

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 228/MP/2021

Coram:

Shri P.K. Pujari, Chairperson

Shri I. S. Jha, Member

Shri Arun Goyal, Member

Shri P.K. Singh, Member

Date of order: 6th December, 2021

In the matter of

Petition under Section 79(1)(b), Section 79(1)(f) and Section 79(1)(k) of the Electricity Act, 2003 read with Article 12 of the Power Purchase Agreement(s) dated 28.12.2018 seeking issuance of appropriate order(s) / direction(s) / declaration from this Commission that the imposition of safeguard duty on the import of solar cells, whether or not assembled in modules or panels, vide Notification No. 2/2020-Customs (SG) dated 29.7.2020 issued by the Department of Revenue, Ministry of Finance (Government of India) is an event of Change in Law and for seeking approval of the quantum and mechanism of compensation (along with interest) as submitted along with the present Petition in line with the methodology provided by this Commission vide its order dated 20.8.2021 in Petition No. 536/MP/2020.

And

In the matter of

Mahindra Renewables Private Limited,
Mahindra Towers, Dr. G. M. Bhosale Marg,
P. K. Kurne Chowk, Worli,
Mumbai – 400 018

....Petitioner

Vs.

Solar Energy Corporation of India Limited,
6th Floor, Plate B, NBCC Office,
Block Tower – 2, East Kidwai Nagar,
New Delhi – 110 023

...Respondent

Parties Present:

Shri Hemant Sahai, Advocate, Mahindra Renewables
Shri Nitish Gupta, Advocate, Mahindra Renewables
Shri Avdesh Mandloi, Mahindra Renewables
Shri Nishant Talwar, Mahindra Renewables
Ms. Tanya Sareen, Advocate, SECI
Ms. Poorva Saigal, Advocate, SECI
Shri. Ravi Nair, Advocate, SECI
Ms. Neha Singh, SECI



ORDER

The Petitioner, Mahindra Renewables Private Limited, has filed the present Petition under Section 79(1)(b), Section 79(1)(f) and Section 79(1)(k) of the Electricity Act, 2003 (hereinafter referred to as the 'the Act') read with Article 12 of the Power Purchase Agreement ('PPA') dated 28.12.2018 seeking declaration/ approval that the imposition of safeguard duty on the import of solar cells, whether or not assembled in modules or panels, vide Notification No.2/2020-Customs (SG) dated 29.7.2020 issued by the Department of Revenue, Ministry of Finance, Government of India is an event of 'Change in Law' under the PPA and for approval of the quantum and mechanism of compensation (along with interest) in line with the methodology provided by this Commission vide order dated 20.8.2021 in Petition No. 536/MP/2020. The Petitioner has made the following prayers:

“(a) Declare imposition of safeguard duty by the Ministry of Finance vide its notification dated 29.07.2020 as a change in law event under Article 12 of the PPA;

(b) Declare and allow the Petitioner to claim additional cost of Rs.88,30,19,737 (i.e. sum of Rs.80,82,11,871 paid as safeguard duty to the Government plus the carrying cost calculated at the rate of 10.41% totalling to Rs.7,48,07,866 considered from the date of payment to the date of COD) on account of the change in law event, i.e. imposition of safeguard duty by the Ministry of Finance vide its notification dated 29.07.2020;

(c) Direct the Respondent to pay total lump sum of Rs.3,10,50,594.06 (assuming date of actual payment as 17.11.2021) or as calculated based on the date of actual payment, and to pay the remaining amount through equal monthly annuity of Rs.1,03,50,198.02 spread throughout the remaining period of 13 years from the date of COD, as per the methodology prescribed by this Commission vide its order dated 20.08.2021 in Petition No.536/MP/2020. The directions sought from this Commission is subject to assumption that the date of actual payment is 17.11.2021 and the claim shall stand revised /modified subject to the date of actual payment to be made by the Respondent;

(d) Pass such order(s), further relief(f) in the facts and circumstances of the case as this Commission may deem just and equitable in favour of the Petitioner...”

2. The case was called out for admission through virtual hearing on 2.12.2021.

3. During the course of hearing, the learned counsel for the Petitioner submitted that the present Petition has been filed seeking declaration/ approval that the imposition of safeguard duty on the import of solar cells, whether or not assembled in modules or panels, vide Notification No.2/2020-Customs (SG) dated 29.7.2020 issued by the Department of Revenue, Ministry of Finance, Government of India is an event of 'Change in Law' under the PPA and for approval of the quantum and mechanism of compensation (along with interest) in line with the methodology provided by this Commission in its order dated 20.8.2021 in Petition No. 536/MP/2020.

4. In response to the observation of the Commission regarding the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 (hereinafter referred to as 'the Change in Law Rules') notified by the Ministry of Power, Government of India, the learned counsel submitted that the Change in Law Rules do not apply in the case of the Petitioner. The learned counsel, referring to Rule 2(1)(c) and Rule 3(1) argued that the Change in Law Rules apply only in cases where the expression 'Change in Law' is not defined in the agreement between the parties, as the said Rules specifically excludes 'otherwise defined in the agreement'. However, in the case where the agreement itself provides the detailed provisions on 'Change in Law', as in the case of the Petitioner's PPA, such provisions of PPA continue to apply.

5. The learned counsel further contended that the Change in Law Rules has only prospective application and that the Change in Law event relating to imposition of safeguard duty occurred prior to the notification of the Change in Law Rules.

6. The learned counsel also submitted that the Petitioner has no objection in approaching the Procurers with computations and details in terms of the Change in Law Rules and that it has already furnished such details to the Respondent, SECI.

7. The learned counsel, however, submitted that the methodology/ formula for compensation as specified in the Change in Law Rules cannot be imposed on the Petitioner as the provisions of the Change in Law Rules cannot supersede the provisions of the PPA. The learned counsel submitted that the Commission vide its order dated 20.8.2021 in Petition No. 536/MP/2020 has already prescribed a mechanism of compensation for the Change in Law event of imposition of safeguard duty and the Petitioner's case is entirely covered by the said decision.

8. Referring to order of the Commission dated 2.12.2021 in Petition No. 188/MP/2021 wherein the Commission has asked the Petitioner therein to file a Petition before the Commission only after approaching the Respondents therein in terms of the Change in Law Rules, the learned counsel prayed that the Commission may adjourn the matter to allow the Petitioner to examine and distinguish its case from that of the order dated 2.12.2021 in Petition No. 188/MP/2021 (Coastal Energen Private Limited v. TANGEDCO and Anr.) and to seek necessary instructions, if any. The learned counsel also sought liberty to implead distribution licensees as party to the Petition by filing an amended memo of parties.

9. After hearing the submissions of the learned counsel of the Petitioner, the matter was reserved on "admissibility".

10. We have considered the submissions made by the learned counsel for the Petitioner. Relevant portion of Change in Law Rules notified by the Ministry of Power, Government of India, are extracted as under (emphasis by us):

*“2(c) “change in law”, in relation to tariff, **unless otherwise defined in the agreement**, means any enactment or amendment or repeal of any law, made after the determination of tariff under section 62 or section 63 of the Act, leading to corresponding changes in the cost requiring change in tariff, and includes —*

(i) -----

(ii) -----

(iii) -----

3. Adjustment in tariff on change in law— (1) On the occurrence of a change in law, the monthly tariff or charges shall be adjusted and be recovered in accordance with these rules to compensate the affected party so as to restore such affected party to the same economic position as if such change in law had not occurred.

(2) For the purposes of sub-rule (1), the generating company or transmission licensee, being the affected party, which intends to adjust and recover the costs due to change in law, shall give a three weeks prior notice to the other party about the proposed impact in the tariff or charges, positive or negative, to be recovered from such other party.

(3) The affected party shall furnish to the other party, the computation of impact in tariff or charges to be adjusted and recovered, within thirty days of the occurrence of the change in law or on the expiry of three weeks from the date of the notice referred to in sub-rule (2), whichever is later, and the recovery of the proposed impact in tariff or charges shall start from the next billing cycle of the tariff.

(4) The impact of change in law to be adjusted and recovered may be computed as one time or monthly charges or per unit basis or a combination thereof and shall be recovered in the monthly bill as the part of tariff.

(5) The amount of the impact of change in law to be adjusted and recovered, shall be calculated -

*(a) **where the agreement lays down any formula, in accordance with such formula; or***

(b) where the agreement does not lay down any formula, in accordance with the formula given in the Schedule to these rules;

(6) The recovery of the impacted amount, in case of the fixed amount shall be —

(a) in case of generation project, within a period of one-hundred eighty months; or

(b) in case of recurring impact, until the impact persists.

(7) The generating company or transmission licensee shall, within thirty days of the coming into effect of the recovery of impact of change in law, furnish all relevant documents along with the details of calculation to the Appropriate Commission for adjustment of the amount of the impact in the monthly tariff or charges.

(8) The Appropriate Commission shall verify the calculation and adjust the amount of the impact in the monthly tariff or charges within sixty days from the date of receipt of the relevant documents under sub-rule (7).

(9) After the adjustment of the amount of the impact in the monthly tariff or charges under sub-rule (8), the generating company or transmission licensee, as the case may be, shall adjust the monthly tariff or charges annually based on actual amount recovered, to ensure that the payment to the affected party is not more than the yearly annuity amount.”

11. As per the above-quoted provisions, on occurrence of a Change in Law, the affected party, in the present case the Petitioner, and other parties, in the present case the Respondent, are to settle the Change in Law claims among themselves and approach the Commission only in terms of Rule 3(8) of the Change in Law Rules.

12. We observe that plain reading of the definition of Change in Law as given in Rule 2(1)(c) of the Change in Law Rules, it becomes amply clear that the said definition of Change in Law shall come into play unless otherwise defined in the agreement and cannot, in any manner, be construed to mean that the Change in Law Rules shall apply only to those agreements which do not have the Change in Law provisions. The phrase “*unless otherwise defined in the agreement*” has been used in the context of the definition of Change in Law and not in the context of applicability of the Change in Law Rules. Therefore, we find the argument as canvassed by the learned counsel of the Petitioner that the Change in Law Rules does not apply in the case of the Petitioner, to be misplaced.

13. It is a settled law that as a general rule, no law operates retrospectively unless it has been provided differently in the law itself, or with exceptions as have been

delineated by Hon`ble Supreme Court. Hon`ble Supreme Court in the case of T. Kaliamurthi and Anr. v. Five Gori Thaikal Wakf and Ors. [2008 (9) SCC 306], dealing with law of limitation has succinctly laid down the principle as under (emphasis by us):

*"22. It is well settled that no statute shall be construed to have a **retrospective** operation until its language is such that would require such conclusion. The exception to this rule is enactments dealing with **procedure**. This would mean that the **law** of limitation, being a **procedural law**, is **retrospective** in operation in the sense that it will also apply to proceedings pending at the time of the enactment as also to proceedings commenced thereafter, notwithstanding that the cause of action may have arisen before the new provisions came into force. However, it must be noted that there is an important exception to this rule also. Where the right of suit is barred under the **law** of limitation in force before the new provision came into operation and a vested right has accrued to another, the new provision cannot revive the barred right or take away the accrued vested right."*

14. It is also a settled principle of law that where a particular provision operates in a future, it cannot be said to be retrospective merely because within the sweep of its operation all existing rights are included. In this regard, it would be relevant extract the decision of the Hon'ble Supreme Court in the case of Trimbak Damodhar Raipurkar v. Assaram Hiranman Patil, [(162) Supp. (1) SCR 700]:

"9. In this connection it is relevant to distinguish between an existing right and a vested right. Where a statute operates in future it cannot be said to be retrospective merely because within the sweep of its operation all existing rights are included."

15. We observe that the Petitioner has not pointed out any specific provision in the Change in Law Rules which prevents it from recovery of safeguard duty under Change in Law.

16. It is evident that the Change in Law Rules has been framed to facilitate timely recovery of costs due to Change in Law events and provides a process and methodology to be followed. Admittedly, as the Petitioner has no objection in

approaching the Procurers with computations and details in terms of the said Rules to claim relief under Change in Law, the Petitioner needs first to approach SECI/ procurers in terms of the Change in Law Rules for adjustment of tariff on account of such Change in Law.

17. We note that the compensation for Change in Law shall be computed in terms of Rule 3(5) of the Change in Law Rules, which provides that where the agreement lays down any formula, the same shall be in accordance with such formula; or where the agreement does not lay down any formula, in accordance with the formula given in the Schedule to the Change in Law Rules. The Petitioner has contended that it is covered by order dated 20.8.2021 in Petition No. 536/MP/2020 wherein the Commission has prescribed a mechanism of compensation for Change in Law event of imposition of safeguard duty and the provisions of the Change in Law Rules cannot supersede the provisions of the PPA.

18. Regarding the submissions of the Petitioner that provisions of the Change in Law Rules cannot supersede the provisions of the PPA and whether the process to be followed as per the provisions of the Change in Law Rules and the methodology/ formula for compensation as specified therein get imposed on the Petitioner, the same are required to be raised in the appropriate forum for adjudication.

19. In view of the foregoing discussion, the Petitioner may approach SECI/procurers for settlement of Change in Law claims among themselves in terms of the Change in Law Rules and approach the Commission only in terms of Rule 3(8) of the Change in Law Rules.

20. Accordingly, the Petition No. 228/MP/2021 is disposed of in terms of the above at the admission stage.

**Sd/-
(P.K.Singh)
Member**

**sd/-
(Arun Goyal)
Member**

**sd/-
(I.S.Jha)
Member**

**sd/-
(P.K. Pujari)
Chairperson**