

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION

No. 16 C-1, Miller Tank Bed Area, Vasanth Nagar, Bengaluru- 560 052

Dated : 17th September, 2019

Present:

Shri Shambhu Dayal Meena .. Chairman
Shri H.M. Manjunatha .. Member
Shri M.D. Ravi .. Member

1) OP No.98/2018

BETWEEN:

ACME Guledagudda Solar Energy Private Limited,
Corporate Office: Plot No. 152,
Sector 44, Gurgaon,
Haryana – 122 001.

.. **PETITIONER**

[Represented by HSA Advocates, Advocates]

AND:

Bangalore Electricity Supply Company Limited
Corporate Office,
K.R. Circle,
Bengaluru – 560 001.

.. **RESPONDENT**

[Represented by Justlaw, Advocates]

2) OP No.99/2018

BETWEEN:

ACME Kudligi Solar Energy Private Limited,
Corporate Office: Plot No, 152,
Sector 44, Gurgaon
Haryana- 122 002.

.. **PETITIONER**

[Represented by HSA Advocates, Advocates]

AND:

Bangalore Electricity Supply Company Limited
Corporate Office,
K.R. Circle,
Bengaluru – 560 001.

.. **RESPONDENT**

[Represented by Justlaw, Advocates]

3) OP No.100/2018**BETWEEN:**

AMCE Sandur Solar Energy Private Limited,
Corporate Office: Plot No. 152,
Sector 44, Gurgaon,
Haryana- 122 001.

.. **PETITIONER**

[Represented by HSA Advocates, Advocates]

AND:

Hubli Electricity Supply Company Limited
Corporate Office,
Navanagar,
P.B. Road,
Hubballi – 585 025.

.. **RESPONDENT**

(Represented by Shri Shahbaaz Husain, Advocate)

4) OP NO.101/2018**BETWEEN:**

ACME Siddlghatta Solar Energy Private Limited,
Corporate Office: Plot No. 152,
Sector 44, Gurgaon,
Haryana- 122 001.

.. **PETITIONER**

[Represented by HSA Advocates, Advocates]

AND:

Bangalore Electricity Supply Company Limited,
Corporate Office,
K.R. Circle,
Bengaluru – 560 001.

.. **RESPONDENT**

[Represented by Justlaw Advocates]

5) OP No.102/2108**BETWEEN:**

ACME Kittur Solar Energy Private Limited,
Corporate Office, Plot No.152,
Sector 44, Gurgaon,
Haryana – 122 001.

.. **PETITIONER**

[Represented by HSA Advocates, Advocates]

AND:

Bangalore Electricity Supply Company Limited
Corporate Office,
K.R. Circle,
Bangalore-560 001.

.. **RESPONDENT**

[Represented by Justlaw, Advocates]

6)**OP No.103/2018****BETWEEN:**

ACME Hukkeri Solar Energy Private Limited,
Corporate Office, Plot No. 152,
Sector-44, Gurgaon
Haryana-122 001.

.. **PETITIONER**

[Represented by HSA Advocates]

AND:

Hubli Electricity Supply Company Limited
Corporate Office,
Navanagar,
P.B.Road
Hubballi – 585 025.

.. **RESPONDENT**

[Represented by Shri Shabaaz Husain]

COMMON ORDERS

1. These Petitions are filed under Section 86(1)(f) and other provisions of the Electricity Act, 2003 by the Petitioners which are SPVs of M/s ACME Solar Holdings Limited (ACME) and engaged in the business of development, owning, operating and maintaining utility scale grid connected solar power projects, for generation of solar power.
2. The Petitioners have filed these petitions before maintaining utility scale grid connected solar power projects, for generation of solar power this Commission praying in each case to:-
 - (a) Declare the imposition of safeguard duty on the import of solar modules as Change in Law event in terms of the PPA which has led to an increase in the non-recurring expenditure for the Project;

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- (b) Evolve a suitable mechanism to compensate the petitioner for the increase in non-recurring expenditure incurred by the petitioner on account of Change in law;
 - (c) Grant interest/ carrying cost from the date of impact till reimbursement thereof by the Respondent;
 - (d) Grant extension of SCOD of the project equivalent to the time taken in approval of Change in Law and
 - (e) Pass any such other and further reliefs as this Commission deems just and proper in the nature and circumstances of the present case.
 3. The Karnataka Renewal Energy Development Limited (KREDL) being a nodal agency of the Government of Karnataka had invited proposals vide its Request for Proposal (RfP) dated 7.12.2017, prescribing the technical and commercial terms and conditions for selection of bidders for undertaking the development of solar PV ground mounted power projects in Karnataka. Pursuant to the aforementioned RfP, KREDL accepted the bids of ACME Solar Holdings Ltd for development of 15 MW and 20 MW (AC) capacity of solar PV ground mounted projects at various places and had issued Letters of Award (LOA) dated 08.02.2018 to M/s. ACME Solar Holdings Limited.
 4. These petitions are filed with similar grounds, therefore, we have clubbed them together and heard to pass an appropriate Common Order. Petitioners have entered into separate Power Purchase Agreements (PPAs) with the Respondents concerned for setting up of the solar PV ground mount projects and the consequent supply of solar power to concerned ESCOM (Annexure- A). The brief facts of the case are given below:

SI No.	Petition No and Name of Project & location	Capacity	Date of Acceptance of bid	Date of signing PPA with concerned ESCOM	Date of approval of PPA	Period allowed as per PPA for SCOD
1	Petition No.98/2018 ACME Guledgudda	15 MW	8.2.2018	22.3.2018 BESCOM	4.5.2018	18 months
2	Petition No.99/2018 ACME Kudalgi	20 MW	8.2.2018	22.3.2018 BESCOM	4.5.2018	18 months
3	Petition No.100/2018 ACME Sandur	20 MW	8.2.2018	27.3.2018 HESCOM	4.5.2018	18 months
4	Petition No.101/2018 ACME Siddalghatta	20 MW	8.2.2018	22.3.2018 BESCOM	4.5.2108	18 months
5	Petition No. 102/2018 ACMC Kittur	15 MW	8.2.2018	22.3.2108 BESCOM	4.5.2018	18 months
6	Petition No. 103/2018 ACME Hukkeri	15 MW	8.2.2018	27.3.2108 HESCOM	4.5.2018	18 months

5. The present petitions are filed before this Commission for seeking declaration of Safeguard Duty Notification No.1/2018 (SG) dated 30.7.2018 issued by the Ministry of Finance, Government of India, as a "Change in Law" event in accordance with Article 15 of the Power Purchase Agreement and consequential reliefs thereon(Annexure-2). This notification was issued by the Ministry of Finance, Government of India, under sub-section (1) of Section 8-B of the Customs Tariff Act, 1975 read with Rules 12,14, and 17 of the Customs Tariff (Identification and Assessment of Safeguard Duty) Rules,1997 levying safeguard duty on import of "Solar Cell whether or not assembled in modules or panels". Under this notification, safeguard duty is leviable at different rates on

import of solar cell from China and Malaysia during the period of two years, which is given below: -

- a. twenty-five per cent ad valorem, minus anti-dumping duty payable, if any, when imported during the period from 30th July 2018 to 29th July 2019.
 - b. twenty per cent ad valorem, minus anti-dumping duty payable, if any, when imported during the period from 30th July 2019 to 29th January 2020.
 - c. Fifteen per cent ad valorem, minus anti- dumping duty payable, if any, when imported during the period from 30th January 2020 to 29th July 2020.
6. The Learned Counsel for Petitioners submitted written arguments and also rejoinder to statement of objections filed by the Leaned Counsel for Respondents. In order to understand the scope of the 'Change in law' provisions under the present PPA and the reliefs for which the petitioners are entitled, the relevant provisions of the PPA are mentioned hereunder:

(i) The term 'Law' has been defined in article 21.1 of the PPA as given below: -

"Law" shall mean in relation to this Agreement, all laws including Electricity laws in force in India and any statue, ordinance, regulation, notification or code, rule or any interpretation of any of them by an Indian Government Instrumentality and having force of law and shall further include without limitation all applicable rules, regulations, orders, notification by an Indian Government Instrumentality pursuant to or under any of them and shall include without limitation all rules, regulations, decisions and orders of the KERC."

(ii) Further, the term 'Law' includes rules, regulations, orders issued by an Indian Government Instrumentality, therefore, it is relevant to examine the term "Government Instrumentality" which has also been defined under Article 21.1 of the PPA, which is re-produced below: -

“Government instrumentality” means any department, division or sub-division of Government of India or the State Government and includes any commission board, authority, x x x----- to this Agreement”

The above mentioned definition of Government Instrumentality includes the Government of India as well as the Government of Karnataka, Further, it also includes any Ministry, Department, Board, Authority, Agency, Corporation, and Commission under direct or indirect control of the Government of India. Therefore, it is submitted that the aforesaid definition includes all Ministries and Departments including Ministry of Finance.

(iii) Article 15 of the PPA stipulates and recognises the “change in law” which is reproduced here under: -

“15.1.1 ‘Change in Law’ means the occurrence of any of the following events after the “Effective Date” resulting into any additional recurring/ non-recurring expenditure by the Developer or any income to the Developer:

a. The enactment coming into effect, adoption, promulgation, modification or repeal (without re-enactment or consolidation) in India, of any law, including rules and regulations framed pursuant to such Law;

b. x x x x x

c. x x x x x

d. x x x x x

e. Any change in taxes and duties or introduction of any taxes and duties made applicable for setting up of the project and supply of power by the Developer as per the terms of this agreement. The Bidder shall consider all the prevailing taxes and duties applicable on the date of submission of Technical Bid while submitting the Bid for the project(s). If any such above prevailing taxes and duties are not considered or omitted or ignored, then it shall be accepted that the bidder has considered all such taxes and duties in its Bid. Any change in law pertaining to taxes and duties after the date of

submission of Technical Bid shall be to the account of ESCOM and appropriate change in tariff, either increase or decrease in proportionate, due to the change in taxes and duties shall be as per clause 15.2 (Relief for Change in Law) of PPA.

But shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Developer, or (ii) any change on account of regulatory measures by the KERC, or (iii) any change in the KERC approved Tariff as compared to the approved tariff exist as on the Bid Due Date.”

(iv) Article 15.2 of PPA provides ‘Relief for Change’ in Law which states that the aggrieved Party shall be required to approach the KERC under provision 15.2.1 for seeking approval of Change in Law. Further, Article 15.2.2 stipulates that the KERC has to acknowledge the decision on change in law and date from which it will become effective, provide relief for the same, shall be final and governing on both the Parties.

(v) It is further submitted that the “Effective Date” under the PPA is very crucial and relevant on which a change in law event occurs and thereafter, if any change or introduction in new taxes and duties has occurred after the submission of Technical Bid, then the Solar developer will get benefits of such change in law event. The abstract of the Article of PPA is given below:

“Article 3.1 Effective Date: -

This agreement shall come into effect from the date of its execution by getting concurrence from KERC on the PPA and such date shall be referred to as the Effective Date.”

Thus, the Article 15.1.1.e. stipulates that:

“Any change in taxes and duties or introduction of any taxes and duties Any change in law pertaining to taxes and duties after the date of submission of Technical Bid shall be to the account of the BESCOM or HESCOM as case may be PPA”

(vi) The petitioners contend that in view of above provisions of PPA, the imposing of safeguard duty by the Government of India vide its notification dated 30.7.2018 is an event that has occurred after effective date of PPA that is 4.5.2018 and thus, it qualifies a change in law event under the terms of the PPAs. Hence, the Petitioners being aggrieved by the same, have approached this Commission, for seeking declaration of that event of imposing of safeguard duty on import of solar cells/ panels as a "change in law event" under Article 15.1 of the PPA and also sought for consequent reliefs under Article 15.2 from this Commission.

(vii) The Petitioners further submitted that Under Section 8-B of the Customs Tariff Act, 1975 and Rule 12 of the Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997 which empowers the Central Government to issue notification levy safeguard duty on import of articles/goods into India, if it is satisfied that the said articles/goods are being imported in large quantities and under such circumstances so as to cause or threaten to cause a serious injury to the domestic solar cells/ panels/ modules manufacturing industry. Therefore, Ministry of Finance, Government of India had issued the safeguard duty notification dated 30.7.2018 by imposing safeguard duty on the import of solar cells/panels, as prescribed in the aforesaid notification. Further, such imposition of safeguard duty would be in the nature of a tax and duty imposed on the imported solar cells / modules. By virtue of issuance of the Safeguard duty notification, it would cover by the phrase" introduction of any taxes and duties" on import of solar cells/ panels for setting up of solar project, which are primary component in the setting up of a solar project.

(viii) The introduction of levy of safeguard duty on import of solar cell/panel would be one-time capital expenditure, resulting in additional burden on the project cost and which requires an

additional financial sanctions from the financial institutions. Moreover, duties and taxes in relation to setting up of solar project leading to increase in recurring and non-recurring expenditure for the petitioners. The petitioners are in the process of importing of solar cells / panels which will be attracting 25% safeguard duty along with an additional IGST of 5% on safeguard duty. The safeguard duty notification which has come into force on 30.7.2018, after the Effective Date of PPA that is 4.5.2018, which leads to increase in non- recurring expenditure for the Petitioners, thus, the same is an event of "Change in Law" in terms of Article 15 of the PPA.

(ix) Petitioners contended that although there is no concept of "return on equity" and "interest on working capital" in a competitive bid tariff document, but the increase in cost due to change in law events have an indirect bearing on the two. These components are integral to the all-inclusive tariff bid. At the time of the submissions of bids, the petitioners have factored in interest on working capital and return on equity based on the cost prevalent at the time of bid. With the increase in the cost due to the change in law events explained above, the working capital requirement and consequently, the interest on working capital have also increased as compared to requirement of capital and interest rate prevalent at the time of filing bid. Thus, the petitioners are entitled to get interest on incremental working capital at normative interest rate to put the petitioners to the same economic position as if change in law has not occurred.

(x) Therefore, the petitioners seek approval of this Commission to claim as an adjustment/ recovery of additional cost which are being accrued to the petitioners on account of levy of safeguard duty notification and pray to declare it as change in law event. The Petitioners will place on record the relevant purchase invoices, bills and documents, to show the actual impact of levy of safeguard duty

on imported solar cells/ panels in due course of arguments. However, to substantiate their claims, a computation sheet of an Indicative change in law impact of safeguard duty on cost of imported solar cells/ module is placed at Annexure-3.

(xi) Petitioners contended that they have served a notice dated 12.9.2018 to the Respondents about the aforesaid safeguard duty notification dated 30.7.2018 issued by the Government of India and its impact on cost of project execution and sought for acknowledging the imposition of safeguard duty as change in law event and further requested to reimburse the additional cost likely to be incurred by the Petitioners. (Annexure-4). But, the Respondents have failed to give any response to this notice.

(xii) Petitioners submit that the essence of "Change in law" clause under Article 15 of the PPAs is to restore the affected party to the same economic position as if the said Change in law event had not occurred. As, restitution is an integral part of the compensation granted under Change in law, carrying cost is to be allowed as part of compensation on account of the change in law provision of PPA. Carrying cost, simply put, is a compensation for the time value of money. It is relevant to highlight the meaning of the word "compensation" as has been laid down by the Hon'ble Supreme Court in the matter of R.C. Cooper vs. Union of India (AIR 1970 SC 540) wherein it was held that "compensation means anything given to make things equal in value: anything given as equivalent, to make amends for loss or damage," further, the Hon'ble Supreme Court in case of Yadava Kumar vs. Divisional Manager, National Insurance Corporation Limited and Ors (2010 10 SCC 341) held that "compensation is a comprehensive term and is aimed at restoring the party to same economic position as if no injury was caused."

(xiii) It is further submitted that the impact of imposition of safeguard duty has considerably increased the cost of project of the petitioners due to which there will be delay in Financial Closure of the projects as the petitioners will be able to raise the additional funds from financial institutions to meet the additional cost after approval of Change in law by the KERC. Hence, there will be delay in achieving the Commercial Operation Date (COD) of the project. Therefore, the petitioners are also seeking relief of extension of Scheduled Commissioning Date equivalent to the time taken in approval of Change in Law.

7. On behalf of Respondents learned counsel from Just Law has submitted that: -

- (i) The present Petitions are not maintainable as there is no cause of action, which has accrued as on the date of filing the Petitions. It ought to be noted that the Petitioners have not suffered the levy of safeguard duty at this stage as they have not commissioned their solar projects as yet. The entire premise, upon which these Petitions have been filed is that, the Petitioners could suffer the said safeguard duty in future during the course of implementation of project, if they import the solar cells/panels from China or Malaysia. In the absence of any substantial material to show that the Petitioners have actually suffered the safeguard duty while importing the solar cells/ modules from developed countries such as China PR and Malaysia wherein safeguard duty is levied as per the aforesaid notification, the question of determining the quantum of compensation on account of change in law, would not arise at this stage of implementation of projects. Therefore, prayers made in these Petitions are premature and deserve to be rejected.

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- (ii) Petitioners are seeking that the imposition of Safeguard Duty under Notification dated 30.7.2018 is to be declared as Change in Law event under the provisions of Article 15 of the PPA, thereby giving the benefit of the alleged additional burden to the Petitioners. In this regard, attention of this Commission is drawn to the relevant Articles 15.1.1 and 15.1.1(e) of the PPAs entered on 22.03.2018 and 27.3.2018 between Petitioners and BESCO & HESCO, which deal with the circumstance under which change in law event could be declared and relief thereof can be given, but, it cannot be declared on the basis of assumptions and presumptions as sought for by the petitioners.
- (iii) As contended by the petitioners that since the safeguard duty on import of solar modules has been imposed after the date of the submission of the technical bid and increase in duties and taxes has taken place after that, so this event is covered as change in law event under Article 15 of the PPA, but such prayer of the Petitioners should have been made based on material facts and circumstances that may or will occur in the future, should not be recognised at this stage by the Commission.
- (iv) As contended by the petitioners that the levy of the safeguard duty has put an additional financial burden on the projects, hence, they are required to raise the necessary funds from REC Limited to undertake and complete the projects, subsequent to declaratory order about the change in law event is passed by this Commission. The admission of aforesaid fact by the petitioners, which shows that not much expenditure has been incurred so far by the Petitioners towards completion of the said solar Projects, if it has really occurred, then petitioners could have submitted the supplementary bills/ claims along with these petitions. Thus, the question of determining the additional compensation that would

be payable on account of change in law, does not arise at this stage. Moreover, petitioners are seeking a mere declaratory order from this Commission to satisfy the pre- requisite conditions put forth by the REC Limited by vide Letter No .REC/CO/REN/Solar/2018-19/ AGSEPL/ dated 31.12.2018 for Sanctioning of Term Loan Assistance to the Petitioners, which could be seen at para 2- imposing of Safeguard Duty/Change in taxes (Annexure-1) which states that:-

- a. In case of imposition of Safeguard Duty by the Government and pending finalisation of increase in tariff by KERC, the disbursement shall be allowed up to Rs.55.20 crores (i.e. 75% of project cost without safeguard duty)
- b. The promoter shall bring in additional funds/ loan to complete the project without any recourse to the project securities.
- c. On final tariff approval by the regulator, the case will be re-valuated with revised tariff and also the project cost. The remaining debt to the extent of project viability/debt servicing will be disbursed subject to maximum total debt of Rs.64.08 Crore. Such debt may be utilised for reimbursement of additional funds/unsecured loans brought in by the promoter.

- (v) It could be seen from the above letter that the petitioners intend to raise more loan from REC Limited with an assurance/ commitment that tariff would be revised by this Commission by declaring the imposition of safeguard duty notification as change in law event. It may be noted that the correspondence made for seeking Term Loan is between Petitioners and REC Limited and does not concern to Respondents and this Commission. Moreover, a third party arrangements does not have any bearing on the

instant case and also on change in law event benefits that Petitioners are seeking from the Respondents herein.

(vi) Averment made by the Petitioners shows that, an additional cost is being incurred or to be incurred on account of the Safeguard Duty Notification, but the Petitioners have failed to place on record even a single invoice or bill of entry of imported solar cells/ panels that can prove the facts that, the Petitioners have actually incurred expenditure and suffered the safeguard duty. The only document which has been placed on record by the petitioners is a hypothetical statement produced at Annexure-3 of the petition, of the "Indicative Change in Law Impact of Safeguard Duty on Cost of imported Solar cells/Modules, considering CERC Benchmark" wherein a 16.26% impact on the cost of the project has been predicted. However, the note at the end of the said statement, states that the above computation is indicative only based on Project Cost of Rs.100 Crore. Petitioners will place on record actual impact of safeguard duty along with actual project cost, module cost, relevant documents, invoices in due course of proceedings, but, no such reliable materials/ records were produced during the course of arguments. Even, the sum indicated at Annexure-3, is based on assumptions and presumptions and it is a settled law that judicial orders cannot be passed merely on the basis of assumptions and presumptions.

(vii) It is contended that unless the reliable material is placed on record by a party to substantiate its contention that it has suffered a taxing event, the benefit of change in law cannot be given. The Hon'ble Central Electricity Regulatory Commission, in the Petition No. 187/MP/2018, while deciding the matter pertaining to introduction of New GST Laws, as change in law event, wherein it held "that any additional cost claim of Petitioner, incurred by it

during the construction period, due to the purchase of any goods or services, has to be correlated with bill of entry raised by the supplier of the goods and services along with an Auditors' certificate."

- (viii) Further, Petitioners have said in their rejoinder submitted on 13.8.2019 that, they have already procured few number of solar modules but could not produce the relevant invoices/ bill of entry of imported solar cells/panels and safeguard duty paid thereon and also about recurring and non- recurring expenditure incurred by them. Moreover, Petitioners have failed to quantify in terms the actual sum of money being claimed as compensation, recurring and non-recurring expenditure on account of issuance of safeguard duty notification dated 30.7.2018. In view of above facts, no prayer can be considered on the said incomplete data, which are based on mere assumption and resultantly, the Petitioners are not entitled to any of the reliefs sought in the present Petitions.
- (ix) The Learned Counsel for Respondents further submit that petitioners should abide by the "Good Industry Practice" as envisaged in Article 21.1 of PPA, that put obligation on Developer to complete its project in economical and efficient manner.
- (x) As contended by the petitioners that, the impact of the imposition of the safeguard duty is that it has considerably increased the cost of the project, due to which the Petitioners would be in position to raise the additional funds to meet the additional cost requirements only subsequent to the approval of this Commission, as a change in law event and reliefs given thereof, this process may delay in achieving the Commercial Operation Date (COD) of the Project for which the petitioners have also sought an extension of the Scheduled Commercial

Operation Date (SCOD) equivalent to the time taken to approve the change in Law benefit. In this regard, it is brought to the notice of the Commission that Article 5.7 of the PPA deals with situations arising out for grant of extension of time for the project, and also stipulates the events in which the developer is prevented from achieving the progress in fulfilling the Conditions Precedent within the time stipulated in the PPA, the concerned ESCOM may grant extension of time, not more than four months for fulfilling the conditions precedent. The developer shall commission the project and thereafter may file a petition before the KERC for seeking such condoning the delay in commissioning the project urging any of the ground mentioned in above said Article. In the instant case, the time taken by the Petitioners to seek the benefit of change in law is not a circumstance and ground, which warrants the grant of an extension of time. Further, since the Petitioners herein have not relied on any of the conditions specified in Article 5.7.1 of PPA. Therefore, the prayer of the Petitioners for extension of time, commensurate with the time taken by this Commission for adjudicating upon the present Petition, is untenable. In view of above, the prayers made by the Petitioners in these petitions are liable to be rejected.

- (xi) At the time of hearing on 1.8.2019, the learned Counsel for the Petitioners in all the cases has filed the Affidavit signed by the Petitioners and made a submission stating that the Petitioners do not press prayer number (d) and the same may be taken on record, for which the learned Counsel for Respondents did not have any objection. Hence, the Prayer(d) in all these petitions shall stand deleted.

8. We have heard the learned Counsels for the Petitioners and Respondents, who have filed the written arguments. The following issues would arise for our consideration:

Issue No.1: Whether there can be a declaration that the Imposition of Safeguard Duty Notification No. 01/2018-Custom(SG) dated 30.07.2018 issued by Government of India, on the import of solar modules is covered under the scope of "Change in Law" under Article 15 of Power Purchase Agreement?

Issue No.2: Whether there is need to evolve a suitable mechanism to compensate the Petitioners for the increase in recurring and non-recurring expenditure without importing the Solar Cells/ panels for the projects is sustainable?

Issue No.3: Whether the claims of the petitioners for grant of interest on working capital and carrying cost for delay in reimbursement by the Respondents is sustainable?

Issue No.4: Whether the claims of the Petitioners to restore the same economic conditions that prevailed prior to occurrence of the Change in Law can be considered?

Issue No.5: What order?

9. **Issue No.1:** *Whether there can be a declaration that the Imposition of Safeguard Duty Notification No. 01/2018-Custom(SG) dated 30.07.2018 issued by Government of India on the import of solar cells/panels is covered under the scope of change in law under Article 15 of Power Purchase Agreement?*

(i) It is not in dispute that the Petitioners have entered the Power Purchase Agreements on 22.3.2018 and 27.3.2018 with the Respondents to setup Solar Power Projects at various places in Karnataka. Projects are under implementation stage and Schedule

Commissioning period is 18 months from the effective date i.e.4.5.2018. However, petitioners sought a declaratory Order from this commission, on imposition of safeguard duty on import of solar cells/ panels on the basis of Notification No.01/2018- Customs(SG) dated 30.7.2018 issued by the Ministry of Finance, Government of India, under Article 15 of PPA, as a "Change in Law" event which will enable them to raise additional funds from the REC Limited. The REC Limited has put a pre-requisite condition for sanctioning of term loan to the Petitioners. In this regard, the learned Counsel for Respondents contended that the correspondence made between Petitioners and REC Limited for sanctioning of Term Loan Assistance is an internal arrangement and does not concern to the Respondents and to this Commission. Moreover, there is no specific provision available under the present PPAs wherein, this Commission could entertain the request for passing a declaratory Order as a "change in law" event for raising additional loans for procuring such solar cells/panels which are stated to be imported from the developed countries, where such safeguard duty is levied. Reliance placed by the Petitioners is on the orders passed by the Hon'ble Maharashtra Electricity Regulatory Commission, in Case Nos.276, 325 and 340 of 2018 and Case Nos.123-124 of 2019, wherein, the imposition of Safeguard Duty is allowed as "Change in Law" under the PPA. Therefore, the petitioners have sought for a similar type of relief as it provided under the existing Article 15.2.1.1 of PPAs.

- (ii) Further, Petitioners have placed reliance on order dated 2.5.2019 in Petition Nos.342 and 343/MP/2018 passed by the Hon'ble Central Electricity Regulatory Commission in case of Acme Rewa Solar Energy Private Limited vs. Solar Energy Corporation of India, wherein, it held that "the imposition of the Safeguard Duty vide Notification No.1/2018(SG) dated 30.7.2018 is covered and classified as "Change in Law" event under provisions of PPA." To counter this argument,

Counsel for Respondents submitted that the petitioner's intention behind seeking such declaratory relief is that of seeking an assurance that the Petitioners will be compensated for the import of solar cells/panels from developed countries such as China or Malaysia. These countries come within the purview of the Safeguard Duty Notification, which defeats the very purpose of the issuance of such notification, in order to protect the domestic industry from threat or injury and to encourage the usage of local solar cells/panels. Further, contends that the Petitioners seek a declaratory Order from this Commission to ensure an additional tariff relief, if the solar cells/panels are to be imported from China or Malaysia, in that scenario, the REC Limited may consider to sanction an additional Term Loan Assistance to these projects and thereafter, the disbursement of loan would be allowed on the basis of final tariff approved by the KERC which may enable them to re-evaluate the project cost with the revised tariff.

- (iii) The Counsel for Respondents further contended that in the instant case, the Petitioners are seeking declaratory relief order on the basis of a Hypothetical Statement produced at Annexure-3 to the petition, which is merely based on assumptions and presumptions, which cannot be considered by the Commission in a quasi-judicial proceeding. Per contra, the Advocate for Petitioners submits that, the Petitioners are not seeking a declaration before the Civil Court in a suit for recovery of money from the Respondents, but these petitions have been filed under Section 86 of the Electricity Act, 2003, for invoking the adjudicatory powers of this Commission. Further, the petitioners are not seeking specific performance of an obligation, but praying for adjudication on facts. Therefore, Order 2 Rule 2 of Civil Procedure Code and principles laid down therein to the extent, to suit for declaratory relief is not applicable in the instant case.

(iv) The Advocate for Respondents submit that it is a settled law that a Prayer for declaration without consequential relief is not maintainable. The Hon'ble Supreme Court of India, in Case of Venkataraja and Ors Vs. Vidyane Doureradjaperumal and Ors [2014] 14 SCC 502] and Muni Lal vs. Oriental Fire and General Insurance Company Limited [1996] 1 SCC90] has held as follows:

“4. Mere declaration without consequential relief does not provide the needed relief in a Suit; it would be for the Plaintiff to seek both reliefs. The omission thereof mandates the Court to refuse the grant of declaratory relief”

Therefore, it is submitted that the petitioners herein have not suffered the levy of safeguard duty as yet and the entire premise upon which the present Petitions have been filed prematurely, seeking a declaratory relief, which is not tenable.

(v) On the basis of examination of written submission/ statement of objections and rejoinders submitted by the parties, we proceed to examine as to whether a Notification No.01/2018-Customs(SG) dated 30.7.2018 issued by the Government of India, imposing the safeguard duty on imported solar cells whether or not assembled in modules or panels, is covered under scope of “Change in law” event or otherwise under the provisions of PPAs of the solar projects? To decide this issue, it is necessary that we have to go through the various definitions and clauses of the present PPA.

(vi) The terms “Law” and “Government Instrumentality” are defined under definitions' clause of Article 21.1 of the aforesaid PPAs. Article 15 defines the term “Change in Law” means the occurrence of any of the following events after the effective date resulting into any additional recurring/ non- recurring expenditure by developer or any income to the developer.

- a. The enactment coming into effect, adoption, promulgation, modification ----- regulation.
- b. A change in the interpretation or application of any law by Indian Government Instrumentality having legal power to interpret or apply such Law.
- c. any change in tax and duties or introduction of any taxes and duties made applicable for setting up of the project and supply of power by the developer as per the terms of agreement, as provided in Article 15.1.1 (e)

Article 15.2 stipulates Relief for change in law and Article 15.2.1 stipulates that the aggrieved party shall be required to approach to KERC for seeking approval of change in law. Further, Article 15.2.2 states that the decision of the State Commission, to acknowledge a change in law and the date from which it will become effective and to provide relief for the same, shall be final and binding on both the parties.

- (vii) The Commission notes that the Hon'ble Appellate Tribunal for Electricity in its Judgment in Appeal No.111/2017 in GMR Warora Energy Limited vs. Central Electricity Commission and Ors, has held that "any tax levied through an Act of Parliament after cut-off date which results in additional expenditure by the petitioner, same is covered as 'Change in Law'".
- (viii) It is not in dispute that a notice of intimation of change in law was issued by the Petitioners vide Letter Ref: ACME/BUS/ 120918/1363 dated 12.9.2018 to the Respondents, regarding imposing of Safeguard Duty, vide notification No.1/2018, dated 30.7.2018 by the Government of India and with reference to Article 15 of PPA. It could be seen from the above said letter that the petitioners have requested Respondents to acknowledge the imposition of

safeguard duty as change in law event with a request to reimburse the additional cost incurred/ is to be incurred for completion of solar projects(Annexure-4). The commission notes that, no record is placed by the Respondents which could show that they have denied to recognise the imposition of safeguard duty notification as a change in law event. The Commission, further notes that Article 15.2.1 of the PPA, stipulates that the aggrieved party shall be required to approach the KERC for seeking approval of change in law. In the instant case, the Petitioners have filed these petitions before this Commission on 19.11.2018 to seek a declaratory order to recognise the imposition of safeguard duty notification dated 30.7.2018 as a "Change in Law" event, as contemplated in Article 15.2.1 of PPA.

- (ix) The Commission notes that any event can be said to be a "Change in law Event" only if satisfies the provisions as stipulated under the PPA. In the instant case, the terms "Law" and "Government Instrumentality" are defined under Article 21.1 of PPA and "Change in Law" has also been defined under Article 15 of the PPA. The definition of "Law" under the PPA is an inclusive definition and contemplates all laws applicable in India in various forms. However, for an event to be considered as "Change in Law event" requires that to be caused by the operation of law or by an Indian Instrumentality. The term "Indian Government Instrumentality" covers Government of India, any Ministry, Government of Karnataka, Inspectorate, Department, Commission, Body, Authority, Agency, Municipal and Local Authority or Statutory Body. The "Change in Law" encompasses introduction of any law after last date of Bid Submission which may affect the project cost of the developer. Under the provisions of PPAs, an event arising from the actions of any authority is covered within the definition of "Indian Government

Instrumentality" would satisfy the requirement of "Change in Law". The Indian Government Instrumentality" as defined under the PPA includes any Ministry of the Government of India. The Ministry of Finance being Ministry under the Government of India is satisfying the requirement of "an Indian Government Instrumentality" under clause 21.1 of PPAs. Further, as per clause 15.1.1.e. of the PPAs, notification of new law or amendment of existing law or introduction / change in tax, duty after the date of submission of Technical Bid qualifies as Change in Law event. In the instant case, the Safeguard Duty Notification dated 30.7.2018 issued by the Ministry of Finance, Government of India is subsequent to the last date of submission of bids. In view of above, the Commission is of the view that as per Government of India Notification No.01/2018-Customs(SG) dated 30.7.2018, imposing Safeguard Duty on import of "Solar Cells, whether or not assembled in Modules or Panels" is covered as an event of" Change in Law "under the provisions Article 15 of the PPAs.

Therefore, we hold that Notification No.1/2018- Customs(SG)dated 30.7.2018 on imposition of safeguard duty on import of solar cells/ panels modules issued by the Government of India is an event of "Change in law" in terms of Article 15 of the PPAs of the Petitioners.

Hence, our answer on Issue No.1 is affirmative,

10. **Issue No.2:** *Whether there is need to evolve a suitable mechanism to compensate the petitioners for the increase in recurring and non- recurring expenditure without importing of solar cells/ panels for the projects is sustainable?*

- (i) The Petitioners sought declaration of safeguard duty notification and seeking compensation for increase in recurring and non-recurring expenditure due to imposition of safeguard duty on

imported solar cells/panels which will have impact on the project cost. Further, there would be additional need for raising funds from the financial institutions, such as REC Limited to meet out the financial requirements. The Counsel for Petitioners contended that while submitting the competitive tariff bid, such safeguard duty on import of solar cells/ panels was not factored in the bids, as the bidding processes were completed earlier to the imposition of safeguard duty Notification dated 30.7.2108. It is submitted that there is a specific provision under Article 15.1.1 of PPA which deals with such events. Further, Article 15.1.1.e. of PPA stipulates that any change in law pertaining to taxes and duties occurring after the date of submission of Technical Bid shall be to the account of concerned ESCOM and appropriate change in tariff, either increase or decrease in proportionate, due to the change in taxes and duties shall be as per clause 15.2 of the PPA.

- (ii) Per contra, the Counsel for Respondents submit that the petitioners have not placed any relevant records/ documents which could show that required number of solar cells/panels have already been imported by the petitioners either from China or Malaysia and safeguard duty is levied thereon by the Customs Authorities, which have resulted in increase the project cost including recurring and non- recurring expenditure and that will have to be borne by the concerned ESCOM in the form of additional tariff. Reliance placed by the Petitioners is only on the basis of a statement relating to an Indicative Change in Law Impact of Safeguard Duty on cost of Solar Cells/ Modules considering CERC Benchmark at Annexure-3 to these petitions, wherein a 16.26% impact on the cost of the project has been predicted. However, the sum indicated therein, is made on assumption and presumption by the Petitioners, which cannot be a basis for seeking claim of additional recurring and non- recurring

expenditure. He further submits that it is a settled law that judicial orders cannot be passed merely on the basis of assumptions and presumptions. If it is passed, then it should be based on actual cost incurred by the Petitioners, supported with documentary evidence with prudence check and Auditor's certificate. Therefore, prayer made by the Petitioners in this regard, is liable to be rejected.

- (iii) After hearing arguments of both the parties, the Commission observes that recurring expenses may be like salary, tax expenses and Operation and Maintenance services to a third party etc. The non-recurring expenditure would be like capital cost of solar cells/ panels / modules and land cost etc. The concept of outsourcing of services to third party is neither included expressly under provisions of the PPAs nor it included implicitly in the Article 15 of the PPA. However, Article 15.1.1 of PPA stipulates that occurrence of any of the events as indicated in aforesaid clause of PPA after the Effective Date resulting into any additional recurring and non-recurring expenditure by the developer or any income to the developer, after the date of submission of Technical bid has to be borne by the concerned ESCOM. It is further observed that in the Competitive e-Bidding process, the Solar power developer bids levelled tariff without disclosing the details of the financial calculations of the project cost, including capital and recurring and non-recurring expenditure. The design of the bid levelled tariff is solely a decision of a solar power developer. In view of above, Commission is of the opinion that it is a commercial decision taken by the petitioners for their own advantage and any increase in cost including on account of taxes and duties and in the event, if the petitioners choose to employ the services of other agencies, cannot increase the liability for the Respondents. Therefore, the Commission is of the opinion that the Petitioners have failed to place the cogent materials/ documents such as :

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- (a) details of date and name of vendor to whom the purchase order is placed or will be placed;
 - (b) the origin of the country from which the order is placed along with the details of the technology;
 - (c) the date on which Invoices raised or would be raised;
 - (d) expected date on which solar cell or modules are / will to be imported into India;
 - (e) the date on which the payment including safeguard duty plus IGST for the goods/items is or will be made;
 - (f) the date on which the solar cells/ panels/ modules are delivered to the Petitioners and
 - (g) expected date on which the Petitioners would receive at the site for commissioning the projects, to substantiate their claims. In the instant case, the claims made by the petitioners on the basis of a computation sheet i.e. an indicative change in law impact of Safeguard Duty on the project cost cannot be relied upon, without placing entire particulars along with prudence check done by the Statutory Auditor which could quantify the actual financial impact on their projects. Hence, the prayer made by the Petitioners is not tenable.
- (iv) The Commission notes that Scheduled Commissioning Date (SCOD) of these projects is eighteen months from the Effective Date under clause 21.1 of PPAs and actual status of Financial Closure of these projects is not known at present. During the proceedings of the case, it is observed that, setting up of solar projects is still underway and as such it is premature to assess any impact of Safeguard Duty in absolute numbers without having substantiating documents with the petitions, the actual impact of Safeguard Duty on project cost, can

be ascertained only when the projects achieve SCOD. It could be noted that the clause 4.1 of PPAs which cast an obligation on Developer to satisfy the Conditions Precedent within twelve months from the effective date of PPAs. Further, clause 4.2(f) stipulates that the Condition Precedent is required to be satisfied by the Developer and it shall be deemed to have been fulfilled Technical Requirements for Solar PV ground mount project as per the Format provided in Schedule- 2 of the PPAs and provide the documentary evidence for the same. In the instant case, no such documentary evidence has been produced by the petitioners during the proceedings of the case. In view of above, the Commission holds that the prayer made by the Petitioners for seeking compensation for recurring and non- recurring expenditure is not sustainable and hereby it is rejected. Therefore, there is no need to evolve a mechanism to compensate the Petitioners at this stage because project has not been commissioned as yet. Hence, our answer to Issue No.2 is in negative.

11. **Issue No.3:** *Whether the Claims of the petitioners for grant of interest on working capital and carrying cost without quantifying it for delay in reimbursement by the Respondents is sustainable?*

- (i) Counsel for Petitioners submits that although there is no concept of "return of equity" and "Interest on working capital" in a competitive bid tariff, but the increase in cost, due to change in law event, have an indirect bearing on the project cost. These components are integral to all-inclusive tariff bid. At the time of submission of bids, the Petitioners have factored in "interest on working capital" and "return on equity" based on the cost prevalent at the time of bid, but with the increase in the cost due to change in law event, the working capital requirement and consequently, the interest on working capital has also increased as compared to requirement of working capital and interest rate prevailed at the time of bid. Thus,

they are entitled to get relief for interest on incremental working capital at normative interest rate. It is submitted that carrying cost is the compensation for time value of the money. Any compensation for change in law is incomplete, if it does not come with carrying cost that is inherent in the very provision of the PPAs.

- (ii) To substantiate their arguments, Petitioners have relied upon an order passed by the Hon'ble Appellate Tribunal for Electricity in Appeal No. 210 of 2017, wherein, it held "that carrying cost is in the nature of compensation for money denied at the appropriate time." The Petitioners further submit that the principle of recovery of carrying cost/ interest and time value of money has been recognised in various cases such as Tata Power Renewal Energy Limited vs. Maharashtra State Electricity Distribution Company Limited, in Case No.276 of 2018 passed by the Maharashtra Electricity Regulatory Commission and the Hon'ble Supreme Court in the Case of Energy Watchdog vs. Central Electricity Regulatory Commission and Ors [2017 (14) SCC 80], has held that where a situation arises which is not covered under the Guidelines or Guidelines do not deal with a given situation, the Commission's general regulatory powers under Section 79(1) (b) of the Electricity Act can be used.
- (iii) The Counsel for Respondents submits that though there is no concept of interest on working capital and return on equity in a Competitive Bidding process. Petitioners have quoted an all-inclusive tariff which has been incorporated under the PPAs and further the PPAs having been signed by the parties is a binding document and no claim could be made by the Petitioners dehors the provisions of the PPAs. He further argued that the Petitioners have not produced any document showing that they have incurred the carrying cost and paid additional interest on working capital used for the completion of solar projects, without

quantifying it and seeking reimbursement from the Respondents is not justifiable. Therefore, the petitioners are not entitled for any relief sought in the present petitions. Reliance placed by him, is on the basis of the Hon'ble Supreme Court in Case of Energy Watchdog vs. Central Electricity Regulatory Commission [2017(14) SCC 80] wherein it held "that an increase in coal price on account of Change in Indonesian Law is not a Change in Law as the PPA provides for relief only when there is change in Indian Law.". He further submits that in the instant case, how the reimbursement claims made for interest on working capital and carrying cost is considered, without quantifying it, when they have not produced any documentary evidence showing that it has adversely impacted on carrying cost of the project. Hence, their prayer is liable to be rejected.

(iv) The Commission placed reliance on the Judgment of Hon'ble Supreme in case of Union of India vs. Tulasiram Patel (1985) 3 SCC 398, wherein, it has held that "when express inclusions are specified, anything which is not mentioned explicitly is excluded". Therefore, the Commission notes that there are no explicit or implicit provisions available under the PPAs which allows the carrying cost to compensate the petitioners without incurring it and without placing the material evidence in this regard. Therefore, Commission holds that claims for grant of return on equity and interest on working capital and reimbursement by the Respondents are not sustainable. Hence, our answer on issue No.3, is in negative.

12. **Issue No.4:** *Whether the claims of the Petitioners to restore the same economic conditions that prevailed prior to occurrence of the Change in Law can be considered?*

(i) The Counsel for Petitioners submits that though there is no specific provision under the PPAs for restoration of the developers to the same

economic positions as if no change in law event had occurred, but Guidelines for tariff based competitive bidding process for procurement of power from grid connected solar PV power projects issued by the Ministry of Power, vide Notification No. 23/27/2017, dated 3.8.2017 provide for such relief. Further, para 5.7.1 of the Tariff Guidelines states that if any change in law event results in any financial loss/ gain to the Solar Power Generator/ Procurer, aggrieved party shall be entitled to be compensated by the other party.

(ii) Counsel for Petitioners further argued that the Competitive Bidding Guidelines (CBG) is issued by the Central Government under Section 63 of the Electricity Act,2003 and biddings for these projects were undertaken by Karnataka Renewal Energy Development Limited (KREDL) under the same notification. It is settled principle of law that CBG notification has force of law. In this regard, they have placed reliance on the findings made by the Hon'ble Supreme Court in Case of Energy Watchdog vs CERC [2017 14 SCC 80] and in case of Jayanti Lal Amartlal Shodahan Vs, FN Rana Commissioner, Baroda Division & Ors [AIR 1964 SC 648]. It is further submitted that the provisions of restitution as laid down in clause 5.7 of the Competitive Bidding Guidelines will apply mutatis mutandis to the change in law provisions under the PPA. Counsel for Respondents contended that the application of restitution principle is not applicable in the instant case, as there is no specific clause or provision available under the existing PPAs. Therefore, the petitioners are not entitled to claim such relief which is not provided under the PPAs.

(iii) The Commission observes that it is a settled law that terms cannot be implied in to contract, contrary to the express provisions set out therein. Therefore, when the PPAs clearly do not envisage restitution to the same economic position unlike other PPAs, there can be no question of providing relief under a general notion of business efficacy. In fact, the stark contrast to other PPAs which expressly

contemplate economic restitution makes it clear that the same was never intended by the parties while entering into the agreement at the first instance. Moreover, there is no specific provision under these PPAs to restore the same economic position, as if no change in law event had occurred. The Commission has placed reliance upon the Judgment of the Hon'ble Appellate Tribunal for Electricity in Appeal No. 210 of 2017 in Case of Adani Power Limited vs. Central Electricity Regulatory Commission and Ors, wherein, it held" that since Gujarat Bid-1 PPA has no provision for restoration to the same economic position, the decision of allowing carrying cost will not be applicable."

(iv) Further, this Commission has placed reliance upon judgment of the Hon'ble Supreme Court in the Case of Union of India vs. Tulasiram Patel (1985) 3 SCC 398, wherein it held that the maxim "expressum facit cessare tacitum" it means when express inclusions are specified, anything which is not mentioned explicitly is excluded. In the instant case, relief for restoration of same economic condition to the Petitioners as it would have been in the absence of change in law event, cannot be considered as there is no specific provision exists in the PPAs. In view of above, we are of the considered view that in the present case, there is no implicit or explicit provision available under the existing PPAs which could restore the same economic position to the Petitioners as prayed for. Therefore, we hold that prayer made by the petitioners is liable to be rejected. Hence, our answer on issue No.4 is in negative.

13. In view of the foregoing reasons, we pass the following:

COMMON ORDER

(1) The Petitions, bearing Nos. 98, 99, 100, 101,102 and 103 of 2018, are partly allowed;

- (2) The Notification No.01/2018-Customs (SG), dated 30.7.2018, issued by the Ministry of Finance, Government of India imposing Safeguard Duty qualifies as a Change in Law event;
- (3) The other prayers b, c and e, as urged in these Petitions, are hereby rejected and prayer d stands rejected, as observed in para 7(xi) of the Order; and,
- (4) The original Order be kept in OP No.98 of 2018 and copies, thereof, in OP Nos.99,100,101,102 and 103 of 2018.

Sd/-

(SHAMBHU DAYAL MEENA)
CHAIRMAN

Sd/-

(H.M. MANJUNATHA)
MEMBER

Sd/-

(M.D. RAVI)
MEMBER