Registered under the Provisions of
Companies Act, 1956 having its Registered
Office at Corporate Office, Navanagar, P.B.Road,
Hubballi – 580025, Karnataka.
(Represented by its Managing Director)

...RESPONDENT

O P No. 113/ 2018

BETWEEN:

Adani Green Energy (UP) Limited,
A Company Registered under the
Provisions of the Companies Act,1956,
having its registered office at
Adani House, Nr. Mithakhali Six Roads,
Navrangpura, Ahmedabad - 380009,
Gujarat.

...PETITIONER

(Both the petitioners are Represented by
Smt. Poonam Patil, Advocate.)

AND

Hubli Electricity Supply Company Limited
A Company Registered under the Provisions of
Companies Act, 1956 having its Registered
Office at Corporate Office, Navanagar, P.B.Road,
Hubballi-580 025, Karnataka
(Represented by its Managing Director)

... RESPONDENT

(Both the Respondents are represented by
Sri Shabaaz Hussain, Advocate for Precinct Legal)

ORDERS ON REMAND

1. The above petitions were filed against respondent (HESCOM) for reimbursement of the additional expenditures incurred, for establishment of the two solar power projects and for O&M charges due to introduction of GST laws w.e.f. 01.07.2017, along with carrying costs. This Commission had partly allowed the above petitions by separate Orders both dated 11.02.2022.
2. The petitioner preferred appeals against the final Orders passed by this Commission so far as the claims disallowed by this Commission. The portion of additional expenditure claimed towards purchase of goods and availing of services subsequent to the date of commissioning of the project was disallowed. Further, the claims towards GST impact on O&M expenses and towards the carrying cost on the additional expenditure were also disallowed. (The Appeal Nos. are 133/2022 & 146/2022 as against the Orders in OP Nos.111/2018 & 113/2018, respectively). The amount towards additional expenditure found to be payable was ordered to be paid within 90 days in three equal instalments, in default to pay LPS at the rate of 1.25%

be considered by the CERC while passing an order afresh. Needless to state that, in terms of the Order of the Supreme Court, the order to be passed by the CERC shall not be enforced till the aforesaid Order is either varied or the appeal itself is disposed of by the Supreme Court. The instant appeal is, accordingly, disposed of."

4. After correction of clerical error in the final Orders passed in appeals referring to the CERC instead of the KERC, the final direction in all the Appeals decided on 12.05.2023 relating to the above OPs, may be stated as follows:

"Mr. Amit Kapur, learned Counsel for the Appellant in this appeal, would submit that the subject matter of this appeal is covered by the order passed by us in Appeal No. 432 of 2022 dated 19.01.2023.

In the said order, we had taken note of para 109 of the earlier order passed by this Tribunal in Appeal No. 256 of 2019 and batch dated 15.09.2022, as also the interim order of the Supreme Court in Civil Appeal No. 8880 of 2022 dated 12.02.2022. We had then recorded the submission urged on behalf of Respondents therein that, in case the matter is remanded to the CERC, the contentions, which they were entitled to raise in law, be left open for examination by the CERC. The said appeal was disposed of and, following the aforesaid interim order of the Supreme Court, we had observed that the order to be passed by the CERC (on remand) shall not be enforced till the aforesaid interim order of the Supreme Court dated 12.12.2022 is either varied or the appeal is itself disposed of.

Mr. V.M. Kannan, learned Counsel appearing on behalf of the second Respondent/Discom in Appeal No. 133 of 2022 and Appeal No.146 of 2022, would submit that, since Civil Appeal No. 8880 of 2022 is listed for final hearing before the Supreme Court on 18.07.2023, hearing of this appeal be deferred till final orders are passed therein, instead of remanding the matter to the KERC.

Learned Counsel on both sides agree that the earlier order passed by us in Appeal No. 432 of 2022 dated 19.01.2023, squarely applies to the facts of the present case also. We see no reason therefore to defer hearing, since the aforesaid order passed in Appeal No. 432 of 2022 dated 19.01.2023 adequately safeguards the interests of the Respondents, in that the order of

KERC, even if passed in the interregnum, will not be enforced till the Supreme Court finally decides the matter.

Following the order passed by us in Appeal No. 432 of 2022 dated 19.01.2023, and in terms thereof, this appeal is also disposed of."

5. The above two Original Petitions were taken up for hearing on 22.08.2023 in the presence of the counsel for both sides. On consideration of the Orders passed by Hon'ble ATE, this Commission noted in the Order Sheet of that day, in OP No.111/2018 & OP No.113/2018, as follows:

"Accordingly, the case is called for hearing on 22.08.2023. The Counsel for petitioner Smt. Poonam Patil present. Counsel for Respondent Ms.Stephania Pinto for Precinct Legal present. Petitioner counsel submits that from the date of enforcement of new taxes for entire period of its impact, including post CoD and O&M expenses along carrying cost is required to be verified in accordance with the Order in Appeal No.432/2022 and agreed to provide relevant documentary evidence including O&M agreement for reconciliation of O&M expenses to the Respondent counsel within one month. The Respondent counsel agreed to carry out the reconciliation within one month thereafter and prays for suitable dates for reconciliation. Commission heard both the counsels and directed to carry out the reconciliation process on 3rd, 4th & 5th October 2023 and to file the outcome of the reconciliation report on or before 31st October 2023. Call on 31.10.2023 for further hearing."

6. On 31.10.2023, the counsel for the parties prayed for the time and accordingly, the case was posted on 16.11.2023. On that day, the counsel for the respondent (HESCOM) prayed for time to file statement of objections to the Original Petition in the light of the Hon'ble ATE Order. In the Order Sheet of that day in OP No.111/201 & OP No.113/2018, the Commission has noted as follows:

"Case is called for hearing on 16.11.2023. Counsel for petitioner Smt. Poonam Patil present and made oral submissions on the minutes of the

meeting. Counsel for Respondent Sri Sumanth, for Sri Shahbaaz Husain, for Precinct Legal present and prays to file statement of objections to the original petition in the light of the Hon'ble ATE Order. Commission heard the counsel and noted that since the Hon'ble ATE has not set aside the original Order of this Commission instead directed to dispose the matter in accordance with law only in respect of O&M charges and carrying cost. Accordingly, directed the respondent counsel to file additional statement of objections on before 23.11.2023 with a copy to the respondent for filing response if any. Call on 06.12.2023."

7. The proceedings that has taken place on 06.12.2023 is recorded in OP No.111/2018 as follows:

"Case is called for arguments on 06.12.2023. Counsel for petitioner Smt. Poonam Patil present, made submission that written arguments along with Annexures are filed in the registry on 05.12.2023, prays to take the same on record and argued the matter on merits. Counsel for respondent Ms. Stephania Pinto, for Precinct Legal, present and prays to argue the matter on the original petition. Commission heard the counsel and noted as directed in the last date of hearing, opportunity was provided to the respondents to file written submissions on the point of O&M charges, carrying costs and GST on post CoD on or before 23.11.2023. However, the respondents have not come forward to file the same so far. Hence, opportunity is provided once again to file the same on or before 12.12.2023 in the registry and reserved the case for orders."

8. The respondent (HESCOM) in the above two Original Petitions filed the Memo dated 30.10.2023 in the registry along with minutes of the meeting held between the representatives of the parties at the Corporate Office of the HESCOM, at Hubballi, on 03.10.2023 & 04.10.2023.
9. The material part of the result of the minutes of the meetings filed in the above two OPs, are stated in para 3 to 7, which are similar in substance. Para 3 to 7 of the minutes of meeting filed in OP No.111/2018 & OP No.113/2018 reads as follows:

“ 3. As per commissioning MOM, the AGEUPL has commissioned 20 MW solar power project on 30.01.202018.

4. It is noted that all the invoices are raised and produced are after the commissioning date except the following invoices:

XX
XX
XX

5. All Invoices were duly reviewed, and it was observed that the AGEUPL has claimed assuming the pre-GST Tax at 2% CST on production of C-Form for Inter-State purchase and 15% service tax on Services. As per HESCOM, the pre-GST Tax at applicable VAT rates for Intra-State purchases and 15% service tax on Services.

6. However, the above GST impact claim amount is subject to the statement of objections that have been/will be filed by HESCOM in the proceedings before the Hon'ble KERC.

7. The reconciliation has been done with one to one correlation of invoices produced by the Generator, depicting the GS amount incurred by the generator. However, the reconciliation is without prejudice to either party's claim on the pre-GST rates and on the net impact resulting from GST as a change in law event.”

10. The petitioner has filed common written arguments applicable in the above two OPs & other OPs on 05.12.2023. The documents supporting the claim towards O&M expenses were also filed along with common written arguments. In support of the claim for carrying cost, the petitioner has relied upon certain precedents. The respondent (HESCOM) had not filed written submissions within the time allowed i.e., on or before 23.11.2023. However, the Commission has granted one more opportunity to the respondent (HESCOM) to file the same on or before 12.12.2023. Then the respondent (HESCOM) has filed written submission dated 28.11.2023. Apart from this, it may be noted that certain defences are stated in the minutes of meetings

prepared after reconciliation meetings. In the written submissions dated 23.11.2023 of the respondent (HESCOM), in substance it is contended:

- (a) that the Hon'ble ATE in Appeal No.432/2022 has reserved the liberty to the respondent (HESCOM) to raise all such contentions as it is entitled to in the eyes of law and has further directed the Regulatory Commission to examine the same;
- (b) that the respondent (HESCOM) has brought out the applicable pre-GST rates on various services and goods procured by the petitioner in setting up its power plants. This Commission, despite noting the contentions of the respondent (HESCOM) on pre-GST rates has not deliberate on them in its Order dated 11.02.2022. After citing the specific objection of this respondent (HESCOM) on the issue of pre-GST rates at page 45 of the Order dated 11.02.2022, this Commission at page 110 has erroneously noted that the respondent (HESCOM) has not objected the petitioner's stand in the instant petitions.
- (c) the wholesome reliance on the CA Certificates of the petitioner and the assumption that such certificates suffer from no infirmities, without considering the substantive objections of the respondent (HESCOM) would be violation of principles of natural justice.
- (d) that this Commission in its very recent Order dated 12.09.2023 passed in OP No.34 of 2019 between Clean Solar Power (Tumkur) Private Limited Vs. GESCOM has observed that the pre-GST rates applicable in relation to Solar Cable and Associated Connectors should be considered on the basis of tax rate applicable under KVAT and that a pre-GST rate of 14.5% is applicable over such Solar Cable and Associated Connectors.

(e) that a summary of the cost impact due to the impact of GST prepared by the respondent (HESCOM) vis-à-vis the claim of the petitioner is produced as Annexure-C. The said claim in OP No.111/2018 comes to Rs.5,54,74,462 as against the claim made by the petitioner of Rs.7,99,67,763 and in OP No.113/2018 comes to Rs.3,26,22,328 as against the claim made by the petitioner of Rs.6,75,22,298.

(f) that the decision in Parampujya Solar Energy Private Limited & Another in Appeal No.256/2019 is wholly contrary to the judgment of the Hon'ble Supreme Court of India, and that of the Hon'ble ATE in Adani Power Limited Vs. CERC & Others.

11. We have heard the learned counsel for the petitioner. The learned counsel for the respondent (HESCOM) has prayed for time to argue the matter. However, the Commission has provided an opportunity to file the written submissions on or before 12.12.2023. As already noted the respondent (HESCOM) has filed written submission on 28.11.2023. The claims now made out by the petitioner towards O&M expenses and the earlier disallowed portions of GST & carrying cost are shown in the table below:

| OP No. | Portion of Addl. Expenditure disallowed towards GST impact incurred subsequent to COD (Rs.) | Commercial Operation Date of the Projects | GST impact on O&M expenses from COD to till 31.03.2023 (Rs.) | Carrying cost (not estimated by the petitioner) (Rs.) |
|----------|---|---|--|---|
| 1 | 2 | 3 | 4 | 5 |
| 111/2018 | 63,41,999 | 30.01.2018 | 1,10,03,613 | --- |
| 113/2018 | 1,55,87,654 | 02.03.2018 | 78,84,780 | --- |

12. The following points arise for our consideration:

Point No.1: Whether the petitioner is entitled to the disallowed portion of additional expenditure towards purchase of goods and availing of services subsequent to the date of commissioning of the project?

Point No.2: Whether the petitioner is entitled to the carrying cost and if so, at what rate?

Point No.3: Whether the petitioner is entitled to the additional expenditure due to introduction of GST laws on O&M expenses from COD till 31.03.2023 and if so, to what amount?

Point No.4: What Order?

13. After considering the records and the submission of the petitioner, our findings on the above points are as follows:

14. Point No.1: Whether the petitioner is entitled to the disallowed portion of additional expenditure towards purchase of goods and availing of services subsequent to the date of commissioning of the project?

(a) The Commission has gone through the previous Orders passed by this Commission in the above cases and the decision of the Hon'ble ATE in Appeal No.256 of 2019 & other connected cases between Parampujya Solar Energy Private Limited & Another Vs. CERC & Others.

(b) In Parampujya case, the Hon'ble ATE has also considered the claim for compensation for the additional expenditure suffered due to GST subsequent to COD. The same is discussed in paras 95 onwards of the judgment of Parampujya case. The material part of the said reasoning is stated in para 97 which reads as follows:

"97. It bears repetition to note that change-in-law clauses in the PPAs (Article 12) assure relief to be provided in relation to "any additional recurring/non-recurring expenditure" arising out of change-in-law. There is no restriction in the contracts as to application of this clause for period prior to the COD. The activities of generation of electricity and

its supply, post-COD, are bound to include non-recurring expenditure, O&M expenses being one such area. In fact, the use of the word "any" in relation to the consequent "recurring or non-recurring expenditure" signifies the wide ambit of the contractual clause, no exclusion of such nature as understood by the Commission deserving to be read there into. The extraneous qualification that such expenditure must relate to period prior to COD cannot be approved of."

(c) In the present cases, the portion of claim towards Additional Expenditure disallowed towards GST impact incurred subsequent to COD, is stated in column No.2 of the table in para 11 of this Order. The said disallowed portion is to be now allowed in both the cases as noted therein, for the reasons stated above.

(d) The written submission of the learned counsel for the respondent (HESCOM) would show that the Remand Order in the appeals concerned in these cases reserved the liberty to the respondent (HESCOM) to raise all such contentions as it is entitled to raise in the eyes of law and this Commission has to examine the same, is to be rejected. Because this Commission has taken the considered view on 16.11.2023, regarding the Remand Order that the Hon'ble ATE has not set-aside the original Order of this Commission instead directed to dispose the matter in accordance with law only in respect of O&M charges and carrying cost, the earlier findings cannot be reopened.

(e) For the above reasons, Point No.1 is held in affirmative.

15. Point No.2: Whether the petitioner is entitled to the carrying cost and if so, at what rate?

(a) In Parampujya Solar Energy case, the Hon'ble ATE has in paras 56 to 93,

considered the liability of the DISCOMs purchasing energy for payment of carrying cost for additional expenditure incurred due to Change-in-Law (CIL) effect. The remand Order specifically directs to follow the principles stated in Parampujya case. In the above OPs this Commission had disallowed the request for allowing carrying cost. Subsequent to Parampujya case, this Commission has allowed the carrying cost at 10% per annum on the additional expenditure incurred due to impact of GST from the respective dates of incurring additional expenditure till the payment of additional expenditures. The same view is being followed in the present case also.

(b) For the above reasons, Point No.2 is held in affirmative

16. Point No.3: Whether the petitioner is entitled to the additional expenditure due to introduction of GST laws on O&M expenses from COD till 31.03.2023 and if so, to what amount?

(a) In Parampujya case, the discussions and reasons regarding the liability to pay the additional cost due to GST on O&M expenses are stated from para 103 onwards. Para 107 concludes the reasons for payment of additional cost due to GST on O&M expenses. The said reasons are stated below:

"107. The above decision applies on all fours. We adopt the view taken in case of Costal Gujarat Power Limited (supra) and disapprove the decision of the Central Commission on the subject as quoted above and hold that the appellant SPPDs are entitled to compensation for additional expenditure (recurring/non-recurring) towards O&M activities as well, notwithstanding the fact that they were outsourced."

(b) The petitioner has produced 'Service Order' supporting the claim for having outsourced the O&M services to third party. It has also produced the CA Certificates in support of the claim made towards impact of GST on O&M expenses. The said claim is as noted in column No.4 of the table in para 11 of this Order. Therefore, the said claim is to be allowed.

(c) The objection of the respondent (HESCOM) noted in minutes of meeting are not maintainable, in view of the fact that the Commission is of the view that the remand Order is only limited to follow the principles stated in Parampujya case, but not reopening of the facts on which already findings are recorded.

(d) For the above reasons, Point No.3 is held in affirmative.

17. Point No.4: What Order?

(a) The petitioner was required to quantify the carrying cost becoming due as on the date of filing the petition and was liable to pay the filing fee (court fee). In the same way for the present, the petitioner has claimed additional expenditure due to GST on O&M expenses till 31.03.2023, which claim substantially relates to subsequent to filing of the present OPs. On this claim also the petitioner is liable to pay the filing fee (court fee).

(b) In the present cases, the liability to pay additional expenditure incurred on O&M expenses and post-COD GST impact and the payment of carrying cost have been arrived at mainly on the basis of the principles stated in Appeal No.256 of 2019 decided on 15.09.2022 by the Hon'ble

ATE in Parampujya Solar Energy Private Limited and Another Vs. Central Electricity Regulatory Commission & Others and other connected Appeals. It is found that as against this decision the Civil Appeal No.8880/2022 has been admitted before the Hon'ble Supreme Court of India and an interim order is passed on 12.12.2022 as noted above. In the present remand Order, it is directed that the reliefs to be granted is subject to the final outcome of the case pending before the Hon'ble Supreme Court of India. In this regard, the direction given in the remand Order reads as follows:

"Needless to state that, in terms of the Order of the Supreme Court, the order to be passed by the CERC shall not be enforced till the aforesaid Order is either varied or the appeal itself is disposed of by the Supreme Court. The instant appeal is, accordingly, disposed of."

- (c) Subsequent to the interim Order passed by the Hon'ble Supreme Court of India, directing to pass further Order in terms of para 109 of the Appeal No.256/2019 dated 15.09.2022 (Parampujya case) but such further Order should not be enforced till the matter is considered by the Hon'ble Supreme Court of India, this Commission had passed conditional Orders directing to pay the amounts found due under different Heads subject to the final result in Civil Appeal No.8880/2022 of the Hon'ble Supreme Court of India and directing the parties to adjust their rights and liabilities accordingly, by way of restitution, with a view to avoid accrual of carrying cost payable by the ESCOMs.
- (d) Additional expenditure on O&M expenses is a recurring cost. It is not in dispute that such recurring cost is liable to be reimbursed by the

respondent (HESCOM) from time to time on production of invoices raised against the petitioner by the O&M Service Provider for having incurred GST towards O&M Services in terms of the O&M Service Agreement. Further, the petitioner should also satisfy by furnishing CA certificate as proper documentary evidence for having discharged the liability of payment of GST to the service provider on additional expenditure. On compliance of such requirements by the petitioner, the respondent (HESCOM) may be directed to pay the additional expenditure due to O&M Services becoming due subsequent to 01.04.2023 and by drawing the required Supplementary Bills from time to time.

(e) For the above reasons, we pass the following:

FURTHER ORDER

(i) The following claims towards GST impact subsequent to the COD on the goods purchased and service availed and on the O&M expenses as noted in the below table are allowed:

| OP No. | Portion of Addl. Expenditure now allowed towards GST impact incurred subsequent to COD (Rs.) | GST impact on O&M expenses from COD to 31.03.2023 (Rs.) |
|----------|--|---|
| 1 | 2 | 3 |
| 111/2018 | 63,41,999 | 1,10,03,613 |
| 113/2018 | 1,55,87,654 | 78,84,780 |

(ii) The petitioner is entitled to carrying cost at 10% per annum on the additional expenditure incurred due to introduction of GST laws from the respective dates of incurring additional expenditures till the date of payment in full.

- (iii) The petitioner shall compute the carrying cost becoming due as noted in sub-para (ii) above within 8 (eight) weeks from the date of issue of this Order and a copy of the computation sheet shall be furnished to the respondent (HESCOM) for its verification.
- (iv) The respondent (HESCOM) shall pay the amounts found due as noted in sub-paras (i) & (iii) above, in four quarterly equal instalments with single default clause, the first instalment becoming due after three months from the date of this Order and the subsequent instalments becoming due on succeeding quarters.
- (v) The petitioner is directed to quantify the carrying cost at 10% per annum, accruing due as on the date of filing the petitions and to pay Court Fee (Filing Fee) payable on such carrying cost that would become due as on the date of filing these two petitions within one month from the date of this Order.
- (vi) The petitioner is further directed to pay the Court Fee (Filing Fee) payable on O&M expenses now claimed within one month from the date of this Order.
- (vii) In default of payment of Court Fee (Filing Fee) as noted in sub-paras (v) & (vi) above, these two petitions stand rejected.
- (viii) The reliefs of carrying cost and of reimbursement of additional expenditures incurred subsequent to commissioning of the projects, as granted above shall be subject to the final result in Civil Appeal No.8880/2022 of the Hon'ble Supreme Court of India and the parties shall adjust their rights and liabilities accordingly, by way of restitution. The Petitioner in both the cases shall give an undertaking to the above effect.
- (ix) On raising the Supplementary Bills for reimbursement of

additional expenditure incurred subsequent to 01.04.2023, due to GST effect on O&M Services on the basis of actuals with supporting documents as noted in para 17 (d), the respondent shall pay the same.

(x) The original Order be kept in OP No.111/2018 and the copy of it in the other connected case.

sd/-
(P. RAVI KUMAR)
Chairman

sd/-
(H.M. MANJUNATHA)
Member (Legal)

sd/-
(M.D. RAVI)
Member