

No.N/18/2019

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,

No.16, C-1, Millers Tank Bed Area, Vasanthnagar, Bengalure-560052

Dated: 15.06.2021

Present

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

OP No.08/2019

BETWEEN:

Adyah Solar Energy Private Limited,
138, Ansal Chambers-II, Bhikaji Cama Place,
New Delhi -110 066.
(Represented by Shri Sujith Gosh, Advocate)

...PETITIONER

AND

Hubli Electricity Supply Company Limited,
Corporate Offices,
Navanagar, P.B. Road,
Hubballi-580 025.
(Represented by Shri Shahbhaz Hussain, Advocate)

... RESPONDENT

ORDER

1. This is a petition filed under Section 86(1) (f) of the Electricity Act, 2003

praying for the following relief to:

- a) Declare the imposition of Safeguard Duty on the import of solar modules as a Change in Law in terms of the PPA which have led to an increase in the recurring and non-recurring expenditure for the project;

- b) Direct payment of safeguard duty and IGST on account of Safeguard Duty amounting to Rs.31,75,76,295 in the form of a lump sum payment;
- c) Alternatively, direct payment of safeguard duty and IGST on account of safeguard duty amounting to Rs.31,75,76,295 in the form of annuity payment and evolve a suitable mechanism for the payment of the same.
- d) Grant interest/carrying cost from the date of impact till reimbursement of the entire amount of safeguard duty and IGST on account of safeguard duty thereof by the Respondent;
- e) Pass any such other and further reliefs as this Commission deems just and proper in the nature and circumstances of the present case.

2. The brief facts set out in the petition are as under:

- a) Adyah Solar Energy Private Limited (Petitioner) is a company incorporated under the Companies Act, 2013. It is a Special Purpose Vehicle (SPV) of M/s Renew Solar Power Private Limited (Renew) which is engaged in the business of development, building, owning, operating and maintaining utility scale grid connected solar power projects, for generation of solar power. The petitioner is a generating company as defined under Section 2 (28) of the Electricity Act, 2003.
- b) The Government of Karnataka (GoK) had resolved to undertake development of 1200 MW AC Solar Power Project within 2000 MW AC Pavagada Solar Park. In this backdrop, Karnataka Renewable Energy Development Limited (KREDL) as the nodal agency of the GoK, invited

proposals by Solar Power Developers vide its Request for Proposal (RfP): No.KREDL/07/SG/1200 MW/Pavagada Park/809/2017-18, dated 31.01.2018. (RfP). The RfP prescribed a technical and commercial terms and conditions for selection of bidders for establishing 1200 MW AC, (50 MW AC x 24 blocks) Grid-connected Ground Mounted Solar Photovoltaic projects to be implemented in Pavagada Solar Park in the State of Karnataka on "Build-Own-Operate" basis under open category only for the procurement of solar power by the ESCOMs of Karnataka for a period of 25 years.

- c) KREDL accepted the bid of Renew Solar Power Private Limited for development of 50 MW AC capacity of Solar Power Project at Block B-13, Pavagada Solar Park in the State of Karnataka and issued its Letter of Award No. KREDL/ 07/ SG/1200 MW/Pavagada Park/ B-13/ 809/ 2017-18/ 2360-63 dated 21.03.2018 (LoA) along with the Allotment letter to Renew Solar Power Private Limited.
- d) In accordance with the terms of the RfP, Renew Solar Power Private Limited promoted and incorporated the petitioner as a special purpose vehicle for the purpose of this project. Vide letter bearing No. nil dated 16.04.2018, Renew requested HESCOM to accept petitioner as the entity which shall undertake and perform the obligations and exercise all the rights of the Selected Bidder under the LoA including the obligation to enter into PPA pursuant to the LoA for execution of the project.

- e) HESCOM agreed to the said request of Renew and entered into a Power Purchase Agreement (PPA) dated 20.04.2018 with the petitioner, for development of 50 MW AC capacity of Solar Power Project at Block B-13, in the Pavagada Solar Park and the consequent supply of solar power to HESCOM. The PPA dated 20.04.2018 between the petitioner and HESCOM was also approved by the Karnataka Electricity Regulatory Commission (KERC) vide approval letter No. KERC/S/F-31/Vol-1258/18-19/347 dated 06.06.2018.
- f) Vide Notification No.01/2018–Customs (SG) dated 30.07.2018 (Safeguard Duty Notification), the Central Government has imposed Safeguard Duty as per the following rates on the import of “Solar Cells whether or not assembled in modules or panels” (Solar Cells and Modules); -
- i) 25% ad valorem, minus anti-dumping duty, if any when imported during the period from 30.07.2018 to 29.07.2019;
 - ii) 20% ad valorem, minus anti-dumping duty, if any, when imported during the period from 30.07.2019 to 29.01.2020;
 - iii) 15% ad valorem, minus anti-dumping duty, if any when imported during the period from 30.01.2020 to 29.07.2020.
- g) The present petition is filed before this Commission in accordance with Article 15 of the PPA dated 20.04.2018, seeking compensation consequent to issuance of safeguard duty notification imposing safeguard duty at the rates prescribed therein on the import of solar cells and modules. The issuance of safeguard duty notification and the consequent imposition of safeguard duty on the import of solar cells and

modules by the petitioner has resulted in an increase in recurring and non-recurring expenditure for the petitioner and has thus adversely impacted the project of the petitioner. Further, it would also result in recurring expenditure, in as much as the import of modules during the period of Operation and Maintenance (O&M) may also be eligible to safeguard duty.

- h) It is also relevant to refer to the date of submission of online Techno-commercial Bid by the petitioner. In the present case, the petitioner submitted its bid on 12.03.2018. Hence, such date would be treated as the 'date of submission of techno-commercial bid' as per Article 15.1.1 of the PPA.
- i) 'Change in Law' provision under the PPA is triggered if there has been an enactment of a new law or any change in taxes and/or duties or introduction of any tax and/or duties for setting up of the project for supply of power, after the submission of online Techno-commercial bid, which has resulted in increase in recurring and non-recurring expenditure by the petitioner, i.e., SPD.
- j) As per Article 15.2 of the PPA, the aggrieved party is required to approach 'KERC' for seeking approval of change in law and the consequent relief in terms of the PPA. Under Article 21 of the PPA, the term KERC is defined to mean the KERC and thus, this Commission has the jurisdiction to adjudicate the dispute herein the present petition.

- k) The imposition of safeguard duty on the import of solar modules would constitute a change in law event in terms of the PPA, it is relevant to understand the statutory framework in relation to the levy of safeguard duty.
- l) The power to levy safeguard duty vests with the Central Government in terms of Section 8-B of the Customs Tariff Act, 1975 (Customs Tariff Act). Section 8-B of the Customs Tariff Act provides that the Central Government may impose safeguard duty by way of a Notification on the import of an article into India, if it is satisfied that the said article is being imported in such increased quantities and under such circumstances so as to cause or threaten to cause serious injury to the domestic industry.
- m) Further, Rule 12 of the Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997 provides that the Central Government may impose Safeguard Duty on the product covered under the final finding of Director General Trade Remedies and which duty shall not exceed the amount found adequate to remedy the serious injury to the domestic industry.
- n) In this context and in exercise of the power conferred inter alia under Rule 12 of the Safeguard Duty Rules, 1997 the Central Government issued the safeguard duty vide Notification dated 30.07.2018 imposing safeguard duty on the import of solar cells and modules at the rates prescribed thereunder in the said Notification.

- o) The imposition of safeguard duty is in the nature of a tax and duty imposed on the import of solar cells and modules. Thus, with effect from 30.07.2018, the import of solar cells and modules into India would be leviable to a safeguard duty (in the nature of tax) at the rate of 25% ad valorem for the first year of imports, where after, the safeguard duty is progressively liberalised.
- p) The imposition of safeguard duty on the import of solar cells and modules, pursuant to the safeguard duty notification would qualify as a Change in Law Event in terms of the PPA.
- q) The petitioner incurred expenditure in the nature of one – time capital expenses on the import of solar cells and modules by the petitioner for setting up of the solar power project as per the PPA. As these expenses are incurred on a one-time basis, the same should qualify as ‘non-recurring expenditure’.
- r) Prior to imposition of safeguard duty vide Safeguard Duty Notification, the import of modules was solely subjected to IGST at 5% (BCD free). However, with effect from 30.07.2018, the import of solar cells and modules required for setting up of solar power project as per the PPA would be leviable to 25% Safeguard Duty (which is progressively liberalised) along with an additional IGST of 5% on the value of safeguard duty. Thus, effectively, the additional non-recurring expenditure incurred by the petitioner is 25% of the cost of modules as well as additional IGST

of 5% on safeguard duty. The same has been explained through an illustration as follows:

Indicative Change in Law Impact of Safeguard Duty on Module cost				
Module cost	Rs.	100.00		
Particulars	Unit	Pre-Safeguard duty(A)	Post Safeguard duty(B)	Change in law Impact (B-A)
Basic Value	Rs.	100.00	100.00	
Safeguard duty rate	Rs.	0%	25%	25%
Safeguard duty	Rs.	0.00	25.00	25.00
GST Rate on safeguard duty	%	0%	5%	5%
GST On safeguard duty	Rs.	0.00	1.25	1.25
Total value of module(excluding IGST of 5% which was payable irrespective of inclusion of safeguard duty)	Rs.	100.00	126.25	26.25
Impact on Module cost	%	26.25%		
Note: Above computation is indicative only based on an assumption that the module cost is of INR.100. Petitioner will place on record actual impact of safeguard duty along with actual project cost, module costs, relevant documents, invoices etc. in due course of proceedings.				

- s) Thus, basis the same, it is clear that import of solar modules has resulted in increase in non-recurring expenditure. At this juncture, it is relevant to examine whether such change in law event resulting in increase in non-recurring expenditure was after the date of submission of online Techno-commercial Bid as per Article 15.1.1 of the PPA.
- t) The petitioner has entered into a supply agreement for procurement of modules vide Supply Agreement dated 24.09.2018 with ZNSHINE PV-TECH Company Limited (supply contract), which are required in setting up of 50 MW AC Power Project at Block B-13 in the Pavagada Solar Park. In terms of the said supply contract the petitioner is purchasing Solar PV Modules of DC Capacity 72.5 MWp from ZNSHINE PV-TECH Company

Limited and the import of such PV modules has commenced from the month of November, 2018 onwards (Annexure-3).

- u) Since the time of import of Solar PV modules into India i.e., the period from the month of November, 2018 onwards, the petitioner is incurring an additional non-recurring expenditure as described above.
- v) In terms of the first bullet of Article 15.1.1 of the PPA, in order to qualify as change in law, change in law event resulting in the increase in non-recurring expenditure must have occurred after the submission of online Techno-Commercial Bid. In the present case, the petitioner submitted the online techno-commercial bid on 12.03.2018. Thus as the Safeguard Duty Notification came into effect on 30.07.2018, much after the date of bid submission and the non-recurring expenditure is being incurred from November 2018 onwards, such imposition of safeguard duty would qualify as a change in law under the fifth bullet of Article 15.1.1 of the PPA.
- w) Even in terms of fifth bullet of Article 15.1.1 of the PPA, in order to qualify as a change in law, the change in law event in relation to any change in tax or duty on the setting up of solar power project must have occurred after the date of submission of online Techno-Commercial Bid and such change in law shall be to the account of HESCOM.
- x) The date of submission of online Techno-Commercial Bid was 12.03.2018. Thus, as the Safeguard Duty Notification came into effect on 30.07.2018, much after the date of bid submission and non-recurring expenditure is

being incurred from November, 2018 onwards, such imposition of safeguard duty would qualify as a Change in Law under the fifth bullet of Article 15.1.1 of the PPA.

- y) Further, Article 15.1.1 of the PPA provides that if any change in tax structure i.e., change in rate of tax or duty or introduction of any tax or duty has taken place after the date of submission of bid, then in such a case the effect of such change shall be to the account of HESCOM and the consequent variation in tariff (whether proportionate increase or decrease) shall be in accordance with Article 15.2 of the PPA. The said article provides that the aggrieved party should approach before this Commission for seeking the approval of such change in law and thereby obtain the consequent relief. Basis the above, it is submitted that since imposition of safeguard duty qualifies as a change in law even under the fifth bullet of Article 15.1.1 of the PPA being introduction of new tax/duty coming into effect after the date of bid submission, the petitioner has rightly invoked the jurisdiction of the Commission for seeking approval of such a change in law in terms of the PPA.
- z) The imposition of safeguard duty would qualify as a change in law as per the first and fifth bullet of Article 15.1.1 of the PPA in as much as the same is an enactment of a new Law and the same has led to introduction of new taxes in relation to setting up of solar power project for supply of power and such change in law has led to increase in non-recurring

expenditure for the petitioner after the submission of online Techno-Commercial bid.

- aa) It is also relevant to note that Ministry of Power, Government of India, vide letter dated 27.08.2018 issued directions under Section 107 of the Electricity Act, 2003 to the CERC that, any change in domestic duties, levies, cesses and taxes imposed by the Central Government, State Government or Union Territories or any Governmental Instrumentality which leads to corresponding changes in cost may be treated as change in law and be allowed as pass through. Thus, basis such letter issued by the Ministry of Power, Government of India, Safeguard duty being domestic only to be treated change in law and is a pass through (Annexure-4).
- ab) The imposition of safeguard duty as per Notification No.01/2018-Customs (SG) dated 30.07.2018 would be applicable for a period of two (2) years till 30.07.2020. In the present case, the SCOD is 06.04.2019. Thus, it is highly plausible that the import of modules as replacements during the Operation and Maintenance period would also be subjected to safeguard duty. Thus, such imposition of safeguard duty may result in non-recurring expenditure as well, if certain modules are imported as a part of the O&M up to 30.07.2020.
- ac) Although there is no concept of 'return on equity' and 'interest on working capital' in a competitively bid tariff, the increase in tax costs 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 bid, the petitioner has factored in 'interest on working capital' and return on equity

based on the taxes and duties prevalent at the time of bid. With the increase in the tax costs 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 and the rate prevalent at the time of bid. Thus, the petitioner is entitled to interest on incremental working capital at normative interest rate to put petitioner to the same economic position as if change in law has not occurred.

ad) It is pertinent to refer to “Guidelines for Tariff based competitive bidding process for procurement of power from Grid Connected Solar PV Power Projects” issued by Ministry of Power, Government of India, vide Notification No.23/27/2017-R&R dated 03.08.2017 (Tariff Guidelines). The said Tariff Guidelines have been issued under the provisions of Section 63 of the Electricity Act, 2003 for the long term procurement of electricity by distribution licensees, from grid connected solar PV power projects having a size of 5 MW and above, through competitive bidding. Given that in terms of PPA dated 20.04.2018, the petitioner is setting up a solar power project of 50 MW capacity at Block B-13, in the Pavagada Solar Park, in the State of Karnataka, the aforementioned Tariff Guidelines are applicable to the petitioner's solar power project.

ae) Para 5.7.1 of the Tariff Guidelines states that if any change in law event results in any adverse financial loss/gain to the solar power generator, the solar power generator/procurer shall be entitled to compensation by the other party, in order to ensure that the solar power generator is placed in the same

financial position as it would have been, had it not been for the occurrence of the 'Change in Law' event.

- af) The Tariff Guidelines issued under the provisions of Section 63 clearly recognize that the SPD is required to be placed in the same financial position as it would have been had the Change in Law not occurred, which is essentially the principle of restitution. Thus, basis the Tariff guidelines, it is imperative that the petitioner is granted an interest on working capital at normative interest rate in order to put the petitioner to the same economic position as if change in law has not occurred.
- ag)The petitioner seeks approval of this Commission to claim as an adjustment/recovery of additional tax cost which are being accrued to the petitioner on account of safeguard duty notification on account of change in law event. The petitioner will place on record the relevant documents invoices, etc. to show the actual impact of safeguard duty on its project in due course of proceedings.
- ah) The statutory change in tax structure due to imposition of safeguard duty on the import of solar cells and modules has resulted in an increase in the non-recurring expenditure for the petitioner after the date for submission of online Techno-commercial bid, and thus triggers the 'Change in law' event, as defined under Article 15 of the PPA.
- ai) As per article 15 of the PPA, once a change in law has occurred, the aggrieved party is required to approach the KERC for seeking approval of

change in law. Accordingly, the petitioner has approached this Commission seeking relief on account of the change in law.

3. Upon issuance of Notice, the Respondent appeared through its counsel and submitted statement of objections/additional statement of objections/Court rulings denying each para of the petition and amended petition. The gist of the statement of objections/additional statements of objections are as follows:

a) The petition filed by the petitioner is devoid of any merits and the same needs to be dismissed in limine. The respondent hereby save and except those which are specifically admitted hereunder, denies and disputes all the interpretations, claims and averments of the petitioner.

b) The petitioner has filed the present petition seeking relief on account of a change in law viz., the imposition of safeguard duty on the import of solar cells and modules with effect from 30.7.2018, resulting in the increase in recurring and non-recurring expenditures for the petitioner. The petitioner is seeking for a suitable compensation and interest/carrying cost in terms of Article 15 of the PPA towards incremental cost borne by the petitioner on account of imposition of safeguard duty.

c) The petitioner is seeking relief due to change in central laws applicable to the petitioner after the Effective Date as provided in the PPA. As per Article 15.1, the change in law includes enactments coming into effect after the effective date. As per Article 15.2, the aggrieved party has to approach

this Commission for seeking approval to the change in law and the decision of the Commission shall be final and governing on both the parties. The respondent hereby reverts to the contents of the petition in the following manner.

- d) The petitioner has reiterated the provisions of the PPA under Article 15 and same does not warrant any comment. However, the petitioner has conveniently failed to highlight Article 5.1.1 (g) of the PPA, which pins the liability of taxes on the petitioner.
- e) Article 5.1.1 (g) of the PPA mandated the petitioner to bear all the liabilities arising out of imposition of taxes, cesses, duties or levies by the Government.
- f) The above Article 5.1.1 (g) makes it unequivocal that the petitioner shall exclusively be responsible for taxes, duties or levies to be levied with respect to the implementation of the project. Any change in the applicable taxes shall also be borne by the petitioner as the same has been casted as an obligation on the petitioner under Article 5.1.1 (g) of the PPA. Furthermore, the said article does not subject itself to the Article 15 on change in law, which leads to the conclusion that any change in tax rates or laws shall be borne by the petitioner without being entitled to any kind of compensation.
- g) Even assuming but not admitting that the imposition of safeguard duty is change in law, the prayer of the petitioner is bad in law for want of information and proof that such change has not resulted in applicability

of safeguard duty on the instant project due to negligence of the petitioner. It is a settled principle of law that the petitioner cannot seek compensation for the losses arising out of its own or its agent's negligence. It is incumbent upon the petitioner to prove that no such negligence can be attributed to its or its agent's actions and omissions.

- h) On 05.12.2017, Indian Solar Manufacturers' Association representing five Indian producers approached the Directorate General of Safeguards Custom and Central Excise (DG) under Rule 5 of the Customs Tariff (identification and Assessment of Safeguard Duty) Rules, 1997 claiming that growing imports of solar equipment from China, Malaysia and Taiwan is crippling their business.
- i) On 05.01.2018, on the basis of the preliminary findings issued by the DG, it was recommended that 70% of safeguard duty should be imposed ad valorem on the imports of the PUC viz., except the developing countries mentioned under the Rules. The same was challenged before the Hon'ble Madras High Court and the Hon'ble Delhi High Court. The Hon'ble Madras High Court had dismissed the petition but the Hon'ble Delhi High Court ordered that the petition may be treated as a representation of the petitioner in the safeguard duty proceedings before the DG.
- j) Karnataka Renewable Energy Development Limited (KREDL) had accepted the bid of the petitioner and issued the letter of award on 21.03.2018. The petitioner after getting the approval of the respondent, entered into PPA dated 20.04.2018 with the respondent.

- k) At the time of entering into the PPA with the respondent, it was well within the public knowledge that the DG had recommended a 70% safeguard duty on import of Solar Equipment from China, Malaysia and Taiwan. The notification by the Central Government imposing safeguard duty was enforced from 30.07.2018, four months after the PPA came into effect. The petitioner at the time of entering the PPA ought to have known the intention of the government to impose safeguard duty and the petitioner should have diligently acted on that knowledge and imported the solar cells and modules the earliest. Four months was sufficient time for the petitioner to act on that knowledge but imported the solar cells and modules and hence the respondent cannot be burdened due to the idleness and ignorance of the petitioner.
- l) The averments that the imposition of the safeguard duty on import of solar cells and modules constitutes change in law is hereby denied as false and erroneous. On the contrary, the petitioner has been obligated to bear all the taxes and the changes thereon under Clause 5.1.1 (g) of the PPA.
- m) The petitioner has shown the effect of change in safeguard duty through an illustration and has mentioned an alleged increase in non-recurring expenditure but it has failed to show any details regarding any payment made towards safeguard duty. Hence, it is put to strict proof of the same. Without prejudice to that above submission, even if it is assumed that imposition of safeguard duty constitutes change in law, mere mentioning

of the impact of safeguard duty is not sufficient to claim compensation under the provision of 'change in law'.

- n) As per the CERC order dated 19.09.2018, in 50 MP 2018 and 52 MP 2018, to prove a claim under Article 15, the party has to show a clear correlation between the projects, the supply of goods or services and invoices raised and other relevant documents for proving the payment of safeguard duty. As one of the three primary elements being the invoices raised or documents showing payment of safeguard duty, the correlation cannot be established as there are no invoices or documents produced by the petitioner. It further goes on to say that the invoices should be backed by the Auditor's certificate.
- o) The petitioner has failed to provide all the relevant details and without proper documentation and invoices certified by the Auditor, the relief sought by the petitioner cannot be granted and the petitioner is put to strict proof of the same.
- p) The petitioner has merely shown the supply agreement for solar modules between Zhejiang Jinko Solar Company Limited and the petitioner has failed to show any supply agreement between him and Risen and Hanwa for DC capacity. Even by showing the supply agreement, the petitioner has failed to show any invoice or document indicating the additional cost incurred by them due to the imposition of the safe guard duty. Mere mention of increase in cost without any actual documentation is not

sufficient to claim compensation under Article 15 of PPA. Thus the petitioner is put to strict proof of the same.

- q) The petitioner is claiming recurring expenses for transactions that have not occurred yet. The petitioner cannot claim compensation of a probable expenditure that might occur in the future. Thus, the contention of the petitioner under this head is liable to be dismissed.
- r) The petitioner has sought to be put in the same economic position it would have been in the absence of change in law, which relief is not provided for or contemplated in the PPA and wherefore, same cannot be claimed in this petition for want of enabling provision in PPA.
- s) While interpreting terms of the PPA, the Hon'ble APTEL and the Hon'ble CERC have always chosen to interpret the PPA in such a manner that the reliefs that are not provided in the PPA explicitly or implicitly, are not granted or allowed under the PPA, which is in stark contradiction to the interpretation chosen to be followed by the petitioner where the terms of the PPA are interpreted in such a manner that if any relief is not explicitly denied under the PPA, the same should be granted under the PPA. The constitution Bench of the Hon'ble Supreme Court in the case of Union of India Vs. Tulsiram Patel (1985) 3 SCC 398 has held that the maxim "expressum facitcess are tacitum" refers that when there is express mention of certain things, then anything not mentioned is excluded. The maxim is the principle of logic and common sense and not merely a technical rule of construction. Hence, while interpreting the terms of the

PPA the same logic shall be used to determine the relief that can be granted under it.

- t) Applying the above ratio of the Hon'ble Supreme Court to the present facts it is clear that, with the PPA not providing for restoration of the petitioner to the same position as it would have been in the absence of the change in law, the petitioner is barred from claiming such relief and concept of discount factor to account for time value of money cannot be considered in this case.
- u) The petitioner's claim for carrying cost is not tenable as there is no explicit or implicit provision for carrying cost in the PPA. The Hon'ble APTEL and Hon'ble CERC have held that if the provisions of the PPA are silent on the question of restoration then the relief carrying cost cannot be granted. If the PPA does not have any provision regarding restoring the Developer to the same economic position as if the Change in Law had never occurred, the relief of carrying cost cannot be granted.
- v) The Hon'ble APTEL in Appeal No.210 of 2017 in Adani Power Limited Vs. CERC & Others, passed a judgment dated 13.04.2018 in which they held that since the PPA had no provision for restoration to the same economic position, the decision of allowing carrying cost will not be applicable. The same position was reiterated by the Hon'ble APTEL in a judgment dated 14.08.2018 in Appeal No.111 of 2017 in M/s GMR Warora Enrgy Limited Vs. CERC & Others.

- w) The Hon'ble CERC in an order dated 05.02.2019 in Petition No.187/MP/2018 and other petitions held that carrying cost cannot be allowed unless there is an express provision for restitution in the PPA.
 - x) The Hon'ble CERC in an order dated 09.10.2018 in Petition No.188/MP/2018 and other batch matters had taken the same stance regarding carrying cost.
 - y) The PPA neither under Article 15 nor under any other provision grants the relief restitution or carrying cost. Thus, the relief of carrying cost cannot be granted explicitly or implicitly under the PPA. Therefore, the petitioner claims of carrying cost does not hold water, and the same cannot be allowed.
 - z) The conditions for change in law given by the petitioner's in para 46 is untenable. It has been repeatedly settled by the Hon'ble APTEL and Hon'ble CERC that unless it has been expressly provided in the PPA that the party shall be restored to the same economic position as if the change of law has never occurred, and the same relief cannot be granted to the party.
 - aa) Thus, as the PPA does not include a clause for restoration of the petitioner's claim for grant of interest/carrying cost from the date of impact till reimbursement and same is inadmissible.
4. The learned Advocate for the petitioner filed the rejoinder, additional rejoinder, additional submissions reiterating the contentions of the petition, besides relying on certain rulings referred to in the rejoinder.

- i) Final Findings/proceedings dated 16.07.2018 of the Director General (Safeguard Duty), Directorate General of Trade Remedies, conducted under the Customs Tariff Act, 1975 and Customs Tariff Rules, 1997.
- ii) Renew Solar Power Private Limited Vs. NTPC in Petition No.187/MP/2018, Hon'ble CE RC's Order dated 5.2.2012.
- iii) Prayatna Developers Private Limited Vs. NTPC Limited No. 50/MP/2018.
- iv) ACME Bhiwadi Solar Power Private Limited Vs. Solar Energy Corporation of India, CERC's Order dated 09.10.2018.
- v) ACME Rewa Solar Power Private Limited Vs. SECI, CERC order dated 02.05.2019
- vi) Case No.259/19 passed by MERC between Azure Power Thrityfour Private Limited Vs. Maharashtra State Electricity Distribution Company Limited.
- vii) Union of India Vs. Colonel LNS Murthy (2012) 1 SCC 718
- viii) Nabha Power Limited vs. Punjab State Corporation Limited & Others. (Civil Appeal No.179/2017)
- ix) K.R.C.S. Balkrishna Chetty & Sons and Company Vs. State of Madras, AIR 1961 SC 1152.
- x) Suminto Heavy Industries Limited vs. ONGC Limited.
- xi) Energy Watchdog Vs. CERC (2017) 14 SCC 80.

5. The learned Advocate for the respondent filed the additional statement of objections countering averments made by the petitioner in its rejoinder and additional submissions besides relying on the following rulings:

- i) Union of India Vs. Tulsiram Patel (1985) 3SCC 398.
- ii) Appeal No. 210/2017 Adani Power Limited Vs. CERC & others.
- iii) Appeal No. 111/2017 M/s GMR Warora Energy Limited Vs. CERC & others.
- iv) Petition No. 187/MP/2018 dated 05.02.2019 of CERC (M/s Renew Wind Energy Vs. NTPC Limited).

v) Petition No. 188 /MP/dated 09.10.2018 of CERC.

vi) Prayathna Developers Private Limited Vs. NTPC (Petition No. 43/MP/2019).

6. We have heard the learned counsels for the parties. The petitioner and the respondent have filed written arguments. The learned advocates for the petitioner and the respondent relied on certain rulings. We will deal with them whenever necessary.

7. From the above pleadings and rival contentions raised by the parties, the following Issues arise for our consideration:

Issue No.1: Whether it would be necessary for this Commission not to proceed with the present petition till the disposal of the SLP No.24009-24010/2018 pending before the Hon'ble Supreme Court of India?

Issue No.2: Whether the petitioner prove that the imposition of Safeguard Duty vide Notification No.01/2018-(Custom-(SG) dated 30.07.2018 issued by the Ministry of Finance, Government of India, on import of Solar Modules amounts to 'Change in Law' as per Article 15 of the PPA?

Issue No.3: Whether the petitioner is entitled to interest/carrying cost from the date of incurring expenses to the date of actual payment on additional expenditure incurred by it as claimed in the petition?

Issue No.4: Whether the respondent prove that the petitioner has imported excess Solar Modules and SGD claim is excessive?

Issue No.5: Whether the petitioner is entitled for appropriate and proportionate increase in tariff due to imposition of Safeguard

Duty and consequently amend tariff specified in the PPA dated 20.04.2018?

Issue No.6: What Order?

8. On consideration of the entire pleadings and the documents produced by the parties and the submissions made by them, our findings on the above Issues are as follows:

9. **Issue No.1:** Whether it would be necessary for this Commission not to proceed with the present petition till the disposal of the SLP No.24009-24010/2018 pending before the Hon'ble Supreme Court of India?

a) The respondent has contended that the decision on the validity of the Safeguard Duty Notification No.01/2018- Customs (SG) dated 30.07.2018, is pending before the Hon'ble Supreme Court of India in SLP(C) No.24009-24010/2018 filed by the Government of India, in case of Union of India Vs. ACME Solar Holdings Limited. This fact is not denied by the petitioner. The respondent has relied upon the decision cited in D.K. Trivedi & Sons and Others Vs. State of Gujarat and Others (1986) Supp SCC 20 to contend that when the same or similar matters are pending before a superior court, the lower court ought to stay the hearing of the matter until the superior court disposes of the matter.

b) In the decision of D.K. Trivedi & Sons and Others Vs. State of Gujarat and Others (1986) Supp SCC 20 at paragraph 83, the Hon'ble Supreme Court has stated as follows:

“Civil Appeals 1525 and 1526 of 1982 are directed against the order of the Gujarat High Court dismissing the writ petitions filed by the appellants challenging the constitutionality of Section 15 of the Mines and Minerals (Regulation and Development) Act, 1957, and the validity of Notification No.GU-81/75/MCR 2181/ (168)-4536-CHH dated June 18, 1981, and directing the appellants to approach the Supreme Court as similar matters were pending there. In our opinion, the course adopted by the High Court was not correct. If the High Court thought that the point raised by the appellants was the same as was pending in this Court, it ought to have stayed the hearing of the writ petitions until this Court disposed of the other matters. As we have, however, held Section 15 and the amendments made by the said notification dated June 18, 1981, to be valid and constitutional, both these appeals are, therefore, dismissed.”

- c) The Commission noted the ruling of Hon'ble Supreme Court in the case of Atma Ram properties (P) Limited Vs. Federal Motors(P) Limited reported in (2005)1 SCC 705 and Madan Kumar Singh Vs. District Magistrate, Sultanpur reported in (2009) 9 SCC 79 which confirm that mere pendency of a matter before a superior court, does not appear as stay of the lower court's proceedings. Moreover, the Hon'ble Supreme Court has not stayed and/or issued any orders which preclude this Commission from disposing of the present petition. The same has also been admitted by the counsel for respondent.
- d) On consideration of the paragraph 83 of the decision rendered by the Hon'ble Supreme Court in D.K. Trivedi & Sons and Others Vs. State of

Gujarat & Others (1986) Supp SCC 20, we are of the considered opinion that the staying of the present proceeding, till the disposal of SLP (C) Nos.24009-24010/2018 before the Hon'ble Supreme Court, is not necessary for the following reasons:

- i) The perusal of paragraph 83 of the above said Hon'ble Supreme Court decision would show that the constitutional validity of Section 15 of the Mines & Minerals (Regulation & Development) Act, 1957 and the validity of Notification issued under the said Section 15 were under challenge before the Hon'ble High Court of Gujarat in two writ petitions. It appears as the same question was already pending before the Hon'ble Supreme Court, the Hon'ble High Court of Gujarat directed the writ petitioners to approach the Hon'ble Supreme Court dismissing the writ petitions. As against the dismissal of the writ petitions, civil appeals were filed before the Hon'ble Supreme Court. In such circumstances, the Hon'ble Supreme Court has observed that the course adopted by the Hon'ble High Court was not correct and if the Hon'ble High Court thought that the point raised by the appellants was the same as was pending in this Court, it ought to have stayed the hearing of the writ petitions till this Court disposed of the said matter.
- ii) In the present proceedings before us, the validity of the Safeguard Duty Notification No.01/2018-Customs (SG)dated 30.07.2018 issued

by the Ministry of Finance, Government of India, is not in dispute or it cannot be disputed before this Commission.

- iii) The learned Counsel for the petitioner has relied on the judgment reported in (2005) 1 SCC 705 Atma Ram Properties (P) Limited Vs. Federal Motors (P) Limited, wherein the Hon'ble Supreme Court held as under: -

"It is well settled that mere preferring of an appeal does not operate as stay on the decree or order appealed against nor on the proceedings in the court below. A prayer for the grant of stay of proceedings or on the execution of decree or order appealed against has to be specifically made to the appellate court and the appellate court has discretion to grant an order of stay or to refuse the same. The only guiding factor, indicated in Rule 5 aforesaid, is the existence of sufficient cause in favour of the appellant on the availability of which the appellate court would be inclined to pass an order of stay. Experience shows that the principal consideration which prevails with the appellate court is that in spite of the appeal having been entertained for hearing by the appellate court, the appellant may not be deprived of the fruits of his success in the event of the appeal being allowed. This consideration is pitted and weighed against the other paramount consideration: why should a party having succeeded from the court below be deprived of the fruits of the decree or order in his hands merely because the defeated party has chosen to invoke the jurisdiction

of a superior forum. Still the question which the court dealing with a prayer for the grant of stay asks itself is: why the status quo prevailing on the date of the decree and/or the date of making of the application for stay be not allowed to continue by granting stay, and not the question why the stay should be granted."

- e) The learned Counsel for petitioner contended that respondent has relied upon the judgment of the Hon'ble Supreme Court in case of D.K. Trivedi & Sons and Others Vs. State of Gujarat & Others, when same/similar matters are being before a superior court, the lower court ought to stay the hearing of the matter until the superior court disposes off the matter. He submits that the ratio in the D.K. Trivedi case is totally inapplicable to the present petition. In the D.K. Trivedi case, the Hon'ble Supreme Court has clarified that an objection can only be raised if a party raises the 'same' point before the lower court and superior forum. Moreover, the present petitioner i.e., Adyah Solar Energy Private Limited is not a party before the Hon'ble Supreme Court nor it has challenged the safeguard duty notification before any forum. The petitioner is approaching this Commission by way of the present petition after having incurred the expenditure towards the safeguard duty.
- f) In the judgment reported in (2009) 9 SCC 79 Madan Kumar Singh (Dead) through LRs Vs. District Magistrate, Sultanpur & Others, wherein the Hon'ble Supreme Court at para 14 held as under: -

"It is trite to say that mere filing of a petition, appeal or suit, would by itself not operate as stay until specific prayer

in this regard is made and orders thereon are passed. There is nothing on record to show that any stay was granted in favour of any party, restraining the respondents not to deliver the papers of the truck to the appellant. It would go to show that the respondents were unlawfully holding back the papers with them, for which, otherwise they were not entitled to do so."

- g) There are other issues involved in this petition, which require detailed hearing and examination for consideration of prayers made by the petitioner. If this proceeding is stayed awaiting the decision of the Hon'ble Supreme Court on the validity of the safeguard duty notification dated 30.07.2018, the hearing of this proceeding would be unnecessarily delayed. In the event of the Hon'ble Supreme Court, holding invalidity of the said Safeguard Duty Notification No.01/2018-Customs (SG) dated 30.07.2018 issued by the Ministry of Finance, Government of India, then the petitioner would not be entitled to any relief prayed for in the present proceeding.
- h) It may be noted that the Hon'ble Supreme Court has not issued any specific or general direction to this Commission, not to proceed to hear the claims for reimbursement of safeguard duty made by the petitioner in the event of change in law due to safeguard duty notification dated 30.07.2018 issued by the Government of India. In view of above facts, we are of the view/opinion that it would not be appropriate to stop the hearing/proceeding of the petition.

i) It is pertinent to mention here that the learned counsel for the respondent has not objected to the undertaking given by the petitioner on 06.01.2021 by way of affidavit in para 13 stating that if safeguard duty levied on the solar modules is struck down by the Hon'ble Supreme Court in this regard, even though the present petitioner is not a party to these proceedings, then the petitioner will refund the amount received in the form of reimbursement of safeguard duty to the respondent i.e., HESCOM.

j) Therefore, Issue No.1 is held in negative.

10. **Issue No.2:** Whether the petitioner proves that the imposition of Safeguard Duty vide Notification No.01/2018-Customs (SG) dated 30.07.2018 issued by the Ministry of Finance, Government of India, on import of solar modules amounts to 'Change in Law' as per Article 15 of PPA?

a) It is not in dispute that the petitioner has entered into PPA on 20.04.2018, with the respondent to setup Solar Power Project at Pavagada in Karnataka State. The Solar power project is commissioned within the schedule commissioning period/date. Now, the petitioner sought from this Commission to declare, acknowledge and hold that the imposition of safeguard duty on import of solar modules/cells on the basis of Safeguard Duty Notification No.01/2018-Customs (SG) dated 30.07.2018 issued by the Ministry of Finance, Government of India, under Article 15 of PPA, as a "Change in Law" event.

b) To counter this argument, learned Counsel for respondent submitted that the prayers urged by the petitioner in this petition would be additional burden foisted upon the respondent for seeking the imposition of Safeguard Duty Notification No.01/2018-Customs (SG) dated 30.07.2018 by the Government of India, to be declared as an event constituting a "Change in Law" under Article 15 of the PPA and also seeking from this Commission to determine the appropriate and proportionate increase in tariff and carrying costs as well. The petitioner is not entitled for any relief of change in law under Article 15 of PPA as the grievances of the petitioner are based on facts and circumstances that could have easily been avoided by the petitioner. The petitioner could have imported solar modules/cell from the developing countries except China and Malaysia, which were notified on 05.02.2016 vide Notification No.19/2016 by the Government of India, where there is no safeguard duty leviable on import of solar cells whether assembled or not assembled in modules or panels. The petitioner was in full cognizance of the contents of the safeguard duty notifications and exemptions on the levy of safeguard duty on solar panels imported from developing countries and proceeded to import solar panels from China knowing the same will attract the levy and placed purchase orders, after one and half months after the safeguard duty notification was issued. It was entirely possible for the petitioner to avoid the payment for safeguard duty by importing the solar panels/cells from countries notified as developing countries, in

which event the safeguard duty would not be levied and no change in law event would have occurred. The respondent further contend that the petitioner is seeking the benefit of change of law despite wilfully attracting the levy of safeguard duty in spite of knowing the contents of the notification and then seeking to pass on the burden of the same to the respondent herein, who were not consulted prior to such a decision being made.

c) It is further contended by the respondent that the solar modules of Tata Power Solar and Adani Solar Modules are more economical at the rate of Rs.20 per watt and Indian manufacture of solar modules would also be eligible for a Government subsidy on the same, which would make more economical than those are purchased from China. From the quality perspective, top Indian brands manufacturing solar panels to rival those manufactured internationally are good and more competitive from the cost perspective, even without the imposition of safeguard duty. The safeguard duty is levied on the foreign products, primarily during periods of import surge in order to protect the domestic solar manufacturers and not to encourage the purchase of products from the foreign entities. The petitioner is in full cognizance of this fact and have chosen to disregard the contents of the safeguard duty notification, by wilfully entering into an agreement for the import of solar modules from a Chinese firm after coming into effect of the safeguard duty notification issued by the Government of India. The claims for reimbursement of

safeguard duty from the respondent would be a burden on the finances of the power distribution companies which are public undertakings owned by the State Government. Therefore, Commission may not consider to declare the Safeguard Duty Notification No.01/2018-Customs (SG) dated 30.07.2018 issued by the Government of India as "Change in Law" event under the PPA.

d) Per contra, the learned counsel for petitioner contended that there is no bar under the PPA on import of solar modules. In fact Article 15.1.1(e) of PPA provides that any change in law pertaining to taxes, duties after the date of submission of Techno Commercial Bid shall be to the account of the ESCOM and appropriate change in tariff, either increase or decrease in proportionate, due to the change in taxes, duties shall be as per clause 15.2 of PPA. Moreover, this is a commercial decision of the petitioner to import solar modules/cell from China and the respondent cannot impose conditions that petitioner could have purchased solar modules/cell from domestic manufacturers and avoided the attraction of safeguard duty on import of solar module/ cell from China. Therefore, the petitioner is requesting the Commission to declare, acknowledge and hold that the imposition of Safeguard Duty vide Notification No.01/2018-Customs (SG) dated 30.07.2018 as a change in law event as per PPA paras with effect from 30.07.2018.

e) On the examination of written submission/statement of objections and rejoinders submitted by the parties, we proceed to examine as to

whether the Safeguard Duty Notification No.01/2018-Customs (SG) dated 30.07.2018 issued by the Ministry of Finance, Government of India, imposing the safeguard duty on imported solar cells, whether or not assembled in modules or panels, is covered under the scope of 'Change in Law' event or otherwise under the provisions of PPAs of the solar projects. Whether to consider the prayers made by the petitioner on the basis of averments made in this petition or otherwise? Now, we proceed to examine the various definitions and relevant clauses/articles under the PPAs of petitioner, the Guidelines, Notifications and rulings of various authority and Superior Courts.

- f) The terms "Law" and "Government Instrumentality" are defined under definitions clause of Article 21.1 of the aforesaid PPAs as hereunder:

"Government Instrumentality" means any department, division or sub-division of the Government of India or the State Government and includes any commission board, authority, agency or municipal and other local authority or statutory body including panchayat under the control of Government of India or the State Government, as case may be, and having jurisdiction over all or any part of the project facilities or the performance of all or any of the services or obligations of the developer under or pursuant to this Agreement."

"Law" shall mean in relation to this Agreement, all laws including Electricity Laws in force in India and any statute, 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, notifications by any 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."

g) Article 15.1.1 of PPA, defines the term 'Change in Law' means the occurrence of any of the following events after the submission of online Techno Commercial Bid resulting into any additional recurring/non-recurring expenditure by the solar power developer or any income to the developer. The sub-clauses of Article 15. read as under:

"a)the enactment coming into effect, adoption, promulgation, modification Regulation framed pursuant to such Law;

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) -----

d) -----

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

h) The Article 15.2 stipulates relief for 'Change in Law' and Article 15.2.1 stipulates that the aggrieved party shall be required to approach the

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, provide relief for the same, shall be final and governing on both the parties.

- i) We have perused the Judgments and Orders of the Hon'ble Supreme Court, Hon'ble Appellate Tribunal for Electricity, Hon'ble Central Electricity Regulatory Commission and other State Electricity Regulatory Commissions submitted by both the parties. Now, we proceed to examine them and will give our findings on them in succeeding paras of this Order.
- j) The reliance is placed on the proceedings of the Directorate General of Trade Remedies dated 16.07.2018, while deciding the similar case claiming safeguard duty on import of solar modules from China, wherein the Director General (Safeguard) has conducted proceedings under the Customs Tariff Act, 1975 and the Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997 and recorded his findings and recommended on the imposition of safeguard duty on import of solar modules from China PR and Malaysia. The extract of recommendation is produced below: -

Para 76 - *"The increase in imports of Product Under Consideration "PUC" into India, have caused serious injury and threaten to cause serious injury to the domestic products of "PUC" and it will be in the public interest to impose safeguard*

duty on imports of "PUC" into India in terms of Rules 12 of the Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997 for a period of two years. Considering the average cost of production of "PUC" of the domestic producers after allowing the reasonable return on cost of production minus interest, safeguard duty as indicated below which is considered to be adequate to protect the interest of domestic industry on PUC being imported falling under sub-heading 8541 4011 of the First Schedule of the Customs Tariff Act, 1975, is recommended to be imposed. The Item mentioned herein is indicative only and the description of the imported goods will determine the applicability of the recommended Safeguard Duty."

Year	Safeguard Duty Recommended
First Year	Safeguard Duty @25% ad valorem
Second Year (For first 6 months)	Safeguard Duty @20% ad valorem
Second Year (For next 6 months)	Safeguard Duty @15% ad valorem

The Commission notes that on the basis of final findings of DGRT in F.No.22/1/2018 DGTR dated 16.07.2018 and as per his recommendations, the safeguard duty was levied on import of "solar cells whether or not assembled in modules or panels" from China PR and Malaysia. Accordingly, the Ministry of Finance, Government of India has issued the Safeguard Duty Notification No.01/2018- Customs (SG) dated 30.07.2018.

- k) We have relied upon the order dated 14.08.2018 passed by the Hon'ble Appellate Tribunal for Electricity in Appeal No. 111 of 2017 in GMR Warora Energy Limited Vs. Central Electricity Regulatory Commission and Others,

wherein it is 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." In the same judgement, it is held that any tax or application of new tax on 'supply of power' covers the taxes on inputs required for such generation and supply of power to the Distribution Licensees. In the instant case, solar modules/cell are essential items to set up a generating station in order to supply power to the respondents as per terms of PPAs. The impose of safeguard duty on imported solar modules/cells from China by the Government of India has resulted in the change in cost of inputs required for generation and hence the same is to be considered as" Change in Law"

- l) This Commission has also held in O.P. Nos. 98-103 /2018 in case of ACME Guledagudda Solar Energy Private Limited Vs. BESCO & Others and OP No.48 to 52 of 2019 of Fortum Solar India Private Limited Vs. BESCO & Others, stating that "the Safeguard Duty Notification No.01/2018-Customs (SG) dated 30.07.2018 issued by the Ministry of Finance, Government of India, imposing safeguard duty qualifies as a Change in Law event."
- m) It could be seen from the available records that petitioner has participated in competitive bidding for the aforesaid solar power project and KREDL has accepted their bid and PPA was entered with respondent on 20.04.2018 earlier to the Safeguard Duty Notification No.01/2018-Customs (SG) dated 30.07.2018 issued by the Ministry of Finance,

Government of India. Article 15.1.1 (e) of the aforesaid PPA clearly provides that any change in law pertaining to taxes, duties after the date of submission of the Techno Commercial Bid shall be to the account of the HESCOM and appropriate change in tariff, either increase or decrease in proportionate, due to the change in taxes, duties shall be as per clause 15.2 of PPA. In the instant case, the safeguard duty levied on import of solar cells whether or not assembled in modules or panels falls under the category of duty as envisaged under the clause 15.1.1 (e) of PPA.

- n) Keeping in view of definitions of 'Government Instrumentality', "Law", provisions of Article 15.1.1 (e) of PPA dated 20.4.2018 and various rulings of Hon'ble Appellate Tribunal for Electricity, the Commission is of the view that the Safeguard Duty Notification No.01/2018-Customs (SG) dated 30.07.2018 imposing Safeguard Duty on import of "Solar Cells, whether or not assembled in modules or panels" from China PR and Malaysia is covered as an event of 'Change in Law' under the provisions of Article 15 of the PPAs. The Commission notes that no record is placed by the respondent which could show the denial to recognize the imposition of the Safeguard Duty Notification No.01/2018- Customs (SG) dated 30.07.2018 as Change in Law event. Therefore, the contention of the respondent has no force and is liable to be rejected.

- o) Therefore, we hold that Safeguard Duty Notification No.1/2018-Customs (SG) dated 30.07.2018 issued by the Ministry of Finance, Government of India, imposition of safeguard duty on import of solar cells/panels modules is an event of 'Change in law' in terms of Article 15 of the PPA.
- p) The learned counsel for respondent further contended that the Safeguard Duty Notification No.01/2018-Customs (SG) dated 30.07.2018 envisages that 25% (twenty-five per cent), ad valorem minus anti-dumping duty is payable, if any, but in the instant case, the petitioner has not deducted any anti-dumping duty from the claims made for reimbursement of safeguard duty, therefore, its claims shall not be considered. To counter the contention of the respondent, the petitioner had argued that there was no anti-dumping duty levied on import of solar modules from China. During the course of hearing this commission sought a clarification from the learned counsel for the petitioner on this issue. During the hearing/proceedings of this case, learned Advocate for the petitioner has submitted that during the period when safeguard duty is being levied on solar cells and modules, no anti-dumping duty and countervailing duty has been levied on the import of solar cells and modules in India. It may be noted that learned counsel for respondent has failed to substantiate his contention that there was an anti-dumping duty levied on solar modules, before issuance of the Safeguard Duty Notification No.01/2018-Customs (SG) dated 30.07.2018 by the Government of India. The Commission has gone through the relevant

provisions of the First Schedule to the Customs Tariff Act, 1975 and observed that Chapter-85, Section-XVI, Tariff Item-Heading 8541 4011- Solar cells whether or not assembled in modules or panels are shown as duty "free" so it is presumed that there was no anti-dumping duty levied on solar modules.

q) For the reasons mentioned in above paras, we hold and declare that the Safeguard Duty Notification No.01/2018-Customs SG) dated 30.7.2018 issued by the Ministry of Finance, Government of India, is a "Change in Law" under Article 15.1 of the PPA entered into by the petitioner and respondent.

r) Therefore, we answer Issue No.2 in the affirmative.

11. **Issue No.3:** Whether the petitioner is entitled to interest/carrying cost from the date of incurring expenses to the date of actual payment on additional expenditure incurred by it as claimed in the petition?

a) The petitioner has filed an interlocutory application on 09.12.2020 for amendment to the main petition, especially in prayers (b) and (c) and inter alia, with a request to direct the respondent to make payment of the safeguard duty and IGST on safeguard duty, amounting to Rs.31,75,76,295 on account of change in law event, in the form of lump sum or in the form of annuity basis and evolve a suitable mechanism in this regard. This Commission has allowed the amended application.

Accordingly, the Counsel for respondent has filed additional statement of objections thereafter.

b) The petitioner in its amended petition submits that, it had placed the orders for purchase of solar modules from the Vendor namely; ZNSHINE Private Techno Company Limited (based in China) and received all the solar panels at Chennai Port/ICD Whitefield Plantations, Hoskote, Bengaluru, during the period from December 2018, January & March 2019, thereby attracting the imposition of safeguard duty at the rate of 25% of the value of solar modules and petitioner has incurred additional cost due to the introduction of/imposition of safeguard duty for which it must be compensated along with the carrying cost for the period starting from the date on which it has incurred the additional cost to the date of actual reimbursement by HESCOM. It is not in dispute that the Government of India had issued Safeguard Duty Notification dated 30.07.2018 and the said Notification Introduced safeguard duty at the following rates on the import of solar cell (whether or not assemble in modules or panels) from certain countries including China.

Time Period	Safeguard Duty
From 30.07.2018 to 29.07.2019	25%
From 30.07.2019 to 29.01.2020	20%
From 30.01.2020 to 29.07.2020	15%

c) The petitioner in this regard has filed an additional Affidavit dated 10.04.2019 and furnished the details of impact of imposition of safeguard duty as below:

BE No.	Supplier	Date of BE	Port	SGD/BCD	IGST on SGD	Total SGD
9189047	Zn Shine	10.12.2018	ICD Bangalore	6,02,29,750	30,11,487.48	6,32,41,237.12
9426711	ZN Shine	27.12.2018	Chennai	4,23,81,074	21,19,053.70	4,45,00,127.80
9838254	ZN Shine	29.01.2019	ICD Bangalore	3,68,77,499	18,43,874.97	3,87,21,374.35
9245293	ZN Shine	13.12.2018	ICD Bangalore	2,67,00,077	13,35,003.84	2,80,35,080.67
9266534	ZN Shine	15.12.2018	ICD Bangalore	2,67,00,077	13,35,003.84	2,80,35,080.67
9426694	ZN Shine	27.12.2018	Chennai	2,20,73,476	11,03,673.80	2,31,77,149.90
9877786	ZN Shine	31.01.2019	ICD Bangalore	2,14,98,246	10,74,912.32	2,25,73,158.64
9199837	ZN Shine	10.12.2018	ICD Bangalore	1,60,20,046	8,01,002.31	1,68,21,048.41
9199905	ZN Shine	10.12.2018	ICD Bangalore	1,60,20,046	8,01,002.31	1,68,21,048.41
9877714	ZN Shine	31.01.2019	ICD Bangalore	1,31,29,572	6,56,478.58	1,37,86,050.19
9878633	ZN Shine	31.01.2019	ICD Bangalore	95,24,744	4,76,237.20	1,00,00,981.16
9877787	ZN Shine	31.01.2019	ICD Bangalore	82,05,699	4,10,284.93	86,15,983.61
2316157	ZN Shine	06.03.2019	ICD Bangalore	30,93,309	1,54,665.44	32,47,974.17
Total				30,24,53,614	1,51,22,681.00	31,75,76,295.00

- d) According to the petition, the petitioner has imported the solar modules from China during December 2018, February & March 2019. As per Safeguard Duty Notification dated 30.07.2018, the petitioner has paid safeguard duty at the rate of 25% and IGST at 5% on SGD, the petitioner has claimed in the petition, Rs.31,75,76,295 including interest, which is due to the introduction of/ imposition of safeguard duty. The petitioner contended that it has incurred additional expenditure on account of Change in Law event and prayed for reimbursement of additional expenditure along with interest on additional working capital deployed for execution of its solar power project from the Respondent.
- e) The learned counsel for petitioner contended that the petitioner is seeking reimbursement of safeguard duty paid/remitted by them to Customs Department, while importing solar modules/cells/panel from China on account of safeguard duty levied by Safeguard Duty Notification No.01/2018-Customs (SG) dated 30.07.2018 issued by the Government of India along with carrying cost from the date of incurring expenses to the date of actual payment. The petitioner has incurred

additional expenditure on account of change in law event and prayed for reimbursement of additional expenditure along with interest on additional working capital deployed for its solar project as envisaged under Article 15.1 and 15.2 of the PPA.

- f) The learned counsel for petitioner further contended that petitioner is entitled to carrying cost under principles of *quantum meruit* as statutorily enshrined in Section 70 of the Indian Contract Act and the petitioner would be entitled to carrying cost. Section 70 of the Indian Contract Act, 1872 provides that where a person is lawfully does anything for another person and does not do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered the petitioner is entitled for carrying cost compensation/interest.
- g) The Counsel for petitioner contended in its rejoinder stating that in case Article 15.1.1 provides that a change in law events is any event listed thereunder "resulting into any additional recurring/non-recurring expenditure by the SPD". The usage of words "*resulting into any additional..... expenditure*" signifies the parties' intent to allow change in law relief, to cases where additional expenditure would be subsequently incurred by the parties. Had the parties' intent being to restrict it relief for change in law only once actual expenditure has been incurred, the parties would have used the word "*resulted into any additional.... expenditure*".

h) The petitioner further contended that, carrying cost is a compensation for the time value of money and is an inherent provision under the change in law clause of the PPA. Since, the Change in Law clause is based on principles of restitution, relief of carrying cost on the additional cost incurred on account of Change in Law is implicit in the PPA. The 'economic position which is sought to be restored in terms of the change in law clause does not limit itself to a simple correlation of increased expenditure and the corresponding compensation amount but ought to also include compensations in terms of carrying cost incurred in respect of the said change in law events. This is also supported by principle of business efficacy, as recognised in the case of Nabha Power Limited Vs. Punjab State Power Corporation Limited and another (Civil Appeal No. 179 of 2017) which provides that a contractual term can be implied in light of the express terms of the contract, commercial common sense and the facts known to both parties at the time of entering into the contract. Further, a Change in law clause being a restitution clause, demands that the petitioners should be compensated for all necessary and reasonable extra costs including carrying cost and / or interest on the additional cost incurred on account of change in law.

i) The learned counsel for petitioner has relied upon the rulings reported in:

a) (2010) 11 SCC 296 (Sumitomo Heavy Industries Limited Vs. Oil & Natural Gas Corporation Limited).

b) 1970 (1) SCC 213 (Piloo Dhunjishwa Sidhwa Vs. Municipal Corporation of the City of Poona).

- c) (2012) 1 SCC 718 Union of India Vs. Colonel LSN Murthy & Another.
- d) K.R.C.S. Balkrishna Chetty and Sons & Company Vs. State of Madras, AIR 1961 SC 1152.
- e) Order dated 13.11.2019 passed by MERC in case No.259/2019 between Azure Power Thirtyfour Private Limited Vs. Maharashtra State Electricity Distribution Company Limited.

We have gone through the above said rulings, few cases cited above are relating to Sales Tax Act and General Sales Tax Rules and Supply of Goods under Indian Contract Act, 1872 and carrying cost, the facts of the above said cases are quite different from the facts of the instant case.

- j) Per contra, the learned counsel for respondent submits that with regard to carrying cost, the law stands settled that only if there is a provision in the PPA for restoration of developer to same economic position as if the change in law event has not occurred, the developer/seller is eligible for carrying cost for such allowed change in law event from the effective date of change in law until the same is paid by HESCOM as allowed by the appropriate authority by an order/judgment. In the present case, neither does the PPA entered into between the parties contain a single provision that permits/stipulates restoring the solar power generator to the same financial position as prior to the event of change in law, nor does it contemplate the payment of carrying cost or interest of any kind to the aggrieved party on account of change in law. In view of above, the petitioner herein is not entitled to any relief of restoration to the previous

financial position, by way of interest/carrying cost from the date of incurring till the date of reimbursement, as the PPA entered into by both the parties contains no provision for such relief. The PPA is a legally binding contract entered into by the parties, reflecting the intention of both the parties and is bound by the terms of the same.

- k) The Respondent further contends that the provision under Article 5.1.1 (g) of the PPA cast obligation upon the solar power developer that the solar power developers shall be responsible for all payments related to any taxes, cesses, duties or levies imposed by the Government Instrumentalities or competent statutory authority on land, equipment, material or works of the project or on the electricity consumed by the project by itself or on the income or assets owned by it. It is clear from the above stated clause of the PPA that the petitioner is responsible for the payment of all taxes and duties imposed by the Government in relation to all works connected to the project. It is in cognizance of this fact that the petitioner had bid in response to the respondent herein. The bid of an eligible bidder has to quote an all-inclusive bid that includes the cost of any existing foreseeable taxes and duties as stipulated in the above said article such as taxes, cesses, anti-dumping duty etc. The safeguard duty notification dated 30.07.2018 stipulates the safeguard duty @ 25% ad valorem minus anti-dumping duty if any. In view of the fact that the anti-dumping duty payable by it, the same was included in the cost of the petitioner's bid as agreed in terms of the PPA. The only change in law benefit, if any, payable

to the petitioner would be the difference in the rates stated in the safeguard duty notification and the anti-dumping duty payable.

l) At the cost of repetition, we would like to state that the petitioner is seeking reimbursement of safeguard duty paid/remitted by them to Customs Department, while importing solar modules/cells/panel from China on account of safeguard duty levied due to Safeguard Duty Notification No.01/2018-Customs (SG) dated 30.07.2018 issued by the Government of India, along with carrying cost from the date of incurring expenses to the date of actual payment. The petitioner seeking reimbursement of safeguard duty and IGST on safeguard duty on import of solar module/panels from China which it has paid through Bank challans while getting customs clearance at Chennai & ICD Whitefield Plantation, Hoskote, Bengaluru. The petitioner has incurred additional expenditure on account of change in law event and claimed reimbursement of safeguard duty and IGST along with interest on additional working capital deployed for its solar project as envisaged under Article 15.1 and 15.2 of the PPA.

m)The Commission notes that the petitioner has imported solar modules/cells from China and incurred additional expenditure due to imposition of safeguard duty at the rate of 25% on import of solar modules/cell (whether or not assembled in modules or panels) within the period specified i.e., from 30.07.2018 to 29.07.2019. This Commission, answering the Issue No.2, has opined that the Safeguard Duty Notification No.01/2018-Customs (SG)

dated 30.07.2018 is as "Change in Law" event, thus the petitioner is entitled to get relief under the provisions of Article 15.2 of the PPA, on number of solar modules/cells imported and safeguard duty and IGST paid thereon with reference to minimum contracted energy as per provisions of PPA.

- n) Now, we proceed to examine whether the prayer of petitioner seeking carrying cost/interest on working capital is permissible for reimbursement under the provisions of the PPA entered with the respondent or otherwise.
- o) The petitioner contended in his petition, stating that restitution is an integral part of compensation granted for 'Change in Law' and carrying cost in simple terms is the compensation for time value of money.
- q) The learned counsel for respondent submitted that in the absence of the express provision in the PPA, it is not open for the petitioner to claim relief under principles of equity. The petitioner is not entitled to interest on incremental working capital at normative interest rate or otherwise, in order to put the petitioner to the same economic position as if change in law has not occurred.
- r) The Commission observes that under clause 5.7.1 of the Competitive Bidding Guidelines which envisages that in the event a change in law results in any adverse financial loss/gains to the solar power developer then, in order to ensure that the solar power generator is placed in the same financial position as it would have been had it not been for the

occurrence of the change in law, the solar power developer shall be entitled to compensation by the party, as the case may be, subject to condition that quantum and mechanism of compensation payment shall be determined and shall be effective from such date as may be decided by the Appropriate Commission. This Commission notes that when aforesaid provision is existed there in the competitive bidding guidelines then why the petitioner had not insisted upon to incorporate such provisions in the PPA while entering into PPA dated 20.04.2018 with the respondent and accepted the terms and conditions of the PPA. In view of above facts, we are of the considered opinion that the PPA having signed by both the parties, now it is a binding document, and no claim could be made by the petitioner which dehorn the provisions of the PPA. Therefore, the averments made by the petitioner untenable and liable to be rejected.

- s) The Commission notes that in the Judgment of Hon'ble APTEL dated 13.04.2018 in Appeal No.210 of 2018 in the case of Adani Power Limited Vs. CREC & Others, it was held that since Gujrat Bid-01 PPA has no provision for restoration to the same economic position as if the change in law has not occurred. Therefore, the question of allowing carrying cost will arise. The relevant portion of the judgment dated 13.04.2018 reads as under:

Para 12 d) x. "further, the provisions of Article 13.2 i.e., restoring to the same economic position as if Change in Law has not occurred is in consonance with the principles of 'restitution' i.e., restoration of some specific thing to

its rightful status. Hence, in view of the provisions of the PPA, the principles of restitution and judgment of the Hon'ble Supreme Court in case of Indian Council for Environ-Legal Action vs. Union of India & Others., we are of the considered opinion that the Appellant is eligible for carrying cost arising out of approval of the change in law events from the effective date of change in law till the approval of the said event by the appropriate authority. It is also observed that the Gujarat Bid-01 PPA have no provision for restoration to the same economic position as if the Change in Law has not occurred. Accordingly, this decision of allowing Carrying Cost will not be applicable to the Gujarat Bid-01 PPA."

- t) The Commission placed reliance on the judgment of Hon'ble Supreme Court in the case of Union of India Vs. Tulasiram Patel (1985) 3 SCC 398, wherein it was held that" when express inclusions are specified, anything which is not mentioned explicitly is excluded." In this regard, the Commission further notes the decision rendered by the Hon'ble CERC in the Petition No.188/MP/2017, wherein upon analyzing this issue in depth, it came to the reasoned decision that unless carrying cost is stipulated in the PPA, the aggrieved party is not entitled to it. Therefore, the Commission notes that there are no explicit or implicit provisions available in the instant PPA entered by both the parties which allows the carrying cost/interest on incremental working capital as sought by the petitioner to compensate him.

u) The learned Advocate for respondent rely upon the following rulings:

- (i) Order dated 19.09.2018 passed by CERC in Petition No.50 MP/2018 & 52/MP/2018.
- (ii) (1985) 3 SCC 398 between Union of India Vs. Tulsiram Patel.
- (iii) Order dated 13.04.2018 passed by Hon'ble ATE in Appeal No.2010/2017 between M/s Adani Power Limited Vs. CERC & Others.
- (iv) Order dated 14.08.2018 passed by Hon'ble ATE in Appeal No.111/2017 between M/s GMR Warora Energy Limited Vs. CERC & Others.
- (v) Order dated 05.02.2019 passed by Hon'ble CERC in Petition No.187/MP/2018 between M/s New Wind Energy (TN2) Private Limited Vs. NTPC Limited & Others.
- (vi) Order dated 21.01.2020 passed by Hon'ble CERC in Petition No.43/MP/2019 between M/s Prayathna Developers Private Limited Vs. NTPC Limited & Others.

v) We have gone through above stated court rulings and observed that the facts of the said rulings are different from the facts of the present case on hand.

w) In view of decisions of the Hon'ble Appellate Tribunal for Electricity, existing provisions of the PPA dated 20.04.2018 entered by the parties and reasons mentioned in above paras, the Commission holds that the claims made by the petitioner for grant of carrying cost/interest on additional expenditure on payment of safeguard duty and IGST on safeguard duty paid are not sustainable and liable to be rejected.

x) Hence, we answer, Issue No.3 accordingly.

12. **Issue No:4:** Whether the respondent proves that the petitioner has imported excess solar modules and SGD claim is excessive?

- a) The learned counsel for the petitioner submits that PPA has been entered into between the petitioner and the respondent (HESCOM) for setting up of 50 MW_{AC} capacity of Solar PV ground-mounted project in Block No.13 of Pavagada Solar Power Park.
- b) In the additional affidavit submitted on 06.01.2021 by the petitioner, it is mentioned that the petitioner has installed solar modules of 325/330/335 watts, totalling to 7,25,00,00 watts and total quantum of modules imported are 2,20,147 units/modules to set up of a 72.5 MW solar power project. It also stated that for a 50 MW solar power project, the requirement of modules (assuming that the module is average of 330 watts) would be of 1,51,515 units. A detailed statement of supply of modules is at Annexure-1 and the copies of commercial invoices are placed at Annexure-2 of the affidavit dated 06.01.2021.
- c) The petitioner further submitted that the RfP issued by the KREDL for the present project, wherein, the clause 1.4.1 of RfP stipulates that the solar power developer shall mention the maximum capacity utilisation factor (CUF) at the time of signing of the PPA. The RfP also says that there is no cap on the Maximum CUF. The petitioner proceeded to declare a higher CUF of 27.76%, which is bound to increase the capacity of modules at the DC end. Such higher CUF effectively leads to greater optimization of the project against a contracted AC capacity and thereby leads to

more competitive tariff being offered by the petitioner. In the present case, for offering a competitive tariff of Rs.2.91 per unit, the petitioner had declared a CUF of 27.76 %, thereby it was imperative for the petitioner to add the additional modules at DC end to optimize the DC capacity in order to maintain the said CUF. Therefore, the competitive tariff is the outcome of additional cost incurred by the petitioner, any such increase in cost due to safeguard duty on the import of modules is bound to be reimbursed to the petitioner. In this regard, the petitioner places reliance on the Order passed by the Hon'ble Maharashtra Electricity Regulatory Commission (MERC), whereby the MERC on due appreciation of necessity to install higher capacity of DC modules to achieve greater efficiency has allowed reimbursement of safeguard duty for the capacity of module which are in proportionate to CUF declared by the generator.

- d) The learned Counsel for petitioner submits a rejoinder in reply to the statement of objections filed by the respondent, stating that the petitioner in order to fulfil its obligations under Article 5.6 of the PPA has to ensure supply of minimum contracted energy of 69.029 MUs to the respondent corresponding to a minimum CUF of 15.76%, and the non-compliance of it will attract the penalty payable to the respondent. Therefore, it was imperative for the petitioner to add the additional solar modules at the DC end to optimize the DC capacity in order to maintain the minimum CUF.

e) Per Contra, the learned counsel for respondent submitted a written statement on 11.07.2019 stating that the petitioner has failed to provide all the relevant details and without proper documentation and invoices certified by Auditors, for B-13 of the Solar Park at Pavagada, the relief sought by the petitioner cannot be granted. Further it is contended that the petitioner has merely shown the supply agreement for solar module between the ZNSHINE Tech Company Limited for DC capacity. Even though the petitioner furnished the supply agreement, it has failed to submit any invoices or document indicating the additional cost incurred by it due to the imposition of safeguard duty. The petitioner is put to the strict proof of the same. Further, it can be seen from the material produced by the petitioner which indicates that a W.P. No.1978/2008 filed before the Hon'ble High Court of Madras wherein, directions were sought for by the petitioner to quash the order of Self-Assessment passed by the Custom Authority. A combined reading of the Order of Hon'ble High Court as well as the data furnished by the petitioner in this petition would indicate that the assessment of the duty/tax payable is only provisional in nature, subject to change at the time of final assessment. Moreover, the petitioner has paid the said duty on the provisional bills, under protest and the same is subject to final assessment. Therefore, based on the data furnished by the petitioner, the contention that the petitioner has already suffered the levy of safeguard duty is untenable.

f) The respondent contended that learned counsel for petitioner had submitted an additional Affidavit on 15.01.2020 along with Chartered Accountants' Certificate wherein details on number of solar modules shown as 2,20,147 with a capacity of 73.00 MW), shipment value of Rs.1,20,98,14,458 and payment of safeguard duty of Rs.31,75,76,295. The respondent in its written submissions dated 15.12.2020 at para 21 (xi) submitted that each solar module is of 330 watt capacity; accordingly, for 50 MW capacity, 1,51,515 numbers of solar modules of 330 watt capacity were sufficient, but the petitioner has submitted invoices for 2,20,149 of solar modules each of 330 watt capacity i.e., excess of 68,634 solar modules which can produce an excess of 22.65 MW capacity, whereas the petitioner has contended in its additional affidavit dated 06.01.2020 that it has installed 2,20,147 solar modules for set up of 72.5 MW solar project. The Commission has taken note of the solar modules mentioned in the CA Certificate dated 15.01.2020 i.e., 2,20,147 solar modules. Therefore, the Commission is of the opinion that the petitioner has claimed excess amount of Rs.10,00,58,285 (i.e., Rs.31,75,76,295 x 23 MW / 73.00 MW) towards safeguard duty for which the petitioner is not entitled. Further, the petitioner has not adopted the prudent utility practices in implementing the project. The petitioner had placed purchase orders after having known beforehand the imposition of safeguard duty. The petitioner has acted on its discretion without informing or seeking consent of respondent. Therefore, the petitioner is

not entitled for reimbursement of safeguard duty and IGST on additional quantity of solar modules installed by the petitioner to set up of 73.00 MW solar project, as it is a burden on consumers as the same needs to be factored in consumer tariff. In view of above, the petition deserves to be dismissed.

- g) The contention of the petitioner that extra quantity of solar modules/panels are required to meet the AC power as contemplated under the PPA is untenable and denied. As per PPA, the petitioner is required to supply AC power and DC power generated by the solar photovoltaic power plant is converted to AC power using inverters. Utility interactive Photovoltaic Inverters are used by the petitioner, but many new inverters reduce AC output by adjusting DC voltage and current which is known as clipping on the DC side to protect against overloading. The developer should erect inverters with good efficiency so that there should not be any energy loss while converting DC to AC. It is the responsibility of the petitioner to have efficient Inverters and consistently supply the energy as per agreed contracted capacity.
- h) In response to the contention of the petitioner that, Hon'ble Maharashtra Electricity Regulatory Commission (MERC) in case No.259/2019 between Azure Power Thirty-Four Private Limited Vs. Maharashtra State Electricity Distribution Company Limited has set-out a rational for calculating the permissible extent of DC solar modules that could be installed by solar power developers to meet the contracted capacity requirement in AC

terms and allowed excess DC capacity in the range of approximately 41% to 57%, the respondent contended that the facts mentioned in the Order of MERC, is not similar to this case and therefore, not applicable to this petition.

- i) The counsel for respondent further contended that the competitive bidding warrants the lowest bid price and it never dependent on CUF. The petitioner was able to quote the lower bid price by installing excess modules to achieve higher CUF against the developer who have quoted higher tariff and intended to use better quality of panels. Therefore, any payment of safeguard duty towards installation of additional modules to the petitioner will cause injustice to those solar developers who intended use good quality solar panels and quoted higher bids than this petitioner and same defeats the object of competitive bidding.
- j) To examine this issue as to how much quantity/number of solar modules imported from China by the petitioner could be reasonable to set up 50 MW solar power plant and can be allowed for reimbursement of safeguard duty, under the provisions of the PPA entered by both the parties, it would be appropriate to go through the relevant provisions of the PPA in the instant case. The relevant portion of is reproduce below:
 - a) Article 21.1 of PPA defines "Contract Capacity"
"Contract Capacity" shall mean 50MW contracted by the ESCOM for supply by the Developer to ESCOM at the delivery point from the solar project."

- b) Article 21.1 defines Contract Year; "Contract Year" shall mean the period beginning from the Effective Date and ending on the immediately succeeding March 31 and thereafter each period of 12 months beginning on April 1 and ending on March 31."
- c) Article 21.1 also defines Capacity Utilization Factor" or "CUF". "CUF" shall have the same meaning as provided in CERC (Terms and Conditions for Tariff determination from the Renewal Energy Sources) Regulations, 2009 as amended from time to time. Here, the CUF is expressed in AC terms.
- d) Article 5 of PPA stipulates the Obligation of the Developer and Article 5.6 states about Right to Contract Capacity & Energy.

The Article 5.6 says that HESCOM, at any time during a Contract Year, shall not be obliged to purchase any additional energy from the solar power developer beyond 121.589 Million kWh (MU) at maximum CUF of 27.76%. If for any Contract Year, it is found that the solar power developer has not been able to generate minimum energy of 69.029 Million kWh (MU) corresponding to a minimum CUF at 15.76% i.e., maximum CUF of 27.76% as mentioned by the Bidder at the time of signing the PPA, minus 12% for solar PV on account of reasons solely attributable to the solar power developer, the non-compliance by the solar power developer, shall make solar power developer liable to pay the compensation provided in the Agreement to the HESCOM. This compensation shall be applied to the

amount of shortfall in generation during the Contract Year. The amount of compensation shall be computed at the rate equal to the compensation payable by HESCOM, subject to a minimum of 50% of the applicable tariff.

e) In case of purchase of any excess energy:

Purchase of any excess energy, beyond the energy generated corresponding to a maximum CUF mentioned as by the solar power developer during the signing of the PPA for solar PV shall be charged at a rate equivalent to 75% of PPA tariff or 75% of the applicable APPC charges (as published by KERC), whichever is less, provided first right of refusal will vest with the HESCOM.

- f) It would also be appropriate to see the relevant provisions of Request for Proposal (RfP) for inviting bids for setting up of Grid-Connected Ground Mounted Solar Photovoltaic Projects in the Pavagada Solar Park. RfP-Volume-I No.RFP No.KREDL/07/SG/1200 MW/Pavagada Park/809/2017-18 dated 31.01.2018 stipulates as follows:

Article 1.4.1 -*The bidder shall note that there is no cap on Maximum CUF. The solar developer shall mention the Maximum CUF during the signing of PPA with ESCOM(s).*

-The Minimum CUF shall be the Maximum CUF mentioned by the bidder at the time of PPA signing minus 12%.

-The solar power developer shall maintain the Minimum CUF as mentioned above for the project capacity measured in AC during the PPA term.

Illustration:

If a bidder mentioned the Maximum CUF of 32%, then the Minimum CUF shall be 20% (i.e., $32-12=20$).

The bidder is allowed to select the DC capacity of the project subject to the prudent utility practices prevailing in the State of Karnataka, but shall inform the same to KREDL, ESCOM, CEIG and any other concerned authority.

Article 1.4.2. In case the Project supplies energy less than the energy corresponding to the Minimum CUF in any Contract Year, the Solar Power Developer shall be liable to pay to the concerned ESCOM, the compensation as per relevant provisions mentioned in the PPA.

Article 1.4.3. In case the project supplies excess solar energy than the Maximum CUF in any Contract Year, the settlement in the energy shall be as per the relevant provisions mentioned in the PPA.

- k) The Central Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable Sources) Regulations, 2009 also define the CUF for Solar PV project. The extract of Regulation 58 is given below:

Regulation 58 (1) "The Capacity Utilization factor for Solar PV Project shall be 19%."

- l) As per CERC (Terms & Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2009 and PPA Article 21.1, the CUF allowed is 19% for Solar PV Projects. But in the instant case, both the parties have agreed for the contract to supply of minimum

energy at 15.76% of CUF, which are binding on both the petitioner and respondent.

m) The petitioner made averment that the Hon'ble Maharashtra Electricity Regulatory Commission (MERC) in case No.259 of 2019 has allowed installation of additional solar power modules against minimum threshold of 19% CUF to optimize performance of the plant by achieving higher CUF. To bring the clarity on this issue, the extract of para 19 of the said order of the Hon'ble Commission is as under:

Para-19 "-----In case, if MSDCL's argument is accepted that it does require energy more than 19% CUF, then it would not only lose the opportunity of procuring such additional energy at lower rate of Rs.2.72/kWh, but would be required to undertake separate bidding process for procuring such additional energy as MSDEL is still under shortfall in its Solar RPO."

We observe that the reliance placed on the MERC decision by the petitioner is not applicable to the instant case as facts of aforesaid case is not similar in the instant case.

n) The contention of the petitioner that there was no need to intimate/inform to HESCOM/KREDL/concerned authority, before importing solar modules from China for setting up of 50 MW AC capacity in order to generate additional energy beyond 121.589 MU KWh at CUF of 27.76%, because there is no cap put on the capacity utilization factor in RfP

document and bidder is allowed to select the DC capacity of the project subject to the prudent utility practices prevailing in the State of Karnataka. Thus, the petitioner has procured additional quantity of solar modules and moreover, the petitioner has filed petition before this Commission for seeking reimbursement of safeguard duty and IGST paid thereon, and this fact is well known to the respondent and now it cannot be questioned at this juncture. Further, the petitioner contended that PPA is a binding contract and would prevail over the RfP and PPA does not contemplate any condition to inform the respondent regarding installation of additional modules for setting up of the solar power project.

- o) We examined the averments and counter arguments of both the parties on the issue of reimbursement of safeguard duty and IGST on additional quantity of solar modules procured by the petitioner over the minimum contracted capacity as envisaged under clause 5.6 of the PPA dated 20.04.2018, which puts onus on the petitioner to generate minimum contracted energy of 69.029 Million kWh (MU), (energy generated corresponding to a minimum CUF i.e. maximum CUF of 27.76% mentioned by the bidder at the time of signing the PPA, minus 12% for solar PV new projects), and non-compliance of this provision, would make solar power developer liable to pay the compensation to HESCOM as provided in the PPA. Further, this clause also stipulates that the HESCOM, at any time during a contract year, shall not be obliged to

purchase any additional energy from the solar power developer beyond 121.589 Million kWh (MU) at maximum CUF of 27.76%. Further, it also stipulates that, in case HESCOM purchases at any excess energy, beyond the energy generated corresponding to maximum CUF, the solar power developer shall charge it at concessional tariff/rate.

- p) The plain reading of the provisions of clause 1.4.1, 1.4.2 & 1.4.3 of RfP and the above-mentioned clauses of Article 5.6 of PPA would clearly point out that the obligation on the petitioner is to generate minimum contracted energy of 69.029 Million kWh (MU) at a minimum CUF of 15.76% in terms of PPA. In the present case, the petitioner has voluntarily taken a business decision to install additional modules, this fact can be taken note, from the additional affidavit filed on 06.01.2021 by the counsel for the petitioner. Whereas according to CA Certificate dated 15.01.2020, the petitioner has installed 2,20,147 solar modules for 73.00 MW capacity. The respondent in its written submissions dated 15.12.2020 in para 21 (xi) stated that each solar module is of 330 watt capacity; accordingly, for 50 MW capacity, 1,51,515 numbers of solar modules each of 330 watt capacity were sufficient, but the petitioner has submitted invoices for 2,20,149 of solar modules each of 330 watt capacity i.e., excess of 68,634 numbers of solar modules which can produce an excess of 22.65 MW of power. Considering the pleadings of the parties, the Commission is of the opinion that the particulars about the solar modules furnished in CA Certificate dated 15.01.2020 is

acceptable as the petitioner rely on it. Therefore, the inference that can be drawn from the submissions of the petitioner is that the it had installed excess solar modules of 68,634 numbers to set up solar project of 73.00 MW. Hence, the petitioner is not entitled for excess reimbursement on additional solar modules installed. Therefore, the petitioner is not entitled for reimbursement of Rs.10,00,58,285 (i.e., Rs.31,75,76,295 x 23 MW / 73 MW) as safeguard duty and IGST thereon. Thus, the said burden cannot be foisted on the respondent which in turn it will be passed on to the consumers as additional tariff. We are of the opinion that the line of arguments submitted by the respondent is acceptable.

- q) The petitioner contended that while filing this petition, it has mentioned the number of solar modules installed for 72.5 MW DC capacity and this fact is known to respondent as it is mentioned in the petition. In this regard, we have examined the relevant provisions of the PPA which deals with the matter. Article 20.12 describes various methods for issuance of notice and how communications shall be made. This Article stipulates that any notice or other communication to be given by any party to the other party under or in connection on any matters contemplated by this agreement shall be in writing as per procedure prescribed under this Article. The clause 1.4.1 of RfP also says that the bidder is allowed to select the DC capacity of the project subject to the prudent utility practices in the State of Karnataka, but shall intimate the

same to KREDL, ESCOM, CEIG and any other concerned authority. In the instant case, petitioner has not placed any documentary evidence before this commission to show that it had informed the respondent before importing the excess numbers of solar modules from China which are going to be used for its solar project. Therefore, we can clearly say the petitioner has not followed the mandatory requirements as stipulated in clause 1.4.1 of RfP. Further, clause 20.7 of the PPA states that “this agreement and schedules together constitute and exclusive statement of the terms of the agreement between the parties-----,” the parties hereto agree that any obligations of the developer arising from the Request of Proposal (RfP) shall be deemed to form part of this Agreement and treated as such”. The perusal of the Article would clearly show that the intention of the parties to read the terms of the RfP into PPA together. Therefore, we are of the considered opinion that having agreed both the parties to the provisions of RfP and PPA, the contention now being raised by the petitioner for the first time stating that the RfP is not binding on it completely untenable and opposed to law. Therefore, the contention of the petitioner that the respondent is aware of the facts of installation of additional excess solar modules at its project, is untenable and liable to be rejected.

- r) The clause 5.7.1 of the Guidelines for Tariff Based Competitive Bidding Process for Procurement of power from Grid Connected Solar PV Power Project, stipulates that in the change of law event, the solar power

generator/procurer shall be entitled to compensation by the other party, as the case may be, subject to the condition that the quantum and mechanism of compensation payment shall be determined by the appropriate Commission and shall be effective from the date of order as may be decided by the appropriate Commission.

- s) At the time of the argument, the learned advocate for the petitioner has relied on the advisory letter dated 05.11.2019 issued by the Ministry of New & Renewable Energy (MNRE), Government of India, has allowed generators to install DC capacity more than the contracted capacity. The Commission perused the letter dated 05.11.2019 and notes that it only states that the generators are free to install DC capacity more than the contracted capacity, but nowhere in the said advisory letter has dealt with issue of DC capacity to be considered for change in law event. The Commission notes that the PPA has stipulated minimum CUF of 15.76% which has to be maintained throughout the year and minimum contracted energy of 69.076 MUs has to be supplied by the petitioner to the respondent in a contract year. Thereby the generator has to provide additional DC capacity to take care of losses in inverters, evacuation infrastructure and also degradation factor of solar modules etc., Such higher capacity has to be provided by the generator and no compensation of reimbursement of safeguard duty and IGST thereon, on installation of additional modules can be allowed due to change in law

event as it is a commercial decision of the project developer, this fact has been admitted by the petitioner in its rejoinder.

- t) The Commission is of the opinion that the decision of petitioner of importing additional solar module from China with the intention of optimize performance of the solar PV plant by achieving higher CUF of 27.76% is against the minimum threshold of CUF of 15.76% as mentioned in the PPA is commercial decision of the petitioner. The petitioner has admitted in its affidavit dated 06.01.2021 that it has installed additional solar modules to set up 72.5 MW capacity solar plant to generate the maximum contracted energy of 121.589 MUs at maximum of 27.76% CUF, as against the minimum contracted energy of 69.029 MUs at minimum CUF of 15.76% and seeking of reimbursement of safeguard duty and IGST thereon; on additional solar modules, such additional financial burden cannot be allowed to pass on to the respondent and in turn to the consumers. Therefore, we are of the opinion that petitioner is entitled for reimbursement of safeguard duty and IGST thereon, from the respondent restricted to minimum contracted energy on 15.76% CUF as mandated under the provisions of the PPA. Hence, the claims of reimbursement of safeguard duty and IGST on installation of additional solar modules for 73.00 MW (as per CA Certificate) solar power project, is untenable and liable to be rejected. The claims of reimbursement of safeguard duty and IGST thereon, could be considered in proportion to the minimum contracted energy of 69.029 MUs, at minimum CUF 15.76% and solar

modules required for 50 MW solar power project = (Rs.31,75,76,295 x 50 MW / 73 MW = Rs.21,75,18,010) and remaining of Rs.10,00,58,285 is not allowed for reimbursement on account of additional solar modules installed for 73.00 MW solar power project of the petitioner.

- u) Keeping the above facts in view, we are of the considered opinion that petitioner is entitled for reimbursement of safeguard duty and IGST thereon; for the number of solar modules required for setting up of 50 MW solar power plant and corresponding to minimum contracted energy of 69.029 MUs to be generated at 15.76 % of CUF in order to fulfil its obligations as envisaged under Article 5.6 of the PPA dated 20.04.2018 entered by both the parties. This Commission observes that petitioner has admitted these facts, in the additional affidavit filed on 06.01.2021 at para 3 stating that to set up a 72.5 MW solar plant at Block B-13 Pavagada solar park, it had installed 2,20,147 units/modules. Further, the petitioner stated that for setting up of a 50 MW project, the quantum of modules (assuming that the module is average of 325/330/335 watts) would be 1,51,515 units/modules. In view of these facts submitted by the petitioner, we reject the claims made for reimbursement of safeguard duty and IGST on excess solar modules installed by the petitioner at Block B-13 at Pavagada solar park.
- v) In view of the above, relevant provisions under the PPA and RfP and contents of additional affidavit submitted on 06.01.2021 by the petitioner and also the Clause 5.7.1, the Guidelines for Tariff Based Competitive

Bidding Process for Procurement of Power from Grid Connected Solar PV Power Project, which stipulates that in the change of law event, the Solar Power generator/procurer shall be entitled to compensation by the other party, subject to the condition that, the quantum and mechanism of compensation payment shall be determined and shall be effective from the date as may be decided by the appropriate Commission and reasons mentioned in the above paras. This Commission rejects the claims for reimbursement of safeguard duty and IGST thereon, on excess number of solar modules imported and installed by the petitioner. However, we are of the opinion that the petitioner is entitled for reimbursement of safeguard duty and IGST for 50 MW Solar power plant at minimum 15.76% CUF and to generate and supply the minimum contracted energy of 69.029 MUs to the respondent in order to fulfil its obligations under Article 5.6 of the PPA dated 20.04.2018 entered by both the parties. The petitioner is entitled for reimbursement of Safeguard Duty and IGST on SGD to the tune of Rs.21,75,18,010 (i.e., 31,75,76,295 x 50 MW/73 MW) and remaining amount of Rs.10,00,58,285 is rejected on account of additional/excess solar modules.

w) In view of the above discussion, we answer Issue No.4 accordingly.

15.**Issue No.5:** Whether the petitioner is entitled for appropriate and proportionate increase in tariff due to imposition of Safeguard Duty and consequently amend the Tariff specified in the PPA dated 20.04.2018?

a) The tariff in this case has been discovered through competitive bidding as per the Guidelines issued by the Central Government under Section 63 of the Electricity Act, 2003. The petitioner is not required to indicate the financial and technical parameters while quoting the tariff by it, in the bidding documents. The lowest tariff discovered is Rs.2.91 per unit and the Commission has adopted the above tariff. Accordingly, the PPA has been entered into between the parties on 20.04.2018. The Commission has approved the PPA on 06.06.2018. The Solar Power Project was required to be commissioned within 10 months from the date of approval of the PPA. This Commission held that as per Issue No.4, the additional capital cost incurred by the petitioner is Rs.21,75,18,010 consequent to imposition of Safeguard Duty and IGST on it, on the Solar Panels for the 50 MW Solar Power Project involved in this case.

b) As per the approved PPA, Article-15 provides for change in law and Article 15.1.1(e) specifies as under:

“15.1.1 (e) any change in taxes and duties or introduction of any taxes and duties made applicable for setting up of the project for 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 the HESCOM 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."

- c) As seen from the above Article 15.1.1 (e) of the PPA read with the RfP conditions, for any increase in taxes and duties due to change in law, this Commission has to determine the incremental tariff.
- a) Article 15 of the PPA dealing with the Change in Law or any other Article of the PPA does not provide for any financial and technical parameters to determine the incremental tariff due to incurring the additional capital cost. Therefore, we are of the considered opinion that any additional expenditure towards safeguard duty and IGST incurred on the project on account of change in law shall have to be considered as additional capital expenditure forming part of the project. Hence for determining the incremental tariff on the additional cost, the Commission has adopted the parameters as per the Generic Tariff Order dated 18.05.2018, in the matter of "Determination of Tariff and other Norms in respect of New Solar Power Project (Ground mounted and Solar Rooftop Photovoltaic Units)" issued by this Commission, considering the date of purchase of

panels and payment of additional safeguard duty and GST under Change in Law:

b) The following are the relevant parameters adopted for computation of incremental tariff as considered in the Generic Tariff Order dated 18.05.2018:

- i) Debt: Equity Ratio;
- ii) Interest on capital loan;
- iii) Tenure for repayment of loan;
- iv) Return on Equity;
- v) Depreciation;
- vi) Interest on working capital at 2 months' receivables;
- vii) Discount Rate to factor in the time value of Money to arrive at levellised tariff for the life of the plant.

f) The quantum of generation of energy in a contract year would be directly proportional to the CUF. In the Generic Tariff Order dated 18.05.2018, the normative CUF of 19% was considered. In the present case, the Maximum CUF was left to the discretion of the petitioner at the time of entering into the PPA. Accordingly, the petitioner has quoted maximum CUF of 27.76%. As per the terms of the PPA, the minimum CUF works out to 15.76% corresponding to generation of minimum contracted energy of 69.029 MUs in a contract year. For recovery of additional cost incurred by the petitioner, we have considered the CUF of 15.76% corresponding to the generation of minimum contracted energy of 69.029 MUs in a contract year. Thereby the petitioner is able to recover the additional capital cost on account of Change in Law, by way of incremental tariff as

reckoned in para 12 (v) of this Order, on minimum contracted energy over the term of the PPA.

- g) Accordingly, the Commission has considered the following parameters for computation of incremental tariff as per the Generic Tariff Order dated 18.05.2018 issued by this Commission in the matter of “Determination of Tariff and other Norms in respect of New Solar Power Project (Ground mounted and Solar Rooftop Photovoltaic Units)”:

Sl. No.	Parameters	Normative Values Adopted
1	Debt: Equity Ratio	70:30
2	Debt Repayment in years	13
3	Interest on capital loan	10% per annum
4	Return on Equity	14% per annum
5	Depreciation	5.38% for first 13 year and remaining Depreciation spread equally over the balance years of the useful life of the plant
6	Interest on working capital at two month's receivables	11% per annum
7	Discount Rate to arrive at time value of money	11.20% per annum (WACC)

- h) As per Article 5.6 of the PPA, the CUF has been considered at 15.76%, corresponding to generation of minimum contracted energy of 69.029 MUs in a contract year, which is reckoned for determination of incremental tariff.
- i) While considering the above parameters, the Commission has not reckoned the following parameters for the reasons explained against each:

- (i) Degradation factor & Auxiliary Consumption: While computing minimum contracted energy of 69.029 MUs in a contract year, the degradation factor and Auxiliary Consumption has been considered for the life of the project and hence the same has not been factored in for determining the incremental tariff.
- (ii) As per the norms, the O & M expenses are linked to the capacity of the plant in MW (Rs.4.50 lakhs per MW) and not dependent on the capital cost of the project. Hence the same has not been factored in for determining the incremental tariff. Moreover, O&M expenses are post-construction activities.
- j) The incremental tariff has been determined by this Commission, on the basis of the above parameters. The Commission has arrived at an average tariff for 25 years at 31 paise per unit for the life of the project. Considering the Discount Rate Weighted Average Capital Cost (WACC) of 11.20% per annum, the levellised tariff for 25 years over the life of the project is 39 paise per unit. The computation sheet for the incremental tariff is annexed to this Order.
- k) On the basis of Minimum CUF of 15.76%, as per Article 5.6 of the PPA, the annual generation from the Solar Power Project is arrived at the minimum contracted energy of 69.029 MUs. The petitioner is allowed reimbursement of additional capital cost of Rs.21,75,18,010 during the period of PPA, as per the above parameters by way of incremental tariff of 39 paise per unit on the minimum contracted energy of 69.029

MUs per year, limited to the minimum contracted energy, as explained in para 12 (v) of this Order. Therefore, in any contract year, if the petitioner supplies more than 69.029 MUs of energy, it would not be entitled to the incremental tariff.

l) Hence, Issue No.5 is decided accordingly.

16. **Issue No.6:** What Order?

For the foregoing reasons, we pass the following:

ORDER

- a) The petition is party allowed.
- b) The petitioner is entitled to incremental tariff of 39 paise (thirtynine paise) per unit on the annual minimum contracted energy generation of 69.029 MUs for the energy supplied/to be supplied to HESCOM during a contract year from the date of COD till the expiry date of the PPA, in addition to tariff of Rs.2.91 per unit as provided in Article 12.1 of the PPA on the said quantum.
- c) It is made clear that for the energy supplied in excess of 69.029 MUs in any contract year, the petitioner is not entitled to the incremental tariff.
- d) The petitioner is entitled to raise the supplementary bill for the arrears of the incremental tariff as ordered above in sub-para (b) of this Order from the date of COD till the date of this Order. The amount found to be due under the supplementary bill shall be paid by the respondent in three equal monthly installments, with single default clause.

