

No.N/19/2019

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,
No.16, C-1, Millers Tank Bed Area, Vasanth Nagar, Bengaluru-560 052.

Dated: 15.06.2021

Present

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

O.P. No.09/2019

BETWEEN:

Adyah Solar Energy Private Limited,
A Company Registered under the
Companies Act,1956, having its Registered
Office at 138, Ansal Chambers-II,
Bhikaji Cama Place,
New Delhi-110 066.

....PETITIONER.

(Represented Sri Sujith Ghosh, Advocate for Shodhan
Babu A.M., Kusum Ranganth, Law Offices of Panag & Babu)

AND

Bangalore Electricity Supply Company Limited,
(Wholly owned Government of Karnataka undertaking)
A Company Registered under the provisions
of the Indian Companies Act,1956 having
its Registered Office at K.R. Circle,
Bangalore-560 001.
(Represented by its Managing Director)

... RESPONDENT.

(Represented by Sri S. Sriranga Advocate for
M/s JUSTLAW Advocates)

ORDERS

1. This is a petition filed under Section 86 (1)(f) of Electricity Act, 2003 praying for the following reliefs to:

- a) Declare the imposition of safeguard duty on the import of solar modules as a Change in Law in terms of the Power Purchase Agreement (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.35,57,01,527 in the form of a lump sum payment;

Alternatively:

- c) Direct payment of safeguard duty and IGST on account of safeguard duty amounting to Rs.35,57,01,527 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; and
- e) Pass any such other and further reliefs as this Commission deems just and proper in the nature and circumstances of the present case.

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

- a) Adyah Solar Energy Private Limited, (Petitioner) is a Company Registered under the Companies Act, 2013. It is a Special Purpose Vehicle (SPV) of M/s Renew Solar 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 Electricity Act, 2003.

- b) The Government of Karnataka had resolved to undertake development of 1200 MW 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 Government of Karnataka, invited proposals from 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 the technical and commercial terms & 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 ESCOMs of Karnataka for a period of 25 years.
- c) Pursuant to the aforementioned RfP, KREDL accepted the bid of Renew Solar Power Private Limited for development of 50 MW (AC) capacity of Solar Power Project at Block B-2, (wrongly mentioned as Block B-1 in the petition) Pavagada Solar Park in the State of Karnataka and issued its Letter of Award No.KREDL/07/SG/1200 MW/Pavagada Park/B1/809/2017-18/2344-47 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 Special Purpose Vehicle (SPV) for the purposes of this project. Vide letter bearing No. Pavagada Solar Park/PPA-BESCOM/2018-09 dated 19.04.2018, Renew Solar Power Private Limited, requested BESCOM to accept the petitioner as the entity which shall undertake and perform the obligations and exercise all the rights of the selected Bidder under the Letter of Award (LoA) including the obligation to enter into PPA pursuant to the LoA for execution of project.
- e) Thereafter, BESCOM agreed to the said request of Renew Solar Power Private Limited and entered into a PPA dated 20.04.2018 with the Petitioner for development of 50 MW_(AC) capacity of Solar Power Project at Block B-2, in the Pavagada Solar Park and the consequent supply of solar power to BESCOM. The PPA dated 20.04.2018 (Annexure-1 collectively) between the petitioner and BESCOM was also approved by the KERC vide approval letter No. KERC/S/F-31/VOL-1264/18-19/335 dated 06.06.2018 (KERC approval letter–Annexure-1 collectively).
- f) Vide Notification No.1/2018–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) twenty-five per cent ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30th July 2018 to 29th July 2019;

- ii) twenty per cent ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30th July 2019 to 29th January 2020 (both days inclusive); and
 - iii) fifteen percent ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30th January 2020 to 29th July 2020 (both days inclusive).
- g) The present petition is filed before the 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 issue 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 petitioner. Further, it would also result in recurring expenditure in as much as the import of solar modules during the period of operation and maintenance may also be eligible to safeguard duty.
- h) The petitioner submitted that in order to understand the scope of the 'Change in Law' provisions under the PPA and the reliefs that the petitioner is entitled to, relevant provisions of the PPA, have been analyzed as hereunder:
- (i) a change in law event is any of the events as enumerated in the PPA. Enactment of a new law as well as any change in tax or duty or introduction of any tax or duty for setting up of

solar power project for supply of power are listed as events of Change in Law;

- (ii) such change in law event must have occurred after the date of submission of online Techno-Commercial Bid;
 - (iii) further, any change in law pertaining to taxes and duties after the date of submission of technical bid shall be to the account of BESCOM and relief for the same shall be in the form of an appropriate change in tariff (whether proportionate increase or decrease) shall be as per Article 15.2 of the PPA; and
 - (iv) The change in law must result in additional recurring/non-recurring expenditure or income to the Petitioner.
- i) With reference to the aforementioned clauses, 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, and such date would be treated as the 'date of submission of Techno Commercial Bid' as per Article 15.1.1 of the PPA.
- j) '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 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.

- k) As per Article 15.2 of the PPA, the aggrieved party is required to approach Karnataka Electricity Regulation Commission (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 Karnataka Electricity Regulatory Commission and thus, this Commission has the jurisdiction to adjudicate the dispute of the present petition.
- l) The imposition of safeguard duty on the import of solar modules would constitute a change in law event in terms of the PPA and it is relevant to understand the statutory framework in relation to the levy of safeguard duty.
- m) 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, which 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.
- n) 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. Further, the safeguard duty rules provide for the date of commencement of duty and liberalization of duty respectively.

- o) In this context and in exercise of the powers conferred inter alia under Rule 12 of the Safeguard Duty Rules, the Central Government issued the Safeguard Duty Notification No.01/2018-Customs (SG) dated 30.07.2018 (Annexure-2) imposing safeguard duty on the import of solar cells and modules at the rates prescribed thereunder in the said notification.
- p) 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% (twentyfive per cent) ad valorem for the first year of imports, where after, the safeguard duty is progressively liberalized.
- q) 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 as explained hereunder:
 - i) Such imposition of safeguard duty by virtue of the Safeguard Duty Notification would be covered by the phrase introduction of any taxes and duties made applicable for setting up of the project for supply of power on account of the fact that safeguard duty qualifies as a tax imposed on the solar cells and modules which are the primary component in the setting up of a solar power plant. Thus, the imposition of safeguard duty on imported solar cells and modules would in

effect tantamount to an incremental tax cost accrued on the setting up of the solar power project. Further, the change in tax structure i.e., the imposition of safeguard duty has been brought into effect from 30.07.2018, which is much after the submission of the Techno-Commercial Bid. Therefore, the imposition of safeguard duty vide Safeguard Duty Notification dated 30.7.2018 would qualify as a change in law event under the fifth bullet of Article 15.1.1 of the PPA and shall be to the account of BESCOM.

- ii) Alternatively, it is submitted that the imposition of safeguard duty is in the nature of an enactment of a new law in as much as the same has been imposed by a Notification of the Ministry of Finance, Government of India which has come into effect on 30.07.2018 which is much after the date for submission of online Techno-Commercial Bid. Thus, the imposition of safeguard duty vide Safeguard Duty Notification would qualify as a change in law event even under the first bullet of Article 15.1.1 of the PPA.
- r) The petitioner submits that the expenditure incurred is in the nature of one-time capital expenses on the import of solar cells and modules for setting up of the solar power project as per the PPA. As these expenses are incurred on a one-time basis, the same would qualify as 'non-recurring expenditure'. It is submitted that prior to the imposition of safeguard duty vide Safe Guard Duty Notification, the import of solar modules was solely subjected to IGST at 5% (Basic Countervailing Duty free). However, with effect from 30.07.2018, the import of solar cells/ modules required for setting up of Solar Power Project as per the PPA would be leviable to 25%

safeguard duty along with an additional IGST of 5% on the value of safeguard duty. Thus, effectively the additional non-recurring expenditure incurred by the petitioner would be 25% of the cost of modules as well as additional IGST of 5% on safeguard duty. A chart showing the indicative change in law impact of safeguard duty with illustration is given as follows:

Indicative Change in Law impact of Safeguard Duty on Module chart				
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	%	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.	00.00	1.25	1.25
Total Value on 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: The 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) On the basis of above illustrative table, it is clear that import of the solar module has resulted in increase in non-recurring expenditure. 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 submits that a "Supply Agreement" dated 11.09.2018 (Annexure-3) was entered between Adyah Solar Energy Private Limited (Purchaser) and Hefei JA Solar Technology Company Limited, P.R. China

(Supplier), for a total installed capacity of about 145 MW_{DC}, to be installed as part of the projects of the petitioner including setting up of 50 MW_(AC) Power Project at Block B-2 in the Pavagada Solar Park. In terms of the said supply contract the petitioner is purchasing Solar PV modules of DC Capacity of 72.5 MWp from Hafai JA solar Technology Company Limited and the import of such PV Modules has commenced from the month of December 2018, onwards, which has resulted in incurring additional non-recurring expenditure as described above.

- u) 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 had 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 was incurred from December 2018 onwards, such imposition of safeguard duty would qualify as change in law under the first bullet of Article 15.1.1 of the PPA.
- v) 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 BESCO. 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 December 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) 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 case the effect of such change shall be to the account of BESCOM 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 this Commission for seeking the approval of such change in law and thereby obtain the consequent relief. Since imposition of safeguard duty qualifies as a change in law event under the fifth bullet of Article 15.1.1 of the PPA by the introduction of new tax/duty coming into effect after the date of bid submission, the petitioner has invoked the jurisdiction of this Commission for seeking approval of such a change in law in terms of the PPA.
- x) 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.

- y) The Ministry of Power, Government of India, vide Letter No.23/43/2018- R&R, dated 27.08.2018 issued directions under section 107 of the Electricity Act 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 (Annexure-4).
- z) The Petitioner submits that the imposition of safeguard duty as per Notification No.1/2018–Customs (SG) dated 30.07.2018 would be applicable for a period of two (2) years i.e., till 30.07.2020. The SCOD is on 06.04.2019. Thus, it is highly plausible that the import of modules as replacements during the operation and maintenance period would also be subject to safeguard duty. Thus, such imposition of safeguard duty may result in increase in non-recurring expenditure as well, if certain modules are imported as a part of O&M up to 30.07.2020.
- aa)The petitioner contends that 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 as explained above, the working capital requirement

and consequently, the interest on working capital have also increased as compared to requirement and rate prevalent at the time of submission 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.

ab) 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 the Ministry of Power, Government of India, vide Notification bearing No.23/27/2017-R&R dated 03.08.2017 (Tariff Guidelines) (Annexure-5). 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 the grid connected Solar PV Power Projects having a size of 5 MW and above, through competitive bidding. As per terms of above said tariff guidelines, petitioner is allotted a solar power project of 50 MW capacity at Block B-2 in the Pavagada Solar Park in the State of Karnataka and entered into PPA dated 20.04.2018 with the respondent i.e., BESCOM. Thus, the aforementioned Tariff Guidelines are applicable to the petitioner's solar power project.

ac) 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, then 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. The guidelines issued under Section 63 of the Electricity Act, 2003, clearly recognize that the generator/ solar power developer is entitled to get interest on working capital at normative interest rate in order to put petitioner to the same economic position as if, change in law event has not occurred, which is essentially the principle of restitution.

ad) 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. As per Article 15 of the PPA, once a change in law has occurred, the aggrieved party is required to approach the KERC by filing the petition for seeking approval of change in law. Accordingly, the petitioner has approached the Commission seeking relief on account of 'Change in Law'.

ae) Since petitioner did not specify the amount/ claims seeking for payment of safeguard duty from the respondent in the main petition, it has filed an Interlocutory Application on 9.12.2020 to carry out amendments for seeking payment of safeguard duty and IGST amounting to Rs.35,57,01,527 on account of change in law event, which has to be reimbursed either in the form of a lump sum amount or annuity payment. This commission has allowed the interlocutory application to carry out the amendments in the main petition. The petitioner had filed additional submission/documents by

way of affidavits during the course of hearing and also filed rejoinder to statements of objections of the respondent.

3. The learned counsel for petitioner has filed rejoinders/additional affidavits along with various court rulings and placed reliance on the following:

- i) Final Findings/proceedings dated 16.7.2018 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 9.10.2018.
- v) ACME Rewa Solar Power Private Limited vs. SECI, CERC order dated 02.05.2019
- vi) Union of India vs. Colonel LNS Murthy (2012) 1 SCC 718
- vii) Nabha Power Limited vs. Punjab State Corporation Limited & Others. (Civil Appeal No.179/2017)
- viii) K.R.C.S. Balkrishna Chetty & Sons and Company vs. State of Madras, AIR 1961 SC 1152.
- ix) Suminto Heavy Industries Limited Vs. ONGC Limited.
- x) Order dated 13.11.2019 passed by MERC in case No.259/2019 between Azure Power Thirty-four Private Limited Vs. Maharashtra State Electricity Distribution Company Limited.

4. The petitioner contended that the Hon'ble Central Electricity Regulatory Commission (CERC) has recognized and allowed in above mentioned Orders, the introduction of GST, as a change in law event under the PPA. The Director General (Safeguard Duty) in his final findings dated 16.7.2018,

while recommending the imposition of safeguard duty on import of solar cells and modules, has held that such safeguard duty imposition would be covered as an event of change in law under PPA of the solar power developers and would be a pass through.

- a) Further, the petitioner has filed an affidavit on 10.04.2019 seeking to bring on record, various details of bills of entry and additional documents evidencing payment of safeguard duty on the imports of solar modules made by the petitioner for construction of its solar power plant (Annexure A-1 and Annexure-2).
- b) The petitioner submitted that "carrying cost" is a compensation for time value of money and is an inherent provision under the change in law clause of a PPA. Since the change in law clause is based on the 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 a corresponding compensation amount but ought to also include compensation in terms of carrying cost incurred with respect to the said change in law events. This position is supported by the principle of business efficacy, as recognized in the case of Nabha Power Limited vs. Punjab State Power Corporation Limited and Another, which provides that a contractual term can be implied in the light of the express terms of the contract, commercial

common sense and facts known to both parties at the time of entering into the contract. Further, the change in law clause being a restitution clause, demands that the petitioner should be compensated for all necessary and reasonable extra costs including carrying cost and interest on the additional cost incurred on account of change in law. In this regard, petitioner placed reliance on the case of Sumito Heavy Industries Limited Vs. ONGC Limited. Without prejudice to the above submissions, the petitioner states that even in the alternative scenario, they would be entitled to carrying cost under the principles of *quantum meruit*, as statutorily enshrined in Section 70 of the Indian Contract Act, 1872 will be attracted and the petitioner would be entitled to carrying cost.

- c) The learned counsel of the petitioner further filed an affidavit dated 18.11.2020 duly signed by Authorised Signatory enclosing chart evidencing payment of safeguard duty along with supporting documents such as Bill of Entries, payment of safeguard duty (page 2 to 92 and a letter issued by the Deputy Commissioner of Customs (Group-5A), office of the Commissioner of Customs, Custom House, Rajajinagar, Chennai, to the petitioner for finalization of 13 provisionally Assessed Bill of Entries. The petitioner by way of an affidavit filed on 10.12.2020 has suggested a mechanism for seeking payment of safeguard duty and IGST and interests thereon on annuity basis as additional expenditure incurred for importing solar modules

from China from the respondent, which is placed as Annexure-1 to the said affidavit.

- d) The petitioner submits that during the course of hearing, the Commission put forth the query about the status of installation and technical specification of solar power modules procured by the petitioner. In this regard, it is submitted that in conformity with the conditions of PPA, the inverters have been installed of rated capacity of 50 MW. Accordingly, even though additional modules for a 72.5 MW are installed and the inverters clips the additional energy such that only 50 MW AC current is supplied through the inverter. The inverters installed by the petitioner are in accordance with requirements provided under Schedule II of the PPA and as per approved standards. The learned counsel for petitioner submitted an additional affidavit dated 06.01.2021 on behalf of petitioner duly signed by Authorised Signatory along with a true copy of a statement showing the details of capacity of project, number of solar modules; payments made on account of safeguard duty (Annexure-1); commercial invoices (page 5 to 21) at Annexure-2 and true copy of Inverter certificate (Attestation of conformity at Annexure-3 (page 22 to 52)).

5. Upon issuance of Notice, the respondent appeared through its counsel and submitted Statement of Objections/additional submissions and court rulings, denying each para of the petition and amended

petition. The gist of statement of objections and additional statement of objections is as follows:

- a) The Respondent admitted that the KREDL is the Nodal Agency, for floating of Request for Proposal (RfP) and Renew Solar Power Private Limited participated in bid and become successful bidder for development of a 50MW_{AC} capacity solar power project at Block B-2, Pavagada solar power park and KREDL issued an allotment letter. Subsequent to the issue of Letter of Award, Renew Solar Power Limited, incorporated the petitioner i.e., Adyah Solar Energy Private Limited for establishing the said project in Pavagagda solar park and requested BESCOM, the respondent herein, to accept the petitioner as the entity which would undertake and perform the obligations and exercise the rights of the selected bidder under the PPA. The petitioner and respondent entered into PPA on 20.40.2018, which was subsequently approved on 6.6.2018 by the Commission.
- b) On 30.7.2018, the Government of India, vide Notification No.01/2018-Customs (GC) has imposed a safeguard duty on "solar cells whether or not assembled in modules or panels at twenty-five per cent ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30.07.2018 to 29.07.2020 (both days inclusive).
- c) Aggrieved by the alleged additional burden on account of SGD foisted upon the petitioner, the petitioner has filed the present petition seeking that the imposition of safeguard duty by aforementioned

Notification be declared as an event constituting a Change in Law under Article 15 of the PPA, thereby claiming the benefit of the alleged additional burden to the Petitioner.

- d) It is the case of the petitioner that the imposition of safeguard duty on the import of solar cells and modules, pursuant to the Safeguard Duty Notification dated 30.07.2018 should be treated as a change in law event as per the terms of the PPA as it constitutes the 'enactment of a new law' as well as the 'introduction of taxes and duties made applicable for setting up of the project for supply of power' since solar cells and modules are the primary component in the setting up of the solar power plant and as on the date of the submission of the online Techno Commercial Bid 12.03.2018, no Safeguard Duty was leviable on the import of solar cells and modules. The petitioner contends that the levy of this additional duty would increase the non-recurring expenditure of the petitioner and lead to additional expenditure of 25% safeguard duty (which would be progressively liberalized) along with an additional IGST of 5% on the value of the safeguard duty. The petitioner has relied on a hypothetical statement to substantiate this claim in Para 22 of the present petition which was filed on 21.1.2019, therein, a 26.25% impact on the cost of the project has been predicted. The note at the end of the said statement, states that the "Above computation is indicative only based on an assumption that the module cost is of INR 100. Further, it is stated that the 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". The sum indicated by the petitioner in the statement produced is entirely based on assumptions and presumptions. It is settled law that judicial orders cannot be passed merely on the basis of assumptions and presumptions. In view of the same, the prayers sought for in the petition do not merit consideration and the petition deserves rejection.

- e) The petitioner has submitted that it has entered into a Supply Contract for the procurement of Solar PV Modules of DC capacity of 72.5 MW that are required for the setting up of the 50 MW (AC) Power Project in Block B-2 of the Pavagada Solar Park vide Supply Agreement dated 11.09.2018 with Hefei JA Solar Technology Limited (a Chinese Company) and that the import of such PV modules pursuant to the Supply Contract has commenced from the month of December 2018. The petitioner has contended that since the Safeguard Duty Notification came into effect on 30.07.2018 which is after the date of submission of the Techno-Commercial Bid on 12.03.2018, the additional non-recurring expenditure incurred by the petitioner due to the import of the solar PV modules from China from December 2018 onwards should be borne by the respondent BESCOM on account of Change in Law.
- f) The Safeguard Duty Notification produced at Annexure-2 of the petition, categorically allows the import of the subject goods i.e., "solar

cells whether or not assembled in modules or panels," from Countries notified as Developing Countries (vide Notification No.19/2016-Customs (NT) dated 5th February 2016, except China and Malaysia) and it furthermore specifically states that such imports would be exempt from the levy of Safeguard Duty. The Safeguard Duty Notification came into effect on 30.07.2018, four and a half months after the effective date or the date of the online submission of the Techno-Commercial Bid. In complete knowledge of the contents of the Safeguard Duty Notification, the petitioner subsequently entered into a supply contract with the Chinese Company Hefei JA Solar Technology Company Limited on 11.09.2018, one and a half months after the coming into effect of the Safeguard Duty Notification cognizant that such import from China would attract the levy of safeguard duty. The petitioner has made no attempt to avoid levy of safeguard duty. While it was entirely possible for the petitioner to import such cells from Countries notified as developing countries thereby avoiding the levy, the petitioner has made no attempt to do so and is belatedly seeking the benefit of a levy that could easily have been avoided. In the present circumstances, the question of entertaining the present petition and considering the grant of additional compensation on account of change in law does not arise. Therefore, on the above-mentioned reasons, the present petition deserves rejection.

- g) The petitioner has relied upon a Ministry of Power, Government of India, letter dated 27.08.2018 (Annexure-4) addressed to the CERC in which the CERC is directed to allow pass through of any change in domestic duties, levies, cesses and taxes imposed by the Central Government, State Government, Union Territory or Government instrumentality, leading to corresponding changes in cost after the award of bids, under "Change in Law" unless otherwise provided in the PPA. The petitioner has contended on the basis of the aforementioned letter, that since safeguard duty, is a domestic duty it ought to be treated as pass through and be treated as a change in law. What the petitioner has failed to state is that the letter clearly directs, in paragraph -1 of the aforesaid letter saying that the said duty may "be allowed as pass through subject to the approval of the Appropriate Commission." In view of the same, the direction in the said letter does not guarantee the treatment of safeguard duty to be allowed as a change in law to the petitioner, but it merely directs that the Appropriate Commission (this Commission) determine as to whether the levy of safeguard duty should be considered a change in law based on the facts of the present case, through the course of the present proceedings.
- h) The petitioner has also contended that as per the Safeguard Duty Notification, the imposition of safeguard duty will likely to continue until 30.07.2020 and in view of the fact that the Schedule Commercial Operation Date (SCOD) is on 06.04.2019 it is plausible that the import of

the modules and their replacements during the Operation and Maintenance(O&M) period would also be subject to the levy of safeguard duty. In view of the same, the petitioner contends that such imposition may result in an increase in non-recurring expenditure in the event certain Modules are imported as a part of O&M up to 30.07.2020. The entire premise upon which this contention is based is that the petitioner could suffer the said duty in future. It is contended that unless material is placed on record by a party to substantiate its contention that it has suffered a taxing event, the benefit of change in law cannot be given. Further submitted that the requirement of proof and documentation rests on the party claiming the refund to prove that it has suffered from the levy of a duty due to change in law. In the context of introduction of new GST, Hon'ble Central Electricity Regulatory Commission (CERC) in the Petition No. 187/MP/2018 (in which it has clearly been) held that any additional cost claim of a petitioner, incurred by it during the construction period, due to the purchase of any goods or services, has to be correlated with invoices raised by the supplier of the goods and services as well as a certificate issued by the Auditor in this regard. The petitioner must have suffered the burden of the safeguard duty levy in order to seek the benefit of change in law. If the petitioner has indeed suffered an additional burden, such as the levy of safeguard duty, the onus of proving the same lies with the petitioner. In the absence of any material to show that the petitioner has actually suffered the levy, the question of

determining whether compensation is due and if so, the quantum of compensation due on account of change in law does not arise at this juncture.

- i) The petitioner has also averred that the imposition of the safeguard duty/change in law event has had an indirect bearing on the all-inclusive tariff bid, since the petitioner considered the interest that would be payable on additional working capital that would be required due to the imposition of the safeguard duty, subsequent to submission of the bid. The petitioner has also claimed to be entitled to interest on the incremental working capital in order to be put in the same economic position as if a change in law had not occurred. The petitioner has also relied on Para 5.7.1 of the "Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects" (Tariff Guidelines) issued by the Ministry of Power, Government of India, under Section 63 of the Electricity Act, 2003, vide Notification bearing No.23/27/2017-R&R dated 03.08.2017 which states that "In the event a change in law results in any adverse financial loss/gain to the solar power generator 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 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 and shall be effective from such date as may be decided by the Appropriate Commission”.

j) 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 same financial position as prior to the change in law, nor does it contemplate the payment of carrying cost or interest of any kind to the aggrieved party on account of a change in law. In this regard, reliance is placed on the decision rendered by the Hon'ble CERC in the matter in Petition No 188/MP/2017 wherein, Central Commission has analyzed the issue relating to change in law in depth and passed a reasoned order stating that unless carrying cost is stipulated in the PPA, the aggrieved party is not entitled to it. The petitioner herein is not entitled to the reliefs of restoration to the previous financial position, interest/carrying cost from the date of impact till the date of reimbursement by the respondent in view of the fact that the PPA entered into by both parties contains no provision for such relief. The PPA, being a legally binding contract entered into by the parties, reflecting the intention of both parties would take precedence over the general guidelines issued by the Ministry of Power, Government of India.

k) Article 5 of PPA sets obligation of solar power developer. Article 5.1.1 (g) envisages that solar power developer 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 to or on the electricity consumed by the project or by itself or on itself or on income or assets owned by it. It is clear from the above Article 5.1.1 of PPA that the petitioner is responsible for the payment of all taxes and duties imposed by the Government or any Instrumentality in relation to all works connected to the project. It is in cognizance of this fact that the petitioner has bid in response to the Request for Proposal of the respondent herein. The bid of an eligible bidder, is an all-inclusive bid that includes the cost of any existing foreseeable taxes and duties as stipulated in Article 5.1.1 of the PPA such as anti-dumping duty etc. The respondent herein accepted the bid of the petitioner on the understanding that the petitioner had factored into its bid any expenditure to be incurred by it on account of the payment of taxes and issued its letter of award. The petitioner subsequently entered into a PPA with the respondent in full knowledge of its obligations under the said PPA including the payment of taxes and duties. The petitioner, in the current petition, is seeking to benefit from the application of the safeguard duty notification by contending that the duty payable by it amounts to the same percentages stated in the Safeguard Duty Notification, i.e., 25% safeguard duty (which would be progressively liberalized) with an additional IGST of 5% of the value of the safeguard duty but has however, ignored the proviso to the Notification which proposes the levy of the duty "minus anti-dumping duty payable, if

any". The petitioner has approached this commission with unclean hands and is seeking to be compensated for the entire duty stated in the notification rather than the duty after deduction of anti-dumping duty payable, which is what the notification truly seeks to levy. The petitioner has already been compensated for the cost of anti-dumping duty payable by it, in view of the fact that it was included in the cost petitioner's bid as agreed upon 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.

- I) The respondent further submits that safeguard duty is levied on the purchase of foreign products, primarily during periods of import surge in order to protect domestic manufacturers and ultimately encourage the purchase of products from domestic manufacturers and discourage their purchase from foreign entities. The petitioner in full cognizance of this, has chosen to disregard the contents of the safeguard duty notification, by willfully entering into an agreement for the import of solar modules from a Chinese firm after the coming into effect of the notification, knowing that such import would attract the levy of the duty. In view of the petitioner's blatant disregard for the contents of the notification and the intention of the Government of India to penalize purchasers of goods from foreign entities to the detriment of their local counterparts, and it would defeat the entire

purpose of the notification for the safeguard duty to be paid by the respondent. This project was undertaken in public welfare, and the respondent, being a wholly owned Government Company providing an essential service to the public at large should not be penalized and made to bear the cost of the petitioner's willful disregard for the contents of the safeguard duty notification despite having every opportunity to avoid the attraction of such levy.

m) The attention of this Commission is drawn to the Order of the Hon'ble High Court of Madras in WP No.1978/2019 wherein a direction was sought by the petitioner to quash the order of Self-Assessment seeking to impose safeguard duty upon several BoE, on the ground that they were illegal, arbitrary and without the authority of law. In the said proceedings, the Hon'ble High Court of Judicature at Madras has passed an Order (Annexure-R1). A combined reading of the Order of the Hon'ble High Court as well as the data furnished by the petitioner herein would indicate that the assessment of duty/tax payable is only provisional in nature, in view of which it is subject to change at the time of final assessment. The petitioner has paid the said duty under the provisional bills, under protest and the same is subject to a final assessment. Therefore, based on the data furnished the contention that the petitioner has already suffered the levy is untenable.

6. The Counsel for respondent filed additional statement of objections by way of an affidavit on 11.2.2021 countering the averments made by the

petitioner in its rejoinder and additional submissions. The gist of the arguments is as follows:

- a) The petitioner had made averment that it is the liability of the respondent to reimburse the safeguard duty imposed on additional modules imported by the petitioner, in the light of the judgment of this Commission dated 31.12.2020 in OP No.48 of 2019 M/s Fortum Solar Power India Private Limited vs. BESCO and others, wherein, this Commission has held that article 1.4.1 of the RfP requires the generator to select the DC capacity of the solar project in keeping with prudent utility practices and inform the same to ESCOM. Further, this Commission was pleased to hold that in a case when approval of concerned ESCOM is not sought regarding installation of additional modules, then the generator is not entitled to reimbursement of safeguard duty towards modules installed in excess to the contracted capacity. Based on the same, the petitioner stated that it has installed additional modules to supply the contracted capacity of 50 MW at 27.76% CUF in terms of Article 5.6 of the PPA. Further, the petitioner sought to distinguish the Judgment of this Commission in OP No.48 of 2019 to contend that PPA being a binding contract would prevail over the RfP and PPA does not require the petitioner to inform the respondent regarding installation of additional modules. Based on the same, it was submitted that the said decision is inapplicable to the present case.

- b) In response to the said contention, it is submitted that as per Clause 1.4 of RfP, the petitioner was required to decide the DC capacity required for installation of plant and inform the respondent about the same as envisaged under clause 1.4 of RfP. The relevant portion of said RfP is as under:

“Clause(b) of 1.4 of RfP “Capacity Utilization Factor: 1.4.1 The bidder shall note that there is no cap on Maximum CUF. The solar developer shall mention the Maximum CUF at the time of PPA signing of PPA with ESCOMs. The Minimum CUF shall be the Maximum CUF mentioned by the bidder at the time of PPA signing minus 12%. The solar developer shall maintain the Minimum CUF as mentioned above for the project capacity measured in AC during the PPA terms. If a Bidder mentioned in 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.”

The said clause is identical to the Clause in RfP that was considered in the case of OP No.48 of 2019 of Fortum Solar Power India Private Limited vs. BESCOM. Therefore, the contention of the petitioner that the said provision is inapplicable is untenable.

- c) Further, in response to the contention of the petitioner that it was not required to inform the respondent about the number/ type of modules

that it was proposing to install as the same is not contemplated in PPA, it is important to refer to the definition of “entire agreement” as defined under Clause 20.7 of the PPA, which clearly states that obligations of the developer arising from the Request for Proposal shall be deemed to form part of the PPA.

- d) The contention of the petitioner that it has intimated the respondent about the procurement of alleged additional solar modules from China by way of the present petition, it is relevant to note that the contents of Article 20.12 of the PPA which clearly requires that all notices and communications be exchanged between the parties in writing either by fax, emails or letters. Therefore, the petitioner ought to have intimated the respondent about its intentions with regard to additional modules in the manner contemplated in the contract which binds the parties. The interpretation adopted by the petitioner, if accepted then it would lead to absurd results. Thus, the contention that present petition itself is intimation enough, is wholly untenable and not something that is contemplated in the contract.
- e) During the course of hearing this Commission had asked both the parties to clarify on the actual generation of energy and percentage of CUF of the petitioner's plant. In this regard, an additional written statement dated 11.02.2021 was submitted by the respondent stating that the agreed maximum CUF of the petitioner's plant under the PPA is 27.76% but the petitioner is injecting energy within the maximum CUF

of 27.76 % and not beyond the contracted capacity. In the present case, the petitioner has installed solar modules far in excess of what is required for the project. The respondent further stated that it has filed an additional statement of objections wherein it has mentioned that the petitioner ought to have only installed 1,33,334 modules corresponding to 50 MW. However, the petitioner has in fact has installed 1,94,775 modules. Therefore, it has installed 61,441 excess modules to set up of a 72.5 MW project. A tabular chart showing actual generation of power during Financial year 2018-19 to FY-2020-21 is given at Annexure- A to the additional Affidavit/written submissions filed on 11.02.2021 by the respondent.

Annexure-A

Details on number of modules installed and modules are to be required for the solar project.

Op No.	CUF as per PPA (in per cent)	Total Number of Modules installed	Number of Modules required for 50 MW considering CUF at 19%	Excess Modules installed (in Number)
OP 09 of 2019	27.76	1,94,775	1,33,334	61,441

Details of Year-wise energy generation (In MU) and percentage of CUF Achieved:

Name of the Company	COD	2018-19		2019-20		2020-21 (Up to Jan 2021)	
		Energy Generated in MU	CUF%	Energy Generated in MU	CUF%	Energy Generated in MU	CUF%
Adyah Solar Energy Pvt. Ltd. Block- B-2 Pavagada	01.03.2019/ 21.03.2019	6.991	25.7314	108.826	24.829	91.208	24.840

- f) The respondent contends that though the maximum declared CUF by the petitioner is 27.76% in PPA but never generated the energy as per declared CUF. Likewise, the petitioner in above said Financial Years has never generated the maximum contracted capacity energy. The contention of the petitioner that procurement of additional solar modules is made in order to achieve the maximum contracted energy of 121.672 MUs in a contract year is not tenable.
- g) The respondent submits that during the course of hearing, this commission sought clarification on modality of levying safeguard duty and IGST levied thereon. In this regard, it is submitted that under the GST regime, Goods and Service Tax is calculated after addition of safeguard duty. In case of goods imported from outside the country then as per proviso to Section 5 of the IGST Act, 5% IGST shall be levied and collected in accordance with the Section 3 of the Customs Tariff Act, 1975 on the value as determined under the said Act. In the present case, the safeguard duty payable on 1,33,334 modules at 25% and 5 % IGST on the total safeguard duty would be leviable.

7. The Respondent placed reliance on the following rulings:

- i) Oil India Limited vs. South East Asia Marine Engineering and constructions Limited (Civil Appeals No.673 of 2012 and another, Order dated 11.5.2020)
- ii) Adani Power Limited vs. Gujarat Electricity Regulatory Commission, in Appeal No.210 of 2017.
- iii) NTPC vs. Madhya Pradesh State Electricity Board (2011) 15 SCC.

iv) S. RM.AR. SP. Sathappa Chettiar vs. S. RM. AR. RM. Ramanathan Chettiar 1958 SCR 1024; AIR 1958 SC 245.

8. We have heard the learned counsels for the parties. The petitioner and the respondent have filed written arguments/ additional statement of objections by way of affidavits and rejoinders. The learned Counsels for the petitioner and the respondent relied on certain rulings as mentioned in above paras. We will deal with them wherever necessary.
9. 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 proves 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 proves 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?

10. 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:

11. **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 has 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 and 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 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 present 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 6.1.2021 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., BESCOM.

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

12. **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 for allowing 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 willfully 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 willfully 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) 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 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 have 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 BESCOM 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. BESCOM & Others and OP No.48 to 52 of 2019 of Fortum Solar India Private Limited Vs. BESCOM & 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 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 BESCOM 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, this 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, 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 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, the learned counsel on behalf of 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.

- a) 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.

13. **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 on 09.12.2020 an interlocutory application 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.35,57,01,527 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 submitted that, it had placed the orders for purchase of solar modules from the Vendor namely; Hefei JA Solar Company Limited (based in China) and received all the solar panels at Chennai Port/Krishnapatnam Port during the period from December 2018 to February 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 BESCOM. It is not in dispute that the Government of India 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	Safeguard Duty (SGD) in INR]	IGST on SGD (INR)	Total impact on a/c of imposition of SGD (INR)
9766457	JA Solar	23.01.2019	Chennai	4,75,77,718	23,78,886	4,99,56,604
9838671	JA Solar	29.01.2019	Chennai	4,76,53,479	23,82,674	5,00,36,152
9710140	JA Solar	19.01.2019	K Patnam	4,75,77,718	23,78,886	4,99,56,604
9914289	JA Solar	04.02.2019	K Patnam	4,75,01,957	23,75,098	4,98,77,055
9626874	JA Solar	14.01.2019	K Patnam	4,70,91,683	23,54,584	4,94,46,267
9868884	JA Solar	31.01.2019	Chennai	1,70,46,157	8,52,308	1,78,98,465
9541146	JA Solar	07.01.2019	K Patnam	1,67,61,528	8,38,076	1,75,99,604
9885780	JA Solar	01.02.2019	Chennai	1,59,09,746	7,95,487	1,67,05,234
9382155	JA Solar	24.12.2018	K Patnam	1,45,78,080	7,28,904	1,53,06,984
9881402	JA Solar	01.02.2019	Chennai	1,25,12,560	6,25,628	1,31,38,188
2031999	JA Solar	12.02.2019	Chennai	83,78,454	4,18,923	87,97,377
9589500	JA Solar	10.01.2019	Chennai	44,13,367	2,20,668	46,34,036
9561324	JA Solar	08.01.2019	Chennai	22,46,026	1,12,301	23,58,328
9450302	JA Solar	28.12.2018	Chennai	22,42,728	1,12,139	23,54,921
Total				33,14,91,255	1,65,74,563	34,80,65,818

d) The petitioner stated that, as per the directions of the Hon'ble Madras High Court vide Order dated 25.02.2019 in WP No. 1878/2019, the petitioner was directed to clear solar modules without the department insisting upon payment of safeguard duty. As per the above directions, the petitioner furnished Bank Guarantee for 50% of the amount of safeguard duty demanded in the Bill of Entry and furnished a bond for balance 50% of the safeguard duty. The details are as under:

PBE No.	Supplier	Date of BE	Port	Bond No.	SG Duty (SGD) [in INR]	IGST on SGD (INR)	Total impact on a/c of imposition of SG Duty (INR)	Total Payment made	
								RTGS	DD
988642	JA Solar	08.02.2019	Chennai	BH 954542	56,49,059	2,82,453	59,31,511	11,29,812	28,24,530
988620	JA Solar	8-02-2019	Chennai	BH 954542	11,46,183	57,309	12,03,492	2,29,237	70,17,445

e) According to the petition, the petitioner has imported the solar modules from China during December 2018 to February 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 and the petitioner has claimed in the petition, Rs.35,57,01,527 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.

- f) The learned Counsel for petitioner submits that during the course of hearing on 15.09.2020, the Commission sought details of Bills of entry and payment of safeguard duty. Therefore, on 18.11.2020, the petitioner counsel filed an affidavit on behalf of the petitioner duly signed by the Authorized signatory along with a Chart evidencing payment of safeguard duty with Bills of Entry, TR6 Challan and challan dated 25.2.2019 amounts paid in the State bank of India, Kotak Mahindra Bank Challan and a letter dated -01.2020 written by the Deputy Commissioner of Customs, Custom House, to the petitioner regarding payment of safeguard duty @25% as per CBIC's instruction No.14/2018 dated 13.09.2018 and finalization of 13 provisionally assessed Bill of entries, informing the petitioner that above said letter may be treated as confirmation for payment of safeguard duty and IGST component on that duty along with interest and closure of associated PD bonds executed in respect of 13 bill of entries.
- g) 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.

- h) 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 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.
- i) The Counsel for petitioner contended in its rejoinder stating that 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 the relief for change in law only for actual expenditure incurred, the parties would have used the word "*resulted into any additional.... expenditure*".
- j) 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 said change in law events. This is also supported by principle of business efficacy, as recognised in the case of Nabha Power Ltd 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.

k) The learned counsel for petitioner has further 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 & Co. vs. State of Madras, AIR 1961 SC1152.
- e) Order dated 13.11.2019 in case No.259/2019 passed by MERC between Azure Power Thirty-four 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 the facts of the above said cases are quite different from the facts of the instant case.

- l) 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 BESCOM 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.

- m) The respondent further contended 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 to 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.

- n) 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 & Krishnapatnam Ports. 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.
- o) 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 held that the Safeguard Duty Notification No.01/2018 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.

- p) 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.
- q) The petitioner contended in its 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.
- r) 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. Therefore, 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.
- s) The Commission observed 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 other 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 to incorporate such provisions in the PPA while entering into PPA dated 20.4.2018 with the respondent and had 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 de hors the provisions of the PPA. Therefore, the averments made by the petitioner is untenable and liable to be rejected.

- t) The Commission notes that in the Judgment of Hon'ble ATE 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, the question of allowing carrying cost will not be 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."

u) 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 to it.

v) The learned Advocate for respondent relied upon the following rulings:

- (i) (2011) 15 SCC 580 (NTPC Vs. Madhya Pradesh State Electricity Board);
- (ii) (1962) SC 366 (Murlidhar Chiranjilal Vs. Harish Chandra);

(iii) (1963) AIR MP 242 (Pannalal Jugamatlal Vs. State of MP).

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

w) In view of decisions of the Hon'ble Appellate Tribunal for Electricity, the existing provisions of the PPA dated 20.4.2018 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 working capital 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.

14. **Issue No:4:** Whether the Respondent proves that the Petitioner has imported excess solar modules and SGD claim are excessive?

a) The learned counsel for the petitioner submits that PPA has been entered into between the petitioner and the respondent (BESCOM) for setting up of 50 MW_{AC} capacity of Solar PV ground-mounted project in Block No.2 of Pavagada Solar Power Park.

b) As per the additional affidavit submitted on 06.01.2021 by the duly Authorised Signatory on behalf of the petitioner, it is mentioned in para 3 that for setting up of a 50 MW project, the petitioner has installed solar modules totalling up to 72.5 MW that amounts to 7,25,00,000 watts. As the wattage of modules is 370/375 watts, the number of modules installed by

the petitioner for 72.5 MW is 1,94,640 units (additional 135 modules procured as spares, total amounting to 1,94,775 modules). Further it is submitted that for a 50 MW project, the quantum of modules (assuming that the module is an average of 370 watts) would be 1,35,135 units. The petitioner had entered into a Module Supply Agreement dated 11.09.2018, with M/s Hefei JA Solar Technology Co. China, (supplier). The supplier has supplied a total of 72.49 MW of solar modules to Block B-2 of Pavagada solar park of the petitioner. A true copy of statement of number of solar modules, capacity, shipment value and payment made on account of safeguard duty paid is at Annexure-A, true copies of commercial invoices of solar modules are placed at Annexure-2 of affidavit dated 06.01.2021.

- c) The petitioner further submits that as per Clause 1.4.1 of Request for Proposal (RfP) issued by the KREDL for the present project, 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 and 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 69.076 Million Units 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 the objection statement on 11.07.2019 stating that the petitioner has filed a series of random bills of entry without clarifying as to whether the bills of entry of

solar modules imported from China are pertaining to the 50 MW solar power project at Block B-2 of the Pavagada Solar power project or otherwise. Further, it can be seen from the material produced by the petitioner which indicates that 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. The Hon'ble High Court of Judicature of Madras has passed an Order produced as Annexure R-1 to the Objection Statement. 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 the 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 mentioned are 1,94,775 with a capacity of 72.80 MW, shipment value of Rs.1,35,31,45,983 and payment of safeguard duty of Rs.35,52,00,821. In response to the certification of the Chartered Accountant produced by the petitioner, the respondent filed a memo dated 16.01.2020 wherein, it

is submitted that as per C.A. certificate the petitioner had installed 1,94,775 number of modules for a capacity of 73 MW. However, the Respondent in his submission dated 16.01.2020 stated that the contracted capacity of the petitioner is 50 MW for which 1,35,450 number of modules are required. Therefore, the petitioner has installed excess modules 61,367 numbers for an extra capacity of 22 MW. Thus, the petitioner has claimed excess amount of Rs.10,96,64,573 ($\text{Rs.}34,80,65,818 \times 23 \text{ MW} / 73 \text{ MW}$) as per additional submission dated 16.01.2020 by the Respondent. The learned counsel for respondent submitted another additional statement dated 27.01.2021, wherein it has stated that the petitioner has installed an excess of 61,441 modules for an extra capacity of 22.80 MW. Thus, the petitioner has claimed an excess amount of Rs.11,12,44,213 ($\text{Rs.}35,52,00,821 \times 22.80 \text{ MW} / 72.80 \text{ MW}$) towards safeguard duty, which ought not be granted. 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 72.80 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 countered 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 to 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 into 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 the PPA is reproduced 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 BESCOM, at any time during a Contract Year, shall not be obliged to purchase any additional energy from the solar power developer beyond 121.672 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 69.076 Million kWh(MU)(energy generated corresponding to a minimum CUF i.e., maximum CUF 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 BESCOM. 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 BESCOM, subject to a minimum of 50% of the applicable tariff.

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 BESCOM.

- e) It would also be appropriate to peruse 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, 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 in the contract for 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 BESCOM/ KREDL concerned authority, before importing solar modules from China for setting up of 50 MW AC capacity in order to generate additional energy beyond 121.672 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, it contends 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 its solar power project.

- o) We have 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 69.076 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 BESCO as provided in the PPA. Further, this clause also stipulates that the BESCO, at any time during a contract year, shall not be obliged to purchase any additional energy from the solar power developer beyond 121.672 Million Kwh (MU) at maximum CUF of 27.76%. It also stipulates that, in case BESCO purchases 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 clauses 1.4.1, 1.4.2. and 1.4.3 of RfP and above-mentioned clauses of Article 5.6 of PPA clearly point out that the obligation on the petitioner is to generate minimum contracted energy

of 69.076 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. The inference that can be drawn from submissions is that the petitioner had installed more solar modules to set up a 72.80 MW solar plant. The respondent contended in its additional written submissions dated 27.01.2021 that the petitioner has installed 61,441 excess number of solar modules over the required number of modules for setting up of 50 MW capacity considering the minimum energy contracted capacity at CUF of 15.76% and has claimed excess reimbursement of Rs.11,12,44,213 as safeguard duty and IGST thereon. Thus, the said burden cannot be foisted on the respondent which in turn 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, 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, the Commission has 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 to the concerned parties. This Article stipulates that any notice or other communication to be given by any party to the other party under or in connection with 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's capacity 72.5 MW DC. 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 and PPA together. Therefore, we are of the considered opinion that having agreed by 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 is completely untenable and opposed to law. Moreover, there is no reliable document or record placed before this Commission by the petitioner which could show that that petitioner had informed the

respondent before importing the exact quantity of solar modules from China to set up of a 72.5 MW DC capacity power plant. Therefore, the contention of the petitioner that the respondent is aware of the facts of installation of excess/additional 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) Article 15.2 of the PPA dated 20.4.2018, deals with relief for change in law. Article 15.2.1 states that the aggrieved party shall be required to approach the KERC for seeking approval of Change in Law. Further, Article 15.2.2 says that the decision of KERC to acknowledge a Change in Law shall be final and governing on the both parties.
- t) At the time of argument, the learned counsel for the petitioner relied on letter dated 05.11.2019 issued by the Ministry of New and Renewable Energy, Government of India, and submitted that it has allowed generators to install DC capacity more than the contracted capacity. The Commission on perusal of the said letter, notes that it only states that

the generators are free to install DC capacity more than the contracted capacity, but nowhere 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 have 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. Such higher capacity has to be provided by the generator and no compensation or 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.

- u) In view of above facts and relevant provisions of Request for Proposal (RfP) and PPA dated 20.04.2018 taking into consideration, 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 of 72.5 MW DC capacity by achieving higher CUF of 27.76% as against the minimum threshold of CUF of 15.76% as mentioned in the PPA is a commercial decision of the petitioner and this fact, the petitioner has admitted in its affidavit dated 06.01.2021, that it had imported 1,94,775 modules and installed 1,94,640 solar modules to set up a 72.5 MW capacity solar plant to generate the maximum

contacted capacity of 121.672 Million units, at maximum of 27.76% CUF, against the minimum contracted capacity of 69.076 Million Units at minimum CUF of 15.76% in a contract year and seeking for reimbursement of safeguard duty and IGST, on whole number of solar modules imported for setting up a 72.5 MW solar power plant. The petitioner in its above said affidavit had also admits that for a 50 MW project, the quantum of modules required is 1,35,135 units/modules.

- v) Keeping the above facts in view, the claims made for reimbursement of safeguard duty and IGST on installation of additional solar modules would be an additional financial burden which cannot be foisted on the respondent being a wholly owned government company providing an essential service to the public at large and in turn it would pass on the consumers as additional tariff. Therefore, we are of the considered opinion that the claims of reimbursement of safeguard duty on installation of excess of 61,441 modules is not allowed and it is hereby rejected. The Commission observes that there is a discrepancy in the claim made by the petitioner in the prayer column and submissions made during the course of the proceedings. Therefore, this Commission relying upon the additional affidavit dated 15.01.2020 along with CA certificate dated 15.01.2020 and Annexure-1, in which it is stated that the petitioner has installed modules of 1,94,775 numbers for the capacity of 72.80 MW and safeguard duty paid is Rs.35,52,00,821. Therefore, this Commission holds that the claims for reimbursement of safeguard duty and IGST thereon, on account of change in law event, could be considered in proportion to the

Minimum contracted energy of 69.076 MUs during a contract year at the rate of Minimum CUF of 15.76% and solar modules. Hence, the petitioner is entitled for Rs.24,39,56,608 i.e., $\text{Rs.}35,52,00,821 \times 50 \text{ MW} / 72.80 \text{ MW}$ and remaining claims for reimbursement of safeguard duty and IGST thereon, amounting to Rs.11,12,44,213 is rejected on account of installation 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.24,39,56,608 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 taxed and duties after the date of submission of Technical Bid shall be to the account of the BESCO 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.
- d) 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 GST 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 IGST under Change in Law:

e) 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 69.076

MUs in a contract year. For recovery of additional cost incurred by the petitioner, we have considered year. the CUF of 15.76% corresponding to the generation of minimum contracted energy of 69.076 MUs in a contract. 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 14 (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 69.076 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 69.076 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.

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 35 paise per unit for the life of the project. Considering the Discount Rate Weighted Average Capital Cost (WACC) of 11.20% per annum, the levelised tariff for 25 years cover the life of the project works out to 44 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 69.076 MUs. The petitioner is allowed reimbursement of additional capital cost of Rs.24,39,56,608 during the period of PPA, as per the above parameters by way of incremental tariff of 44 paise per unit

on the minimum contracted energy of 69.076 MUs per year, limited to the minimum contracted energy, as explained in para 14 (v) of this Order. Therefore, in any contract year, if the petitioner supplies more than 69.076 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 partly allowed.
- b) The petitioner is entitled to an incremental tariff of 44 paise (forty-four paise) per unit on the minimum contracted energy generation of 69.076 MUs supplied/to be supplied to BESCOM 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 supply exceeding 69.076 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.
- e) The petitioner is not entitled to interest/carrying cost.

- f) The petitioner shall abide by the undertaking as per the Affidavit dated 06.01.2021 to reimburse the amount received from the Respondent, if any, in the event of the Hon'ble Supreme Court of India, in SLP No.24009-24010/2018, setting aside the Safeguard Duty Notification No.01/2018-Custom (SG) dated 30.07.2018, issued by Ministry of Finance, Government of India. In case, the petitioner fails to repay the amount received from the respondent, the respondent is at liberty to adjust the amount due to it, in the monthly tariff bills.
- g) Accordingly, the petitioner and the respondent shall amend the Article 12.1 of the PPA as ordered above and submit the SPPA for the approval of the Commission.

Sd/-

(SHAMBHU DAYAL MEENA)
Chairman

Sd/-

(H.M. MANJUNATHA)
Member

Sd/-

(M.D. RAVI)
Member

Annexure																											
Determination of Incremental Tariff for 50 MW for OP 9/2019																											
Assumptions for Financial parameters																											
Cost/50 MW- Rs. Lakhs	2439.57																										
Debt: Equity	70:30																										
Debt- Rs. Lakhs	1707.698																										
Interest charges on Debt-%	10.00%																										
Debt Repayment in Yrs.	13																										
CUF	15.76%																										
Equity- Rs. Lakhs	731.870																										
ROE-%	14%																										
Auxiliary consumption	0.00%																										
O & M expenses in Rs. lakhs	0.00%																										
O & M Escalation p.a.	0.00%																										
WC interest @11% on 2 months bill	11.00																										
Depreciation @ 5.38% p.a.for first 13yrs	5.38%																										
Tariff Calculations		(All amounts in Rs. Lakhs)																									
Particulars	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25		
Outstanding Debt at beginning	1707.696	1576.335	1444.974	1313.613	1182.251	1050.890	919.529	788.168	656.806	525.445	394.084	262.723	131.361	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000		
Loan repayment	131.361	131.361	131.361	131.361	131.361	131.361	131.361	131.361	131.361	131.361	131.361	131.361	131.361	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000		
Outstanding Debt at end	1576.335	1444.974	1313.613	1182.251	1050.890	919.529	788.168	656.806	525.445	394.084	262.723	131.361	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000		
Average Debt for the year	1642.016	1510.654	1379.293	1247.952	1116.571	985.209	853.848	722.487	591.126	459.764	328.403	197.042	65.681	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000		
Equity	731.870	731.870	731.870	731.870	731.870	731.870	731.870	731.870	731.870	731.870	731.870	731.870	731.870	731.870	731.870	731.870	731.870	731.870	731.870	731.870	731.870	731.870	731.870	731.870	731.870		
Interest charges on debt	164.202	151.065	137.929	124.793	111.657	98.521	85.385	72.249	59.113	45.976	32.840	19.704	6.568	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000		
ROE	102.462	102.462	102.462	102.462	102.462	102.462	102.462	102.462	102.462	102.462	102.462	102.462	102.462	102.462	102.462	102.462	102.462	102.462	102.462	102.462	102.462	102.462	102.462	102.462	102.462		
Depreciation	131.36	131.36	131.36	131.36	131.36	131.36	131.36	131.36	131.36	131.36	131.36	131.36	131.36	40.659	40.659	40.659	40.659	40.659	40.659	40.659	40.659	40.659	40.659	40.659	40.659		
Working Capital	67.58	65.35	63.12	60.89	58.66	56.43	54.20	51.97	49.74	47.50	45.27	43.04	40.81	24.30	24.30	24.30	24.30	24.30	24.30	24.30	24.30	24.30	24.30	24.30	24.30		
Interest on WC	7.43	7.19	6.94	6.70	6.45	6.21	5.96	5.72	5.47	5.23	4.98	4.73	4.49	2.67	2.67	2.67	2.67	2.67	2.67	2.67	2.67	2.67	2.67	2.67	2.67		
Total Expenditure	405.46	392.08	378.70	365.31	351.59	338.55	325.17	311.79	298.41	285.02	271.64	258.26	244.88	145.79	145.79	145.79	145.79	145.79	145.79	145.79	145.79	145.79	145.79	145.79	145.79		
Generation at CUF of 15.76%/MJ	69.076	69.076	69.076	69.076	69.076	69.076	69.076	69.076	69.076	69.076	69.076	69.076	69.076	69.076	69.076	69.076	69.076	69.076	69.076	69.076	69.076	69.076	69.076	69.076	69.076		
Net Generation- units	69.076	69.076	69.076	69.076	69.076	69.076	69.076	69.076	69.076	69.076	69.076	69.076	69.076	69.076	69.076	69.076	69.076	69.076	69.076	69.076	69.076	69.076	69.076	69.076	69.076		
Tariff - KERC																											
Cost/unit	0.59	0.57	0.55	0.53	0.51	0.49	0.47	0.45	0.43	0.41	0.39	0.37	0.35	0.21	0.21	0.21	0.21	0.21	0.21	0.21	0.21	0.21	0.21	0.21	0.21		
Discount rate	1.000	0.899	0.809	0.727	0.654	0.588	0.529	0.476	0.428	0.385	0.346	0.311	0.280	0.252	0.226	0.203	0.183	0.165	0.148	0.133	0.120	0.108	0.097	0.087	0.078		
Discounted tariff	0.59	0.51	0.44	0.38	0.33	0.29	0.25	0.21	0.18	0.16	0.14	0.12	0.10	0.05	0.05	0.04	0.04	0.03	0.03	0.03	0.03	0.02	0.02	0.02	0.02		
Levelised tariff for 25yrs	0.44																										