

**Before the**  
**MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**  
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**CASE No. 47 of 2019**

Case of Azure Power India Private Limited for approval and determination of compensation on account of Change in Law for Solar Project.

M/s. Azure Power India Pvt. Ltd ..... Petitioner

V/s

Maharashtra State Power Generation Co. Ltd ..... Respondent No. 1

Maharashtra State Electricity Distribution Co. Ltd. .... Respondent No.2

**Appearance**

For the Petitioner : Ms Dipali Sheth (Adv)  
For the Respondent No.1 : Shri S.B Soni  
For the Respondent No.2 : Shri Ashish Singh (Adv)

**Coram**

**Anand B. Kulkarni, Chairperson**  
**I.M. Bohari, Member**  
**Mukesh Khullar, Member**

**ORDER**

**Date: 22 April, 2019**

1. M/s Azure Power India Private Limited (**APIPL**) has filed this Case dated 18 February, 2019 for approval and determination of compensation on account of Change in Law due to promulgation of Safeguard Duty on the import of Solar Cells, by Ministry of Finance, Department of Revenue's Notification No. 01/2018-Customs (SG) dated 30 July, 2018 for its

Solar Project as per draft Power Purchase Agreement (**PPA**) with Maharashtra State Power Generation Co. Ltd (**MSPGCL**).

**2. Prayers of Petitioner are as below:**

- a) *Declare the imposition of Safeguard Duty on the import of solar panels/modules as a 'Change in Law' event as according to the provisions of in the RfP Documents.*
- b) *Direct the Respondent No. 1 to include the provisions of 'Change in Law' and 'Relief for Change in Law' in the proposed PPAs which are to be entered into by the Petitioner and the Respondent No. 1 for the Projects.*
- c) *Direct the Respondent No. 1 to reimburse the Petitioner for the corresponding increase in the Project cost on account of Safeguard Duty as and when paid by the Petitioner no later than seven (7) days of claim(s) submitted by the Petitioner on the basis of each consignment of solar panel/modules or a make a provision regarding the same in the proposed PPAs;*
- d) *Allow carrying cost on reimbursement of Safeguard Duty in case of delay in reimbursement;*
- e) *Direct Respondent No. 1 to pay costs for the present Petition; and*

**3. APIPL in its Petition states that:**

3.1. MSEDCL in Case No. 308 of 2018 had sought the approval from the Commission for the adoption of tariff and executing a Power Supply Agreement (**PSA**) with MSPGCL to meet their solar Renewable Purchase Obligation (**RPO**). MSPGCL has been made a party to the Petition by virtue of it being the ultimate beneficiary in the transaction between the APIPL and MSEDCL. The Commission vide Order dated 29 November, 2018 in Case No. 308 of 2018 has adopted the tariff and approved procurement of such solar power through MSPGCL.

3.2. Before filing of above Petition, MSPGCL had invited bids by issuing the Request for Proposal (**RfP**) Documents for the selection of Solar Power Developer (SPD) for 50 MW AC cumulative capacity grid interactive solar PV power plants each at Vidarbha (Phase A) Vidarbha (Phase B) and Marathwada (Projects). Selection of such SPD is for the development of solar power for the "Mukhyamantri Saur Vahini Yojana" through a competitive e-bidding process followed by an e-Reverse Auction for procuring electricity.

3.3. APIPL was selected as the successful bidder and was awarded the contract for the Projects. The details of each Project which had been awarded to the APIPL is as below:

Sr. No	Region	Tender Code	Bid Specification No	Rate (Rs/kWh)
	Marathwada	61489	CE/SPGD-P-II 50 MW MARATHWADA MAHARASHTRA- AG/PPP/PV-26	3.02
	Vidarbha (Ph-II-A)	61487	CE/SPGD-P/ Ph-II 50 MW VIDARBHA MAHARASHTRA -A- AG/PPP/PV-34	3.08
	Vidarbha (Ph-II-B)	61488	CE/SPGD-P/ Ph-II 50 MW VIDARBHA MAHARASHTRA -B- AG/ PPP / PV-35	3.00

3.4. MSPGCL in compliance with the RfP Documents, thereby issued the respective Letters of Award (LOA) all dated 17 May, 2018.

3.5. Pursuant to these LOAs, APIPL vide its Letter of Award bearing reference no. AZI/1450MW/KREDL/Module/015 dated 29 July, 2018 (LOA) has placed an order to purchase solar modules required to set up for the MSPGCL projects, from Risen Energy Company Limited, a company incorporated under the laws of the People's Republic of China (PRC), for various projects including the Project for supply of power to MSPGCL. Under the LOA the solar modules will be imported at a rate of 0.225 USD/Wp and LOA is irrevocable and non-cancellable.

3.6. APIPL, in compliance with the RfP documents, had thereafter issued the required Bank Guarantees dated 5 February, 2018 towards the Earnest Money Deposit (EMD) as security to the MSPGCL which was later extended at the request of MSPGCL. The details of Bank Guarantees are provided in table below:

Sr. No.	BG No.	BG Amount	Project Ref.	Issue Date
1	OGT0005180018350	Rs. 2,00,00,000	Marathwada	05.02.2018
2	OGT0005180018351	Rs. 2,00,00,000	Vidarbha – A	05.02.2018

3	OGT0005180018353	Rs. 2,00,00,000	Vidarbha – B	05.02.2018
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Thereafter, APIPL also submitted Performance Bank Guarantees dated June 05, 2018 to the MSPGCL as required under the RfP Documents.

3.7. The Commission vide its order dated 29 November, 2018 in Case No. 308 of 2018 accorded their approval for the tariff rate for the procurement of the solar power for the Projects.

3.8. Pursuant to this Order of the Commission, MSPGCL vide its letter dated 1 December, 2018 called upon APIPL to grant their consent for conditions pertaining to evacuation and location of metering at substation end. APIPL vide letter dated 7 December, 2018 has replied to the said letter.

3.9. Meanwhile, the Ministry of Finance vide Notification No. 01/2018-Customs (SG) dated 30 July, 2018 (Notification) imposed Safeguard Duty on the import of solar panels/modules for a period of two (2) years at the rate specified therein. The rates at which the Safeguard Duty would be imposed according to the Notification as provided hereunder:

*“(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 (both days inclusive);*

*(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 (both days inclusive); and*

*(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 (both days inclusive).”*

3.10. Pursuant to the imposition of such Safeguard Duty, APIPL has to bear additional cost for procuring the solar panels/ modules from foreign manufacturer in China who has been awarded LOA dated 29 July, 2018 as detailed herein above. Such additional cost needs to be reimbursed by the MSPGCL in accordance with the terms of RfP.

3.11. As per provision of the PPA read with Notification, imposition of Safeguard Duty will amount to Change in Law in so far as it amounts to an introduction of a duty, subsequent to the submission of the bid by the APIPL, which directly affects the project since the cost of the solar modules constitutes a major component of the total project

cost. The imposition of Safeguard Duty thereby satisfies all the ingredients that constitute a Change in Law under the provisions of the PPA.

- 3.12. The Ministry of Power vide its Notification No. 23/43/2013-R&R dated 27 August, 2018 issued directions to the Central Electricity Regulatory Commission(CERC) under Section 107 of the EA for allowing pass-through of any change in domestic duties, levies, cess and taxes imposed by the Central Government, State Governments/Union Territories or by any Government instrumentality leading to corresponding changes in the cost, after the award of bids, under 'Change in Law' unless otherwise provided in the PPA.
- 3.13. The Commission has in various orders held that the imposition of a new tax/duty would amount to a 'Change in Law' event. Vide Order dated 1 January, 2019 in Case No. 227 of 2018, has held that the "Introduction of GST by Government of India is Change in Law event". In view of the same, the imposition of Safeguard Duty by the Government of India would also amount to 'Change in Law' under the provisions of the PPA.
- 3.14. The Commission has the jurisdiction and the power to determine suitable mechanism to compensate the APIPL for the additional cost incurred for the Project as a result of the imposition of the Safeguard Duty, to bring it back to the same economical position as if such 'Change in Law' has not occurred. The APIPL deserves to get relief in terms of pass through of the expenditure incurred due to such 'Change in Law' even as per 'Change in Law' clause of the draft PPA and pass on the impact of Safeguard Duty to the MSPGCL.
- 3.15. Further, considering time value of the money as recognized by the Appellate Tribunal for Electricity and the Commission in various orders, APIPL is entitled to carrying costs incurred due to the imposition of the Safeguard Duty.
- 3.16. APIPL has also raised a query regarding the adjustment of tariff to be provided as a relief for the imposition of Safeguard Duty prior to the signing of the draft PPA to which MSPGCL has replied that it will be as per the clause relating to the same in the RfP Documents. The relevant clause in RfP Documents provides seeking relief from the Appropriate Commission in case of Change in Law.

#### **4. MSEDCL submission is summarized below:**

- 4.1. MSEDCL is not a part or a signatory to the RfP documents dated 8 February, 2018 entered between the APIPL and MSPGCL, therefore it has not received the copy of Petition filed by APIPL.

- 4.2. It has not signed any agreement with MSPGCL for purchase of power from APIPL based on the RfP documents dated 8 February, 2018. However, MSEDCL in future may sign an agreement for purchase of power from MSPGCL and any change in law if granted to the APIPL may increase the price of power which MSEDCL would eventually buy from MSPGCL.
- 4.3. As on date, MSEDCL is not an affected party but would necessarily be an affected party in future if it would tie up with MSPGCL for purchase of power. Hence any impact of MSPGCL would adversely impact MSEDCL as well in future.
- 4.4. Therefore, MSEDCL has requested to treat the reply filed by MSEDCL in Case No. 27 of 2019 as an integral part of the present reply. MSEDCL seeks to rely upon the contents of reply in Case No. 27 of 2019 which are summarized below:
- a. The Petition is not maintainable in its present form and is liable to be dismissed since Petitioner has claimed compensation based on various assumptions i.e. on ad-hoc basis and not based on actual costs incurred with underlying support materials. When Petitioner placed on record the entire particulars along with documentary evidences, then only it is possible to undertake the prudence check of the claim submitted under Change in Law.
  - b. Petitioner has to provide at least documentary evidence in support of the petition such as but not limited to:
    - i. Details of the date, vendor etc. to whom the Purchase Order is placed/ will be placed;
    - ii. The origin of the country from which the order is/ will be placed along with the technology;
    - iii. Date on which the invoices are/are going to be raised;
    - iv. Expected date on which solar cells or module or panel are/will be imported into India;
    - v. Actual impact of Safeguard Duty in addition with GST for procurement of such goods;
    - vi. Date on which the goods have been delivered to the Petitioner/ Expected date on which the Petitioner would receive the goods at the site for commissioning of the said project;

- 4.5. Since setting up of the Project is still underway and as such, it is premature to assess any impact of Safeguard Duty in absolute numbers in absence of any substantiating documents. The actual impact of Safeguard Duty can be ascertained only when the project achieves COD or the actual cost is incurred.
- 4.6. As per the PPA provision, the compensation is aimed at putting the affected party i.e. the Petitioner in the present case, in the same financial position as if the “Change in Law” had never occurred and therefore actual Safeguard Duty needs to be considered. Since the actual impact of Safeguard Duty can only be ascertained when the project achieves COD, therefore, the impact of Safeguard Duty on the project cost and impact of such on tariff should be determined at the time of COD of the project only considering actual payment made against safeguard duty presented with documentary evidences.
- 4.7. The Safeguard Duty is capital expenditure in nature and is required to be spread out over the balance life of the assets. Also, spreading the impact of Safeguard Duty across the project life not only ensures the seriousness of the developer towards project with regards to its risk, reward and uncertainty other than the ones specifically provisioned in the PPA, associated with the solar power project continue to be linked with the project and are not passed on to the consumers at a time, but also ensures that all the business and project development risks (other than the ones specified and provisioned in the PPA) subsumed by the project developer continue to be borne by them.
- 4.8. The event of Change in Law has not occurred yet. The question of carrying cost does not arise until the actual financial impact due to imposition of Safeguard Duty on the project cost is ascertained. Therefore it will be premature to consider the impact of carrying cost at this point of time and as and when the Commission gives its order regarding the financial impact of Safeguard Duty on the petitioner, MSEDCL will implement the same.

## **5. MSPGCL submission is summarized below:**

- 5.1. MSPGCL had conducted the process for selection of SPDs for Phase- II (300 MW) and Phase – III (A) (50 MW) for implementation of ‘Mukhyamantri Sour Krishi Vaahini Yojana’. Under the tenders for Phase - II, APIPL was selected as L1 bidder for four tenders of 50 MW in each block namely Vidarbha-A & B; Marathwada and Western Maharashtra-B. Out of these, MSEDCL had given consent only for three blocks namely Vidarbha-A & B; Marathwada and accordingly MSPGCL and MSEDCL had approached the Commission for adoption of Tariff of Long Term Procurement of solar power from these projects (MERC Case No. 308 of 2018).

- 5.2. In its Order dated 29 November, 2018 in Case No. 308 of 2018, the Commission has accorded approval for procurement of Solar Power through MSPGCL for 25 Years and has also accorded approval for signing the PSA with MSEDCL as per rates discovered through competitive bidding process.
  - 5.3. PPA between the APIPL and MSPGCL is yet to be signed. Being one of the successful bidders, APIPL has filed the present Petition inter alia praying for seeking approval and determination of compensation on account of Change in Law for Solar Project under the draft PPA.
  - 5.4. Pursuant to Order dated 29 November, 2018 the Commission in Case No. 308 of 2018, MSPGCL had requested APIPL to grant their consent on the conditions imposed regarding evacuation and location of metering at sub-station end as per the draft PSA approved by the Commission. On the basis of the terms and conditions in approved draft PSA , the queries raised by the APIPL with respect to the draft PPA were replied by MSPGCL vide letter dated 29 December, 2018. In reference to the “Safeguard Duty” and the “change in law’ provisions, queries were raised APIPL and were correspondingly replied to them.
  - 5.5. MSPGCL had categorically replied on the issue of “change in law” provisions, it shall be required to approach the Appropriate Commission for seeking approval of ‘Change in Law’ and the decision of the Appropriate Commission to acknowledge a ‘Change in Law’ event and provide relief for the same shall be final and governing on both the Parties subject to signing of the relevant PPAs with the APIPL.
  - 5.7. MSPGCL in its submission has raised similar issues as made out by MSEDCL about maintainability, Documentary evidence, methodology for pass-through, actual financial impact of imposition of Safeguard Duty and Carrying Cost.
  - 5.8. The impact of Safeguard Duty shall be considered on case to case basis for every solar power project and also after submission of documentary evidences of procurement of solar panel or modules. Accordingly, MSPGCL requested the Commission to dismiss the petition.
6. At the hearing held on 9 April, 2019, APIPL has stated that the Commission vide its Order dated 15 February, 2019 has declared that imposition of Safeguard Duty is Change in Law event and consequential impact shall be considered on actual basis for reimbursement under Change in Law, subject to prudent check after filing of petition with all the details, in accordance with the provisions of PPA. APIPL requested the Commission to grant similar

relief to it in the present matter. MSEDCL stated that the Commission in its Order dated 15 February, 2019 has already held that imposition of Safeguard Duty is Change in Law event, this Order of the Commission is generic in nature and is applicable to all similarly placed generators subject to verification. Compensation of Change in Law can be granted only after submission of documentary evidence of actual impact of such event. As APIPL has not submitted actual impact with supporting details, this Petition may be rejected. MSPGCL has made similar submissions and requested to reject this Petition as it is premature.

## **7. Rejoinder filed by APIPL**

- 7.1. The provisions of the PPA to be signed between the APIPL and MSPGCL has been approved according to the conditions laid out in the Request for Proposal documents dated 8 February, 2018 RfP Documents and has not been executed as yet due to certain negotiations and issues which arose as a result of there being a discrepancy between the draft PPA and the RfP Documents. Hence, the present Petition has been filed based on the RfP Documents, as the proposed PPA has to be in consonance with the same.
- 7.2. As regards the Admissibility of the Petition, it is denied that the reliefs claimed are premature in nature. It is further submitted that by virtue of Section 21.12 of the draft PPA to be entered into between the APIPL and the MSPGCL, the Commission has the power to declare the imposition of Safeguard Duty as a 'Change in Law' event and to determine appropriate mechanisms for the payment of the same. Hence the contention of MSPGCL that the Petition is liable to be dismissed is devoid of any merits.
- 7.3. The import of solar modules will be undertaken before the project achieves COD, the exercise of declaring the imposition of Safeguard Duty as 'Change in Law' event subsequent to achieving COD will be counter-productive as the APIPL would have already incurred additional financial burden due to the same. Therefore, the contention of MSPGCL does not hold true in the instant matter as achievement of COD is not relevant to the Prayers sought in the instant matter. It has submitted documentary evidence to substantiate that there will be imposition of Safeguard Duty and relief pursuant to such change in law event.
- 7.4. The Commission vide its Order dated 15 February, 2019 in Case Nos. Nos. 279 of 2018, 325 of 2018 and 340 of 2018 has already held that Safeguard Duty is change in Law therefore; it is entitled to similar relief.
- 7.5. The Commission has the authority to allow pass through of the additional burden incurred by the APIPL due to the Safeguard Duty onto the MSPGCL under the RfP Documents and relevant clauses referred herein above including Section 21.13. It has

submitted sufficient documentary evidence for getting the declaration about the imposition of Safeguard Duty as a ‘Change in Law’ event and for the Commission to determine the mechanism for payment of the compensation as and when leviable.

7.6. As regards the carrying Cost, the Commission in its various judgements including Case No. 227 of 2018 dated 1 January, 2019 in the matter of Rattan India Power Limited versus MSEDCL for bringing the Petitioner back to the same economical position as if such Change in Law event has not occurred has allowed carrying cost. Further there are various rulings by the Appellate Tribunal for Electricity and CERC to substantiate the applicability of carrying costs in the instant matter.

### **Commission’s Analysis and Ruling**

8. The Commission notes that APIPL is Solar Power Generators who have participated in the bid invited by MSPGCL under ‘Mukhyamantri Sour Krishi Vaahini Yojana’. Under this scheme of the Government of Maharashtra, MSPGCL will setup Solar PV projects through competitive bidding route for supply to MSEDCL. Accordingly, MSPGCL had floated the tenders for procurement of Solar Power from Solar Power Developers for Phase- II (300 MW) and Phase – III (A) (50 MW). Under the tenders for Phase - II, APIPL was selected as L1 bidder for four tenders of 50 MW in each block namely Vidarbha-A & B; Marathwada and Western Maharashtra-B.
9. As a power procurer, MSEDCL had filed Petition in Case No. 308 of 2018 for approval and adoption of tariff discovered by MSPGCL under ‘Mukhyamantri Sour Krishi Vaahini Yojana’. The Commission vide its Order dated 29 November, 2018 has allowed this Petition with following rulings:

2. *The Commission accords approval for procurement of Solar Power through MSPGCL for 25 Years as rate discovered through the competitive bidding process as below:*

<b><i>Scheme</i></b>	<b><i>Region &amp; Tender No.</i></b>	<b><i>Capacity in MW</i></b>	<b><i>Tariff Rate in Rs</i></b>
<i>Phase-II</i>	<i>Vidarbha B (Tender No. 61487)</i>	<i>50</i>	<i>3.00</i>
	<i>Marathawada (Tender No. 61489)</i>	<i>50</i>	<i>3.02</i>

<i>Scheme</i>	<i>Region &amp; Tender No.</i>	<i>Capacity in MW</i>	<i>Tariff Rate in Rs</i>
	<i>Vidarbha A (Tender No. 61488)</i>	<i>50</i>	<i>3.08</i>
<i>Phase-III(A)</i>	<i>North Maharashtra (Tender No. 67202)</i>	<i>50</i>	<i>2.99</i>
<i>EoI</i>	<i>Single location in Vidarbha, Marathwada, Western and Northern regions of Maharashtra</i>	<i>2</i>	<i>2.93</i>
		<i>100</i>	<i>3.10</i>

*3. The Commission accords approval for signing the PSA with MSPGCL as per the rates discovered through the competitive bidding process.*

*.....”*

10. The Commission notes that APIPL is selected bidder for total capacity of 150 MW of Solar PV plants under Phase II. The Commission has already approved and adopted such power procurement under Section 63 EA.
11. However, the Commission notes that all the parties to the Petition including APIPL have admitted that subsequent to adoption of tariff by the Commission in its Order dated 29 November, 2018, final PPA is yet to be signed. Claims related to Change in Law need to be decided based on the provisions of PPA signed between the parties. Under such circumstances, in the opinion of the Commission, it would be premature to adjudicate this matter based on the provisions of draft PPA. Hence, the Commission finds that in absence of a legally binding PPA between the parties, present Petition is premature for adjudication by this Commission.
12. Notwithstanding above factual aspects, the Commission notes that the aspect relating to imposition of Safeguard Duty on import of Solar panels/modules has already been decided by this Commission in its Order dated 15 February, 2019 issued in Case Nos 276, 325 and 340 of 2018. Relevant part of the said Order is reproduced below:

*25. The Notification of imposing Safeguard Duty dated 30 July, 2018 has been issued by the Ministry of Finance, GoI. This notification is subsequent to last date of Bid*

*Submission. Under the provisions of PPAs, an event arising from the actions of an authority covered within the definition of 'Indian Governmental Instrumentality' would satisfy the requirement of "Change in Law". "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 the PPAs. Further, as per clause 9.1 of the PPA, notification of new law or amendment of existing law or introduction / change in tax, duty or cess subsequent to Bid Submission date qualifies as Change in Law. Admittedly, Ministry of Finance Notification dated 30 July, 2018 (which is subsequent to Bid Submission date of 8 May, 2018) has imposed Safeguard Duty on import of Solar panel / module from China PR and Malaysia. Hence, this Notification dated 30 July, 2018 is Change in Law event under the PPA.*

.....

*27. PPA also provides for the adjustment in the tariff to be effective from the date of Change in Law. Therefore, provisions of the PPA enable the Commission not only to declare an event as Change in Law but also to determine the increase or decrease in revenues or cost to the Power Producer on account of operation of Change in Law keeping in view the principle of compensation and the effective dates from which such compensation can be paid. There is no concept of in-principle approval of Change in Law, in the PPA. The consequential implementation of Change in Law and compensation will flow from the declaration and recognition that Ministry of Finance Notification dated 30 July, 2018 is a Change in Law. The Commission has already concluded that said Notification of imposing Safeguard Duty is in the nature of Change in Law. Power Producers shall commission their respective projects and approach the Commission for determination of the increase in cost or/and revenue expenditure on account of implementation of such Change in Law. At that stage, the Commission will determine the mode of recovery of the cost or/and expenditure for the Power Producers due to Safeguard Duty on import of Solar panel / modules.*

.....

*29. In view of the foregoing, the Commission rules that the Ministry of Finance Notification dated 30 July, 2018 imposing Safeguard Duty is an event of Change in Law. Further the Commission also rules that the additional expenditure and other consequential impacts shall be considered on actual basis for reimbursement under Change in Law subject to prudent check. Accordingly, Power Producers shall approach the Commission at later date for determination of increase in cost or/and revenue expenditure on account of imposition of Safeguard Duty, if any and the mode of recovery of the same."*

13. Further, both the Respondent in the present matter i.e. MSEDCL and MSPGCL, by referring to above Order of the Commission has submitted that compensation under Change in Law will be considered on actual basis for reimbursement subject to submission of documentary evidence related to payment of Safeguard Duty for import of solar panel/module. Accordingly, APIPL can approach the Commission at later date for determination of increase in cost or/and revenue expenditure on account of imposition of Safeguard Duty, if any and the mode of recovery of the same. The issue of carrying cost can also be dealt with appropriately at that stage.

14. Hence, the following Order.


### **ORDER**

**The Case No. 47 of 2019 is dismissed.**

**Sd/-  
(Mukesh Khullar)  
Member**

**Sd/-  
(I.M. Bohari)  
Member**

**Sd/-  
(Anand B. Kulkarni)  
Chairperson**

  
**(Abhijit Deshpande)  
Secretary**

