

**Before the**  
**MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**  
**World Trade Centre, Centre No.1, 13th Floor, Cuffe Parade, Mumbai 400005**  
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**Case No. 05 of 2022**

**Petition of M/s. Tata Power Renewable Energy Limited for approval of the cost incurred due to change in the rate of Basic Custom Duty from 5% to 20% under Article 9 of the Power Purchase Agreement dated 03 January 2020 signed with The Tata Power Company Limited – Distribution.**

**&**

**Case No.21 of 2022**

**Petition of M/s. Tata Power Renewable Energy Limited for approval of the cost incurred due to imposition of safeguard duty for the period of 30 July 2020 to 29 July 2021 on the import of solar cells under Article 9 of the Power Purchase Agreement dated 03 January 2020 signed with The Tata Power Company Limited – Distribution.**

M/s. Tata Power Renewable Energy Limited (TPREL) : Petitioner  
M/s. The Tata Power Company Limited - Distribution (TPC-D) : Respondent

**Coram**

**Sanjay Kumar, Chairperson**  
**I.M. Bohari, Member**  
**Mukesh Khullar, Member**

**Appearance:**

For the Petitioner : Shri. Anand Srivastava (Adv.)  
For the Respondent : Shri. Prashant Kumar

## ORDER

**Date: 17 May 2022**

1. Tata Power Renewable Energy Limited (TPREL) has filed two Petitions registered as Case No. 5 of 2022 and Case No.21 of 2022 on 22 December 2021 and 6 January 2022 respectively. Both the Petitions have been filed under Section 86 (1) (b), (e) and (f) of Electricity Act, 2003 read with Article 9 of the Power Purchase Agreement dated 03 January 2020 signed with The Tata Power Company Limited - Distribution (TPC-D). Both these Petition are for compensation for increased expenses on account of Change in Law event under the same PPA. Hence, the Commission is deciding these two cases through this common order.
  
2. **TPREL's main prayers are as follows:**

### **Case No.5 of 2022**

- a) *Allow the present Petition;*
  
- b) *Declare the Notification dated 01.02.2021 an event of change of law under Article 9.1 of the PPA resulting in change of Basic custom duty from 5% to 20% after executing the PPA;*
  
- c) *Allow TPREL to claim additional cost of Rs. 2,20,52,290.84 (Rupees two crores twenty lakhs fifty two thousand two hundred and ninety and eighty four paise) (including GST of 8.9%) along-with an estimated carrying cost of Rs. 15,51,998/- (Rupees Fifteen Lakhs Fifty One Thousand Nine Hundred and Ninety Eight only) calculated at 8.25% (SBI 1 year MCLR rate plus 1.25%) on account of the Change in Law event, i.e. increase in rate of Basic Custom Duty by the Ministry of Finance vide its notification dated 01.02.2021 and direct the Respondent to pay increased tariff in terms of 9.2.2. of PPA;*

### **Case No.21 of 2022**

- a) *Admit the captioned Petition;*
  
- b) *Allow the Petitioner to claim additional cost of Rs. 38,49,83,628 (Rupees thirty eight crores forty nine lakhs eighty three thousand six hundred and twenty eight only ) (including GST of 8.9%) along with an estimated carrying cost of Rs. 2,80,42,781 (Rupees Two Crores eighty Lakhs forty two thousand seven hundred and eighty one only) as on 06.01.2022 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 and direct the Respondent to pay increased tariff in terms of 9.2.1. of PPA;*

*OR*

*Alternatively, allow recovery as per the Methodology approved by the Hon'ble Commission in Case No 166 of 2019 dated 13th November, 2019 to claim compensation 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;*

**3. TPREL in its respective Cases has stated as follows:**

**Common Facts**

3.1. TPC-D initiated a competitive bidding process (followed by reverse auction) for procurement of up to 150 MW power from Solar Power Projects, for supply of solar power for 25 years.

3.2. Major events in this procurement process are as below:

<b>Date</b>	<b>Event</b>
21.08.2019	TPC-D issued a Request for Selection (RfS) inviting bids for selecting solar power producers for procurement of up to 150 MW power from solar power projects.
20.09.2019	TPREL submitted its bid on offering a total capacity of 150 MW (AC).
31.10.2019	After being selected, TPC-D issued Letter of Award (LoA) dated 31 October 2019 in favour of TPREL for developing Solar PV Project located at Village: Chhayan, Taluka: Pokhran, District: Jaisalmer, State: Rajasthan.
04.12.2019	The Commission adopted the Tariff through its Order in Case No. 292 of 2019.
01.01.2020	In Compliance with conditionalities in LoA, TPREL submitted Performance Bank Guarantee amounting to Rs.30 Crores in favour of TPC-D.
03.01.2020	TPREL entered into a PPA with TPC-D for supply of 150 MW (AC) solar power to TPC-D at a tariff of Rs.2.83/kWh generated from the Solar PV Project.
23.01.2020	TPREL entered into a Supply contract with Tata Power Solar System Limited (TPSSL) with effective date on 23 January 2020, whereby TPSSL was responsible for all EPC works for the Solar PV Power Plant.
14.05.2020	In order to perform all EPC functions/work TPSSL entered into an supply contract with Sungrow Power Supply Co. Ltd.

3.3. As per the provisions of the PPA, the Scheduled Commercial Operation Date (SCOD) of the Solar PV Project, was 15 months from the date of execution of the PPA for project being set up in solar park, and within a period of 18 months for projects being set up outside solar park. Since the present project was outside the Solar Park, the effective SCOD as per the PPA was

03 July 2021 which is 18 months from the date of execution of the PPA.

- 3.4. TPREL commissioned the Solar Project on 20 August 2021 and is supplying regular electricity to TPC-D from its COD date of 24 August 2021.
- 3.5. Paragraph 6.2(4) of the Tariff Policy, 2016 clearly states that any change in taxes imposed by the Central Government after the award of bids has to be treated as 'change in law'. Guidance is also taken from Ministry of Power's (MoP) letter dated 27 August 2018, wherein MoP issued directions to the Central Commission for allowing pass through of domestic levies, duties, cess and taxes imposed by Central/State Governments (leading to corresponding changes in cost) under 'Change in Law', if not otherwise provided under the power purchase agreement. Further, the 'Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees' (Guidelines for Tariff Determination) as amended from time to time, provide for relief if there is any 'change in law' event.
- 3.6. The Commission has jurisdiction to adjudicate upon the present Petition and grant the reliefs sought herein as per Section 86 of the Electricity Act, 2003 and specifically in light of Article 9.2 of the PPA.

#### **Submissions Case No.5 of 2022**

- 3.7. The Ministry of Finance vide its Notification No. 07/2021-Customs dated 01 February 2021 changed the rate of applicable Basic Custom Duty of 5% [as per the Notification No 1/2011 dated 06 January 2011 to 20% from 01 February 2021. All the applicable changes in Custom Duty have been issued through a separate Letter D.O.F. No. 334/02/2020-TRU dated 01 February 2021. The relevant extract of the Letter is given as below:  
“  
**Chapter 85**  
.....  
**(2) Basic customs duty on Solar Inverters (sub-heading 8504 40) is being raised to 20%. For this purpose, S. No. 13 of the notification No. 57/2017-Customs is being amended. Simultaneously, notification No. 1/2011-Customs, dated 6th January, 2011 is being rescinded. [S. No. (ix) of the notification No. 03/2021-Customs dated 1st February, 2021 and, notification No. 07/2021-Customs, dated 1st February, 2021 refer].”**
- 3.8. In view of the above, Basic Custom Duty of 20% was made applicable from 02 February 2021 on import of Solar Inverters. Such change was not contemplated and could not have been factored in at the time of submission of bid or the cut-off date. Therefore, this event qualifies as a change in law.
- 3.9. TPREL vide its letter dated 08 February 2021, informed the TPC-D about the Change in Law

on account of Notification dated 01 February 2021.

- 3.10. Solar Inverters were planned to be purchased during the last phase of the procurement plan and hence, as per the schedule the same were purchased during the month of February, 2021 for which the Basic Custom Duty and additional Social Welfare Surcharge were paid amounting to Rs.2,20,52,290.84/- (Rupees two crores twenty lakhs fifty two thousand two hundred and ninety and eighty four paise) (including GST of 8.9%) in compliance with the Ministry of Finance vide Notification dated 01 February 2021.
- 3.11. For sufficing claim, TPREL submitted the invoices raised by TPSSL and Sungrow with respect to the purchase of solar Inverters along with the bill of entry, challans, bills of landing, LRs and invoices raised by TPSSL against Basic Custom Duty paid. Further, the Auditor's Certificate regarding increase in Basic Customs Duty has been furnished.
- 3.12. Solar modules were released by the Customs Authority on the basis of challans for the duty paid by TPSSL through various Bank transfers. TPREL submitted Bank statement showing release of payment towards Custom duties from TPSSL to Customs and TPREL to TPSSL.
- 3.13. TPREL in its submission relied upon provisions with respect to Change in Law in PPA dated 03 January 2020. A Change in Law event includes enactment of a new law, change in any tax rates as well as amendment, modification, or repeal of an existing law. Such Change in Law event must occur after the date of bid submission.
- 3.14. If the event of Change in Law results in any adverse financial loss/ gain to the Power Producer / Procurer, then the Power Producer / Procurer, shall be entitled to compensation by the other party who shall ensure that the Power Producer is placed in the same financial position as it would have been if the occurrence of the Change in Law does not take place. The quantum and mechanism of compensation payment shall be determined and shall be effective from such date as may be decided by the Commission.
- 3.15. TPREL has already submitted its quote for tariff through e-reverse auction held on 10 October 2019 for developing Solar PV Project. Considering, that the change in Basic Customs duty has resulted in additional cost only after the Notification dated 01 February 2021, which was not required to be contemplated by TPREL at the time of quoting, TPREL is entitled to seek appropriate relief as per Article 9 of the PPA.
- 3.16. TPREL proposes that TPC-D can pay the compensation as a one-time payment of impact of Basic Customs duty & additional Social Welfare Surcharge along with the carrying cost from the actual payment date till the actual recovery of the amount. This is a simple approach and will avoid the future carrying cost.

3.17. TPREL has considered SBI one (1) year Marginal Cost of fund plus 1.25% for computing carrying cost.

**Claim of BCD and SWS as per Notification dated 1/02/2021**

Particulars		Unit	Invoice Date		Total
			9 Feb 2021	17 Feb 2021	
Supplier Name			SUNGROW POWER SUPPLY CO. LTD	SUNGROW POWER SUPPLY CO. LTD	
Supplier Invoice No.			100020201010004-1	100020201010004-2	
Invoice Quantity	a	Nos.	16.00	22.00	38.00
Unit Price	b	USD	43750	43750	43750
Invoice Value	C=a*b	USD	700000	962500	1662500
Avg. Exchange Rate	d	Ratio (USD:INR)	73.85	73.8	73:82
Invoice Value (INR)	e=c*d	Rs.	51695000	71032500	122727500
<b>Claim after 01/02/2021</b>					
Basic Custom Duty	f	%	20.00%	20.00%	20.00%
Custom Duty	g=e*f/10^7	Rs. Crores	1.03	1.42	2.45
SWS amount as per BOE	h	%	10%	10%	10%
<b>SWS amount as per BOE</b>	i=g*h	Rs. Crores	0.10	0.14	0.25
<b>Total Claim</b>	<b>j=g+i</b>	<b>Rs. Crores</b>	<b>1.14</b>	<b>1.56</b>	<b>2.70</b>
<b>Claim before 01/02/2021</b>					
Basic Custom Duty	k	%	5.00%	5.00%	5.00%
Custom Duty	l=e*k/10^7	Rs. Crores	0.26	0.36	0.61
SWS amount as per BOE	m	%	10%	10%	10%
<b>SWS amount as per BOE</b>	n=l*m	Rs. Crores	0.03	0.04	00.06
<b>Total Claim</b>	<b>o=l+n</b>	<b>Rs. Crores</b>	<b>0.28</b>	<b>0.39</b>	<b>0.668</b>
<b>Change in Law Impact</b>					
<b>Change in Custom Duty post 1<sup>st</sup> February, 2021</b>	p=j-o		0.85	1.17	2.03
GST@8.9%	q	%	8.90%	8.90%	8.90%
GST Amount on Custom Duty	r=p*q		<b>0.08</b>	<b>0.10</b>	<b>0.18</b>
<b>Total Impact of Change in Law</b>	s=p+r		<b>0.93</b>	<b>1.28</b>	<b>2.21</b>
<b>Petition Date</b>			13- Dec-21	13- Dec-21	
<b>Number of Days considered for carrying Cost</b>	t		307	299	
SBI 1 year Marginal Cost of fund +1.25%	u		8.25%	8.25%	
Carrying Cost	V=s*u*t/365		0.06	0.09	0.15
<b>Total Impact of Change in Law including Carrying Cost</b>	<b>w=s+v</b>		<b>0.99</b>	<b>1.36</b>	<b>2.36</b>

*Note: Carrying cost will be revised based on actual date of recovery.*

3.18. Change in Law Impact:

Impact of Basic Customs Duty & additional Social Welfare Surcharge (including GST@8.9%)	Rs.2,20,52,290.84 /-
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Estimated carrying cost (SBI 1-year MCLR rate plus 1.25%)	Rs. 15,51,998/-
<b>Total Impact</b>	<b>Rs.2,36,04,289/-</b>

- 3.19. Further, regarding GST of 8.9% claimed on total amount, TPREL submitted that post 31 December 2018, the Central/ State Government has issued various notifications stating that, for supply and service availed for setting up of a solar power plant, 70% of the total contract value is deemed to be considered as a supply component and the remaining 30% of the total contract value is deemed to be considered as a service component. Consequently, effective GST is payable at the rate of 8.9% [i.e. 5% of 70% + 18% of 30% = 8.9%, i.e. 3.5%+5.4%] on the entire consideration for supply and services availed by it for setting up of a solar power plant.
- 3.20. Accordingly, TPREL has paid GST of 8.9% to TPSSL on the entire consideration. For sufficing claim, TPREL reproduced extracts and provisions of the notification dated 31 December 2018. The Hon'ble Tribunal has also in its Judgment dated 20 September 2021 in Appeal No. 215 of 2021 held that the applicable GST rate post 31 December 2018 will be 8.9%. However, GST applicable only for procurement of Solar Invertors is 5% and hence, in the Bill of entry 5% GST is reflected.
- 3.21. TPSSL invoiced to TPREL GST @ 8.9% on the BCD and additional Social Welfare Surcharge duty paid and has also paid the balance differential GST amount recovered from TPREL to the tax authority.

#### **Submission in Case No.21 of 2022**

- 3.22. The Ministry of Finance vide Notification dated 30 July 2018 (Old Notification) imposed safeguard duty on the import of solar cells whether or not assembled in modules or panels. The Old Notification provides that any person importing solar cells into India is required to pay safeguard duty at the following rates:
- twenty five percent ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30 July 2018 to 29 July 2019 (both days inclusive);
  - twenty percent ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30 July 2019 to 29 January 2020 (both days inclusive); and
  - fifteen percent ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30 January 2020 to 29 July 2020 (both days inclusive);
  - No safeguard duty was payable for any import of solar cells into India from 30 July 2020 onwards.



Accordingly, in terms of the Old Notification, the projects commissioning post 30 July 2020 and importing modules after such date would have not been subject to safeguard duty.

3.23. However, Ministry of Finance vide New Notification dated 29 July 2020 Notification No. 02/2020-Customs (SG) extended the applicability of the safeguard duty for the period of 30 July 2020 to 29 July 2021 at the following rates:

- fourteen point nine per cent ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30 July 2020 to 29 January 2021 (both days inclusive); and
- fourteen point five per cent ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30 January 2021 to 29 July 2021 (both days inclusive).

3.24. As per Supply contract dated 23 January 2020; TPSSL was responsible for designing detailed engineering, layout preparation, material selection, manufacturing supply, inspection, testing at work, packing, transportation from place of manufacture to site, erection, testing at site, pre-commissioning and commissioning, performance testing and performance guarantee for the complete system for the Solar PV Power Plant complete with all accessories, civil works, foundations, structural, electrical, controls and instrumentation. In order to perform the abovementioned functions/work TPSSL entered into a back-to-back arrangement with various suppliers for supply of Solar Modules.

3.25. TPREL in view of the Old Notification providing the sunset date of 29 July 2020 for imposition of safeguard duty had planned the procurement of solar PV modules with the bonafide belief based upon the said Notification that the safeguard duty would not be applicable on the import of solar PV modules 30 July 2020 onwards given the sunset clause. TPREL had accordingly planned to import the solar PV modules after July 2020 by which date the effective safeguard duty would not be applicable. Therefore, it can be seen that as per original schedule the modules were planned to reach at the site during the 0% Safeguard duty (SGD) window i.e. after 29 July 2020. However, since SGD applicability was introduced on 29 July 2020, for the period between 30 July 2020 and 29 July 2021, the module import was subjected to SGD. Such change was not contemplated and could not have been factored in at the time of submission of bid or the cut-off date.

3.26. Therefore, this event qualifies as a 'Change in law'. TPREL vide its letter dated 05 August 2020 has informed TPC-D about the New Notification and stated that the same shall qualify as a 'change in law' event as per Article 9.1 of the PPA.



- 3.27. Considering the extension of imposing safeguard duty on the import of solar cells TPREL filed a Petition in Case No. 218 of 2020 before the Commission praying for a declaration from the Commission to consider imposition of safeguard duty on solar cells for the period of 30 July 2020 to 29 July 2021 as 'change in law' event.
- 3.28. The Commission vide its Order dated 05 March 2021 ruled that the Ministry of Finance Notification dated 29 July 2020 extending the imposition of SGD is an event of Change in Law. The Commission further ruled that the additional expenditure and other consequential impact shall be considered on actual basis for reimbursement under Change in Law subject to prudent check after the TPREL files its petition with all the details in accordance with the provisions of PPA.
- 3.29. As per Article 9.2 of the PPA, TPREL for claiming any relief on account of 'change in law' event is required to approach the Commission. Therefore, considering the provisions of the PPA, TPREL has filed the present Petition before the Commission.

### **Methodology of Compensation**

- 3.30. TPREL suggested methodology of compensation in line with the Commission's earlier dispensation in its Order dated 13 November 2019 in Case No.166 of 2019.

### **Approach 1: Lumpsum Payment of Impact of Change in Law**

- 3.31. TPC-D can either pay the compensation as a onetime payment of impact of safeguard duty along with the carrying cost from the actual payment date of SGD payment. This is a simple approach and will avoid the future carrying cost.
- 3.32. Further, in line with Commission's earlier dispensation it has considered the interest rate for carrying cost based on provisions of late payment surcharge as considered in the PPA (i.e. SBI 1-year Marginal Cost of fund plus 1.25%) for computing carrying cost.
- 3.33. The working of the Change in Law compensation is as given below:

### **Claim of SGD under New Notification**

Particulars	Unit	Period		Total
		30.7.20- 29.1.21	30.1.21- 29.7.21	
Invoice Quantity	MWp	38.85	127.78	166.63
Invoice Value	USD	6988205	25788849	32754853
Ave. Exchange Rate	USD: INR	74.69	73.81	73.99
Assessable value (INR)	Rs.	521931518	1901741541	2423673059
Assessable value	Rs Crores	52.19	190.17	242.37
Safeguard Duty @	%	14.90%	14.50%	

Safeguard Duty	Rs Crores	7.78	27.58	35.35
GST @ 8.9%	Rs Crores	0.69	2.45	3.15
<b>Total Claim Value</b>	Rs Crores	8.47	30.03	<b>38.50</b>
<b>Carrying Cost on total Claim</b>	Rs Crores			<b>2.80</b>
<b>Total including carrying Cost</b>				<b>41.30</b>

As seen from the above, the impact of SGD along with carrying cost works out to Rs 41.30 Crores.

**APPROACH II: Payment of Compensation on per unit basis through the tariff along with the carrying cost over the PPA period.**

3.34. TPC-D may pay the compensation on per unit basis considering the generation at PLF of 27.47% on the basis of Methodology approved by the Commission in its Order in Case 166 of 2019 dated 13 November 2019 over the PPA period to TPREL. The same will be yearly reconciled based on the actual parameters.

3.35. Impact of SGD Notification:

Particulars	Amount
SGD Paid along with GST of 8.9%	Rs. 38,49,83,628
Estimated carrying cost (at the rate of 8.25% based on SBI MCLR Rate plus 1.25%)	Rs. 2,80,42,781

**4. TPC-D in its submission stated as follows:**

**Common Submission:**

- 4.1. TPREL has not placed on record the above supporting documents to substantiate the claim. TPREL has also not placed on record the Supply contract for the import of the Solar modules. It is pertinent to note that the above documents are imperative for the purpose of deciding the applicability of the safeguard duty and to determine whether the quantification provided by TPREL is correct to ascertain the claim under Article 9 of the PPA.
- 4.2. TPC-D intends to verify the claim of TPREL on the aspect of one-to-one correlation of modules by undertaking necessary physical inspection so as to ascertain that the same modules are installed at the project site on which increased rate of custom duty and safeguard duty are claimed.
- 4.3. In case the Commission holds that there is a Change in Law, TPREL is to be compensated by way of increase in tariff in terms of the formula specified under Article 9.2.2. of the PPA. In terms of the same the payment towards the Change in Law is to be made through out the