

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

**APPEAL NO. 61 OF 2021
APPEAL NO. 62 OF 2021
APPEAL NO. 63 OF 2021
APPEAL NO. 64 OF 2021
APPEAL NO. 65 OF 2021**

Dated: **03.02.2022**

Present: **Hon'ble Mr. Justice R.K. Gauba, Officiating Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

APPEAL NO. 61 OF 2021

In the matter of:

AZURE SOLAR PRIVATE LIMITED

Asset No.301-4

World Mark 3, Aerocity,

New Delhi - 110 017

.... Appellant(s)

VERSUS

1. CENTRAL ELECTRICITY REGULATORY COMMISSION

3rd & 4th Floor, Chanderlok Building,

36, Janpath,

New Delhi- 110001

2. NTPC VIDYUT VYAPAR NIGAM LIMITED

Core-7, SCOPE Complex NTPC Bhawan,

7 Institutional Area,

Lodhi Road,

New Delhi – 110003

3. NTPC LIMITED

Core-7, SCOPE Complex,

7 Institutional Area, Lodhi Road,

New Delhi – 110003

**4. PUNJAB STATE POWER CORPORATION
LIMITED (PSPCL)**

Through its Managing Director

The Mall, PSEB Head Office,

Baradari, Patiala,

Punjab - 147 001

5. **UTTAR PRADESH POWER CORPORATION LIMITED (UPPCL)**
Through its Managing Director
Shakti Bhawan, 14 Ashok Marg,
Lucknow - 226 001
6. **CHHATTISGARH STATE POWER DISTRIBUTION COMPANY LIMITED (CSPDCL)**
Through its Managing Director
4th Floor, Vidyut Seva Bhawan Dangania, Raipur,
Chhattisgarh – 492 013
7. **GRID CORPORATION OF ORISSA LIMITED (GRIDCO)**
Through its Managing Director
Bhoi Nagar, Janpath
Bhubaneswar - 751 022
8. **WEST BENGAL STATE ELECTRICITY DISTRIBUTION COMPANY LIMITED (WBSEDCL)**
Through its Managing Director
Vidyut Bhaan, Bidhannagar,
Block DJ, Sector-II, Kolkata – 700 091
9. **DAMODAR VALLEY CORPORATION LTD (DVC)**
Through its Chairman
DVC Headquarters, DVC Towers,
VIP Road, Kolkata – 700054
10. **MANGALORE ELECTRICITY SUPPLY COMPANY LIMITED (MESCOM)**
Through its Managing Director
Paradigm Plaza, AB Shetty Circle,
Mangalore - 575 001
11. **BANGALORE ELECTRICITY SUPPLY COMPANY LIMITED (BESCOM)**
Through its Managing Director
BESCOM, KR Circle,
Bangalore – 560 001
12. **CHAMUNDESHWARI ELECTRICITY SUPPLY CORP. LIMITED (CESC)**
Through its Managing Director No. 927,
New Kantharaj Urs Road,
Saras watipuram
Mysuru – 570 009

- 13. GULBARGA ELECTRICITY SUPPLY COMPANY LIMITED (GESCOM)**
Through its Managing Director
Corporate Office, Station Road,
Kalaburagi,
Karnataka - 585 102
- 14. HUBLI ELECTRICITY SUPPLY COMPANY LIMITED (HESCOM)**
Through its Managing Director
PB Road, Navanagar,
Hubli - 580 025
- 15. ASSAM POWER DISTRIBUTION COMPANY LIMITED (APDCL)**
Through its Managing Director
Bijulee Bhawan, Paltan Bazaar,
Guwahati - 781 001
- 16. JAIPUR VIDYUT VITRAN NIGAM LIMITED (JVVNL)**
Through its Managing Director
Vidyut Bhawan, Jyoti Nagar,
Jaipur-302 005
- 17. JODHPUR VIDYUT VITRAN NIGAM LIMITED (JD.VVNL)**
Through its Managing Director
New Power House, Industrial Area,
Jodhpur,
Rajasthan - 342 003
- 18. AJMER VIDYUT VITRAN NIGAM LIMITED (AVVNL)**
Through its Managing Director
Vidyut Bhawan, Panchsheel Nagar,
Makarwali Road,
Ajmer - 305 004
- Respondent(s)
- Counsel for the Appellant (s) : Mr. Amit Kapur
Mr. Akshat Jain
Ms. Alviya Ahmed
Mr. Aniket Prasoon
Ms. Shweta Vashist
Mr. Md. Aman Sheikh
Mr. Mridul Gupta
Ms. Priya Dhankar
Ms. Akansha Tanvi
- Counsel for the Respondent (s) : Mr. M.G. Ramachandran, Sr. Adv.
Ms. Poorva Saigal

Ms. Tanya Sareen
Ms. Srishti Khindaria
Mr. Ravi Nair for R-2

Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Mr. Ashwin Ramanathan
Mr. Utkarsh Singh
Mr. Amal Nair for R-4, R-16-18

Mr. Shahbaaz Husain
Mr. Fahad Khan for R-10 to R-14

APPEAL NO. 62 OF 2021

In the matter of:

AZURE CLEAN ENERGY PRIVATE LIMITED

Asset No.301-4

World Mark 3, Aerocity,

New Delhi - 110 017

.... Appellant(s)

VERSUS

1. CENTRAL ELECTRICITY REGULATORY COMMISSION

3rd & 4th Floor, Chanderlok Building,

36, Janpath,

New Delhi- 110001

2. SOLAR ENERGY CORPORATION OF INDIA LIMITED

Through its Managing Director

1st Floor, A-Wing

D-3, District Centre, Saket,

New Delhi-110017

3. RAJASTHAN URJA VIKAS NIGAM LIMITED (RUVNL)

Through its Managing Director

Vidyut Bhawan, Janpath

Jaipur-302 005

.... Respondent(s)

APPEAL NO. 63 OF 2021

In the matter of:

AZURE POWER MARS PRIVATE LIMITED

Asset No.301-4

World Mark 3, Aerocity,

New Delhi - 110 017

.... Appellant(s)

VERSUS

1. CENTRAL ELECTRICITY REGULATORY COMMISSION

3rd& 4th Floor, Chanderlok Building,
36, Janpath,
New Delhi- 110001

2. SOLAR ENERGY CORPORATION OF INDIA LIMITED

Through its Managing Director
1st Floor, A-Wing
D-3, District Centre
Saket, New Delhi-110017

3. JODHPUR VIDYUT VITRAN NIGAM LIMITED (JDVVNL)

Through its Managing Director
New Power House, Industrial Area,
Jodhpur,
Rajasthan - 342 003

.... Respondent(s)

Counsel for the Appellant (s) : Mr. Aniket Prasoon
Ms. Shweta Vashist
Mr. Md. Aman Sheikh
Mr. Mridul Gupta
Ms. Priya Dhankar
Ms. Akansha Tanvi

Counsel for the Respondent (s) : Mr. M.G. Ramachandran, Sr. Adv.
Ms. PoorvaSaigal
Ms. Tanya Sareen
Ms. Srishti Khindaria
Mr. Ravi Nair for R-2

Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Mr. Ashwin Ramanathan
Mr. Utkarsh Singh
Mr. Amal Nair for R-3

APPEAL NO. 64 OF 2021

In the matter of:

AZURE GREEN TECH PRIVATE LIMITED

Asset No.301-4
World Mark 3, Aerocity,
New Delhi - 110 017

.... Appellant(s)

VERSUS

1. CENTRAL ELECTRICITY REGULATORY COMMISSION

3rd& 4th Floor, Chanderlok Building,
36, Janpath, New Delhi- 110001

2. SOLAR ENERGY CORPORATION OF INDIA LIMITED

Through its Managing Director
1st Floor, A-Wing,
D-3, District Centre, Saket,
New Delhi-110017

3. HRAYANA POWER PURCHASE CENTRE (HPPC)

Through its Chief Engineer Shakti
Bhawan, Sector-6
Panchkula-134108

.... Respondent(s)

APPEAL NO. 65 OF 2021

In the matter of:

AZURE SUNSHINE PRIVATE LIMITED

Asset No.301-4
World Mark 3, Aerocity,
New Delhi - 110 017

.... Appellant(s)

VERSUS

CENTRAL ELECTRICITY REGULATORY COMMISSION

3rd & 4th Floor, Chanderlok Building,
36, Janpath,
New Delhi- 110001

SOLAR ENERGY CORPORATION OF INDIA LIMITED

Through its Managing Director
1st Floor, A-Wing,
D-3, District Centre, Saket,
New Delhi-110017

HARYANA POWER PURCHASE CENTRE (HPPC)

Through its Chief Engineer Shakti
Bhawan, Sector-6
Panchkula-134108

.... Respondent(s)

Counsel for the Appellant (s) : Mr. Aniket Prasoon
Ms. Shweta Vashist
Mr. Md. Aman Sheikh
Mr. Mridul Gupta
Ms. Priya Dhankar
Ms. Akansha Tanvi

Counsel for the Respondent (s) : Mr. M.G. Ramachandran, Sr. Adv.
Ms. Ranjitha Ramachandran
Ms. PoorvaSaigal

Ms. Tanya Sareen
Mr. Shubham Arya
Mr. Arvind Kumar Dubey
Ms. Srishti Khindaria
Mr. Ravi Nair for R-2

Ms. Ranjitha Ramachandran
Ms. PoorvaSaigal
Ms. Tanya Sareen
Mr. Shubham Arya
Mr. Arvind Kumar Dubey
Ms. Srishti Khindaria
Mr. Ravi Nair for R-3

J U D G M E N T(Oral)

PER HON'BLE MR JUSTICE R.K. GAUBA, OFFICIATING CHAIRPERSON

1. These matters have been taken up by video conference mode on account of pandemic conditions, it being not advisable to hold physical hearing.

2. These five appeals have raised identical grievances vis-à-vis the impugned order passed by the Respondent Commission – Central Electricity Regulatory Commission (CERC), in proceedings qua each of these appellants, solar power generators, the prayer made being in respect of denial of relief on the subject of operation & maintenance expenses in light of two change in law events viz. imposition of Service Tax & GST. The impugned order was rendered on 19.11.2019 passed commonly in Petition Nos. 184/MP/2018, 185/MP/2018, 188/MP/2018, 190/MP/2018 and 191/MP/2018.

3. It appears that the CERC has denied compensation on account of change in law events having an impact on O & M expenses for the reason

that the appellants had outsourced such activities to third party. The appellants are also aggrieved by denial of carrying cost vis-à-vis the previously mentioned claim of compensation, the reasons set out in the impugned order being that in the Power Purchase Agreements (PPAs) governing the relationship of the parties, there is no provision incorporating of restitutionary principle.

4. The appellants rely on decision of this tribunal in the case of *Coastal Gujarat*(Appeal No.172 of 2017) passed on 27.04.2021 and in *Azure Power Eris Private Limited Vs. Bihar Electricity Regulatory Commission & Others* (Appeal No.129 of 2019) rendered on 13.01.2022 to contend that since there is no inhibition in the PPAs against outsourcing of the activities relating to the operation & maintenance, the denial of relief on account of change in law events is unjust and unfair. The appellant also submits that the provision contained in Article 12.2.2 (under the head “for relief of change in law”) allows a decision to be rendered by the Central Commission upon it being approached by the aggrieved party for not only that “approval of change in law” but “for relief” to be provided in such respect. Reliance is placed on judgments including *Sovintorg (India) Ltd. Vs. State Bank of India, New Delhi* (1999) 6 SCC 406 and *Dushyant N. Dalal and Anr. Vs. SEBI* (2017) 9 SCC 660.

5. In case of *Coastal Gujarat Power Limited Vs. CERC & Others*(supra) on the question of outsourcing of operating & maintenance activities, this tribunal had taken the following view:

“67. It is argued that the operation and maintenance of the plant is the responsibility of the appellant and if the appellant seeks to employ services of other agencies, the same cannot increase the liability of the Procurers; this was a commercial decision and choice of the appellant; and that if the appellant had not employed services of outside agencies, there would have been no impact of the alleged changes of tax rates.

68. We find no substance in the above submissions. The work contractors are engaged by the appellant within its discretion and there is no inhibition in PPA in such regard. In fact, it is pointed out by the appellant, and rightly so, that Article 7 of the Model PPA which was a part of the RFQ documents had envisaged that the generator (Seller) alone shall be liable to operate and maintain the power station at its own cost but, in the final PPA that was executed between the parties, the clause to such effect was removed, this clearly indicative of the common understanding of the parties that the generator(CGPL) would not be solely responsible for O&M, the definition of ‘Project Documents’ read with ‘O&M contracts’ contemplating that a third party O&M contractor might be appointed by it (CGPL).

90. The respondents defend the impugned decision arguing that the Commission has duly allowed the claim of change in law in respect of the levy of Swachh Bharat Cess and Krishi Kalyan Cess in respect of such services as are linked to the business of generation and sale of electricity, such relief being not admissible in respect of other services since under Articles 13.1.1 and Article 13.2(b) read with Clause 4.7 of the Guidelines any change in law impact is confined to change in revenues and costs from the business of selling electricity by the Seller to the Procurers. Reference is made to the judgment dated 19.04.2017 of this tribunal in Appeal No. 161 of 2015 in *Sasan Power Limited v. Central Electricity Regulatory Commission and Others*. The respondents submit that there may be various activities carried out by the appellant as a commercial decision but which are neither necessary nor concerned with the business of selling electricity. It is argued that the appellant had failed to demonstrate as to how the other services claimed have an impact on the cost of or revenue from the business of selling electricity by it to the Procurers. At the same time, it is stated that the services claimed by CGPL, except in relation to transportation of goods (coal), are not related to the business of selling electricity. The submission also is that there has to be some benefit to the procurers or necessity for such services. The respondents further aver that the operation and maintenance of the power plant is the responsibility of Appellant and the fact that the appellant chose to employ services of other agencies can not increase the liability of the Procurers.

91. It is not disputed that the appellant(CGPL) is a project specific Special Purpose Vehicle (SPV) set up solely for the purpose of generating and supplying electricity exclusively to the Procurers in accordance with the PPA. It engages in no other business undertaking. All services availed by CGPL are undoubtedly used for its sole objective of generating electricity for supply to the Procurers under the PPA. The increased cost towards Krishi Kalyan Cess and Swachh Bharat Cess affects the cost of the business of the appellant for generation and sale of electricity. The twenty services left out by CERC also are connected to the commercial activities of the appellant adding to its cost of production and supply. In this view, there was no justification for disallowance of the claim for additional financial burden on other services covered under Swachh Bharat Cess and Krishi Kalyan Cess contrary to Article 13 of the PPA.

92. We agree with the submission that CERC erred to introduce an extraneous qualification or filter which is not borne out from the PPA. The qualifying factor under Article 13 of the PPA is whether or not a CIL event has an impact on the cost of, or revenue from, the business of generation and sale of electricity by the seller (CGPL). In this view, the test applied by CERC that taxable service should have a “direct relation to the input cost of generation” is extraneous to the provisions of the PPA and must be rejected. It is trite that

explicit terms of a contract (PPA) bind and it is not open for the adjudicating forums to substitute their own view on the presumed understanding of the commercial terms by the parties [Nabha Power Limited v. PSPCL & Anr. (2018) 11SCC508]. Once it is established that levy of a tax on services availed by CGPL has an impact on the cost of or revenue from business of generation and sale of electricity whether directly or indirectly –compensation must follow.”

6. Following the above, this tribunal with consent of the parties of that case had directed in the matter of *Azure Power Eris Private Limited Vs. Bihar Electricity Regulatory Commission & Others*(supra) similar remit for reconsideration by the State Commission.

7. After some hearing, it is fairly conceded by the learned Senior Counsel, Mr. M.G. Ramachandran on behalf of NVVN& SECI that the matter deserves to be remitted to the Central Commission for reconsideration of the issue of O&M expenses in light of rulings of this tribunal in *Coastal Gujarat*(supra) &*Azure Power Eris Private Limited Vs. Bihar Electricity Regulatory Commission & Others* (supra). Though the learned counsel for other respondents seem to have some reservations, we feel that it would be appropriate that the Commission is called upon to revisit the issue in light of the above mentioned rulings of this tribunal. We order accordingly.

8. Learned counsel for the respondents seek to contest the claim of the appellants on the subject of carrying cost. Learned counsel for the appellants submitted that since the issue of O&M expenses is being remitted, their right to challenge the view taken in the impugned order by the Central Commission vis-à-vis carrying cost may be reserved to be pursued and agitated after decision on O&M expenses issue has been

rendered afresh by the Central Commission. We accept this request and grant liberty, as prayed.

9. For the forgoing reasons, and in these circumstances, we set aside the impugned orders to the extent thereby the Central Commission has denied the relief and impact of change in law on the O&M expenses and remit the same to the Central Commission for fresh consideration in light of the relevant law presently governing the subject. Needless to add, we expect the Central Commission to hold the proceedings expeditiously in accordance with law and render fresh decision under this remit at an early date preferably within two months. We request the Commission accordingly.

10. The appeals are disposed of in above terms.

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO
CONFERENCING ON THIS 03RD DAY OF FEBRUARY 2022.**

(Sandesh Kumar Sharma)
Technical Member

pr/tp

(Justice R.K. Gauba)
Officiating Chairperson